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A Look Back at the Enforcement Efforts of the Federal Antitrust Agencies in 2011

Jeffrey May (Wolters Kluwer) · Saturday, December 31st, 2011

Having filed over 100 cases in the last 12 months, the Department of Justice Antitrust Division was especially active in 2011. The vast majority of those cases were criminal matters; however, 2011 will most likely be remembered for the Antitrust Division's merger enforcement efforts.

The Antitrust Division reviewed a number of mega-mergers in 2011. While the most of merger filings were approved by the Justice Department without challenge or with conditions in a consent decree, there were notable court battles.

Among the most significant of these was the federal/state challenge to AT&T's proposed \$39 billion acquisition of T-Mobile USA Inc. from Deutsche Telekom. The parties ultimately abandoned the proposal. The deal fell apart a little more than a month after the Antitrust Division was handed an important victory when the federal district court in Washington, D.C. enjoined the proposed acquisition by H&R Block Inc. of TaxACT, a digital do-it-yourself tax-preparation software provider, at the government's request (2011-2 Trade Cases ¶77,678).

The Antitrust Division's first merger case of the year was the Comcast/NBC Universal merger. A consent decree resolved antitrust concerns with the combination of Comcast—the nation's largest cable operator and Internet service provider—and NBC Universal's cable networks, filmed entertainment, and television programming (2011-2 Trade Cases ¶77,585). As the year came to a close, the Antitrust Division conditionally approved the merger of Deutsche Börse AG and NYSE Euronext.

The Justice Department also challenged non-reportable transactions. In May, the Antitrust Division moved to block George's Incorporated's acquisition of a Tyson Foods poultry processing plant in Virginia. George's later consented to a settlement requiring it to make capital improvements to the plant in order to increase in the number of chickens processed at the facility, thereby increasing the demand for grower services (2011-2 Trade Cases ¶77,679).

In the health care area, the Antitrust Division resolved a challenge to an agreement between Blue Cross Blue Shield of Montana and five of six Montana hospitals that own New West Health Services, a health insurer that competes with Blue Cross in Montana.

Outside of merger enforcement, another important development in the health care area was the Antitrust Division's first case since 1999 challenging a monopolist with engaging in traditional

anticompetitive unilateral conduct. The Department of Justice announced in February that it had reached a consent decree (2011-2 Trade Cases ¶77,619), prohibiting United Regional Health Care System of Wichita Falls, Texas, from entering into contracts that allegedly inhibited commercial health insurers from contracting with United Regional's competitors and maintained the firm's monopoly for hospital services.

Criminal Enforcement

While the Antitrust Division in 2011 continued ongoing criminal investigations in the real estate, financial services, and other industries, the agency announced its first charges resulting from international cartel investigations into the auto parts industry, including conspiracies involving aftermarket auto lights and automotive wire harnesses and related products. The year also saw the first charges from an investigation into anticompetitive conduct in the airline charter services industry.

Federal Trade Commission

The Federal Trade Commission also was active in 2011 pursuing its competition mission. The Commission issued more than a dozen complaints challenging mergers and acquisitions in 2011.

Most of these matters were resolved by consent order. In a few cases, the FTC filed complaints in federal court to stop the mergers pending a full administrative trial. In addition to the challenged transactions, a number of proposed mergers were abandoned after FTC staff raised competitive concerns.

Many of the FTC's merger challenges in 2011 involved participants in the health care industry. The FTC's first acquisition challenge of the year was a challenge to a hospital merger. In January, the agency challenged ProMedica Health System, Inc.'s consummated acquisition of rival St. Luke's Hospital in Lucas County, Ohio. In March, a federal district court granted the FTC's request for a preliminary injunction, pending a full administrative trial on the merits (2011-1 Trade Cases ¶77,395).

In November, the FTC issued another administrative complaint challenging a hospital merger. In that matter, the agency is seeking to block OSF Healthcare System's proposed acquisition of Rockford Health System, which would combine two of the three major hospital systems in Rockford, Illinois.

The FTC suffered a loss in a third hospital merger challenge initiated in 2011. The Eleventh Circuit affirmed dismissal of the agency's challenge to Phoebe Putney's proposed acquisition of its rival hospital in Albany, Georgia (2011-2 Trade Cases ¶77,722). The agency had alleged that the parties in that case structured the deal to try to use a local hospital authority as a straw man to shield the acquisition from federal antitrust scrutiny under the state action doctrine. However, the appellate court ruled that the transaction was immune.

The Eighth Circuit also dealt a blow to the FTC's merger enforcement efforts in 2011. The appellate court affirmed dismissal of an action brought by the agency and the State of Minnesota against global pharmaceutical company Lundbeck, Inc., challenging a 2006 acquisition (2011-2 Trade Cases ¶77,570). The appellate court ruled that the district court did not commit clear error when it determined that the plaintiffs failed to identify a relevant market in challenging the drug company's acquisition of the rights to a drug that allegedly resulted in a single firm's control of the

“practicable alternatives” for the treatment of a life-threatening heart condition affecting low-birth-weight babies. The Eighth Circuit has denied the Commission’s motion for an en banc rehearing.

Another setback in the health care area was the dismissal of the FTC’s complaint challenging Laboratory Corporation of America’s acquisition of smaller rival clinical laboratory testing company Westcliff Medical Laboratories, Inc. (2011-1 Trade Cases ¶77,348). That court also questioned the FTC’s proposed relevant markets for analyzing the anticompetitive effects of the transaction.

In addition to the merger litigation in the health care sector, the agency announced in 2011 four merger reviews involving drug makers that were resolved by consent decrees. Those actions included: Hikma Pharmaceuticals and Baxter International, [Dkt. No. C-4320](#); Grifols and Talecris Biotherapeutics Holdings Corp., [Dkt. No. C-4322](#) ; Perrigo Company and Paddock Laboratories, Inc., [Dkt. No. C-4329](#); and Teva Pharmaceuticals, Inc. and Cephalon, [Dkt. No. C-4335](#) .

Also in the pharmaceutical industry, the FTC continued efforts to combat so-called “pay-for-delay” agreements, supporting proposed federal legislation and pursuing pay-for-delay cases in federal courts.

Together with the Antitrust Division, the FTC released guidance for assisting health care providers in the formation of new accountable care organizations (ACOs) in October. The “[Final Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program](#)” is intended to help health care providers form procompetitive ACOs that benefit both Medicare beneficiaries and patients with private health insurance, while protecting health care consumers from higher prices and lower quality.

The Commission also issued a unanimous opinion in 2011 holding that the North Carolina State Board of Dental Examiners—an agency of the State of North Carolina that regulates the practice of dentistry—excluded non-dentist providers from the market for teeth whitening services in violation of Sec. 5 of the FTC Act (2011-2 Trade Cases ¶77,705). Earlier in the year, the Commission decided that the board was not entitled to state action immunity (2011-1 Trade Cases ¶77,331).

Expect the issue of state action immunity to continue to be an important issue for the FTC in 2012 and beyond.

“Clarifying the state action doctrine, and limiting its anticompetitive potential, has been a Commission priority from 2001 through today,” said FTC Chairman Jon Leibowitz in a [speech](#) before the American Bar Association Section of Antitrust Law, in November.

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