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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Antitrust Division Increasingly Weighs In as Amicus Curiae

The Department of Justice's Antitrust Division continues to ramp up its private litigation amicus program after vowing to be more involved in antitrust enforcement over all. Last spring, the Antitrust Division's update noted that it had "embarked on an effort to expand its amicus program and significantly increase its participation in antitrust cases before they reach the Supreme Court," with an eye toward helping shape the development and application of antitrust law in the earliest stages of private litigation. See "Oyez Oyez! The Antitrust Division Expands Its Appellate and Amicus Program," Antitrust Division Update Spring 2018. The Antitrust Division's interest has resulted in filing more amicus briefs at the district court level. The cases in which DOJ has chosen to participate have spanned the spectrum of antitrust claims, ranging from a statement of interest in Miami District Court

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to let the state bar know it was not immune from federal antitrust liability to an amicus brief before the Supreme Court in *Apple v. Pepper*.

In 2018 alone, the Antitrust Division filed 10 amicus briefs and statements of interest in cases in which the United States was not a party, compared to just two the prior year. See Statement of Assistant Attorney General Makan Delrahim Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, United States Department of Justice (Oct. 3, 2018). This is the most amicus briefs it filed in a single year since 2005. Notably, under the Obama Administration, which featured aggressive government antitrust enforcement, the Antitrust Division never filed more than five amicus briefs in a single year and filed only 25 in total over eight years. See Appellate Briefs, Antitrust Division Public Documents. In contrast, the Bush Administration's Antitrust Division filed 47 briefs in private litigation in its eight years.

These numbers, and the Antitrust Division's recent commentary, suggest that the DOJ is aiming to make 2018 the new norm rather than an outlier. The DOJ appears to be intervening in these matters to advance

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specific policy issues and government priorities. Of the 10 briefs filed in 2018, six focused on the proper scope of the broader tests at issue: the state action doctrine, the collateral-order doctrine, *Noerr-Pennington* immunity (for private entities petitioning the government for redress), *Illinois Brick* (indirect purchasers cannot seek antitrust damages), the dormant Commerce

Clause, and the binding effect of a foreign government's submission. Likewise, in the cases detailed below, the Antitrust Division urged the court to apply a particular test or case interpretation. However, increased intervention does not necessarily mean more rigorous enforcement. The Division generally advocates for courts to perform a more detailed, nuanced analysis under the relevant framework and in line with prior precedents, rather than advocating for novel antitrust theories.

Recent Intervention in §1 Claims

Under §1 of the Sherman Act, conspiracies in restraint of trade have been analyzed as either per se illegal or subject to the "quick look" or "rule of reason" analysis. Through its amicus filings, the Antitrust Division has been active in trying to clarify the boundaries between these tests and when they apply.

In April 2018, the DOJ filed a statement of interest in *Shawn McCain v. Apex Energy Group*, a case involving a written agreement between former business partners to allocate geographic markets. One partner sought a declaratory judgment to have the agreement declared per se unlawful. In its statement, the DOJ first addressed why the partner had standing, arguing "McCain is suing to increase competition, not to blunt it." While not explicitly agreeing with McCain, the DOJ argued that agreements between competitors to allocate territories, as well as customers, are per se illegal. Citing to well-recognized Supreme Court cases like the 1972 *United States v. Topco*, the 1985 *Northwest Wholesale Stationers*, and the 2007 *Leegin Creative Leather Products*, the DOJ argued that this is consistent with decades of antitrust jurisprudence regarding the per se rule.

In *Marion Healthcare v. Southern Illinois Healthcare*, the DOJ filed a statement of interest in another §1 case, which alleged that Southern Illinois had entered into exclusive agreements with health insurers that substantially foreclosed Marion and others from competing for health insurance contracts. The DOJ disagreed with the defendant's argument that short-term exclusive contracts are per se legal and stated the contracts should be analyzed under the rule of reason. Again, the DOJ suggested this approach was consistent with past precedent and relied on prior government enforcement cases like *United States v. Dentsply International* and *McWane v. FTC.*

Most recently, the day the government shutdown ended, the Antitrust Division filed notices of intent to file a statement of interest in two §1 cases. Both district court cases relate to the applicable standard to analyze "no-poach agreements," or agreements between competitors not to solicit or hire each other's employees. The notices argue that while not all "no-poach agreements" should be analyzed under the rule of reason, agreements that are reasonably necessary to a separate, legitimate business transaction should be. This approach mirrors the language in the Human Resources Guidelines promulgated by the DOJ and FTC in October 2016, which cautioned HR personnel that a naked no-poach agreement between employers is per se illegal if it is "separate from or not reasonably necessary to a larger legitimate collaboration." See Antitrust Guidance for Human Resource Professionals, United States Department of Justice and Federal Trade Commission (October 2016).

The DOJ's position directly undercuts the plaintiffs in one of the cases, which argued for the application of the per se rule to alleged no-poach agreements between fast-food chain franchisees. Counsel for the fast-food plaintiffs has suggested that the DOJ's position runs against its own guidance and prior federal court decisions. See Bryan Koenig, "DOJ Gives Fast-Food Chains Ammo Against No-Poach Suits," Law 360 (Jan. 29, 2019). However, the no-poaching agreement at issue is between a franchisor and a franchisee, within the same franchise system, and is therefore likely ancillary to a legitimate collaboration and properly assessed under the rule of reason.

Due to a lapse in funding, the Antitrust Division said it is not able to work on either statement of interest at this time and implied that if the district courts cannot delay the motion hearings, they should issue orders requesting that the United States submit its views. The motion to dismiss hearing in the fast-food case was scheduled for February 6, but the judge rescheduled it for March 20 and noted appearances on behalf of the U.S. Attorney General. The motion to dismiss hearing in the other case

is still scheduled for February 25.

On February 7, the DOJ filed another notice that it expects to file a statement of interest in an alleged no-poach case involving the Duke University and University of North Carolina medical schools, further highlighting that no industry is immune from antitrust scrutiny.

Recent Intervention in §2 Claims

With respect to monopolization claims, the Antitrust Division's most recent amicus filing was in *Viamedia, Inc. v. Comcast Corp., et al*, where it weighed in on the applicable standard for a refusal to deal claim under §2 of the Sherman Act.

Viamedia filed a complaint against Comcast in 2016, alleging Comcast unlawfully monopolized the spot cable advertising market. Comcast controlled the "Interconnects" in most of the largest markets in the country that provide regional advertisers a "one-stop shop" to buy spot cable advertising blocks from representation companies like Viamedia, ads which then ran with all cable service products in the region. Viamedia alleged that Comcast forced other cable operators to use Comcast Spotlight, its subsidiary, instead of Viamedia if they wanted access to the Interconnect in Chicago and Detroit.

Viamedia's refusal to deal argument relied on *Aspen Skiing*, in which the Supreme Court held that the unilateral termination of a voluntary, and thus presumably profitable, course of dealing suggested a monopolist's willingness to forsake short-term profits to achieve an anticompetitive end. The district court dismissed the claim in November 2016, holding Viamedia failed to show that Comcast's decision to exclude Viamedia was irrational and that replacing intermediaries was a "prototypical valid business purpose." See *Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674 (N.D. Ill. 2016).

Viamedia appealed to the Seventh Circuit, and in November of this year, the DOJ weighed in. The DOJ's amicus brief was not filed in support of either party, but rather urged the Seventh Circuit to hold that a refusal to deal does not violate §2 if a valid business reason exists for its refusal. See Brief for the U.S. as Amicus Curiae in Support of Neither Party, *Viamedia, Inc. v. Comcast Corp.*, No. 18-2852 (7th Cir. Nov. 8, 2018). The DOJ asked the court to follow *Novell Inc. v. Microsoft Corporation*, a Tenth Circuit decision penned by then-Judge Neil Gorsuch, and apply the "no economic sense" test. Under this test, a refusal to deal with a competitor is lawful unless it would make no economic sense but for its tendency to eliminate or lessen competition. The "no economic sense" test was previously endorsed as a useful counseling device in the Bush Administration's §2 guidelines, though the guidelines stated this test should not serve as the general standard. See *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, United States Department of Justice (2008). Seven months after its publication, Assistant Attorney General Christine Varney under the Obama Administration withdrew these guidelines, criticizing them for advocating "extreme hesitancy" in §2 enforcement. See "Vigorous Antitrust Enforcement in this Challenging Era," Remarks as Prepared for the U.S. Chamber of Commerce (May 12, 2009). She did not endorse a specific test, but cited *Aspen Skiing* and other cases as the roadmap for §2 enforcement.

While Viamedia similarly relied on *Aspen Skiing*, the DOJ's statement advocates a policy more in line with the 2008 guidelines. The DOJ noted in closing that Viamedia argues it can satisfy the "no economic sense" test, but did not further address the merits of either party's claims. The DOJ also requested and was granted five minutes of time at oral argument on February 7. At the hearing, the DOJ told the panel that both Viamedia and Comcast were misapplying the no economic sense test. The DOJ said Comcast is incorrect to claim that the test is satisfied whenever there's a slight procompetitive benefit, but noted Viamedia is also incorrect because it must prove its no economic sense claim beyond merely pointing to an alleged anti-competitive effect. See Lauraann Wood, "7th Circ. Grills Comcast Over Local Ad Market Dominance," Law 360 (Feb. 7, 2019) (transcript not yet available).

Recent Intervention in §7 Claims

The Antitrust Division's November filing in *Viamedia* came on the heels of its participation in another unusual case, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, in which, for the first time ever, a private plaintiff successfully obtained a court order of divestiture four years after a consummated merger.

In June 2016, Steves and Sons filed a complaint against JELD-WEN, alleging its 2012 acquisition of Craftmaster Manufacturing Inc. (CMI) substantially lessened competition in violation of §7 of the Clayton Act. JELD-WEN and Steves are both door manufacturers, and JELD-WEN also manufactures molded doorskins, a crucial component in the production of interior molded doors. Steves had a long-term supply contract for doorskins with JELD-WEN but alleged that JELD-WEN abused its monopoly power, overcharging Steves and changing its reimbursement policy for defective doorskins despite their existing agreement.

The DOJ reviewed JELD-WEN's acquisition of CMI in 2012 prior to closing and again in 2015 at Steves' request. During the pendency of the lawsuit, the DOJ sent a letter to the parties, noting that though it had investigated the transaction, no inference should be drawn from the fact that the Antitrust Division did not bring an action. See Letter from Maribeth Petrizzi, Chief, Defense, Industrials, and Aerospace Section, Antitrust Division, U.S. Dep't of Justice to Glenn D. Pomerantz, Munger, Tolles & Olson and Lawrence E. Buterman, Latham & Watkins (Dec. 5, 2017).

While the DOJ had not seen the need to intervene on either occasion, a jury found that JELD-WEN's acquisition did violate §7. The jury awarded Steves $58 million in damages, which was trebled as required by statute to a total of $175 million. In an unprecedented move, Steves then sought divestiture as an alternative to the jury award of future lost profits. See *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 2018 WL 4855459 (E.D. Va. 2018).

In response, the DOJ filed a statement of interest with the district court. It did not address the underlying merits of the case, but rather expressed its strong policy preference for structural relief in the form of divestiture to remedy anticompetitive mergers. See Statement of Interest of the U.S. Regarding Equitable Relief, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 3:16-CV-00545-REP (E.D. Va. June 6, 2018). This echoes numerous public statements from the Division that it favors structural relief such as divestitures rather than behavioral relief that regulates conduct because doing so requires less ongoing enforcement and relies on "free market competitive processes." See Statement of Assistant Attorney General Makan Delrahim Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2018). The statement also outlined factors the Antitrust Division considers when assessing a particular divestiture and criticized aspects of Steves' proposal, such as its suggestion that an alternative divestiture buyer would be bound to the prices of Steves' original contract with JELD-WEN.

After an in depth look at the case law surrounding divestiture as a private remedy, the district court held that Steves had standing to seek and was entitled to an order of divestiture. See *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 2018 WL 4855459 (E.D. Va. 2018). The court made note of the DOJ's statement and assured it fully expected the Special Master overseeing the divestiture to be able to proceed within the same framework used by the DOJ. The court's remedy may change, as JELD-WEN has promised to appeal. Even so, the jury verdict serves as a reminder that private challenges to already consummated mergers can succeed. The case also provides another example of how the Antitrust Division is keeping a close eye on the way courts at all levels apply antitrust principles and how the Division is seeking to make its voice heard, even after declining to intervene in the past.

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