U.S. Court of Appeals Rejects Antitrust Challenge to AT&T-Time Warner Merger

I. Overview

The Antitrust Division of the U.S. Department of Justice ("DOJ") lost its appellate court challenge to AT&T Inc.'s ("AT&T") acquisition of Time Warner.[1] A three-judge panel unanimously affirmed the trial court's decision, which allowed the proposed merger to move forward.[2] The United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") found that District Judge Richard J. Leon did not make a clear error in ruling that the government failed to establish that the proposed combination was likely to lessen competition.[3] The Court of Appeals found the DOJ's arguments "unpersuasive" as a whole.[4] It is reported that the government will not seek Supreme Court review.[5]

II. Background and Procedural History

In October 2016, AT&T announced its agreement to acquire Time Warner for approximately $108 billion, including debt. The DOJ investigated the deal and in November 2017 filed suit to block the proposed vertical merger—a merger that involves companies that do not compete head-to-head, but instead buy and sell to each other. Generally, vertical mergers are less likely to raise antitrust concerns than mergers between direct competitors and thus are not frequently challenged by the government.[6] Prior to this case, it had been approximately 40 years since the DOJ went to a court seeking to enjoin a vertical merger.[7]

While the DOJ based its lawsuit on three theories of harm to competition at the trial level, on appeal the government challenged only the court's findings regarding its increased leverage theory of harm.[8] The DOJ's "increased leverage theory is that 'by combining Time Warner's programming and [AT&T's] distribution, the merger would give Time Warner increased bargaining leverage in negotiations with rival distributors, leading to higher, supracompetitive prices for millions of consumers."[9] As background, traditionally programmers package content into networks and license those networks to distributors. If a programmer and distributor fail to reach an agreement, then a distributor will lose its right to display a programmer's content known as a "blackout," which is typically costly for both the programmer and distributor.

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[1] *United States v. AT&T, Inc.*, No. 18-5214, 2019 WL 921544, at *14 (D.C. Cir. Feb. 26, 2019).

[2] *Id.* The transaction closed shortly after the trial court's decision, subject to an agreement that required AT&T to "hold separate" Time Warner's Turner Networks until February 2019. *See* Elai Katz, *AT&T-Time Warner and a Rare Judicial Perspective on Vertical Mergers*, N.Y. L.J., June 26, 2018, *available* here (noting that the "hold separate" agreement was designed to preserve the possibility of a successful divestiture of Turner Networks, or a part of that business, if such relief was granted in the appeals process).

[3] *AT&T, Inc.*, 2019 WL 921544 at *14.

[4] *Id.* at *1.

[5] Brent Kendall, *U.S. Appeals Court Rejects Justice Department Antitrust Challenge to AT&T-Time Warner Deal*, WALL S. J. (Feb. 26, 2019, 6:55pm ET) ("[A] Justice Department spokesman said . . . '[t]he Department has no plans to seek further review.'"), *available* here.

[6] Katz, *supra* note 2.

[7] *Id.*

[8] *AT&T, Inc.*, 2019 WL 921544 at *1.

[9] *Id.* at *4 (internal citations omitted).

The government argued, among other points, that under the increased leverage theory, Time Warner's bargaining power would increase post-merger when negotiating agreements with rival distributors.[10] The government claimed that Time Warner would have the power to negotiate for higher fees with AT&T's rival distributors because if Time Warner reached an impasse with the rival distributors leading to a blackout, some of the rival distributors' customers would switch to AT&T's DirecTV so they can view Time Warner's programs.[11] The lower court held that the government "failed to . . . show[] that the proposed merger is likely to increase [Time Warner's] bargaining leverage in affiliate negotiations."[12] For additional detail on the trial court's decision, click here for an earlier publication.

III. The Court of Appeals' Opinion

The question before the Court of Appeals was "whether the district court's factual findings [were] clearly erroneous" meaning that Judge Leon's findings were either "illogical or implausible."[13] The Court of Appeals concluded the district court "did not abuse its discretion" in concluding that the government failed to meet its burden to establish that the proposed combination was likely to lessen competition.[14] The Court of Appeal's holding, similar to the lower court, focused heavily on the facts and seems to have been careful to avoid ruling on legal issues regarding vertical mergers more generally. Typically, factual determinations are harder to overturn on appeal.

While the three-judge panel of the D.C. Circuit did criticize in part Judge Leon's conclusions, it was not enough to overturn the decision.[15] The Court of Appeals was not persuaded by the DOJ's arguments that Judge Leon misapplied economic principles and erred in finding insufficient evidence to support the government's experts' proposition of fee increases for rival distributors and increases to consumers. The Court of Appeals observed that the district court's statement that the merger would result in cost savings of $350 million to AT&T customers was inaccurate, clarifying that an expert testified that the deal would result in savings of $352 million to AT&T but that not all of the savings would be passed to customers.[16] Nonetheless, the Court found that error to be harmless because the district court's opinion was not based on balancing any price increases against cost savings to consumers.[17]

IV. Conclusion

This decision provides rare insight into a court's analysis of vertical mergers. While the DOJ's loss highlights the difficultly that plaintiffs have establishing anticompetitive harm from a vertical merger, it also illustrates that a fact-specific analysis will be conducted in both trial and appellate courts when analyzing the competitive effects of vertical mergers.

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[10] *See id.* at *4-6.

[11] *See id.*

[12] *Id.* at *6 (internal citations omitted).

[13] *Id.* at *2.

[14] *Id* at *14.

[15] *Id.* at *10 ("The district court never cited *Copperweld [Corp. v. Indep. Tube Co.]* in its opinion which [was] troubling given the government's competitive harm theories. . . ." 467 U.S. 752 (1984).).

[16] *Id.* at *13.

[17] *Id.*

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; Lauren Rackow at 212.701.3725 or lrackow@cahill.com; or Matthew M. McDonagh at 212.701.3959 or mmcdonagh@cahill.com.