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A brighter future for private plaintiff challenges?

In their suit opposing the AT&T merger, Sprint and Cellular South could redefine scope of relief available.

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Traditionally, private plaintiffs have not fared as well as the government in merger challenges. Indeed, the standards for establishing private standing and entitlement to injunctive relief under § 16 of the Clayton Act relegate many one-time private antitrust plaintiffs to explanatory footnotes in district court opinions granting motions to dismiss new private antitrust lawsuits. A recent opinion in the challenge by two competitor-plaintiffs to AT&T Inc.'s proposed acquisition of T-Mobile USA Inc. highlights the unique challenges private antitrust litigants face when seeking to enjoin competitor mergers. This article provides an overview of those challenges and suggests how recent developments in public antitrust law might affect the case and future private merger challenges.

On March 20, AT&T, the nation's second-largest cellular services provider, entered into a stock-purchase agreement to acquire T-Mobile, the nation's fourth-largest cellular services provider. On Aug. 31, the U.S. Department of Justice announced that it would challenge the merger. Then, in September, Sprint Nextel Corp., the third-largest national cellular services provider, and Cellular South Inc., a smaller regional carrier, filed private antitrust lawsuits to enjoin the merger. Combined, the complaints of both private plaintiffs allege five theories of threatened injury stemming from both horizontal and vertical aspects of AT&T's proposed acquisition.

Predictably, AT&T moved to dismiss the challenges, hoping to trip up the plaintiffs on one of the common hurdles to establishing

private-plaintiff standing. Although § 15 of the Clayton Act allows the government to institute proceedings to prevent and restrain antitrust violations on behalf of the general public, for a private litigant to maintain an action under the Clayton Act, he must allege an "antitrust injury"—that is, a threatened loss or damage, personal to himself, "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 113 (1986) (internal quotations omitted) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 489 (1977)). Even if a threatened injury is causally related to an antitrust violation, it will not qualify as an antitrust injury so as to confer private standing "unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

Clarifying this issue, the U.S. Supreme Court explained: "Conduct in violation of the antitrust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can [succeed] only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." Id. at 343-44. What is more, "in order to obtain forward-looking [injunctive] relief, a [private antitrust] plaintiff must face a threat of injury that is both 'real and immediate, not conjectural

or hypothetical.'" *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 14 (1st Cir. 2008) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

JUDGE HUVELLE'S RULING

Referring to the antitrust injury requirement as "elusive," Judge Ellen Segal Huvelle concluded her decision on AT&T's motion to dismiss Sprint and Cellular South's claims with the following thought on the unique burden faced by private antitrust plaintiffs: "It is unsurprising…that established precedent forecloses competitors' claims that challenge a proposed transaction's effect on competition without sufficiently alleging the threat of an injury-in-fact that they face and that is of they type the antitrust laws were designed to prevent. Such claims belong to the government." *U.S. v. AT&T Inc.*, No. 1:11-cv-01600-ESH, at 42 (D.D.C. Nov. 2, 2011).

Applying the principles of the antitrust-injury requirement to Sprint and Cellular South's claims, Huvelle determined that both plaintiffs successfully pleaded harm in the form of potential foreclosure to access supplies of mobile devices if the merged firm entered into exclusive arrangements with device manufacturers. She also concluded that Cellular South successfully alleged that the merger could foreclose its access to roaming service for its customers. Id. at 17-19, 36. Having survived AT&T's motion to dismiss, Sprint and Cellular South may proceed to establish liability under § 7 of the Clayton Act and to seek relief from the threatened harm of the proposed AT&T/T-Mobile merger.

RECENT DEVELOPMENTS

Just as the proposed AT&T/T-Mobile merger came under scrutiny, in June, the Antitrust Division of the U.S. Department of Justice issued an updated "Policy Guide to Merger Remedies." The new guidelines reflect a commitment and willingness by DOJ to pursue formerly disfavored conduct remedies as a commercial-behavior-controlling means of addressing competition concerns. So although it once seemed that if a structural remedy were unavailable or would be ineffective in a particular merger, then the government would let that transaction proceed, the revised merger-remedy guidelines make it clear that there are out-of-the-box alternatives to structural remedies to protect against the commercial harms of anti-competitive mergers.

Recent consent decrees confirm this potentiality: In both the Google/ITA acquisition and the Ticketmaster/LiveNation merger, the division placed restrictions on the merged firm's prospective relations with suppliers, customers and competitors, and committed to monitor their behavior. *U.S. v. Google*, No. 1:11-cv-00688 (D.D.C. Oct. 5, 2011), available at www.justice.gov/atr/cases/f275800/275897.pdf; *U.S. v. Ticketmaster*, No. 1:10-cv-00139 (D.D.C. July 30, 2010), available at www.justice.gov/atr/cases/f260900/260909.htm.

On its face, § 16 of the Clayton Act grants broad rights to private plaintiffs to secure injunctive relief "against threatened loss or damage by a violation of the antitrust laws." But historically, the Supreme Court and commentators have cautioned against interpreting § 16 as broadly as the government's ability to obtain injunctive relief under § 15 to "prevent and restrain violations" of the antitrust laws. 15 U.S.C. 25-26; *California v. American Stores*, 495 U.S. 271, 281, 295 (1990); Roger Blair, Phillip E. Areeda, Herbert Hovenkamp, Christine Piette Durrance, Antitrust Law ¶ 326, at 24 (3d ed. 2007). Courts reason that the language in § 16 regarding "loss or damage" implies that private-party relief is tied to the restrictions on private-party standing. *American Stores*, 495 U.S. at 295. In other words, a plaintiff's claim for injunctive relief must address "the competition-reducing aspect of the defendant's behavior." See *Atlantic Richfield Co.*, 495 U.S. at 343-44 (1990) (discussing limitations on private-party standing).

> Judge Ellen Segal Huvelle determined that both plaintiffs successfully pleaded harm.

Of course, if they are successful in challenging the acquisition of T-Mobile by AT&T, Sprint and Cellular South may obtain a permanent injunction against the merger. 15 U.S.C. 25; *American Stores*, 495 U.S. at 295. Short of blocking the merger, though, Huvelle's standing decision may also raise the possibility that Sprint and Cellular South can pursue more limited conduct remedies if they can show that those remedies address the competition-reducing aspects of the proposed acquisition.

For example, if the court finds that the AT&T/T-Mobile merger forecloses competitors' access to handsets through exclusive contracts with device manufacturers, it may enter an order prohibiting such exclusive agreements for a period of time. Or if Cellular South can prove that the concentration in the market for roaming is likely to substantially lessen competition, a possible equitable remedy may be requiring the merged firm to enter into roaming agreements on reasonable and nondiscriminatory terms with competitors that lack AT&T's postmerger network size. By granting Sprint and Cellular South standing to pursue their foreclosure theories, the standing decision in AT&T may have the effect of more closely aligning private parties' remedies under § 16 of the Clayton Act with the tools the government has recently employed under § 15.

The recent decision in *AT&T* addresses the obstacles to private plaintiffs of establishing standing to seek the injunctive relief so readily pursued by the government under the Clayton Act. And although Sprint and Cellular South survived the careful antitrust injury analysis of Huvelle, they are a long way from achieving the goal of their lawsuit, which is to prevent the alleged harm to their businesses posed by the proposed AT&T/T-Mobile merger. As Sprint and Cellular South continue now toward establishing their entitlement to relief, they have a unique opportunity to redefine the scope of relief available to private parties in future challenges.

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