

Federal Antitrust Agency Heads Testify at Senate Subcommittee Antitrust Oversight Hearing

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FTC Chairwoman Edith Ramirez and William J. Baer, Assistant Attorney General in charge of the Department of Justice Antitrust Division, testified before the Senate Judiciary Committee's antitrust subcommittee on Tuesday. The hearing, entitled "Oversight of the Enforcement of the Antitrust Laws," was the subcommittee's first antitrust oversight hearing since Ramirez and Baer took the helms of their respective agencies.

In his prepared statement, Baer said that the Antitrust Division is focusing its enforcement efforts on "products consumers use every day...as well as other goods and services that have a significant impact on our nation's economy, including health care, agriculture, transportation, energy, and financial services."

Baer detailed cartel enforcement at the Antitrust Division. He noted that the Antitrust Division filed 67 criminal cases in the last fiscal year and obtained well over a billion dollars in fines. In the last five years, the Antitrust Division averaged criminal fines of almost \$800 million per year, he added.

The Antitrust Division's civil enforcement efforts also produce important results for American consumers, Baer noted. He pointed to the federal/state e-book price fixing case against Apple, Inc. and five publishers. Settlements in the case "have restored meaningful retail price competition." The average price of top best sellers

reportedly dropped by approximately three dollars in just the last few months.

“We are putting scarce American taxpayer dollars to good use,” Baer concluded.

Ramirez offered recent FTC highlights, including the two FTC cases before the U.S. Supreme Court this term, in her prepared statement.

The Supreme Court’s unanimous decision in February to revive the FTC’s suit challenging a Georgia hospital merger-to-monopoly was up first. In that decision (*FTC v. Phoebe Putney Health System, Inc.*, 2013-1 Trade Cases ¶78,269), the Court held that the state action doctrine did not immunize the transaction from the antitrust laws.

The second case involves a “pay-for-delay” patent settlement between drug makers. Ramirez noted that the Court heard arguments in March. She said that she was hopeful that the Court will hold that these types of agreements are presumptively unlawful.

“As both of these Supreme Court cases show, the FTC remains broadly focused on preserving competition in health care markets as a way to help contain health care costs,” Ramirez said. She went on to point out the agency’s recent efforts to block anticompetitive hospital mergers in northern Virginia, Toledo, Ohio, and Rockford, Illinois.

In addition to challenging “pay-for-delay” agreements, the Commission has been looking at other ways that drug companies might be delaying generic competition. Ramirez pointed to two strategies: (1) the potential abuse of safety protocols known as Risk Evaluation and Mitigation Strategies (REMS) to prevent a generic from being able to access samples of brand products to begin the bioequivalence testing process required by the Hatch-Waxman Act; and (2) product hopping, where brand companies, facing a threat of generic competition, make minor non-therapeutic changes to their products to prevent generic substitution.

Ramirez told Subcommittee Chairwoman Amy Klobuchar (D, Minnesota) that she supported her bill aimed at combating pay-for-delay settlements, but that she couldn’t speak for the current Commission.

The Commission also remains focused on high-technology markets, according to the testimony. “The Commission recognizes the important role that innovation

plays in technology markets, and takes a cautious approach where action is more likely to deter rather than promote innovation,” Ramirez noted. Ramirez pointed to the agency’s recent decision to close its investigation of Google’s search practices as an example of this cautious approach.

“The Commission also remains focused on preserving the integrity of the standard setting process,” Ramirez testified. She said that there will be an ongoing dialogue with stakeholders in this area.

Also on the intellectual property front, Ramirez noted that the FTC, in conjunction with the Antitrust Division, has been looking into the practices of patent assertion entities and non-practicing entities or “patent trolls” and the impact on competition. In response to questioning from the senators, neither agency head appeared ready to issue new guidance on unilateral conduct or unfair methods of competition.

Senator Mike Lee (R, Utah), ranking member on the subcommittee, inquired whether the Antitrust Division might issue guidance on Sherman Act, Section 2, in light of the decision of former Assistant Attorney General Christine Varney to withdraw guidance issued in September 2008 during the George W. Bush Administration. Baer said that he would not provide general, formal guidance on Section 2, but would provide guidance on a case-by-case basis through speeches or closing statements.

Senator Lee also questioned Ramirez regarding the need for the FTC to issue guidance on limiting principles for Section 5 unfair methods of competition enforcement. Ramirez directed the senator to guidance provided in recent enforcement actions. According to Ramirez, the agency has been approaching Section 5 enforcement carefully.

Both enforcers agreed that concerns over the differing standards imposed on the two agencies for obtaining preliminary injunctions in merger cases were overstated. Senator Lee asked whether Congress needed to get involved so that the same standard applies for both agencies.

According to Ramirez, at the end of the day, the standards used by the two agencies are quite similar. She did not see a practical difference as applied by judges. Baer agreed.

Baer pledged to continue working to promote competition in agriculture markets. He said that the Antitrust Division was working closely with Department of Agriculture and state attorneys general in farm states and that he understood that these issues were important to American consumers.