

Updates

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2018 ABA Antitrust Law Spring Meeting: Federal and State Antitrust Enforcement Takeaways

The American Bar Association's 66th Antitrust Law Spring Meeting held earlier this month included a number of sessions with representatives from federal and state antitrust enforcement agencies. In this first of a three-part series detailing the meeting's discussions, we offer some key takeaways from those sessions, including the impact of leadership changes at the federal agencies, recent enforcement activities and signals regarding future priorities.

DOJ Antitrust Division

In separate sessions, Assistant Attorney General of the Antitrust Division Makan Delrahim and a panel of deputy assistant attorneys general discussed the DOJ's priorities one year into the Trump administration, including:

Civil consent decrees. AAG Delrahim stressed that the Antitrust Division must return to its central mission as a law enforcement agency rather than a regulatory agency. This means imposing structural remedies, where necessary, rather than behavioral remedies requiring ongoing government oversight. To that end, the division is reviewing hundreds of consent decrees, many of which have been on the books for years, to determine whether they are appropriate or have outlived their usefulness. Echoing these comments, Deputy AAG Barry Nigro said the division "is not a fan of regulation." Nigro also explained the division's change in the burden of proof required to prove a decree violation, from "clear and convincing" to a "preponderance of the evidence." The risk of failure, Nigro said, should be on the defendant, not on consumers. He discussed the new policy on recovering fees for investigating and enforcing decree violations, remarking that the costs for such efforts should fall on defendants, not on the DOJ. Although the DOJ will extend or shorten the lengths of decrees as appropriate on a case-by-case basis, it is not considering changing the standard length it typically seeks.

Standard essential patents and IP rights. Consistent with his recent speeches emphasizing that enforcement of antitrust laws should not frustrate the rights and incentives of innovators, Delrahim noted that "proper respect" should be shown for intellectual property rights. Deputy AAG Luke Froeb said the DOJ's approach was "simple." It seeks to look at the interests of both sides, both innovators and implementers. Panelists noted that in the past there has been too much focus on patent hold-up and not sufficient attention on hold-out, that the DOJ would be looking more closely at standard-setting organization (SSO) rules and how decisionmaking occurs, and that court decisions to the effect that seeking an injunction can constitute an antitrust violation are "worrisome." AAG Andrew Finch downplayed any apparent change in DOJ proprieties in this space, claiming that the current approach is consistent with the current intellectual property guidelines and that recent speeches were "elaborations" on those guidelines.

Criminal enforcement. Acting Deputy AAG Marvin Price summarized recent criminal enforcement activity. Those efforts included imposing a corporate compliance monitor for the first time in a case involving a defendant that pleaded guilty. DOJ insisted on the recent monitor, Price said, because it saw a "lack of commitment" to compliance and the "risk of recidivism." Price was also asked about DOJ's prosecution of "no-poach" agreements. In October 2016, DOJ announced it would begin prosecuting those agreements as criminal, not civil, violations. If DOJ sees evidence that a no-poach agreement was either entered into after October 2016, or continued after that date, it will investigate criminally. The recent case against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation was brought as a civil case because their no-poach agreement was terminated before October 2016.

Challenging consummated mergers post-HSR clearance. Deputy AAG Nigro was asked about DOJ's challenge to Parker Hannifin's acquisition of CLARCOR, Inc., after that deal had been initially cleared. After

clearance, he said, a third party notified DOJ of a competitive overlap that had not been investigated. DOJ found a problem in that market, and filed a case to force Parker Hannifin to divest the relevant assets. Nigro underscored that there is an information asymmetry in the first 30 days after an HSR filing. Merging parties should be forthcoming with staff about competitive overlaps and provide the most informative documents and the most relevant customers to interview. "When that happens," he remarked, "things usually go pretty smoothly."

International agenda. Deputy AAG Roger Alford discussed his recent travels and efforts to promote convergence on substantive standards, procedural norms and increased transparency among competition agencies around the world. Delrahim confirmed the division's focus on continued engagement with international counterparts towards a convergence on the procedures for enforcement of competition laws, and ideally towards the substance of those laws. Alford noted that the United States is still an advocate for enforcing competition laws in a nondiscriminatory way, and is opposed to other countries using those laws to promote their national champions. He said he does not believe that the DOJ will begin trying to promote U.S. companies or try to use the antitrust laws to protect jobs in this country. He is also opposed to broadening the consumer welfare standard to include other public policy factors. Other agencies promote policies to advance those interests. As an antitrust enforcement agency, he said, "we should stay in our lane."

While on the one hand signaling changes in the division's priorities, the speakers also emphasized continuity, noting that the career staff remains largely the same and the division's core work is continuing much as in past administrations.

Federal Trade Commission

In separate sessions, Acting FTC Chairman Maureen Ohlhausen and a panel of acting bureau directors (Bruce Hoffman, acting director of the Bureau of Competition, Thomas Pahl, acting director of the Bureau of Consumer Protection, and Michael Vita, acting director of the Bureau of Economics), spoke about the FTC's activities and priorities.

Ohlhausen's remarks focused on the FTC's performance over the past year. She stated that, despite operating with only two commissioners, an acting director and interim bureau heads, the FTC has achieved many significant (and often bipartisan) accomplishments. Hoffman similarly described an "incredibly active" time at the FTC, with the amount of active litigation at the "upper end" for the commission. In addition to its case work, the commission has engaged in public advocacy, workshops, submissions to state legislatures and amicus briefs. Hoffman emphasized the commission's interest in providing transparency and guidance to parties through public statements and publications.

Pahl, who was serving his final day as acting director of the Bureau of Consumer Protection, noted the bureau's accomplishments during his 14-month tenure, including approximately 125 cases brought or settled, roughly 75% of which were fraud or quasi-fraud cases. He explained that, over time, the bureau has increasingly become a "fraud fighting agency," targeting scams involving small businesses, charities and student debt. Non-fraud cases have involved false advertising claims, particularly regarding healthcare goods and services; new advertising techniques and technologies (e.g., "influencers" and review sites); and privacy and data security issues. As for the latter, Pahl noted the "dual approach" of vigorous enforcement of consumer privacy protections and actions regarding alleged data breaches, including Equifax and Facebook. The commission endeavors to provide additional guidance to companies in this area, including with respect to the "reasonable measures" that must be taken to safeguard against data breaches. Other priorities include robocalls and exercising the FTC's jurisdiction over common carriers to protect consumers in the wake of the FCC's repeal of net neutrality rules.

Vita spoke to the Bureau of Economics' role in supporting the work of the Bureau of Competition and Bureau of Consumer Protection, noting research and analysis efforts, including merger retrospectives, papers and as expert witnesses in FTC cases.

Going forward, the bureau chiefs noted that there was some uncertainty given the expected (and unprecedented) arrival of five new commissioners this year. However, there was a general consensus that there would likely be no radical departures from the commission's activities and priorities over the past year.

State Attorneys General

Gwendolyn Cooley, assistant attorney general with the Wisconsin Department of Justice, moderated a panel addressing state enforcement efforts with Paul Moore (deputy attorney general, California Department of Justice), Joseph Nielsen (assistant attorney general, Connecticut Office of the Attorney General), Elizabeth Arthur (assistant attorney general, Office of the Attorney General for the District of Columbia) and Matthew Sawchak (solicitor general of North Carolina). At separate sessions, Victor Domen (senior antitrust counsel, Tennessee Assistant Attorney General's Office and chair of the National Association of Attorneys General Multistate Antitrust Task Force) and Kathleen Foote (senior assistant attorney, California Department of Justice) discussed state enforcement efforts.

The state enforcers highlighted a number of areas in which states are taking an active role in antitrust and consumer protection cases, both with and without assistance of the federal enforcement agencies. Although "going it alone" can be difficult for states, particularly where cases involve expansive discovery and expensive economic analysis, panelists noted that there is an increasing amount of independent state enforcement action, a trend that is likely to continue. Foote noted that California has a very robust antitrust law and that the state supreme court has given a clear directive that the "overriding purpose" of the statute is "deterrence." As such, the California attorney general's office has a larger appetite for risk, and will be prosecuting more cases even if that means more losses. She cautioned, however, that while there are benefits from having states serve as incubators in the realm of antitrust enforcement, these offices also have fewer resources than their federal counterparts, and so addressing issues like increasing concentration of firms in the U.S. economy will need to be a concern of state and federal enforcers alike.

States have taken a number of actions with respect to pharmaceuticals, an area of special significance given the impact of prescription drug prices on state budgets. This includes product hop litigation, pay-for-delay cases and the coordinated effort of 49 states and territories in the generic drug litigation currently pending in the U.S. District Court for the Eastern District of Pennsylvania. States including Maryland and Oregon have also taken legislative action seeking to address prescription drug prices, with a challenge to Maryland's anti-price gouging statute currently before the U.S. Court of Appeals for the Fourth Circuit. Healthcare, including prescription drugs, is likely to remain a focal point of state enforcers.

Although less common, states have also taken independent action with respect to proposed mergers. For example, after the FTC investigated and declined to take action regarding Valero's acquisition of petroleum tank farms in the San Francisco Bay Area, the California attorney general's office filed suit, with the parties eventually abandoning the transaction and agreeing that they would not pursue the deal during a 10-year period. More recently, the state of Washington filed suit to unwind transactions between healthcare providers that allegedly violate federal and state antitrust laws.

In addition to civil actions, states have pursued some criminal enforcement measures, with New York announcing guilty pleas for bid rigging in the trash hauling market just last week.

Sawchak offered insights on how to work effectively with state enforcers. He emphasized the importance of working closely with the attorney with primary responsibility for the party's case and the intermediate decision maker above him or her, rather than seeking to immediately interface with the attorney general or other political appointees. Particularly in a specialized area of law like antitrust, those on the front lines will often play an important role in any decisionmaking by higher-ups. Engaging the trial lawyer and supervisor is often important to advancing a client's interests in an action involving a state attorney general.

Read the entire ABA Antitrust Law Spring Meeting recap series:

- [Part 2: Merger Analysis](#)
- Part 3: Consumer Protection

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