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Expert Analysis

2015 Antitrust Wrap-Up: Government Actions and Private Litigation

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The year 2015 has been another active one in antitrust and competition law. Government regulators have continued to aggressively enforce the antitrust laws through merger challenges, criminal investigations, and other enforcement actions, and the vast array of private litigation has led to further development of important antitrust principles.

Merger Enforcement

The Federal Trade Commission (FTC) had mixed results in litigating merger enforcement actions this year. In February, the FTC sought a preliminary injunction in *FTC v. Sysco*,[1] to prevent Sysco and US Foods from merging. Sysco and US Foods are the largest and second largest "broadline" foodservice distributors, which means that they "sell[] and deliver[] a

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'broad' array of food and related products to just about anywhere food is consumed outside the home."[1] The key issues in the case were market definition and the viability of the proposed "fix," a divestiture of 11 distribution facilities to the third largest broadline distributor.[2] The companies argued that the relevant market consists of all firms with which they compete in the $231 billion food service industry, which would include not only "broadline food distributors, but also specialty distributors, systems distributors, and cash-and-carry stores."

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The FTC contended that the market was limited in two significant ways. First, "[b]ecause broadline distribution is defined by a number of distinct attributes—such as a vast array of product offerings…—the other modes of distribution are not reasonable substitutes," and the market should include only broadline distributors. Second, because national customers have unique distribution needs, the market should include only broadline distributors capable of serving national customers.

In an opinion that could have far-reaching consequences for market definition generally, the court agreed with the FTC as to market definition and as to the likelihood of competitive harm, and issued the preliminary injunction. The court also found that the proposed divestiture package did not adequately address the reduction in competition likely resulting from the transaction. Shortly after the District Court's decision, Sysco and US Foods terminated their merger agreement.[3]

The FTC's merger litigation record was not, however, perfect this year. In *FTC v. Steris*, No. 15-CV-1080, 2015 WL 5657294 (N.D. Ohio Sept. 24, 2015), the FTC sought a preliminary injunction to prevent Steris and Synergy Health, the second and third largest sterilization companies in the world, from merging. The FTC challenged the merger on the theory that Synergy planned to enter the U.S. market "with an emerging x-ray sterilization technology it hoped would disrupt the current duopoly in the U.S. contract sterilization market, competing directly with Steris" and the market leader, Sterigenics.

Following a three-day hearing, the court ruled against the FTC, holding that the FTC had not met its burden of proving that "absent the merger, Synergy probably would have entered the U.S. contract sterilization market." After the District Court entered its order, the FTC terminated its challenge to the Steris-Synergy Health merger.

Government Litigation

State-Action Antitrust Immunity and State Boards. In *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), the Supreme Court issued an opinion that could have wide-ranging effects on state regulatory bodies. Specifically, the court held that North Carolina's dental regulatory body, comprised of a majority of active market participants, (i.e., six of eight board members were dentists engaged in the active practice of dentistry), was not immune from antitrust scrutiny.

The court reasoned that if a state "rel[ies] on active market participants as regulators," state-action immunity from the antitrust laws will only apply where the state also "provide[s] active supervision" of those market participants. A state board is thus not a state actor for antitrust immunity purposes unless the state clearly articulates a policy of regulation and actively reviews and approves policies to assure that the conduct promotes state policy, not just private interests. For further background on *N.C. Dental* and its potential implications, we invite you to read the March and November editions of this article.[4]

Department of Justice Civil Enforcement Action: 'United States v. American Express.' The Department of Justice (DOJ) scored a trial victory in *United States v. American Express*, 88 F.Supp.3d 143 (EDNY 2015). In *American Express*, the government alleged that American Express's non-discrimination provisions (NDPs), which generally prevent merchants from steering customers to alternative—ordinarily less expensive—credit card brands, violate Section 1 of the Sherman Act.

In a lengthy opinion, the court agreed with the government. As with *Sysco*, perhaps the most noteworthy aspect of the opinion is the court's market definition, which included general purpose credit and charge card network services marketed to merchants, but did not account for the other side of the credit card industry in which credit card issuers compete to gain credit cardholders. This competition for credit cardholders can cause an increase in merchants' cost of accepting credit cards.

DOJ Criminal Enforcement. This year marked another busy one for DOJ criminal enforcement of the antitrust laws. On Nov. 5, 2015, the DOJ secured the convictions of two former London traders in the first trial for alleged rigging of the London Interbank Offered Rate (Libor). Although the government had previously secured $2 billion in criminal settlements, these convictions were the first related to individual criminal charges, and could presage future individual indictments.[5]

The DOJ also continued criminal probes into allegedly collusive practices in other parts of the economy. For instance, as of the end of November, 38 companies and 58 executives have agreed to pay more than $2.6 billion in fines for their roles in auto parts price-fixing conspiracies.[6] The DOJ has also set its sights on shipping companies and executives who allegedly engaged in a shipping price-fixing scheme. As of the end of October, four executives of three separate shipping companies had pleaded guilty, three other executives had been indicted, and three shipping companies had paid $136 million in criminal fines.[7] Finally, in November, the DOJ secured its first

individual guilty plea in its ongoing investigation into an alleged price-fixing conspiracy related to color display tubes used in computer monitors.[8]

FTC Section 5 Guidance

On Aug. 13, 2015, the FTC issued a statement of enforcement principles intended to provide a framework for the exercise of its standalone authority under Section 5 of the FTC Act. The FTC announced it would adhere to the following principles:

- the commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- the commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.[9]

Given their brevity and level of generality, the enforcement principles are unlikely to cause a dramatic shift in the application of Section 5. However, there is now at least some public expression of principles regarding the FTC's use of its standalone Section 5 authority.[10]

Private Litigation

Reverse-Payment Litigation. It has been over two years since *FTC v. Actavis*, 133 S.Ct. 2223 (2013), in which the Supreme Court held that pharmaceutical reverse-payment settlements are to be analyzed under the rule of reason if they include a "large" and "unjustified" payment from a drug's patent holder to an alleged infringer. Since *Actavis*, federal district courts have split over whether the "payment" contemplated by Actavis requires a cash transfer from the patent holder to the alleged infringer, or if a non-cash value transfer is sufficient to trigger antitrust scrutiny. This summer, the U.S. Court of Appeals for the Third Circuit became the first appellate court to decide this issue.

In *King Drug v. Smithkline Beecham*, 791 F.3d 388 (3d Cir. 2015), plaintiffs challenged a reverse payment settlement in which the generic manufacturer agreed to halt litigation attacking the brand manufacturer's patent in exchange for the brand manufacturer's agreement to, inter alia, not market an authorized generic (AG) version of the drug at issue. This agreement thus ensured that the generic manufacturer would face no generic competition for the first 180 days after launching its product.

The court held this "no-AG agreement falls under *Actavis's* rule because it may represent an unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer and may therefore give rise to the inference that it is a payment to eliminate the risk of competition." Due to their significant value to the generic manufacturer and the value forfeited by the brand manufacturer, the court reasoned that no-AG agreements "are likely to present the same types of problems as reverse payments of cash." We likely will have to wait until next year to learn whether *King Drug* signals a shift in the way most federal courts decide this issue.

MLB Antitrust Exemption. The Major League Baseball (MLB) antitrust exemption, which removes many of MLB's practices from the reach of the antitrust laws and was first announced by the Supreme Court in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), was re-affirmed this year by the U.S. Court of Appeals for the Ninth Circuit.[11] In *City of San Jose v. Office of the Commissioner of Baseball*, 776 F.3d 686 (9th Cir. 2015), the court held that MLB's antitrust exemption barred scrutiny of MLB's allegedly anticompetitive actions related to the Oakland Athletics' aborted move to San Jose.

The court rejected San Jose's attempt to limit the exemption to the roster reserve clause challenged in *Flood v. Kuhn*, 407 U.S. 258 (1972), the last case in which the Supreme Court ruled on the

exemption's validity.[12] Instead, the court held that the exemption extends to the "entire 'business of providing public baseball games for profit between clubs of professional baseball players,'" and does not require a fact-intensive inquiry into whether the challenged practice is sufficiently related to baseball's unique characteristics.[13] Finding that franchise relocation decisions clearly fall within the exemption, the court affirmed the district court's dismissal of San Jose's antitrust claims.

NCAA Litigation. The Ninth Circuit issued another significant sports-related opinion in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). In *O'Bannon*, plaintiffs challenged the NCAA's amateurism rules "insofar as they prevented student-athletes from being compensated for the use of their names, images, and likenesses [NILs]." Importantly, the court held that NCAA rules aimed at promoting amateurism (e.g., the rules that prevented compensation for use of student-athletes' NILs) "are not exempt from antitrust scrutiny" even though many of those "rules are likely to be procompetitive" (i.e., improve the quality of and demand for the NCAA's sporting events). Whether such rules constitute unreasonable restraints of trade is to be evaluated under the rule of reason.

In applying the rule of reason to the restraints at issue in *O'Bannon*, the Ninth Circuit affirmed the district court's holding that the NIL rules serve procompetitive purposes—chiefly, promotion of amateurism—but that those rules nevertheless violate the antitrust laws, because their procompetitive objectives could be achieved by less restrictive means than preventing compensation for use of student-athletes' NILs. Specifically, the court held that "allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance" would be a less restrictive way to promote amateurism. The court thus upheld the district court's injunction requiring the NCAA to "permit its schools to provide [scholarships] up to the cost of attendance to their student athletes." However, the Ninth Circuit reversed the district court's holding that another less restrictive alternative would be to "allow[] member schools to pay student athletes small amounts of deferred cash compensation for use of their NILs." The court reasoned, "in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*." (Emphasis in original.)

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Conclusion

The past year saw significant developments in antitrust law. The coming year likely will include more of the same.

1. *FTC v. Sysco Corp.*, No. 15-CV-256, 2015 WL 3958568, at *2 (D.D.C. June 23, 2015).
2. The authors' firm represented Performance Food Group, the divestiture purchaser, in relation to the proposed divestiture.
3. Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), available at https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes.
4. See Shepard Goldfein and James A. Keyte, "Uber Seeks Antitrust Scrutiny of Taxicab Commission," 254 NYLJ 91 (Nov. 10, 2015) reprint available at https://www.skadden.com/sites/default/files/publications/070111515Skadden.pdf; Shepard Goldfein & James A. Keyte, "Court Demands State Oversight Over Agencies for Antitrust Immunity," 253 N.Y.L.J. 47 (March 12, 2015) reprint available at https://www.skadden.com/sites/default/files/publications/070031520Skadden.pdf.
5. See Patricia Hurtado, "U.S. Wins First Libor-Rig Case as Ex-Rabobank Traders Convicted," (Nov. 5, 2015), available at http://www.bloomberg.com/news/articles/2015-11-05/u-s-wins-its-first-libor-rigging-prosecution-in-n-y-jury-trial.
6. "DOJ Fines Toyota Supplier $2.4M for Price-Fixing Scheme," available at https://www.law360.com/automotive/articles/729447/doj-fines-toyota-supplier-2-4m-for-price-fixing-scheme.
7. See "Three Ocean Shipping Executives Indicted for Fixing Prices and Rigging Bids," (Oct. 6, 2015), available at http://www.justice.gov/opa/pr/three-ocean-shipping-executives-indicted-fixing-prices-and-rigging-bids.
8. Joe Van Acker, "DOJ Snags 1st Plea in Monitor Tube Price-Fixing Probe," (Nov. 18, 2015), available at http://www.law360.com/topnews/articles/728696/breaking-doj-snags-1st-plea-in-monitor-tube-price-fixing-probe.
9. Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act (Aug. 13, 2015), available at https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition.
10. For further commentary, see Clifford Aronson, "After Long Debate, FTC Issues Only General Principles Regarding Section 5," (Aug. 21, 2015), available at https://www.skadden.com/insights/after-long-debate-ftc-issues-only-general-principles-regarding-section-5.
11. For further background on the MLB antitrust exemption, see Stuart Banner, "The Baseball Trust: A History of Baseball's Antitrust Exemption" (2013).
12. *San Jose*, 776 F.3d at 689-90.
13. Id. at 690 (quoting *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953)).

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