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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Insights From the ABA Antitrust Spring Meeting 2019

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From March 26-29, 2019, the American Bar Association held its 67th Antitrust Spring Meeting, featuring panels on a wide range of topics from agency updates with the DOJ and FTC to pharmaceutical innovation. In this article, we highlight some key insights from the panels, honing in on agency perspectives articulated throughout the panels as well as hot topics in private litigation.

Agency Guidance

Vertical Mergers and Updated Guidelines. In light of the recent AT&T/Time-Warner decision, vertical mergers were raised on numerous panels, with agency officials providing insight into the landscape of future vertical merger review. FTC Chairman Joseph Simons discussed the Commission's recent clearance of the Staples/Essendant and Fresenius/NxStage mergers. He noted that both decisions were driven by the absence of three prerequisites for enforcement: (1) good documents, (2) good testimony, and (3) good economics. "Good" in this context means documents, testimony and data that support the government's theory of harm. He warned that where at least two of the prerequisites are present, the Commission will likely bring vertical merger enforcement actions. Absent from his commentary was a discussion of the sharp dissents and partisan voting between Democratic and Republican commissioners in these clearance decisions. For example, in Staples/Essendant, Democratic Commissioner Chopra agreed with his Democratic colleague, Commissioner Slaughter, that the Commission's economic model "likely underestimates the harmful effects" of vertical integration. In stark contrast, Commissioner Wilson issued her own statement expressing "grave concerns about [her] colleagues' enthusiasm for treating all vertical mergers with skepticism and conducting a fundamental reevaluation of our vertical merger policy."

As always, the ABA Antitrust Spring Meeting provided practitioners the opportunity to learn, reflect, and contemplate the future of antitrust law.

During the Enforcers Roundtable, Assistant Attorney General (AAG) Makan Delrahim also discussed vertical mergers, opining on the limited value of the 1984 Non-Horizontal Merger Guidelines. He stated that the Antitrust Division is working on updating the guidelines in order to provide practitioners and the business community with relevant

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guidance. He elaborated that in an effort to ensure longevity of the new guidelines and to draw upon a broader base of enforcement knowledge, the Antitrust Division hopes to develop and publish the revised guidelines jointly with the FTC.

Despite this commentary from the DOJ and FTC, timing and structure for creating jointly revised guidelines is unclear. Considering the FTC's 3-to-2 votes in Staples/Essendant and Fresenius/NxStage and the sharply-worded Commissioner statements, internal disagreement over vertical issues may present challenges for a consensus on new guidelines any time soon.

DOJ Leniency Program. The DOJ pushed back against critiques regarding the its leniency program and criminal enforcement. During the Hot Topics panel, Principal Deputy AAG Andrew Finch rebutted claims that the DOJ has decreased the number of leniency program participants in recent years. He emphasized that leniency is not dead; rather, application numbers are consistent with historical averages, pointing to his staff's recent data points in support of his position. Echoing this sentiment during the Enforcers Roundtable, AAG Delrahim downplayed concerns about the effectiveness of the Division's criminal enforcement regime. Nevertheless, he also noted that while DOJ criminal enforcement remains vigorous, he takes a critical view of an investigation before bringing charges, often requiring staff to refine their theories and develop better evidence before taking action. He stated that the DOJ is making efforts to improve its leniency program, citing to the upcoming public roundtable on the Antitrust Criminal Penalty Enforcement & Reform Act on April 11 as an opportunity to gather additional feedback.

Also during the Enforcers Roundtable, European Commissioner Margrethe Vestager explained that the European Commission expects to see an *increase* in leniency applications driven by the recent launch of its eLeniency online tool. She explained that the online program makes it easier for applicants to submit statements and documents in support of their applications. Whether the DOJ considers such a tool in its efforts to improve its criminal enforcement regime may be seen in the coming years.

Technology. Another common topic of discussion on the panels was "big tech." During the Enforcers Roundtable, AAG Delrahim explained the DOJ's approach to big tech, commenting that big is not bad, though big behaving badly is bad. AAG Delrahim argued that in general, because of network effects, the winner-take-all dynamic in tech industries poses challenges to antitrust analysis. While enforcers want to avoid the development of entrenched monopolies given this dynamic, AAG Delrahim insisted that the best approach is not merely trying to cap the growth of big companies but rather identifying harm (such as exclusionary conduct or acquisition of nascent competitors) and the appropriate solution under U.S. law.

Chairman Simons highlighted the FTC's interest in technology, pointing to the FTC's newly-created Technology Task Force, an issue championed by Commissioner Chopra earlier in his tenure. Although the Commission continues to develop the framework for the Task Force, Chairman Simons revealed that it will examine both mergers—consummated and proposed—and conduct, with a particular focus on acquisitions of nascent competitors. The FTC Tech Task Force may lead to new thinking on FAANG (Facebook, Apple, Amazon, Netflix, and Google), large digital platforms and related companies. However, the courts will continue to be guided by precedents that may be adverse to the FTC's initiative.

Data Privacy. In addressing consumer protection, Chairman Simons discussed the need for federal legislation on consumer privacy in the United States. In his view, effective legislation should include (1) civil penalties for initial privacy violations, (2) targeted rulemaking to limit open-ended application, and (3) the removal of exemptions for common-carriers and non-profit organizations. He cautioned that any new legislation should avoid prioritizing privacy protections at

the risk of erecting prohibitive barriers to entry.

Chairman Simons noted that the FTC should have enforcement jurisdiction over the new law and argued that Congress must draft the legislation. He reasoned that Congress is best suited to balance the underlying societal and cultural tradeoffs through legislation. Sarah Oxenham Allen, Chair of the Multistate Antitrust Task Force at the National Association of Attorneys General, reiterated Chairman Simons' call for Congress to enact consumer privacy legislation, on the basis that a federal standard would eliminate the burden on businesses to comply with fifty different standards in fifty different states.

Remedies. Deputy AAG Barry Nigro discussed the DOJ's remedy policy, affirming prior statements on the DOJ's preferences and suggestions for parties. He stated to the extent that there is any risk associated with a remedy, it needs to be borne by the parties, not consumers. He reiterated the DOJ's policy preference for structural remedies and noted a few exceptions where the Division may consider nonstructural relief: (1) in the healthcare context; (2) in situations where behavioral relief is necessary to facilitate a structural remedy; and (3) in situations where significant efficiencies cannot be achieved without the merger.

DAAG Nigro also provided some updates that parties should be aware of moving forward. First, he noted that the Division withdrew the 2011 remedies policies and is relying on the 2004 policy, so filings should not be citing to the 2011 policy. The Division has also added to consent decrees new provisions regarding the standard of proof, attorneys' fees, its ability to extend a decree if the parties are in breach and its ability to shorten the decree if it no longer serves any purpose. He suggested that parties should have a mechanism in place to ensure they are adhering to the decree. The ramping up of costs and burdens on parties imposed by these requirements suggests a departure from prior Republican notions of less stringent enforcement.

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Lastly, DAAG Nigro emphasized the Division's long-standing preference for divesting stand-alone businesses. He stated that asset divestitures must include all assets associated with the business, not just those principally or primarily associated with it. He emphasized that the Division is not intimidated by the size of the divestiture, citing Bayer-Monsanto's $9 billion divestiture and CVS-Aetna's nationwide divestiture despite competitive concerns only occurring in 16 of 31 regions.

Hot Topics in Private Litigation

'Apple v. Pepper'. Former FTC Commissioner Maureen Ohlhausen discussed the implications of allowing indirect purchasers to recover for antitrust harm. She predicts that the Supreme Court will adopt the Eighth Circuit's approach in *Campos v. Ticketmaster Corp.*, where the court ruled that buyers from platforms are indirect purchasers and thus barred from recovery under federal antitrust jurisprudence. AAG Finch stated that whatever the Supreme Court decides will have far-reaching implications. He and other panelists mentioned that the impact of *Apple v. Pepper* will not be whether we should have the indirect purchaser rule at all, but instead how the Court will apply the rule in platform markets. Johannes Laitenberger mentioned that the European Union is currently finalizing guidelines in this area.

Pharmaceutical Innovation. During "Pharmaceutical Innovation: A Tough Pill to Swallow," the panelists discussed the impact of increased antitrust scrutiny on pharmaceutical innovation, honing in on reverse-payment-settlements (RPS) and the trade-offs between static price competition and dynamic innovation competition. One panelist explained that in 2013 with *Actavis* and several other decisions, the pharmaceutical industry began facing increased scrutiny from antitrust

authorities. As Director Hoffman stated in another panel, *Actavis* turned the tide on anticompetitive reverse payments in the pharmaceutical industry. At the time, many argued this heightened scrutiny would chill innovation. While these arguments did not succeed in court, the passage of time and the changes in the industry allow us to evaluate them now.

Some panelists highlighted studies attempting to show the effects of litigation brought under Paragraph 4 of the Hatch-Waxman Act in the context of reverse-payment-settlements. One panelist noted that the studies between 2008 and 2016 point to a 10 percent rise in generic penetration into branded markets. But within those product markets, there was a 7.9 percent reduction in early stage innovation and a 4.6 percent reduction in "first-in-class" early stage innovation. A panelist also noted that increased RPS enforcement changes the strategic incentives of firms and makes generic entry potentially less likely. Having to litigate the full Paragraph 4 challenge increases a generic manufacturer's uncertainty about R&D returns. Because of the intensity of price competition when a generic does come to market, she explained that the lack of an RPS may decrease the incentive to aggressively develop some generics.

In response, one panelist noted that decreases in some product market innovation may not be telling us much about overall innovation. He argued that evidence suggests that pharmaceutical companies have been shifting their R&D rather than decreasing it, though he could not say whether this is a 1-to-1 shift. He also noted that the increased number of Paragraph 4 challenges are at least partially a response to the increased number of patents that branded drug manufacturers are obtaining on individual drugs.

Sham Litigation After 'FTC v. AbbVie'. Focusing on the recent outcome in *FTC v. AbbVie* in which the defendants were ordered to pay $448 million, as well as other private litigations, one panel discussed developments to the sham litigation exception to Noerr-Pennington immunity.

One panelist summarized the sham litigation exception, explaining that, under *Professional Real Estate Developers*, a party must demonstrate that litigation is both (1) objectively baseless and (2) subjectively baseless. Objective baselessness has been a high bar but not impossible. Recent cases show that plaintiffs have had success on the objective baselessness requirement or at least get past the pleading stage, but subjective baselessness has been at trickier issue. Due to the requirement to satisfy objective baselessness first, there is little analysis on subjective baselessness. Unsurprisingly, the panel noted that a successful showing of prong one means parties are much more likely to settle their claims.

The panel jointly discussed the issue of whether a single, legitimate claim, when coupled with multiple frivolous claims, is enough to protect the filing-party from a sham litigation argument. The panel was largely in agreement that courts are unwilling to parse through multiple claims to determine which are legitimate and which are potentially a sham. Interestingly, the panel suggested that the existence of a single legitimate claim may be enough to rebut a potential showing of subjective baselessness.

In sum, the ABA Antitrust Spring Meeting provided agency insights across a variety of subjects and discussed some hot topics in private litigation. As always, the ABA Antitrust Spring Meeting provided practitioners the opportunity to learn, reflect, and contemplate the future of antitrust law. The thousands of attendees from around the world underscores the importance of antitrust in every jurisdiction.