

Antitrust Enforcement Hot Topics for 2017 and Their Potential Impact on 2018

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The following post offers a look back at important trends in antitrust enforcement over the past year. Many of the significant developments that are detailed below, including merger challenges and leadership changes, will have a lasting impact on 2018 and beyond.

MERGER ENFORCEMENT

Department of Justice litigation.

The biggest antitrust news story of 2017 was likely the Department of Justice Antitrust Division challenge to AT&T, Inc.'s proposed \$108 billion acquisition of Time Warner, Inc. The Antitrust Division filed a lawsuit on November 20 in the federal district court in Washington, D.C., alleging that the combined company "would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner's networks, and it would use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers." The proposed acquisition is "a procompetitive, pro-consumer response to an intensely competitive and rapidly changing video marketplace," AT&T said in its answer. While early on much of the debate over the government's action concerned the possible role of the White House in influencing the decision to block the deal, the fate of the deal will likely be decided at a trial set to begin in March 2018 based on allegations in the government's complaint. At

this point, a settlement acceptable to both sides appears unlikely. It has been suggested the Justice Department's tough stance in this matter could chill merger activity at least in the near term (*U.S. v. AT&T, Inc.*, Case No. 1:17-cv-02511).

Of course, the AT&T-Time Warner challenge was not the only significant merger enforcement effort in 2017. Earlier in the year, the Antitrust Division successfully blocked two major health insurance industry mergers. The federal district court in Washington, D.C. enjoined Aetna Inc.'s \$37 billion attempt to buy Humana Inc. On February 14, Aetna and Humana formally abandoned their proposed merger (*U.S. v. Aetna, Inc.*, Case No. 16-1494 (JDB)).

The federal district court in Washington, D.C. also sided with the Justice Department, 11 states, and the District of Columbia, and blocked Anthem's \$54 billion acquisition of Cigna Corp., which would have been the largest merger in the history of the health-insurance industry. In May, Anthem, Inc. terminated its merger agreement with Cigna (*U.S. v. Anthem, Inc.*, Case No. 16-1493 (ABJ)).

In another important win for the Antitrust Division, the federal district court in Wilmington, Delaware, blocked Energy Solutions' \$367 million acquisition of rival Waste Control Specialists. The Antitrust Division challenged the deal, which would have combined two of the most significant competitors for the disposal of low level radioactive waste (*U.S. v. Energy Solutions, Inc.*, Case No. 1:16-cv-01056-SLR).

Department of Justice settlements.

There also were high-profile settlements in 2017 that resolved Justice Department concerns over other mega-mergers. In June, the Justice Department announced that it would require The Dow Chemical Company and E.I. DuPont de Nemours & Co. to divest multiple crop protection and two petrochemical products to proceed with their proposed merger, valued at about \$130 billion. The Antitrust Division, along with the offices of three state attorneys general (Iowa, Mississippi, and Montana), filed a civil antitrust complaint in the federal district court in Washington, D.C. to enjoin the proposed transaction, along with the proposed final judgment. The Department of Justice had said that, without the divestitures, the proposed merger likely would reduce competition between two of only a handful of chemical companies that manufacture certain types of crop-protection chemicals and the only two U.S. producers of acid copolymers and ionomers, potentially harming U.S. farmers and consumers. The final judgment was entered in October

(U.S. v. Dow Chemical Co., Case No. 1:17-cv-01176-APM).

Just this month, a settlement was reached in the Justice Department's action over the consummated acquisition of aviation filtration systems provider CLARCOR Inc. by competitor Parker-Hannifin Corporation. The \$4.3 billion transaction substantially lessened competition in markets for aviation fuel filtration products in the United States, according to a complaint filed in a federal district court in Delaware in September. Under a proposed final judgment, Parker-Hannifin has agreed to divest the Facet filtration business, including the aviation fuel filtration assets that it acquired from CLARCOR (*U.S. v. Parker-Hannifin Corp.*, Case 1:17-cv-01354-UNA).

Federal Trade Commission efforts.

The FTC also had some major wins in its merger enforcement program. In March, Advocate Health Care Network and NorthShore University HealthSystem—two of the leading providers of general acute care inpatient hospital services in Chicago's northern suburbs—terminated their planned merger after the federal district court in Chicago issued a preliminary injunction (*FTC v. Advocate Health Care Network*, Case No.: 1:15-cv-11473).

In addition, an FTC complaint helped quash the combination of the two largest daily fantasy sports providers—DraftKings and FanDuel. In July, the companies agreed to terminate their proposed merger after the FTC issued an administrative complaint and, along with the Offices of the Attorneys General in the State of California and the District of Columbia, authorized the filing of a complaint in the federal district court in Washington, D.C., seeking to block the merger. The complaint alleged that the combined firm would control more than 90 percent of the U.S. market for paid daily fantasy sports contests (*In the Matter of DraftKings, Inc.*, FTC File No. 161 0174).

The blockbuster combination of Walgreens and Rite Aid drug stores was finally cleared by the FTC in September 2017; however, the deal was significantly scaled-back from what had been initially proposed. Despite concerns expressed by FTC Commissioner Terrell McSweeney, the Hart-Scott-Rodino Act premerger waiting period expired for Walgreen's agreement with Rite Aid to purchase 1,932 stores, three distribution centers, and related inventory for \$4.375 billion without action from the agency. Acting FTC Chairman Maureen K. Ohlhausen said that a more

extended investigation was unlikely to uncover “additional, different facts overlooked during the staff’s exhaustive, 22-month investigation.”

CIVIL NON-MERGER ENFORCEMENT

Department of Justice.

As for civil non-merger enforcement at the Justice Department, DIRECTV in March agreed to settle a 2016 suit, alleging that the company acted as the ringleader of a series of unlawful information exchanges sharing competitively sensitive, strategic information with Cox, Charter, and AT&T during the companies’ negotiations for the right to telecast SportsNet LA (also referred to as the Dodgers Channel), in order to insulate themselves from competition. The proposed final judgment, which prohibited DirecTV and AT&T from illegally sharing confidential, forward-looking information with competitors, was approved in October (*U.S. v. DirecTV Group Holdings, LLC*, Case No. 2:16-cv-08150-MWF).

In 2017, the Antitrust Division avoided summary judgment in a joint action (along with the State of Michigan) against Allegiance Health that challenged alleged agreements among Michigan hospital systems to allocate territories for marketing competing healthcare services. Three other three health systems—Hillsdale Community Health Center; Community Health Center of Branch County; and ProMedica Health System—named in the 2015 complaint had already entered into a settlement. A trier of fact will determine whether one hospital’s decision not to market its services in the other hospital’s “area” was the result of an illegal agreement to violate the Sherman Act or merely a unilateral, legitimate business decision one hospital made to ensure continued referrals from the other hospital, the federal district court in Ann Arbor, Michigan, held. A bench trial has been set for March 2018 (*U.S. v. W.A. Foote Memorial Hospital d/b/a Allegiance Health*, Case No. 5:15-cv-12311-JEL-DRG).

The Justice Department suffered a setback when the U.S. Court of Appeals in New York City affirmed a district court’s determination that the longstanding consent decree with Broadcast Music, Inc. (BMI), which placed conditions on BMI’s licensing and sublicensing of its repertory of compositions in order to resolve price fixing allegations, did not require it to offer blanket licenses to music users. In response to the decision, Makan Delrahim, Assistant Attorney General in charge of the Antitrust Division, said that the decision “highlights the challenges of behavioral

consent decrees in antitrust cases” and that “[s]uch decrees, over time, effectively become perpetual regulations that the Department of Justice and the courts are often not well-suited to enforce.” The statement reiterated comments in a [speech](#) delivered by Delrahim shortly before the government filed its challenge to AT&T’s Time Warner, noting the government’s preference for structural remedies ([U.S. v. Broadcast Music, Inc.](#), Case No. 16-3830-cv).

Federal Trade Commission.

There also were a number of significant developments in 2017 in the FTC’s competition enforcement efforts outside of the merger context. In May, the FTC filed its first administrative complaint against a state board since the U.S. Supreme Court issued its 2015 decision in [N.C. State Bd. of Examiners v. FTC](#). The Louisiana Real Estate Appraisers Board, a state agency controlled by licensed real estate appraisers, was charged by the FTC with unreasonably restraining price competition for real estate appraisal services provided to appraisal management companies in Louisiana. According to the FTC’s [complaint](#), the challenged conduct was not shielded from antitrust attack by the “state action” defense because independent state officials had not supervised the board’s discretionary actions. The administrative trial is expected to begin in May 2018 (*In the Matter of Louisiana Real Estate Appraisers Board*, FTC Dkt. 9374).

Qualcomm, Inc., was unable to convince the federal district court in San Jose, California, to dismiss FTC [claims](#) that Qualcomm had abused its dominance in the modem chip market by, among other things, consistently refusing to license standard-essential patents on fair, reasonable, and non-discriminatory (FRAND) terms to competitors. The FTC adequately stated claims against Qualcomm under Section 5 of the FTC Act, based on the company’s alleged practice of above-FRAND royalties, which harmed competition in violation of Section 1 and 2 of the Sherman Act. Also, allegations regarding Qualcomm’s exclusive dealings with Apple were sufficient to withstand the motion to dismiss, the court ruled in June ([FTC v. Qualcomm, Inc.](#), Case 5:17-cv-00220-LHK).

As for challenges to conduct in the pharmaceutical sector, the FTC was permitted to proceed to trial with a monopolization claim based on sham litigation aimed at delaying generic competition for the testosterone replacement therapy drug AndroGel. Patent lawsuits brought by AbbVie Inc. and its partner Besins Healthcare Inc. against two potential competitors, Teva Pharmaceuticals USA, Inc. and Perrigo

Company, which were seeking Food and Drug Administration approval for generic versions of AndroGel 1%, the defendants' brand-name product, were "without question objectively baseless," the federal district court in Philadelphia ruled in September. Therefore, the FTC was entitled to partial summary judgment on the objective baselessness element of the sham litigation prong of its monopolization claim. Genuine disputes of material fact concerning the defendants' monopoly power foreclosed summary judgment in favor of defendants AbbVie and Besins Healthcare (*FTC v. AbbVie Inc.*, Case 2:14-cv-05151-HB).

Also in the health sector, an FTC Administrative Law Judge (ALJ) in October decided that 1-800 Contacts, Inc. harmed consumers and competition by restricting advertisements for the sale of contact lenses on the Internet. 1-800 Contacts and rival online contact lens sellers were charged by the agency with agreeing not to bid on each other's trademarks as keywords in Internet-search-advertising auctions. These challenged agreements prohibited "competitors from presenting paid advertisements on the search engine results page in response to searches for 1-800 Contacts' trademarks," according to the ALJ. The harm to competition established by the FTC was not outweighed by the respondent's purported procompetitive justifications. Thus, the ALJ ordered 1-800 Contacts to refrain from agreeing with a seller to restrict, prohibit, regulate or otherwise limit that seller's use of truthful, non-deceptive, and non-trademark-infringing advertising or promotion. An appeal to the full Commission was expected (*In the Matter of 1-800-Contacts, Inc.*, FTC Dkt. No. 9372, File No. 141 0200).

Outside of its litigation enforcement efforts at the FTC, a new task force was established to advance economic liberty. In a February address, entitled "Advancing Economic Liberty," Acting FTC Chairman Maureen Ohlhausen outlined plans to take action against significant government barriers that restrict participation in the economy by job-seeking Americans, particularly unnecessary occupational licensing.

CRIMINAL ENFORCEMENT

The Justice Department's probes of the auto parts industry and real estate foreclosure auctions, in addition to other investigations, continued in 2017. The real estate foreclosure effort has now netted investors in Florida.

In the auto parts probe, the Justice Department suffered a tough loss when Tokai

Kogyo Co. and Green Tokai Co., Ltd. were found not guilty of conspiring to rig bids following a 13-day jury trial in November. In June 2016, a federal grand jury in Cincinnati charged Tokai Kogyo Co. Ltd., its wholly-owned U.S. subsidiary, Green Tokai Co. Ltd., and Akitada Tazumi with conspiring to fix the prices of automotive body sealing products. The companies were the first to be indicted in 2016 in the government's long-running auto parts probe (*U.S. v. Tokai Kogyo Co. Ltd.*, Case 1:16-cr-00063-TSB).

On the other hand, the Justice Department was handed a win by the U.S. Court of Appeals in Boston in a case against a chief operating officer of a freight carrying company for price fixing. The defendant was denied a new trial (*U.S. v. Peake*, No. 16-2356).

As part of its advocacy efforts, the Justice Department urged the U.S. Supreme Court to grant a pending petition on the question of whether a federal court determining foreign law is required to treat as conclusive the foreign government's characterization of its own law, in an amicus brief submitted by the U.S. Solicitor General. At issue was a suit filed by Animal Science Products and other U.S. purchasers of vitamin C alleging that Chinese manufacturers and exporters of vitamin C conspired to fix the price and supply of vitamin C sold to U.S. companies on the international market in violation of the Sherman Act. The federal district court in New York awarded the plaintiffs \$147 million in damages and enjoined the defendants from engaging in future anticompetitive behavior. The U.S. Court of Appeals in New York City vacated the judgment and held that because the Chinese government had filed a formal statement in the district court asserting that Chinese law required the defendants to set prices and reduce quantities of vitamin C sold abroad, and because the manufacturers could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case. Animal Science argued on appeal that the Chinese government had mischaracterized its own law in asserting that the Chinese companies' anti-competitive behavior was required by Chinese law. Word on the fate of this petition should come from the High Court in January (*Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, Dkt. 16-1220).

STATE ENFORCEMENT

The biggest news story for state antitrust enforcement in 2017 was the decision of

the U.S. Supreme Court to consider a petition brought by 11 states seeking a review of a Second Circuit ruling that the U.S. Department of Justice and complaining states failed to prove that “anti-steering” rules that prohibited merchants who accepted American Express cards from directing customers to alternative credit card brands violated Section 1 of the Sherman Act. This was the first antitrust case taken up by the Court this term. The U.S. Justice Department did not file a petition for review. However, in a brief supporting the petitioning states, it argued that the appellate court incorrectly held that the district court erred by defining the relevant market to include only services to merchants, not services to cardholders (*State of Ohio v. American Express Company*, Dkt. 16-1454).

LEADERSHIP CHANGES

With a new administration in 2017 came new leadership at the federal antitrust agencies.

Department of Justice.

Makan Delrahim was sworn-in as Assistant Attorney General in charge of the Department of Justice Antitrust Division on September 29, six months after being picked by President Donald J. Trump to lead the agency. Delrahim had served as Deputy Assistant Attorney General in the Antitrust Division in the George W. Bush Administration.

It took some time for Delrahim to win Senate confirmation and report to work. Trump announced Delrahim as his pick for antitrust chief on March 28. His nomination was reported out of the Senate Judiciary Committee in June, but final Senate confirmation did not come until September.

Until Delrahim took over at the agency, Andrew C. Finch, a litigation partner in the New York office of Paul, Weiss, had served as the Acting Assistant Attorney General for antitrust. As intended, Finch stayed on as Deputy Assistant Attorney General when Delrahim became antitrust chief.

Finch was named in April, replacing Brent Snyder who had taken over as acting antitrust chief with the change in administration. Snyder had been a Deputy Assistant Attorney General for criminal enforcement at the Antitrust Division. He left the Justice Department in June after 14 years at the agency.

Federal Trade Commission.

At the FTC, Maureen K. Ohlhausen, who was the lone Republican among three members of the Commission at the time of President Trump's inauguration, was named by the president to serve as acting FTC chairman. Edith Ramirez, who had been serving as the chairman, disclosed on January 13 her intention to resign effective in February. That has left the Commission with two commissioners for much of the year.

There had been a number of rumors about possible successors to Ohlhausen to take the helm of the FTC. Sean D. Reyes, Utah's Attorney General, was among the names floated. However, it was not until October that President Trump named his picks to fill the chairman seat and another vacancy on the Commission. Trump selected Joseph Simons—a partner and co-chair of the Antitrust Group at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP—and Rohit Chopra—a Senior Fellow at the Consumer Federation of America—to serve as commissioners at the FTC. If confirmed, Simons would be designated chairman.

Senate consideration of the FTC nominees should begin in early 2018. Stay tuned.