

AntitrustConnect Blog

A Look Back at the Antitrust Enforcement Highlights of 2015

Jeffrey May (Wolters Kluwer) · Thursday, December 31st, 2015

As 2015 comes to a close, it's time to take a look back at some of the major federal antitrust enforcement highlights of the year. While headline-grabbing merger challenges dominated antitrust news, the year was marked by other important antitrust developments that are worth noting.

Department of Justice Enforcement

Merger enforcement. In the last 12 months, only seven of the five dozen actions brought by the Department of Justice Antitrust Division alleged a Clayton Act, Section 7 claim. However, the low number of case filings does not adequately represent the Justice Department's merger enforcement efforts. The mere threat of a suit was sufficient to end one of the most closely-watched mergers of 2015. Comcast Corporation dropped its plans to acquire Time Warner Cable for approximately \$45.2 billion in April, after the U.S. Department of Justice informed the companies of its antitrust concerns. The Department of Justice [said](#) the transaction would have combined the country's two largest cable operators and made Comcast "an unavoidable gatekeeper for Internet-based services that rely on a broadband connection to reach consumers."

The Justice Department declined to challenge another significant deal in the telecommunications industry— AT&T, Inc.'s acquisition of DirecTV. However, the Federal Communications Commission conditioned the deal on the merging parties' regulatory commitments. The FCC's approval of the \$48 billion deal came after the Antitrust Division [concluded](#) in July that the deal did not raise competition concerns.

All but one of the merger cases filed by the Justice Department were resolved by settlements. In July, after the parties were unable to reach a settlement, the government brought an [action](#) to block the sale of General Electric Company's appliance business to rival AB Electrolux. GE decided to defend the deal. A month into a bench trial to enjoin the \$3.3 billion acquisition, however, GE terminated an agreement under which it agreed to sell the appliance unit to Electrolux.

Joint ventures. With a trial looming in 2015, a [settlement](#) was finally reached in a long-running challenge to a New York City tour bus joint venture. Coach USA Inc., City Sights LLC, and their joint venture, Twin America LLC, agreed to remedy competitive concerns in the New York City hop-on, hop-off bus tour market raised in a December 2012 complaint.

Monopolization. The Justice Department also brought an action against United Continental Holdings, Inc., parent of United Airlines, over its efforts to acquire 24 takeoff and landing slots at Newark Liberty International Airport from Delta Air Lines, Inc. The government did not allege a violation of Section 7 of

the Clayton Act. Instead, it asserted in a November [complaint](#) that United's efforts to increase its already dominant position at the Newark airport amounted to monopolization and conspiracy.

Civil non-merger enforcement. In other civil enforcement news, the federal district court in Brooklyn, New York, [held](#) in February that American Express rules, which prevented merchants who accept AmEx cards from "steering" customers to alternative credit card brands, violated Sec. 1 of the Sherman Act. That matter is currently on appeal. Separately, the U.S. Court of Appeals [upheld](#) a victory in another federal/state civil antitrust enforcement action. The court affirmed a determination that Apple Inc. orchestrated a conspiracy among five major publishing companies to raise the prices of electronic books or e-books, as well as an order preventing Apple from signing agreements with those publishers that restrict its ability to set or alter e-book prices.

Standard setting organizations. In an effort to provide guidance to standard setting organizations on standard essential patents and licensing on reasonable and non-discriminatory terms, the Antitrust Division released a [business review letter](#) in February to the Institute of Electrical and Electronics Engineers, Inc. (IEEE) Standards Association. The Antitrust Division determined that the IEEE's updated patent policy that was the subject of the business review request would offer significant procompetitive benefits by facilitating licensing negotiations, product interoperability, and lower costs; mitigating hold up and royalty stacking; promoting competition among technologies for inclusion in standards; and fostering innovation and efficiency.

Criminal enforcement. In addition to pursuing ongoing criminal investigations of the auto parts and financial services industries, as well as real estate foreclosure auctions, the Antitrust Division [announced](#) its first plea agreement from a probe of collusion in the liquid aluminum sulfate industry. In October, a former executive of a water treatment chemicals manufacturer pleaded guilty for his role in a conspiracy to rig bids and allocate customers for the chemical, which is used by municipalities to treat drinking and waste water. The year also saw the first criminal prosecution against an antitrust conspiracy specifically targeting e-commerce and the use of algorithms to fix prices. A former executive of an e-commerce seller of posters, prints, and framed art [agreed to plead guilty](#), and another executive and a United Kingdom-headquartered e-commerce retailer have been [indicted](#) in the probe.

In a major criminal enforcement victory, a federal jury in New York City convicted two former employees of Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank) for their roles in conspiracies to manipulate the London InterBank Offered Rates (LIBOR) for the U.S. Dollar and the Yen. Anthony Allen and Anthony Conti were [found guilty](#) in November of conspiracy to commit wire and bank fraud and substantive counts of wire fraud. This was the first guilty verdict in the federal LIBOR probe. Also in the financial services area, in May, the Justice Department [announced](#) that five major banks pleaded guilty to conspiring to manipulate benchmark rates and will pay billions in fines. Four banks pleaded guilty to criminal antitrust violations relating to the rigging of various foreign exchange (FX) benchmarks, and a fifth bank pleaded guilty to manipulating LIBOR in breach of a 2012 non-prosecution agreement.

There were, however, some setbacks in the Antitrust Division's criminal enforcement efforts. In October, a federal jury in Newark, New Jersey, [acquitted](#) four of five defendants on trial for conspiring to rig bids at auctions conducted by New Jersey municipalities for the sale of tax liens. In addition, the Antitrust Division's long-running enforcement efforts in the coastal water freight transportation industry ended with a trial court loss. In May, following a three-week trial, a federal jury sitting in San Juan, Puerto Rico, acquitted a former executive for shipping company Crowley Liner Services, Inc. who had been [indicted](#) in 2013 for participating in a conspiracy to fix rates and surcharges. However, a 60-month prison sentence for a former executive for Sea Star Line LLC, a Puerto Rico freight carrier, was [affirmed](#) on

appeal to the U.S. Court of Appeals in Boston.

FTC Enforcement

Unfair Methods of Competition policy statement. Perhaps the most talked-about FTC news event of 2015 was the release of the Commission's long-awaited [Statement of Enforcement Principles](#) on unfair methods of competition under Section 5 of the FTC Act. In August, the Commission released a one-page document identifying general principles that guide the agency when deciding whether to bring an action against "unfair methods of competition" that do not amount to traditional antitrust violations. The statement had the support of four of the five commissioners, with Commissioner Maureen K. Ohlhausen dissenting.

State action immunity. In another major development, a divided U.S. Supreme Court handed the FTC a victory in its February [decision](#), limiting the state action immunity doctrine as it applies to state professional boards "controlled by active market participants." The Court ruled that the North Carolina State Board of Dental Examiners was not immune under the state action doctrine for excluding non-dentist providers from the market for teeth whitening services in violation of Sec. 5 of the FTC Act because the board's conduct was not actively supervised by the state.

Monopolization. Another important appellate victory for the FTC was the [Eleventh Circuit's decision](#), upholding the Commission's ruling that a monopolist's exclusive dealing practices violated antitrust laws because they prevented would-be market entrants from becoming meaningful competitors in the market for domestic pipe fittings, resulting in higher prices for municipalities and other waterworks customers. In a separate monopolization matter, Cardinal Health, Inc.—the operator of a chain of radiopharmacies—agreed to pay \$26.8 million in disgorgement to settle FTC charges that the company monopolized 25 markets for the sale of radiopharmaceuticals to hospitals and clinics. The [Cardinal Health settlement](#) represents the second largest monetary settlement the Commission has obtained in an antitrust case.

Reverse-payment settlements. The FTC's attack on "reverse payment" or "pay-for-delay" agreements continued in 2015, with varying degrees of success. Cephalon, Inc. and its parent company, Teva Pharmaceutical Industries Ltd., agreed to settle a long-running action over alleged efforts to block generic competition for the sleep-disorder drug Provigil. The ["landmark" settlement](#) required the companies to pay \$1.2 billion into a fund to compensate Provigil purchasers and prohibited them from engaging in the conduct challenged by the agency. Separately, the federal district court in Philadelphia [dismissed](#) FTC claims that several major drug companies delayed the entry of generic competition into the market for the testosterone replacement drug AndroGel through a settlement resolving patent infringement litigation.

Merger enforcement. The FTC's winning streak in merger enforcement actions came to an end in 2015. A federal district court in Cleveland [denied](#) the agency's request for a preliminary injunction, blocking Steris Corp.'s proposed acquisition of Synergy Health plc, pending administrative review. The agency unsuccessfully alleged that the \$1.9 billion transaction, combining the second and third largest sterilization companies in the world, would significantly reduce future competition in regional markets for sterilization of products using radiation. Despite the loss and some other setbacks, such as the collapse of a record supermarket divestiture order resolving a challenge to the combination of Albertson's and Safeway, the FTC had an ambitious merger enforcement program in 2015.

The FTC resolved concerns about a number of mergers through settlement proceedings in 2015,

including: [Dollar Tree, Inc.'s \\$9.2 billion acquisition of Family Dollar Stores, Inc.](#), [Pfizer Inc.'s \\$16 billion acquisition of Hospira, Inc.](#), and [Endo International plc's \\$8 billion acquisition of Par Pharmaceuticals, Inc.](#) This year, the FTC also ended a long-running challenge to a Georgia hospital combination that reached the Supreme Court, which [ruled](#) in February 2013 that the state action immunity doctrine did not shield the transaction from antitrust attack. Described by the agency as a “less-than-ideal remedy” because it did not include a divestiture order, the [consent order](#) with Phoebe Putney Health System, Inc., the Hospital Authority of Albany-Dougherty County, and HCA Inc. resolved the agency's attack on the hospital authority's acquisition of Palmyra Park Hospital from HCA.

The FTC also had some court victories in the merger enforcement area in 2015. The agency successfully blocked the merger of Sysco Corporation and US Foods, Inc. The parties dropped the deal in June after the federal district court in Washington, D.C. issued a [preliminary injunction](#). The court ruled that there was a reasonable probability that the proposed merger would substantially impair competition in the markets for broadline foodservice distribution services sold to national and local customers.

Also in 2015, the [Ninth Circuit upheld](#) an order unwinding the 2012 merger of two health care providers in Idaho's second-largest city, Nampa, which was found to violate Section 7 of the Clayton Act. The appellate court held that the acquisition of the state's largest independent physician practice group—Saltzer Medical Group—by the state's dominant health care system—St. Luke's Health System, Ltd.—would have given the combined entity the power to demand higher rates in the market for adult primary care services in Nampa.

As the year came to a close, the FTC announced a flurry of merger challenges. In addition to its efforts to block [Staples, Inc.'s proposed \\$6.3 billion acquisition of Office Depot, Inc.](#), the agency moved to stop three hospital system combinations. The FTC is challenging (1) the [proposed merger of West Virginia hospitals Cabell Huntington Hospital and St. Mary's Medical Center](#); (2) [Penn State Hershey Medical Center's proposed merger with PinnacleHealth System](#) (along with the State of Pennsylvania); and (3) the [proposed merger of Advocate Health Care Network and NorthShore University HealthSystem](#) in Chicago's northern suburbs. Administrative trials in these matters are set to begin in April and May 2016. If these parties decide to keep defending their deals, 2016 should be another interesting year.

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