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ANTITRUST TRADE AND PRACTICE

Expert Analysis

AT&T/Time Warner: How Judge's Experience In 'Comcast/NBCU' May Shape the Trial

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The much-anticipated AT&T/Time Warner trial is now underway. In our previous column, we analyzed the legal issues raised by the Department of Justices's (DOJ) suit to block AT&T/DirecTV's (AT&T) proposed acquisition of Time Warner. Our discussion focused on the issues raised in the DOJ's complaint, and the key issues that the D.C. District Court would likely examine in assessing the case. Now, at the approximate midpoint of the trial, we return to consider how a vertical mega-merger from a few years ago—and a familiar face from that case—may provide some clues of what is to come.

A Familiar Face at the Helm

Presiding over the case is Judge Richard J. Leon, a George W. Bush-appointee who took senior status in December 2016. Although the case was initially assigned to Judge Christopher Cooper, an Obama-appointee, the assignment was shifted to Judge Leon without explanation. Judge Leon is no stranger to high-profile cases—he presided over the district court proceedings in *Boumediene v. Bush*, a case in which the Supreme Court ultimately held that prisoners at Guantanamo Bay had a right to the writ of habeas corpus. But more importantly for our purposes, he handled one of the largest vertical media mergers in recent memory—a case with many parallels to AT&T/Time Warner—the multi-billion dollar deal between Comcast and NBC Universal (NBCU).

A Look at 'Comcast/NBCU'

In 2011, Comcast sought to finalize a $37 billion deal to purchase NBCU, which would combine NBCU's video programming with Comcast's distribution network. Unlike here, the government did not sue to block the deal, but the parties appeared in front of Judge Leon to finalize the consent agreement that addressed the government's antitrust concerns. The DOJ had agreed to allow the deal to go through on the condition that Comcast cede control of Hulu, the popular video-streaming website, make stand-alone broadband service available to customers at $49.95 per month for three years, and allow online distributors to submit disputes regarding Comcast's licensing of NBC content to arbitration. In what some viewed as an unusual move, Judge Leon took issue with the arbitration terms and threatened to nix the deal.

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Judge Leon's primary concern was that the arbitration terms in the consent decree would harm online

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video distributors, like Netflix, which sought Comcast and NBCU content, because they were non-appealable. A private, "baseball-style" arbitration would be used to work out the prices for carrying NBCU programming if the parties failed to agree. Although the government had pushed to assuage the fears of Judge Leon, he was still "not completely certain that these safeguards [in the consent decree], *alone*, will sufficiently protect the public interest in the years ahead." For that reason, Judge Leon found that additional steps were necessary to monitor the post-merger entity. He ordered that for two years, the parties would be required to create and maintain a report documenting the arbitration process, including how many online video distributors initiated arbitration and appealed the result of their arbitration. Additionally, Judge Leon ordered yearly hearings before the court to explain and discuss the report.

AT&T/Time Warner

In this case, the DOJ tailored its trial brief to primarily focus on the possible harm to Multichannel Video Programming Distributors (MVPDs) and Virtual MVPDs (VMVPDs), rather than to online video companies. MVPDs include cable companies and satellite companies, such as Comcast, Charter, DirecTV, and Dish; VMVPDs include "cut the cord" options such as Sling TV, PlayStation Vue, and DirecTV Now. Importantly, both DirecTV distributors are owned by AT&T. The DOJ's main contention is that a merged AT&T and Time Warner could threaten to withhold Time Warner's "must have" content (HBO, TNT, TBS, and CNN) as leverage against DirecTV's rival MVPDs, which would ultimately result in consumers paying higher prices. The government claims that the merger could cost consumers "between $270.9 and $361.2 million more per year" for MVPD service alone.

Indeed, on page one of its trial brief, the DOJ directly quoted AT&T's senior vice president and general counsel's statement that, when program distributors acquire content producers, they "have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition." The government also quoted a damaging statement made by DirecTV to the Federal Communications Commission (FCC) when it was evaluating the Comcast/NBCU merger: "This [vertical integration of programming and distribution] ultimately results in higher prices and lower quality service for consumers."

What Parallels Can We Draw?

First, both cases involve a merger between a content company and a content distributor, which although different in certain respects, present the same basic fear that one "behemoth"—AT&T or Comcast—will harm competition by increasing the price of featured programming or otherwise limiting access to that programming. In *Comcast/NBCU*, Judge Leon seemed particularly troubled by the negative impact the merger could have on online video distributors. But since that merger was approved, online video companies have proved an exceedingly disruptive force for the cable industry, as consumers have increasingly "cut the cord" in favor of competing online video distributors and VMVPDs.

In its trial brief, however, the government made clear that its focus at trial would be on the harm caused to traditional MVPD service providers, not online video distributors like Netflix: "[T]he fact that the number of MVPD subscribers is declining … should not distract from the overriding reality that *the vast majority of American households still subscribe to traditional MVPD service and they will continue to do so in the future.*" This position is directly opposed by AT&T's argument that this merger is "frankly, to try and keep up" with the online video distributors like Google, Netflix, and Amazon, that are now "dominating the industry." This is one area to monitor: With the prolonged and ever-growing success of online video companies, will Judge Leon find that the need to protect these online distributors has dissipated?

Second, just as in *Comcast/NBCU*, arbitration terms may play a big role. After the DOJ launched its legal challenge, AT&T proposed a cure for any anticompetitive problem—a "baseball-style" arbitration to license Time Warner's Turner television content (e.g., TNT, TBS, CNN) for the next seven years. AT&T stated that Turner would take pricing disputes with

distributors to binding arbitration, during which time Turner would be unable to withhold its content ("go dark"). This "arbitration/no-blackout mechanism," it argues, would be "virtually identical" to the one the government approved—and Judge Leon signed off on—in *Comcast/NBCU*.

During proceedings last week, just as in *Comcast/NBCU*, Judge Leon seemed to be considering ways to improve the arbitration terms. After testimony from the executive vice president of Charter, an AT&T competitor, Judge Leon asked if some of the concerns regarding arbitration could be alleviated if terms were changed to make the negotiation process more transparent, "mutually beneficial, and mutually fair." As of now, the "blind" process would require each side to submit their proposed rates for content, but only the arbitrator would see the submissions; distributors would not be able to see why Turner set the rate where it did, including if it was to comply with other contractual obligations. During later questioning of the Charter executive, counsel for AT&T/DirecTV stressed the similarities between these arbitration terms and the terms approved in *Comcast/NBCU*. But the executive pushed back, pointing out that the arbitration terms here do not include HBO, a crucial Time Warner property that could be used as leverage outside the arbitration proceedings.

Both at trial and in its brief, the DOJ has maintained that the arbitration terms are woefully inadequate, and do not do enough to resolve its concern that the post-merger entity would withhold Turner content from distributors in order to get higher carriage rates that would ultimately drive up prices for consumers. This is perhaps another important point to watch. In *Comcast/NBCU*, Judge Leon imposed additional conditions because "neither the Court nor the parties has a crystal ball to forecast how this [consent agreement], along with its arbitration mechanisms, will actually function." Does this statement reflect a deeper skepticism of the adequacy of behavioral remedies generally (and preference perhaps, for structural remedies), or a more limited worry about the specific arbitration terms in that case?

Although it is too early to tell which way this case will go, Judge Leon will have to peer into the future and decide whether to block the merger—with or without a crystal ball.

Answers on the Horizon

The trial is expected to last six to eight weeks, with each side calling about 30 witnesses. With trial already underway, although dogged thus far by arguments over the disclosure of confidential business information during testimony, we are already seeing the witnesses and evidence presented shaped by the questions above. Attorneys for AT&T and Time Warner made clear during opening arguments that this deal is necessary in order to remain competitive against rising online players, while the government held firm that these online video distributors are not replacements for MVPDs. And Judge Leon has already lamented the fact that the trial involves so much prognosticating from both sides. "I like telling parties that you don't have a crystal ball, but in this case, I guess I'll have to get a crystal ball. I don't know where to get one—maybe a second-hand store?"

For all the similarities between this case and *Comcast/NBCU*, there is one key difference: Absent an agreement between the parties, this trial will require Judge Leon to make a binary choice—block the merger or not. Given the substantially similar arbitration provision at issue here, might Judge Leon rule for the government, allowing the companies the chance to cut another deal at a later time? Although it is too early to tell which way this case will go, Judge Leon will have to peer into the future and decide whether to block the merger—with or without a crystal ball.

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