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A SPECIAL CLIENT ALERT[1]

JUSTICE BRETT KAVANAUGH: The Supreme Court and Telecommunications Part II[2]

November 13, 2018

How Justice Kavanaugh's Appointment Could Influence U.S. Telecom Policies: Merger Review

Prior to D.C. Circuit Judge Brett Kavanaugh's confirmation hearings, we released a client alert anticipating how, if appointed to the U.S. Supreme Court, Justice Kavanaugh would likely rule on major cases involving the telecommunications industry.[3] That alert discussed the appointee's views on "Chevron" deference, a doctrine promoting judicial deference to regulatory agency decisions, and on the Federal Communications Commission's ("FCC") Open Internet (net neutrality) decisions. With Justice Kavanaugh now having been sworn into the Supreme Court, we continue our review of his potential impact on other telecommunications policies, with this alert focused on mergers and acquisitions.

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[2] This Alert relies upon publicly available court documents and voting records created during Judge Kavanaugh's tenure on the D.C. Circuit Court of Appeals. We use the term "telecommunications" (or its abbreviation "telecom") in this alert expansively to include telephony, wireless and wireline communications, broadband internet access and related technologies. We thank Taylor Cressler, Research Assistant for Sapronov Government Affairs, Inc., for his valuable contributions to this alert.

[3] Sapronov & Associates, P.C. Special Client Alert, *"The Nomination of Judge Brett Kavanaugh: The Supreme Court and Telecommunications,"* dated September 5, 2018 (available upon request).

I. Telecom Merger Review.

1. Generally.

So how might Justice Kavanaugh's appointment affect regulatory and antitrust review of telecom mergers and acquisitions, an area many analysts anticipate will see growth[4] with the expanding economy? The short answer is surprisingly little.

That is not to discount the well-established body of antitrust jurisprudence that has been developed by the U.S. Supreme Court since the trust busting days of the late 19th century (the Sherman Antitrust Act was enacted in 1890).[5] But telecom mergers differ from others in that in addition to customary antitrust review, they require multiple, overlapping regulatory approvals from the FCC, from state public service commissions (or "PUCs"),[6] and, on occasion, from municipalities.[7] The Department of Justice ("DOJ" or "Department") and the Federal Trade Commission ("FTC") both exercise merger review under the Clayton Act, as amended by the Hart-Scott-Rodino Antitrust Improvements Act ("HSR"),[8] with the DOJ typically taking the lead when it comes to telecom.

In short, telecom mergers rarely see U.S. Supreme Court review. Even during the Internet "bubble" days, most were approved, typically with conditions, with the DOJ applying a narrow merger review standard focused on market competition under Clayton Act Sections 7 and 11, prohibiting both combinations in restraint of trade and actual or attempted monopolization. Where the HSR review leads to a so-called "second request" for documentation, the parties often secure approval through a negotiated consent decree, which in turn requires a "public interest" review under the Tunney Act.[9] Conditions for merger approval can be structural, such as divestiture of assets, conduct remedies such as the market entry prohibitions applied to IBM in 1956 and to the Bell Telephone Operating Companies in 1983 (what some scholars called "quarantine"),[10] or both.

Even under the last administration, the failed AT&T/T-Mobile merger was challenged by the DOJ on the grounds that it violated Section II of the Sherman Act due to the market concentration of the combined entities.[11] Both the FCC and the Department contested the merger,

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[4] *See, e.g.*, http://telecoms.com/490636/telecoms-and-media-industries-driving-the-highest-ma-year-ever/.
[5] *See generally*, Peter W. Huber, *et. al.*, Federal Telecommunications Law, Second Edition, §4 (Antitrust).
[6] *See generally*, Sapronov & Myerson, "State Regulation of Telecommunications Mergers and Acquisitions," M&A Lawyer, Glasser Legal Works (1998) (copy available upon request at info@wstelecomlaw.com).
[7] *See generally*, Telecom Deals Now: Understanding the Interplay of Regulatory, Corporate, Securities & Bankruptcy Issues, Bruce R. Kraus, Harvey I. Saferstein and Walt Sapronov, Co-Chairs. New York, NY: Practicing Law Institute, 2001. ISBN: 1402400128.
[8] The Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (codified as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a). The DOJ also follows merger guidelines in the course of its review: see Brief of Appellant, U.S. v. AT&T, No. 18-5214 (D.C. Cir. 2018).
[9] Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (1974).
[10] See Huber *supra*.
[11] Compl., *U.S. v. AT&T et. al*, No. 11-1560 (D.C. Cir. 2011) at https://www.justice.gov/atr/case-document/file/487776/download.

which was eventually abandoned by the parties. Given the inevitable delays that eventually quashed the merger, U.S. Supreme Court review was never a possibility.[12]

Consequently, for telecom mergers and acquisitions, U.S. Supreme Court precedent typically plays a "trickle down" role, not a direct one. The precedent looked to by federal and state antitrust authorities is largely focused on traditional market power analysis (*e.g.*, Clayton Act Section 7),[13] on what is in the "public interest" - and on who decides.

But it is the FCC[14] that wields the most clout over merger review, with both (rarely used) concurrent jurisdiction with the DOJ under Clayton Act Sections 7 and 11 and a much broader "public interest" authority[15] under Titles II and III of the Communications Act: 47 U.S.C. § 214[16] (control transfers) and 47 U.S.C. § 310(d)[17] (wireless license transfers), respectively. The FCC's merger enforcement authority, as it is based on this broad public interest standard - rather than the narrower Clayton Act standard - is largely conclusive. And unlike HSR, where the DOJ has the burden of proof to show that the combination restrains trade or, using the Department's powers of prediction, that it may someday result in monopolization, the FCC operates under no such limits. The merger parties have the burden to convince the FCC that their union satisfies the broad, necessarily vague "public interest" test applicable to both wireline entry and radio licensing. Should the FCC remain unconvinced - especially if the proceeding is referred to an administrative law judge - that typically spells doom for the merger, as neither party will agree to put the deal in limbo awaiting years of litigation.[18]

2. Justice Kavanaugh's Pro-Business Beliefs.

But should such a merger review case come before Justice Kavanaugh, his opinions on telecommunications cases raising market competition issues, as well as dissenting opinions on other industry mergers, are instructive. In *Comcast v. FCC*, Kavanaugh joined the majority, holding that FCC's market share threshold for triggering monopoly type regulation was arbitrary and capricious. In dissenting opinions in *FTC v. Whole Foods Market*[19] and *U.S. v. Anthem*,[20] Kavanaugh essentially argued that antitrust regulation is needed only to prevent substantial

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[12] *See* http://wstelecomlaw.com/2012/03/law-seminars-international-update-on-the-att-t-mobile-merger/ (Materials available upon request at info@wstelecomlaw.com). *See generally*, Jeffrey S. Spigel, Antony R. Petrilla & Walt Sapronov, Getting the Deal Through: Telecoms and Media 331-337 (Global Competition Review 2004).

[13] *See* Brief of Appellant, U.S. v. AT&T, No. 18-5214 (D.C. Cir. 2018) at 16 (citing *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962) (affirming injunction of consummation of merger, the effect of which "may" have been to "substantially lessen" competition in shoe industry).

[14] Mark Del Bianco, Senior Privacy Counsel at Sapronov & Associates, P.C., whose experience in anti-trust and regulatory matters includes representation of Firm clients before the FCC, contributed to the discussion in this alert.

[15] *See* 3 15 U.S.C. § 18 (Section 7 of Clayton Act prohibiting mergers that may substantially lessen competition or tend to create a monopoly). *See generally*, A. Maltas, *et. al*., "A Comparison of the FCC and DOJ Merger Review Process."
(https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug16_maltas_8_5f.authcheckdam.pdf.)

[16] 47 U.S.C. § 214 (1934).

[17] 47 U.S.C. § 310(d) (1934).

[18] *See Maltas supra* at n. 39 and accompanying discussion (citing, *e.g.*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946)).

[19] *FTC v. Whole Foods Market*, 533 F. 3d 869 (D.C. Cir. 2008).

[20] *U.S. v. Anthem*, No. 17-5024, (D.C. Cir. 2017).

consumer price increases (over five percent) in a relevant market, and then only if they are outweighed by consumer cost savings in a related, larger market.[21] Unsurprisingly, Justice Kavanaugh, can be expected to continue a "Chicago School," pro-business approach[22] to merger review on the high court, preferring an invisible market hand, not governmental ones, to ensure consumer benefits.

3. AT&T-Time Warner.

The current case to watch, whether or not it eventually gets to the Supreme Court, is the AT&T/Time Warner merger.

Thus far, the D.C. District Court for the District of Columbia has rejected the DOJ challenge to the vertical merger, the first one brought in over 40 years. The Department's appeal of that decision is set to be heard by the D.C. Circuit Court of Appeals on December 6, 2018. As discussed in its brief, the DOJ will likely argue that because the AT&T/Time Warner merger is between a content producer and one content distributor in a market of many, there is a "reasonable probability" that the merger will produce anti-competitive behavior in the form of increased prices for AT&T's (the distributor's) rivals, who are also Time Warner's (the producer's) current customers.[23] The defendants will likely argue that the facts of the case in the AT&T/Time Warner merger are not much different than others (*e.g.*, the NBC/Comcast merger) that have been approved without litigation in the past forty years.

Here is the DOJ's prayer for relief:

> "The district court identified precisely the basis for its decision - a finding that the merger would not increase Time Warner's leverage. JA117-118, 196 (Op. 70-71, 149). The court reached this ultimate finding only by rejecting fundamental logic and the economics of bargaining it purported to accept, and by casting aside Copperweld's[24] principle of corporate-wide profit maximization. A remand is necessary, therefore, to determine under the correct analysis whether the merger violates Section 7."[25]

So even if DOJ prevails, the immediate result is a remand to the D.C. District Court - not a rejection of the merger: U.S. Supreme Court review is a long way away.

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[21] *See generally*, Shepard Goldfein & Karen Hoffman Lent, *A Focus on Price: Antitrust in the Kavanaugh Era*, NY L.J., (2018), *at* https://www.law.com/newyorklawjournal/2018/08/13/a-focus-on-price-antitrust-in-the-kavanaugh-era/.

[22] Stephen Calkins, *How Might a Justice Kavanaugh Impact Antitrust Jurisprudence?* ProMarket (July 20, 2018), https://promarket.org/might-justice-kavanaugh-impact-antitrust-jurisprudence/ (quoting Robert H. Bork, The Antitrust Paradox 210 (1978)).

[23] *See* Brief of Appellant, *U.S. v. AT&T*, No. 18-5214 (D.C. Cir. 2018) (citing *Brown Shoe Co. v. United States*, 370 U.S. at 325).

[24] *Copperweld v. Independence Tube*, 467 US. 752 (1984) (holding that antitrust harm by a defendant includes that of its affiliates).

[25] *See* Brief of Appellant, *U.S. v. AT&T* at 72.

II. Conclusion.

As with any appointed Supreme Court Justice, his or her prior opinions are just that: they are not predictive judgements of how the appointee will rule on the High Court. But they do give insight as to the reasoning, schools of thought, and statutory construction principles that the new Justice relied on while on the lower bench. We will go out on a limb and expect that Justice Kavanaugh will allow big players in the industry - including both AT&T and Time Warner - to grow and, unless the consumer harms demonstrably outweigh the efficiencies - to merge.

A final word on the future of vertical mergers with the changing business models of today large technology companies: they can be harder to judge. An acquisition by Facebook, for example, cannot be measured by increase in consumer cost since there is no monetary value attached to the services it provides. Likewise, the technology industry is fueled by network effects where the larger a company becomes, the more momentum it retains in growth, thus making it harder for new market entrants to be competitive, regardless of market power analysis.

But as for the AT&T/Time Warner merger, any further review of its merits will likely rest on traditional antitrust questions of whether AT&T and Time Warner possess enough combined market power to foreclose competitors' access to content or raise rival distributor's costs.[26] While the "vertical foreclosure" case could be argued against AT&T considering its few national competitors, it would be harder to prove that Time Warner possesses "must have" programming. Even with CNN, there are enough television and online news sources today that could make this "must have" argument a difficult one to make.[27]

We thus expect that this particular union and its yet-to-be-proven consumer harms will likely not see Justice Kavanaugh's scrutiny any time soon. But if it does, he would not lightly reject it. Further, should the pending appeal of the D.C. District Court's rejection of the its challenge before the D.C. Circuit Court of Appeals fail and the DOJ elects to seek expedited review from the U.S. Supreme Court, convincing its new conservative majority to second guess the two lower courts will be an uphill battle.

In future alerts, we will look at the privacy regulation and other telecom controversies, both as they may come before the U.S. Supreme Court, and especially as they may be affected (perhaps with legislation) by the recent midterm elections. We end this and all of our political alerts[28] with the hope that GOD BLESS AMERICA!

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[26] *See* F. Goldfein and J. Keyte, "The DOJs Challenge to the AT&T Time Warner Deal," Dec. 12, 2017, New York Law Journal, available at https://www.skadden.com/-/media/files/publications/2017/12/the_dojs_challenge_to_the_att_time_warner_deal.pdf.

[27] Dr. Martyn Roetter, Advisor to our affiliate, Sapronov Government Affairs, Inc., whose experience as an expert in merger proceedings includes the Justice Department's challenge to the erstwhile AT&T-T-Mobile Merger proceeding, contributed to the vertical foreclosure discussion in this alert.

[28] For copies of our previous political alerts, please contact us at info@wstelecomlaw.com. For more on our practice, please visit our new website at www.wstelecomlaw.com.