

# Gov't Amicus Efforts Show Antitrust Policy Via Advocacy

By **Stefan Meisner, Michelle Lowery and Anthony Ferrara** (May 19, 2020)

Under the administration of President Donald Trump, the U.S. Department of Justice's Antitrust Division has significantly ramped up its private litigation amicus program.

The Antitrust Division has filed an increasing number of amicus briefs and statements of interest at the appellate and district court levels in an effort to influence the development of antitrust law. In 2017, the Antitrust Division filed just two amicus briefs. The next year, it filed 13 amicus briefs and statements of interest, and, in 2019, it filed a record 26.

The Antitrust Division has continued its active amicus efforts in 2020. This article reviews some of the key trends emanating from the positions taken by the Antitrust Division in its amicus filings and whether its program is having an impact on decisions by the courts.

## Focusing on Labor Markets

The Antitrust Division has been active as an amicus in cases involving labor market issues. In particular, the Antitrust Division has filed a number of statements of interest advocating for its preferred framework for analyzing no-poach agreements, i.e., agreements between employers not to solicit or hire each other's employees. Through these filings, the Antitrust Division has advanced a nuanced view of when no-poach agreements are illegal per se and when they should be analyzed under the rule of reason.

In *In re: Railway Industry Employee No-Poach Antitrust Litigation*<sup>[1]</sup> and *Seaman v. Duke University*,<sup>[2]</sup> the Antitrust Division filed statements of interest arguing that no-poach agreements among competitors are per se unlawful, unless they are ancillary to a separate legitimate transaction or collaboration.

The Antitrust Division argued in another trio of cases, *Stigar v. Dough Dough Inc.*,<sup>[3]</sup> *Richmond v. Bergey Pullman Inc.*,<sup>[4]</sup> and *Harris v. CJ Star LLC*,<sup>[5]</sup> that no-poach agreements between franchisees and franchisors are typically subject to the rule of reason because the franchise relationship is vertical.

However, if a franchisor and its franchisee compete directly to hire employees with similar skills, then a no-poach agreement between them would be horizontal and subject to the per se rule.

## Narrowing Exemptions and Immunities

The Antitrust Division has also used its amicus program to argue for narrow interpretations of exemptions and immunities from the antitrust laws. Assistant Attorney General Makan Delrahim has stated that the Antitrust Division is vigilantly looking at cases involving exemptions and immunities, and that the Antitrust Division is skeptical "whenever we see regulation replacing vigorous enforcement of the antitrust laws."<sup>[6]</sup>



Stefan Meisner



Michelle Lowery



Anthony Ferrara

## ***State Action Immunity***

The Antitrust Division has been particularly focused on limiting the application of state action immunity, which provides federal antitrust immunity to private actors when a state clearly articulates a policy to displace competition and actively supervises the private conduct.

The Antitrust Division has argued in several cases that the defendants did not satisfy the clear articulation prong of the state action immunity standard. For example, in *Chamber of Commerce v. City of Seattle*,<sup>[7]</sup> the Antitrust Division filed an amicus brief arguing that state action immunity did not apply to a Seattle ordinance allowing for-hire drivers to collectively negotiate with driver coordinators like Uber Technologies Inc. and Lyft Inc., because the state of Washington did not clearly articulate a policy to displace competition in the negotiation of those contracts.

The Antitrust Division has filed amicus briefs in other cases arguing that the state action doctrine did not apply because the state did not actively supervise the conduct at issue. In *SmileDirectClub LLC v. Tanja D. Battle*,<sup>[8]</sup> SmileDirectClub filed suit against the Alabama Board of Dental Examiners, alleging that the board adopted rules that restricted competition in violation of Section 1 of the Sherman Act. The board claimed it was protected by state action immunity as a state entity.

On appeal, the Antitrust Division and the Federal Trade Commission filed a joint amicus brief, arguing that the defendant had to establish not only clear articulation, but also active supervision, because the board, although seemingly a state entity, was controlled by active market participants.<sup>[9]</sup>

## ***Union Activity***

The Antitrust Division weighed in on the scope of the antitrust exemption for union activity in *William Morris Endeavor Entertainment LLC v. Writers Guild of America West Inc.*<sup>[10]</sup> In this case, three Hollywood talent agencies challenged, under Section 1 of the Sherman Act, new rules by the screenwriter unions restricting the agents' fees and prohibiting agents from affiliating with production or distribution companies. The unions moved to dismiss, arguing that the rules were exempt from antitrust scrutiny.

The Antitrust Division filed a statement of interest urging the court to deny the defendants' motion to dismiss because development of a factual record was necessary to determine if the union activity exemption applied.

## ***McCarran-Ferguson Act***

The Antitrust Division has also taken on the McCarran-Ferguson Act, which affords insurers an exemption from the antitrust laws under two conditions: (1) the challenged practice must be part of the business of insurance, and (2) the practice must be regulated by state law. In *Oscar Insurance Co. of Florida v. Blue Cross and Blue Shield of Florida Inc.*,<sup>[11]</sup> the plaintiff brought a Sherman Act challenge to Florida Blue's exclusivity policy, whereby Florida Blue prohibited its brokers from selling plans offered by competing insurers. The district court dismissed the complaint based on the McCarran-Ferguson exemption.

The Antitrust Division filed a statement of interest in support of the plaintiff at the district court level, as well as an amicus brief with the U.S. Court of Appeals for the Eleventh

Circuit, arguing that Florida Blue's exclusivity policy did not fall within the business of insurance under U.S. Supreme Court precedent and that it constituted coercion.

### ***Noerr-Pennington Immunity***

In *Intellectual Ventures I LLC v. Invention Investment Fund II LLC*,<sup>[12]</sup> the Antitrust Division filed an amicus brief arguing that the Noerr-Pennington doctrine does not protect anticompetitive patent acquisitions from antitrust liability, even if the patent acquirer subsequently files litigation to enforce the patents. The Antitrust Division made a similar argument in *Intel Corp. and Apple Inc. v. Fortress Investment Group LLC*,<sup>[13]</sup> again urging the court to interpret the Noerr-Pennington doctrine narrowly.

### **Intellectual Property/Antitrust Issues**

Another major focus of the Antitrust Division's amicus efforts has been the intersection of IP and antitrust law. Prior to the Trump administration, the DOJ and FTC took similar approaches to standard-essential patents and fair, reasonable and nondiscriminatory commitments. Both agencies expressed concern about the ability of SEP holders to harm competition by violating their obligations to license on FRAND terms.

The DOJ has now moved away from FTC on this issue, staking out a position more friendly to SEP holders. Delrahim has stated that SEP holders' FRAND commitments are not the proper concern of the antitrust laws. In his view, contract and patent law provide adequate remedies for breaches of FRAND commitments, and the "blunt application" of antitrust law can deter innovation.<sup>[14]</sup>

The Antitrust Division has filed a number of amicus briefs advocating for this new position. Most significantly, the Antitrust Division took the extraordinary step of opposing the FTC in its suit against Qualcomm Inc.<sup>[15]</sup> The FTC sued Qualcomm in January 2017, alleging that the company violated the FTC Act by maintaining its monopoly position as a modem chip supplier through a number of exclusionary practices, including by refusing to license its SEPs on FRAND terms to rival chip suppliers.

In May 2019, the district court ruled in favor of the FTC and ordered extensive injunctive relief. Following the district court decision, the Antitrust Division filed a statement of interest supporting Qualcomm's request that the U.S. Court of Appeals for the Ninth Circuit stay the district court's injunction.

The Antitrust Division also later filed an amicus brief with the Ninth Circuit in support of Qualcomm. In its briefs, the Antitrust Division argued that the district court failed to identify a harm to the competitive process, as required under Section 2 of the Sherman Act. The Antitrust Division also argued that Qualcomm does not have an antitrust duty to license its SEPs to rival chip suppliers.

The Antitrust Division has supported SEP holders in other cases as well. For example, in *Continental Automotive Systems Inc. v. Avanci LLC*,<sup>[16]</sup> a maker of automotive components brought suit against several alleged holders of SEPs relevant to cellular standards, claiming that the defendants refused to license their SEPs on FRAND terms. The Antitrust Division filed a statement of interest arguing that the plaintiff had not stated a claim for relief under Section 2 of the Sherman Act because it failed to allege harm to competition.<sup>[17]</sup>

### **T-Mobile/Sprint**

The Antitrust Division also filed an amicus brief in New York district court to defend its resolution of the T-Mobile/Sprint merger. After investigating this proposed merger for 15 months, the Antitrust Division reached a settlement with the parties requiring them to divest assets to DISH Network and to help DISH build up its own wireless network. A group of 13 states and the District of Columbia brought suit seeking a nationwide injunction blocking the proposed merger in its entirety, despite the remedy which the Antitrust Division had secured.[18]

The Antitrust Division filed a statement of interest defending its settlement and urging the district court to reject the states' injunction request.

### **Is the DOJ Succeeding?**

Courts have differed in their reactions to the Antitrust Division's amicus filings. In some cases, courts have adopted the position advocated by the Antitrust Division. For example, in *Chamber of Commerce v. City of Seattle*, the Ninth Circuit agreed with the Antitrust Division that the state action immunity doctrine did not apply to the Seattle ordinance at issue.[19] The New York district court hearing the T-Mobile/Sprint merger trial also took the Antitrust Division's side, rejecting the states' request for an injunction blocking the proposed merger.[20]

Other courts have rejected the positions advanced by the Antitrust Division in its amicus filings. In *Oscar Insurance Co. of Florida v. Blue Cross and Blue Shield of Florida Inc.*, for example, the district court held that the defendant's conduct was protected by the McCarran-Ferguson Act, in spite of the Antitrust Division's statement of interest arguing that the McCarran-Ferguson exemption did not apply.

The court went as far as noting in a footnote that the Antitrust Division's "briefing and participation at oral argument ... was unhelpful to the resolution of the issues at bar." [21] Some courts have also rejected the Antitrust Division's requests to participate in oral argument as an amicus. The district court in *NextEra Energy Capital Holdings Inc. v. Deann T. Walker* [22] remarked that the Antitrust Division's participation in oral argument would not be useful to the court. A number of other courts, however, have granted the Antitrust Division argument time, including the Ninth Circuit in *FTC v. Qualcomm*.

### **Conclusion**

The Antitrust Division has been extremely active in filing statements of interest and amicus briefs in the Trump era. Going forward, the Antitrust Division will likely continue to closely watch private cases involving labor markets, exemptions and immunities from the antitrust laws, and issues at the intersection of IP and antitrust. There is a high likelihood of intervention by the Antitrust Division in these cases, particularly where parties seek per se treatment of no-poach agreements between franchisors and franchisees, argue for broad application of exemptions or immunities, or bring Sherman Act claims against SEP holders.

---

*Stefan M. Meisner and Michelle Lowery are partners, and Anthony S. Ferrara is an associate, at McDermott Will & Emery LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This*

*article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] No. 18-798 (W.D. Pa.).

[2] No. 15-462 (M.D.N.C.).

[3] No. 18-244 (E.D. Wash.).

[4] No. 18-246 (E.D. Wash.).

[5] No. 18-247 (E.D. Wash.).

[6] See Makan Delrahim, Remarks at Antitrust Division's First Competition and Deregulation Roundtable, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-division-s-first>.

[7] No. 17-35640 (9th Cir.).

[8] No. 19-12227 (11th Cir.).

[9] See also *Seaman v. Duke University*, No. 15-462 (M.D.N.C.); *TIKD Services LLC v. Florida Bar*, No. 17-24103 (S.D. Fla.); *Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV*, No. 18-2327 (7th Cir.).

[10] No. 19-5465 (C.D. Cal.).

[11] No. 18-1944 (M.D. Fla.); No. 19-14096 (11th Cir.).

[12] No. 18-1367 (Fed. Cir.).

[13] No. 19-7651 (N.D. Cal.).

[14] See Makan Delrahim, Remarks at USC Gould School of Law – Application of Competition Policy to Technology and IP Licensing (Nov. 10, 2017), <https://www.justice.gov/opa/speech/file/1010746/download>.


[15] *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir.).

[16] No. 19-2933 (N.D. Tex.).

[17] See also *Lenovo (United States) Inc. & Motorola Mobility, LLC v. IPCom GmbH & Co.*, No. 19-1389 (N.D. Cal.); *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, Nos. 19-40566, 19-40643 (5th Cir.).

[18] *State of New York & Other Plaintiff States v. Deutsche Telekom AG*, No. 19-5434 (S.D.N.Y.).

[19] 890 F.3d 769, 779-80 (9th Cir. 2018).

[20] *State of New York & Other Plaintiff States v. Deutsche Telekom AG*,  No. 19-5434, Decision & Order (S.D.N.Y. Feb. 11, 2020).

[21] 413 F. Supp. 3d 1198, 1199 n. 1 (M.D. Fla. 2019).

[22] No. 19-626 (W.D. Tex.).



Statements of Interest			
Date	Case/Court	Stage of Proceeding	Issue
2/8/2018	Marion Healthcare LLC v. Southern Illinois Healthcare, No. 12-871 (S.D. Ill.)	Summary judgment	Exclusive dealing
3/12/2018	TIKD Services LLC v. Florida Bar, No. 17-24103 (S.D. Fla.)	Motion to dismiss	State action immunity
4/13/2018	LSP Transmission Holdings, LLC, v. Nancy Lange, et al., No. No. 17-4490 (D. Minn.)	Motion to dismiss	Dormant Commerce Clause
4/25/2018	McCain v. Apex Energy Group, No. 14-791 (W.D. Ohio)	Summary judgment	Standing for declaratory relief
6/6/2018	Steves & Sons, Inc. v. JELD-WEN, No. 16-545 (E.D. Va.)	Following jury trial	Merger remedy
2/8/2019	In re Railway Industry Employee No-Poach Antitrust Litigation, No. 18-798 (W.D. Pa.)	Motion to dismiss	No-poach agreements
3/7/2019	Seaman v. Duke University, No. 15-462 (M.D.N.C.)	Summary judgment	State action immunity; no-poach agreements
3/8/2019 3/8/2019 3/8/2019	Stigar v. Dough Dough, Inc., No. 18-244; Richmond v. Bergey Pullman Inc., No. 18-246; Harris v. CJ Star, LLC, No. 18-247 (E.D. Wash.)	Motion to dismiss	No-poach agreements
4/23/2019	In re Cathode Ray Tube (CRT) Antitrust Litigation, No. 7-5944 (N.D. Cal.)	Motion to dismiss	Foreign Sovereign Immunities Act
4/24/2019	Oscar Insurance Co. of Florida v. Blue Cross & Blue Shield of Florida, Inc., No. 18-1944 (M.D. Fla.)	Motion to dismiss	McCarran-Ferguson Act exemption
5/2/2019	FTC v. Qualcomm Inc., No. 17-220 (N.D. Cal.)	Urging district court to order additional briefing and hold hearing on remedy	Standard essential patents (SEPs) / licensing
6/26/2019	NSS Labs, Inc. v. CrowdStrike, Inc., et al., No. 18-5711 (N.D. Cal.)	Motion to dismiss	Exemption from <i>per se</i> treatment for standards development organizations
7/12/2019	Oakland v. Oakland Raiders, et al., No. 18-7444 (N.D. Cal.)	Motion to dismiss	What constitutes injury to “business or property” under the Clayton Act
7/16/2019	FTC v. Qualcomm Inc., No. 19-16122 (9th Cir.)	Motion for partial stay of injunction pending appeal	Standard essential patents (SEPs) / licensing
9/20/2019	NextEra Energy Capital Holdings, Inc., et al. v. Deann T. Walker, et al., No. 19-626 (W.D. Tex.)	Motion to dismiss	Dormant Commerce Clause
9/30/2019 10/11/2019	Sitzer, et al. v. The National Association of Realtors, et al., No. 19-332 (W.D. Mo.); Moehrl, et al. v. The National Association of Realtors, et al., No. 19-1610 (N.D. Ill.)	Motion to dismiss	Interpretation of consent decree
10/25/2019	Lenovo (United States) Inc. and Motorola Mobility, LLC v. IPCom GmbH & Co., KG, No. 19-1389 (N.D. Cal.)	Motion for anti-suit injunction	SEPs / licensing
11/26/2019	William Morris Endeavor Entertainment, LLC, et al. v. Writers Guild of America, West, Inc., et al., No. 19-5465 (C.D. Cal.)	Motion to dismiss	Union activity exemption
12/5/2019	Global Music Rights, LLC v. Radio Music License Committee, Inc., et al., No. 16-9051 (C.D. Cal.)	Motion for judgment on the pleadings	Standard for buyers’ cartel
12/20/2019	State of New York & Other Plaintiff States v. Deutsche Telekom AG, et al., No. 19-5434 (S.D.N.Y.)	Permanent injunction hearing	T-Mobile/Sprint merger
2/27/2020	Continental Automotive Systems, Inc. v. Avanci, LLC, et al., No. 19-2933 (N.D. Tex.)	Motion to dismiss	SEPs / licensing
3/20/2020	Intel Corp. & Apple Inc. v. Fortress Investment Group LLC, et al., No. 19-7651 (N.D. Cal.)	Motion to dismiss	Patent aggregation; <i>Noerr-Pennington</i> immunity
Amicus Briefs			
Date	Case/Court	Stage of Proceeding	Issue
11/3/2017	Chamber of Commerce v. City of Seattle, et al., No. 17-35640 (9th Cir.)	On appeal to Ninth Circuit following dismissal	State action immunity
11/15/2017	Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., No. 16-1220 (U.S.)	On appeal to Supreme Court (cert. stage)	Whether the submission of a foreign government conclusively establishes the content of foreign law
2/21/2018	Salt River Project Ag. Improvement & Power Dist. v. Tesla Energy Ops., Inc., FKA SolarCity Corp., No. 17-368 (U.S.)	On appeal to Supreme Court (merits stage)	State action immunity; collateral order doctrine
3/6/2018	Animal Science Products, Inc., et al. v. Heibei Welcome Pharmaceutical Co. Ltd., et al., No. 16-1220 (U.S.)	On appeal to Supreme Court (merits stage)	Whether the submission of a foreign government conclusively establishes the content of foreign law
5/8/2018	Apple, Inc. v. Pepper, et al., No. 17-204 (U.S.)	On appeal to Supreme Court (cert. stage)	<i>Illinois Brick</i> doctrine
5/11/2018	Intellectual Ventures I LLC v. Invention Investment Fund II, LLC, No. 18-1367 (Fed. Cir.)	On appeal to Federal Circuit following grant of summary judgment	<i>Noerr-Pennington</i> immunity
8/17/2018	Apple, Inc. v. Pepper, et al., No. 17-204 (U.S.)	On appeal to Supreme Court (merits stage)	<i>Illinois Brick</i> doctrine
9/17/2018	In re William E. Paplauskas, Jr., No. SU-2018-161-M.P. (R.I.)	On appeal to Rhode Island Supreme Court from Committee on Unauthorized Practice of Law	Unauthorized practice of law
10/19/2018	LSP Transmission Holdings, LLC v. Lange, No. 18-2559 (8th Cir.)	On appeal following dismissal	Dormant Commerce Clause
11/8/2018	Viamedia, Inc. v. Comcast Corp., et al., No. 18-2852 (7th Cir.)	On appeal following dismissal	Refusal to deal
4/25/2019	Marion Healthcare, LLC, et al. v. Becton Dickinson & Company, et al., No. 18-3735 (7th Cir.)	On appeal following dismissal	<i>Illinois Brick</i> doctrine
5/8/2019	Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, et al., No. 18-2327 (7th Cir.)	On appeal following dismissal	State action immunity
6/10/2019	Stromberg, et al. v. Qualcomm Inc., No. 19-15159 (9th Cir.)	On appeal following court’s certification of nationwide class under California antitrust law	Class certification under California law
8/23/2019	Steves & Sons, Inc. v. Jeld-Wen, Inc., No. 19-1397 (4th Cir.)	On appeal following jury verdict	Whether laches applies to a private party Clayton Act suit seeking divestiture of a consummated merger
8/30/2019	FTC v. Qualcomm, Inc., No. 19-16122 (9th Cir.)	On appeal following bench trial	SEPs / licensing
9/11/2019 9/25/2019	D. Blaine Leeds & SmileDirectClub, LLC v. Adolphus M. Jackson, et al., No. 19-11502; SmileDirectClub, LLC v. Tanja D. Battle, et al., No. 19-12227 (11th Cir.)	On appeal following denial of motion to dismiss	State action immunity
10/30/2019	HTC Corp., et al. v. Telefonaktiebolaget LM Ericsson, et al., Nos. 19-40566, 19-40643 (5th Cir.)	On appeal following jury verdict	SEPs / licensing
1/6/2020	Oscar Insurance Co. of Florida v. Blue Cross & Blue Shield of Florida, Inc., et al., No. 19-14096 (11th Cir.)	On appeal following dismissal	McCarran-Ferguson Act immunity
4/1/2020	NextEra Energy Capital Holdings, Inc., et al. v. Deann T. Walker, et al., No. 20-50160 (5th Cir.)	On appeal following dismissal	Dormant Commerce Clause