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The Potential Antitrust Impact of the Trump Administration's Supreme Court Nominee

By Jeremy B. Koegel and Marissa E. Troiano

Introduction

President Donald Trump's inauguration to the Oval Office has led to speculation about the impact his administration may have on antitrust enforcement and the development of antitrust law more broadly.

There has already been intense speculation about President Trump's likely appointments to the Department of Justice and Federal Trade Commission, who will have direct responsibility for developing and executing President Trump's antitrust policy over the coming four years. Perhaps even more important in the long term, the current Supreme Court vacancy, and the possibility of multiple additional vacancies over the next four years, may well set the stage for President Trump to have an enduring impact on antitrust law. While Trump's proposed short list of nominees come from a broad range of backgrounds, including state supreme courts, federal circuit courts, and federal district courts, Trump has been consistent in expressing his desire to name conservative justices in the mold of former Justice Antonin Scalia, who left a conservative legacy in antitrust law that bolstered protections for antitrust defendants during his tenure.

On Tuesday, January 31, 2017, Trump fulfilled his promise, nominating Tenth Circuit Judge Neil Gorsuch to fill the current vacancy on the Court. The addition of Gorsuch, and the potential for further conservative nominees, could lead the Court to continue its recent

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penchant for raising procedural barriers to litigation, especially class actions. And, if the Court were to take pro-defendant positions on pleading and class certification issues, it would follow that private antitrust enforcement will face greater hurdles.

The Supreme Court Vacancy

The Supreme Court vacancy, and the possibility of multiple vacancies during the course of the Trump administration, could have a permanent impact on antitrust law moving forward. In addition to the current vacancy, Ginsburg (age 83), Kennedy (age 80), and Breyer (age 78) all could be nearing the end of their careers. Two key antitrust issues that the Court may decide in the short term are (1) the "plus factors" required for pleading under *Twombly*[1] and *Iqbal*[2] and (2) whether the standards for class certification will continue to become more stringent, building on *Wal-Mart Stores, Inc. v. Dukes*[3] and *Comcast v. Behrend*.[4]

Courts have reached inconsistent decisions regarding what "plus factors" are sufficient to state a claim of anticompetitive conspiracy under *Twombly* and *Iqbal*. The Third Circuit has held that if independent economic self-interest is an alternative justification for defendants' common behavior, allegations of opportunity to conspire are not sufficient to state a claim for damages.[5] In contrast, the Seventh Circuit has held that allegations that defendants met in small groups, increased prices even as costs fell, and abruptly changed their behavior to implement uniform pricing, are sufficient to state a claim for anticompetitive conspiracy.[6] If the Court elects to clarify which plus factors are sufficient, justices appointed by President Trump may take more defendant-friendly positions, further raising the bar for antitrust plaintiffs to survive motions to dismiss.

A second issue that could come before a Court is whether the standards for class certification will continue to narrow after the Court's holding in *Comcast v. Behrend*.[7] In *Comcast*, Scalia's majority opinion reversed the Third Circuit's decision to certify a putative class, finding that the damages model put forth by the plaintiffs could not establish antitrust injury and damages on a class-wide basis.[8] The opinion opened the door to attacks on the substance of the expert's damages model at the class certification stage, and increased the focus on whether and how class members may be differently situated and therefore less amenable to class treatment. Inconsistent interpretations from circuit courts could lead the Court to revisit this issue, and any Trump appointees are likely to take defendant-friendly positions that reflect Scalia's legacy.

Judge Gorsuch's Impact on the Court if Confirmed

Judge Gorsuch has extensive antitrust experience as both a judge and a litigator, and if confirmed, could join the Court with strong views on antitrust issues. Interestingly, Gorsuch once represented a plaintiff in a high profile antitrust case. In 1998, while in

[1] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
[2] Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[3] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
[4] Comcast Corp. v. Behrend, 133S, Ct. 1426 (2013).
[5] *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d. Cir. 2010).
[6] *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2015).
[7] 133 S. Ct. 1426 (2013).
[8] 133. S. Ct at 1432-35.

private practice at Kellogg Huber, Gorsuch was part of a team that sued U.S. Tobacco Co. on behalf of Conwood Co. LP, a manufacturer of smokeless tobacco.[9] The complaint alleged that the defendant had harmed competition in the smokeless tobacco market by establishing exclusive vending rights with retailers. Gorsuch and the Kellog Huber team were successful at trial, and won a $350 million jury verdict on behalf of the plaintiffs that was trebled to $1.05 billion. Judge Gorsuch's history as an antitrust litigator may impact his thinking as a Justice on pleading and class certification issues, despite his conservative credentials. Although his Tenth Circuit opinions relating to antitrust grappled with substantive rather than procedural issues, Gorsuch could exhibit greater sensitivity to the impact the Court's ruling will have on antitrust litigants, and may bring a practical and less academic perspective to decisions that would impact the pleading and class certification standards that are so central to litigation.

Conclusion

There is currently significant uncertainty about the impact that the Trump administration will have on the antitrust enforcement and the development of the law as it relates to antitrust matters over the next four years, as well as his enduring legacy for antitrust law on the Supreme Court. Certainly the current Supreme Court vacancy and potential additional vacancies during Trump's tenure as president may have a lasting impact on the antitrust laws. Judge Gorsuch's confirmation alone would add a conservative justice with significant antitrust experience to the Court's ranks. However, it remains difficult to predict how Gorsuch's experience as both litigator and juror may bear on the important issues that the Court is likely to address in the near future.

Ultimately, the number of appointments that Trump makes will determine whether there is a large-scale shift in the Court's position on the antitrust issues discussed above. But even if Gorsuch is Trump's only appointment, the Court is likely to continue down its current path of adopting pro-defendant positions that narrow plaintiffs' ability to get past crucial procedural barriers when bringing antitrust claims.

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[9] Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002), *cert denied*. 537 U.S. 1148 (2003).

Abuse of Standard Essential Patents: The Qualcomm Example

By Jenn Mellott and Elise Nelson

On January 17, 2017, the FTC sued Qualcomm Inc. in the US District Court for the Northern District of California seeking to enjoin Qualcomm from engaging in allegedly anticompetitive practices in violation of Section 5 of the FTC Act.[1] The FTC's suit came about three weeks after the Korean Fair Trade Commission's (***KFTC***) imposed sanctions on Qualcomm and two of its of roughly $865 million in monetary penalties and behavioral remedies for abuse of dominance or monopolization. The sanctions imposed by the KFTC relate to Qualcomm's failure to abide by its commitments to the standard setting organization (***SSO***) to offer its standard essential patents (***SEPs***) in a Fair, Reasonable, and Non-discriminatory (***FRAND***) manner.[2] After the FTC filed suit, follow-on civil suits were filed on behalf of purported class plaintiffs and Apple in the US and elsewhere alleging that Qualcomm engaged in unfair patent licensing practices.[3]

Central to the FTC's investigations into Qualcomm's alleged anticompetitive tactics is the claim that Qualcomm breached its commitments to offer its SEPs under FRAND terms. In particular, the FTC alleged that Qualcomm (i) conditioned access to its baseband processors by original equipment manufacturers (***OEMs***) on the OEM accepting a license to Qualcomm's cellular SEP on Qualcomm's preferred terms, which included the OEMs paying elevated royalties when they used a baseband processor of one of its competitors; (ii) refused to license its SEPs to its competitors although required to do so under its commitments to license its SEPs on FRAND terms; and (iii) extracted exclusivity in exchange for reduced patent royalties from Apple, an OEM for which Qualcomm competes with other baseband processor competitors for as a customer.[4]

The FTC pursued its action against Qualcomm on the basis of a 2-1 enforcement vote. The FTC alleged that Qualcomm's conduct resulted in series of anticompetitive effects. First, the FTC alleged that Qualcomm's conduct raised OEMs' costs when choosing to use competitors' baseband processors, thereby diminishing OEMs' demand for competitors' baseband processors. Second, the FTC alleged that this, in turn, reduced competition and entry into the supply of baseband processors, effectively reinforcing Qualcomm's position in the market.

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[1] Fed. Trade Comm'n v. Qualcomm, Inc., Complaint, 5:17-CV-00220 (N.D.Ca. 2017), *available at* https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf.

[2] Korean Federal Trade Commission, *Strict Sanctions on Qualcomm's Abuse of Cellular SEPs*, Unofficial English Translation of KFTC's Press Release (Dec. 28, 2016), *available at* https://www.qualcomm.com/documents/kftc-issued-press-release-dated-december-28-2016-unofficial-english-translation.

[3] *See, e.g.*, *Apples sues Qualcomm over unfair licensing terms*, c|net (Jan. 20, 2017), *available at* https://www.cnet.com/news/apple-sues-qualcomm-for-1b-over-unfair-licensing-terms/.

[4] Fed. Trade Comm'n v. Qualcomm, Inc., Complaint, 5:17-CV-00220 (N.D.Ca. 2017), *available at* https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf.

Commissioner Maureen K. Ohlhausen (R) dissented from the enforcement vote and later called for the FTC to consider withdrawing its complaint against Qualcomm. Commissioner Ohlhausen argued that the FTC's complaint was based on a flawed legal theory, "lack[ed] economic and evidentiary support and fails to allege the requisite element that Qualcomm indeed charged more than a FRAND royalty in licenses to its SEPs."[5] Specifically, she argued the FTC's fundamental theory of margin squeezing—or forcing OEMs "to pay unreasonably high royalties to license FRAND-encumbered patents—requires that Qualcomm is charging higher royalties, and in particular above-FRAND royalties, to OEMs that buy non-Qualcomm chipsets." As Commission Ohlhausen points out, the FTC's complaint does not allege that Qualcomm charges above-FRAND royalty rates or even "elevated" royalty rates. Chairwoman Ohlhausen argued that without any additional economic evidence of exclusion or anticompetitive effects, the complaint is baseless and should be withdrawn.

Taken together, the FTC action, the KFTC's decision to impose sanctions (pending the outcome on appeal), and the subsequent private, likely will be a costly and time consuming process for Qualcomm, and it may ultimately incur extensive damages. Beyond the potential costs associated with this one case, if the suits against Qualcomm are successful this will discourage Qualcomm—and other similarly situated companies—from continuing to engage in SSO standard setting in the future. In particular, companies that participate in SSOs are required to license any SEPs created in connection with that participation on FRAND terms. However, if that same company develops a patent independently, it will not be required to license the patent on FRAND terms even if an SSO selects the patent as an essential part of a standard. As such, if companies are exposed to heightened antitrust scrutiny in connection with obligations to license under FRAND terms, these companies will have less incentive to participate in SSOs and may instead develop technologies that could still be selected by the SSO as SEPs without having to commit to FRAND royalty rates.[6]

Both the Department of Justice (***DOJ***) and FTC have recognized the procompetitive benefits of standard setting, and the costs it can avoid by having companies engage in a standards war.[7] Encouraging companies to participate in SSOs results in higher quality, lower cost products for consumers and accelerates technological developments. If companies like Qualcomm do not participate in SSOs because of the risk of substantial liability, it will be to the detriment of consumers. Quality may be reduced if the development of new technologies is slowed by standards wars and duplicative independent development by multiple competitors.

Perhaps more importantly, because competitors who develop a standard independently are not bound to license that patent on FRAND terms, competitors who do not participate in

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[5] Fed. Trade Comm'n v. Qualcomm, Inc., Dissenting Statement of Commissioner Maureen K. Ohlhausen, 5:17-CV-00220 (N.D.Ca. 2017), *available at* https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf.

[6] Recall, as discussed earlier, that the FTC complaint failed to demonstrate that Qualcomm is charging above-FRAND royalty rates, and that, as Commission Ohlhausen suggests in her dissent, that the FTC is challenging Qualcomm on a baseless theory of harm given the economic evidence that has been proffered thus far.

[7] *See generally*, U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), *available at* http://justic.gov/atr/publichearings/ip/222655.pdf.

SSOs would be able to charge monopoly royalty rates for its patent licenses without the imminent threat of litigation, resulting in increased costs for OEMs that likely would be passed on in large part to consumers.[8] A decrease in welfare would go directly against one of the main two goals of antitrust law: promoting competition and promoting consumer—or total—welfare. While there is currently only speculation as to whether Qualcomm, and other similarly situated companies, may in fact withdraw from SSOs as a result of the seemingly heightened antitrust scrutiny one subject itself to by simply participating in an SSO, the FTC, other regulators, and the US courts should carefully consider this potential impact in assessing whether to pursue claims like the one against Qualcomm. At a minimum, such claims should not be pursued unless there is clear evidence that the competitor in question has licensed its products at above-FRAND rates.

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[8] There would be no threat of litigation without evidence of other unlawful behavior since it is not an antitrust violation to possess monopoly power, rather it only elevates to an antitrust violation if there is evidence of

Merger Musings: December 2016 Takeaways

By Mark Opashinov, Joshua Chad, and Christie Bates

Despite the uncertainties brewing on both sides of the Atlantic, 2016 proved to be another year marked by the "mega-merger." In December 2016, there were a number of proposed mega-mergers in the news, including Aetna-Humana,[1] Cigna-Anthem,[2] Boehringer Ingelheim-Sanofi,[3] Abbott-St. Jude,[4] McKesson-Change Healthcare,[5] Microsoft-LinkedIn,[6] and AT&T-Time Warner.[7] For the purposes of this commentary, we will focus on the lessons to be drawn from the Aetna-Humana and Cigna-Anthem mergers.

Aetna-Humana: be wary of ordinary course business documents

The proposed $37 billion Aetna-Humana merger of the nation's largest health insurers was challenged by the Department of Justice (***DOJ***).[8] The Aetna-Humana merger largely involved the private market for Medicare Advantage plans, an expanding sub-sector in which managed healthcare plans are offered. DOJ contended that the proposed transaction would harm seniors in the private-market Medicare Advantage program in Florida, Georgia, and Missouri.

Not surprisingly, market definition was a central issue for regulators considering competitive effects of the proposed transaction. The proper product market definition hinged on whether Medicare Advantage should be considered a distinct antitrust market, as argued by DOJ, or, as per Aetna and Humana, whether it competed with the original Medicare program.

DOJ's argument that the programs were distinct was twofold. First, DOJ cited the distinct user preferences between the programs, emphasizing that many seniors prefer Medicare Advantage due to its lower overall costs. Second, DOJ attached significance to the fact that Aetna and Humana treated their programs as distinct from one another in their own internal analyses.

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[1] United States v. Aetna Inc., Complaint, 1:16-cv-01494 (D.D.C. 2016), *available at* https://www.justice.gov/atr/file/878196/download.

[2] United States v. Anthem, Inc., Complaint, 1:16-cv-01493 (D.D.C. 2016), *available at* https://www.justice.gov/atr/file/903111/download.

[3] In the Matter of C.H. Boehringer Sohn, Complain, F.T.C. File No. 161-0077, *available at* https://www.ftc.gov/system/files/documents/cases/1610077_bi-sanofi_complaint.pdf.

[4] In the Matter of Abbott Laboratories and St. Jude Medical, Complaint, F.T.C. File No. 161-0126, *available at* https://www.ftc.gov/system/files/documents/cases/abbott-stjude_complaint.pdf.

[5] *US: DoJ's investigation into McKesson, Change Healthcare merger ends*, CPI Journal (Jan. 2, 2017), *available at* https://www.competitionpolicyinternational.com/us-dojs-investigation-into-mckesson-change-healthcare-merger-ends/.

[6] Joshua Jamerson, *Microsoft Closes Acquisition of LinkedIn*, The Wall Street Journal (Dec. 28, 2016 at 1:45pm), *available at* https://www.wsj.com/articles/microsoft-closes-acquisition-of-linkedin-1481215151.

[7] Thomas Gryta, Keach Hagey, Dana Cimilluca, and Amol Sharma, *AT&T Reaches Deal to Buy Time Warner for $85.4 Billion*, The Wall Street Journal (Oct. 22, 2016 at 11:06pm), *available at* https://www.wsj.com/articles/at-t-reaches-deal-to-buy-time-warner-for-more-than-80-billion-1477157084.

[8] On January 23, 2017 Judge Bates penned a 158 page opinion noting that the Court was not persuaded that the efficiencies generated by the merger would be sufficient to mitigate the anticompetitive effects for consumers in the challenged markets. The parties subsequently abandoned the transaction. United States v. Aetna Inc., Memorandum Opinion, 1:16-cv-01494 (D.D.C. 2017), *available at* https://www.justice.gov/atr/case-document/file/930696/download.

Aetna and Humana countered that the two programs were best characterized as alternatives to one another, offering evidence that seniors can--and do—switch back and forth between the programs, suggesting substitutability. Further, Aetna and Humana argued that the US government's Center for Medicare and Medicaid Services (***CMS***), the body responsible for the administration of Medicare, would be an important post-merger constraint on the merged entity because the CMS sets the reimbursement rates paid to providers in the Medicare Program. In turn, these rates act as the benchmark for Medicare Advantage insurers, including Aetna and Humana.

During the preliminary injunction hearing before the District Court for the District of Columbia, the Court took particular note of the parties' ordinary course views of the market, assigning substantial probative value to the parties' internal documentation. This underscores the importance of internal ordinary course documents in US merger reviews.

Cigna and Anthem: your actions have to match your words

The concurrent megamerger, which until recently was facing a challenge, is the Cigna-Anthem transaction, which was a proposed $48 billion merger.[9] DOJ's challenge was heard in a bifurcated trial that addressed the national and regional aspects of competition separately. On the national scale, the DOJ focused on the merger's potential impact on the "national employer market" for health insurance services, and whether this was an appropriate market for antitrust analysis.

DOJ argued that large employers with national operations require health insurance service providers that can furnish a single National healthcare plan for employees across the country, and that the proposed deal would reduce competition in this space. On the regional scale, DOJ specifically alleged that for national accounts in 35 local markets, the proposed transaction would result in a two-to-one merger.

In turn, Cigna and Anthem argued that, as a result of their merger, the combined entity would be able to reduce overhead costs and gain greater negotiating leverage due to their increased size and scope, thus allowing the merged entity to obtain better pricing from physician groups and hospitals. These benefits would ultimately trickle down to consumers and companies.

During the hearing, unsealed Court testimony revealed that the ongoing discord between Cigna and Anthem had become a focal point of the hearing. This testimony, which the Court dubbed the "elephant in the room," undermined the prospects of the material efficiencies claimed by the parties in that:

(1) Each party had accused the other of violating their merger agreement;

(2) The records showed that Cigna CEO David Cordani had doubts about the benefits of the deal for his company; and

[9] On February 8, 2017 Judge Jackson blocked Anthem's acquisition of Cigna, saying the merger of two of the nation's largest insurers would make it harder for large national employers to get competitive rates for health insurance. The parties are appealing the decision. United States v. Anthem, Inc., Memorandum Opinion, 1:16-cv-01493 (D.D.C. 2017), *available at* https://www.justice.gov/atr/case-document/file/940946/download.

(3) Anthem CEO Joseph Swedish had created a "secret team" for the planned integration because of Cigna's lack of cooperation.

As presiding Judge Jackson remarked, "How do you work on integration without talking to the person you're integrating with?" Understandably, the Court had considerable doubts about the claimed efficiencies and consumer benefits the merger would generate given the discord between the parties. The Court also did not accept arguments that the estimated efficiencies would be attainable where the parties' own actions undermined the likelihood of successful integration.

Takeaways for Counsel

In early 2017, the District Court for the District of Columbia blocked both the Aetna-Humana and the Cigna-Anthem mergers. Since then, Aetna and Humana have abandoned their deal,[10] whereas Cigna-Anthem has filed an appeal.[11] A few lessons can be drawn from these cases. First, parties contemplating mergers ought to consider how Courts may view and interpret their actions, and, in particular, parties should take particular care not to undermine their arguments through their words and/or deeds Whether it is characterizing the relevant market in ordinary course business documents in a substantially different manner from the position taken to advance the merger or whether it is demonstrating an inability to work together while arguing for consumer benefits resulting from the integrated firm, it is clear that actions will speak louder than words.

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[10] *See*, *e.g.*, Anna Wilde Matthews, *Aetna, Humana Abandon Merger, Putting Paths to Growth in Doubt*, The Wall Street Journal (Feb. 14, 2017 at 3:15pm), *available at* https://www.wsj.com/articles/aetna-humana-mutually-end-merger-agreement-1487074314.

[11] *See*, *e.g.*, Ana Mulero, *Anthem files appeal to reverse court's blocking of $54B Cigna merger*, HealthcareDIVE (Feb. 13, 2017), *available at* http://www.healthcaredive.com/news/anthem-files-appeal-to-reverse-courts-blocking-of-54b-cigna-merger/436044/; Ana Mulero, *Cigna reverses course, says Anthem merger should be approved*, HealthcareDIVE (Mar. 3, 2017), *available at* http://www.healthcaredive.com/news/cigna-reverses-course-says-anthem-merger-should-be-approved/437374/.

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