AT&T and Time Warner's Merger:
The Court Battle and Political Undercurrents

by

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The heated regulatory and court battle over the merger of AT&T Inc. and Time Warner Inc. had the potential to turn the antitrust world on its head – or at least sideways. Typically, horizontal mergers between two direct competitors raise the most significant antitrust problems, and thus face a greater likelihood of being challenged by U.S. antitrust regulators. By contrast, vertical mergers – between a company and either its supplier or customer – are usually approved by the government, though perhaps with some restraints on the post-merger company's conduct attached as conditions.

Thus, it was somewhat surprising when the federal government in 2017 sued for an injunction to prevent the vertical merger of programming distributor AT&T and content provider Time Warner. The Justice Department's lawsuit prompted questions about antitrust regulators' current view of merger law. It also raised suspicions of political influence, especially since it was the first high-profile decision of the new antitrust leadership installed by the Trump Administration. In a stinging defeat for the Justice Department, U.S. District Court Judge Richard Leon ruled against the government in June 2018, paving the way for the merger to be completed only two days later.[1] Although the government has appealed the decision, the trial court ruling was a crucial victory for AT&T and Time Warner, and could bode well for other businesses considering vertical mergers. Moreover, the Trump Justice Department's significant loss in its first major antitrust trial could influence its approach on merger reviews for the remainder of the Trump Administration.

Merger Announcement and Reaction

On October 22, 2016, AT&T and Time Warner jointly announced that AT&T would buy all Time Warner stock for $107.50 per share. As the firms' press release explained: "The deal combines Time Warner's vast library of content and ability to create new premium content that connects with audiences around the world, with AT&T's extensive customer relationships, world's largest pay TV subscriber base and leading scale in TV, mobile, and broadband distribution."[2] The release also touted both the financial benefits to the post-merger AT&T and the "significant benefits for customers," including "better value, more choices, enhanced customer experience for over-the-top and mobile viewing."[3] The deal would give AT&T ownership of Time Warner's popular cable networks, as well as the legendary Warner Bros. studio.

In a case of unfortunate timing, that merger announcement came in the final weeks of the heated 2016 presidential election. While rumors of the combination were swirling, and shortly before the deal was formally announced later that day, Republican presidential nominee Donald Trump expressed his opposition to the deal. "AT&T is buying Time Warner, and thus CNN, a deal we will not approve in my administration because it's too much concentration of power in

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[1] U.S. v. AT&T Inc., 2018 U.S. Dist. LEXIS (D.D.C. 2018).
[2] Press Release, AT&T Inc., AT&T to Acquire Time Warner (Oct. 22, 2016), http://about.att.com/story/att_to_acquire_time_warner.html.
[3] *Id.*

the hands of too few," Trump said at a campaign rally.[4] The mention of CNN, only a small part of the entire Time Warner business, raised eyebrows, as CNN was then and remains today a favorite target for Trump's criticism of the media.

When the deal was announced, most antitrust commentators acknowledged that the proposed merger would be subject to thorough scrutiny. Still, the prevailing view was that this vertical merger could be approved, though likely with restraints placed on the conduct of the combined AT&T-Time Warner. The pattern had already been set with the similar joint venture of Comcast Cable and NBC Universal, which was approved with conditions by the Obama Administration's Justice Department in 2011.[5] Technically, the Justice Department sued to block that Comcast-NBCU deal, but concurrently filed a proposed settlement with the conditions that the companies had already agreed to. Those conditions were approved by District Court Judge Leon – the same judge who would preside over the AT&T-Time Warner trial.[6]

However, questions about how well the Comcast-NBCU conditions had worked in reality over the succeeding years lurked in the background for AT&T and Time Warner. The political environment and shifting views on antitrust law also complicated the analysis. At least one prescient media observer noted the potential for opposition to the deal only days after it was announced. Pulitzer Prize-winning columnist James Stewart, in an October 2016 *New York Times* column headlined "Why a Merger of Media Firms That Should Be a Sure Bet Isn't," cited antitrust law professors who noted an evolving view of antitrust law.[7]

Though vertical mergers have generally been approved for the past half-century, Stewart wrote that a "younger generation of antitrust scholars … are rethinking the nation's fundamental approach to antitrust law. … [T]he new generation harks back to the original trustbusters of the early 20th century, who were most concerned about preventing corporations from gaining too much power."[8] Referring to AT&T and Time Warner executives, Stewart concluded that "there's a risk they will find themselves in the midst of a revolution in antitrust thinking that transcends any one case."[9]

This newer thinking is exemplified by two recent law review articles – both written by law professors at Georgetown University who previously worked at the Federal Trade Commission. (The FTC shares antitrust enforcement authority with the Justice Department.) In an article entitled "Invigorating Vertical Merger Enforcement," Professor Steven Salop argues that "in our modern market system, vigorous vertical merger enforcement is a necessity, particularly in markets where economies of scale and network effects lead to barriers to entry and durable market power."[10] Similarly, Professor Howard Shelanski advocates for using antitrust as a "countercyclical force to deregulation."[11] In other words, Shelanski suggests that "antitrust should become stronger as regulation becomes weaker."[12]

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[4] Ryan Knutson, *Trump Says He Would Block AT&T-Time Warner Deal*, WALL ST. J., Oct. 22, 2016, https://www.wsj.com/articles/trump-says-he-would-block-at-t-time-warner-deal-1477162214.

[5] Press Release, Dep't of Justice, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions.

[6] U.S. v. Comcast Corp., 2011 U.S. Dist. LEXIS 116381 (D.D.C. 2011).

[7] James B. Stewart, *Why a Merger of Media Firms That Should Be a Sure Bet Isn't,* N.Y. TIMES*,* Oct. 26, 2016, at B1.

[8] *Id.*

[9] *Id.*

[10] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018).

[11] Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1922 (2018).

[12] *Id.*

Should these arguments prevail, they would signal a shift away from the Chicago School philosophy of antitrust law. This approach focuses more on questions of economic efficiency and the impact of business actions on consumers, rather than on company size or industry consolidation alone. The rise of the Chicago School in the 1980s, and its continuing prevalence since, has meant that mergers resulting in significant concentration are more likely to be approved, as long as a convincing argument can be made that it will create substantial economic benefits of some type.

By contrast, the more traditional approach to antitrust law, which had been the dominant theory in the United States for much of the 20th century until the 1980s, called for more vigorous enforcement of antitrust laws. This view was summarized in a 1945 court opinion by Judge Learned Hand of the Second Circuit Court of Appeals, who explained that traditional antitrust theory is "based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results."[13] Traditional antitrust theorists are more skeptical about large mergers in general, and thus not inclined to allow the potential for economic efficiencies to justify an otherwise anticompetitive merger. While the newer thinking of some antitrust scholars may not be a full-fledged return to the "original trustbusters of the early 20th century,"[14] as Stewart wrote in his *New York Times* column, their recommended approach would certainly be a move in that general direction.

Political Issues

Candidate Trump's immediate opposition to the proposed merger, and his subsequent tweets as president often criticizing CNN provided the foundation for questions about potential political influence in the Justice Department's decision to challenge the AT&T-Time Warner merger. Another factor was the perception, at least, that Makan Delrahim, the assistant attorney general for the Justice Department's antitrust division, may have changed his view on the proposed merger.

Delrahim is an antitrust expert, having served as deputy assistant attorney general for antitrust in the George W. Bush Administration. While in private practice in Los Angeles in October 2016, he was interviewed on the Canadian Business News Network about the antitrust issues facing AT&T and Time Warner. In a telephone interview, Delrahim said, "Just the sheer size of it and the fact that it's media I think will get a lot of attention. However, I don't see this as a major antitrust problem."[15]

That Delrahim comment was reported extensively after he assumed oversight of the AT&T-Time Warner review. But less attention has been paid to the remainder of the interview, where his comments were less definitive. After discussing several other proposed mergers in the communications industry, Delrahim concluded:

> That's not to say that there aren't going to be some concerns and antitrust issues of one distributor owning various content, and it might somehow impact other distributors. But it doesn't raise the same challenges as some of those other transactions have brought. … So from a technical standpoint, I think these folks [AT&T and Time Warner] would have

[13] U.S. v. Aluminum Co. of America, Inc., 148 F.2d 416, 428 (2d Cir. 1945).
[14] Stewart, *supra* note 7.
[15] *No Big Worries in AT&T Deal for Time Warner*, Oct. 24, 2016, BUSINESS NEWS NETWORK, https://www.bnn.ca/video/no-big-worries-in-at-t-deal-for-time-warner~978794.

an easier route toward approval than a merger of two competitors.[16]

Delrahim worked in the White House legal counsel's office at the beginning of the Trump Administration, and was nominated for the assistant attorney general role in March 2017. He was confirmed by the Senate for that post in late September 2017, and quickly made a splash in his new job. In November, as news reports circulated that the AT&T-Time Warner deal might be challenged, Delrahim spoke at the American Bar Association's Antitrust Fall Forum. His remarks questioned the effectiveness of behavioral or conduct remedies in vertical mergers. He indicated that structural remedies – typically selling off particular assets – would be a better option to address anticompetitive concerns. While commenting on the issue of reducing regulation in general, Delrahim said:

> The second answer relates to remedies – at times antitrust enforcers have experimented with allowing illegal mergers to proceed subject to certain behavioral commitments. That approach is fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market. … As we reduce regulation across the government, I expect to cut back on the number of long-term consent decrees we have in place and to return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer.[17]

Delrahim's comments clearly signaled trouble for the AT&T-Time Warner deal, as behavioral remedies had been the key to the earlier approval of the similar Comcast-NBCU merger. In a possible reference to that case, Delrahim said: "Without getting into specifics, I can say that behavioral remedies have proven challenging to enforce today."[18] At the same time, he did not entirely close the door to behavioral remedies:

> This is not to say we would never accept behavioral remedies. In certain instances where an unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy, then there's a place for considering a behavioral remedy if it will completely cure the anticompetitive harms. It's a high standard to meet.[19]

Four days after that speech, the Justice Department filed its complaint seeking to enjoin the AT&T merger. What cannot be known at this point, if ever, is what caused Delrahim's apparent shift in position since his original televised comments about the deal 13 months earlier. It is certainly possible that he was influenced by the detailed investigation of the proposed merger done by the Justice Department staff, or perhaps by his meetings with AT&T and Time Warner executives where they refused to consider potential divestitures requested by the Justice Department. Legitimate questions about the effectiveness of the Comcast-NBCU behavioral remedies might have been another factor.

But it is difficult to ignore conjecture and concern that politics could have played some role in the challenge. During his Senate confirmation hearing, Delrahim said, "politics will have no role in antitrust enforcement."[20] Later, in answer to written questions from members of the Senate Judiciary Committee, Delrahim wrote, "I was not asked, nor have I provided, any

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[16] *Id.*

[17] Makan Delrahim, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[18] *Id.*

[19] *Id.*

[20] Liz Crampton, *Antitrust Nominee Pledges International Focus, Recusal*, May 11, 2017, ANTITRUST ON BLOOMBERG LAW, https://www.bna.com/antitrust-nominee-pledges-n73014450770/.

commitments or assurances regarding any potential enforcement actions or pending matters before the antitrust division. … I have had no conversations with the President regarding [AT&T-Time Warner]."[21]

Of course, it would not have been necessary for Delrahim to have a direct conversation with Trump to know his opinion of the case. Trump's outspoken opposition to the deal was major news, as was his general discontent with the Justice Department and his own Attorney General, Jeff Sessions. In fact, asked by a reporter about the lawsuit against AT&T the day after the suit was filed, Trump responded: "Personally, I've always felt that that was a deal that's not good for the country. I think your pricing is going to go up. But I'm not going to get involved. It's litigation."[22] The mixed messages contained in that one brief comment demonstrate why it is hard to know with any certainty whether or not politics could have influenced the Justice Department's decision to challenge the merger.

But if politics did play a role, apparently two sides can try to play that game. In December 2017, only hours after Congress passed the massive corporate tax cut championed by President Trump, AT&T announced that it would increase capital spending in the United States by $1 billion, and would pay a $1000 bonus to most of its employees once the bill was signed into law.[23] The commitment did not go unnoticed by Trump, who later that same day remarked: "AT&T plans to increase U.S. capital spending $1 billion and provide a special $1000 bonus to more than 200,000 U.S. employees, and that's because of what we did. That's pretty good. That's pretty good."[24]

Moreover, after the merger trial concluded, AT&T acknowledged that it had paid Essential Consultants LLC, the business formed in 2016 by Trump personal attorney Michael Cohen, $600,000 in consulting fees for "insights" into the new Trump Administration during its first year.[25] As no evidence of this arrangement had been presented at trial, it did not appear to play any role in the court's decision. However, the fact that AT&T was making consulting payments to the same firm that paid adult film actress Stormy Daniels $130,000 for her non-disclosure agreement involving Trump was a public relations embarrassment for AT&T.

Clayton Act on Mergers

In the United States, merger law is governed primarily by the Clayton Act of 1914, which was enacted with the purpose of stopping potential monopolies before they could be created.[26] Because mergers are one means that could lead to a monopoly, Section 7 of the Clayton Act directly addresses the issue of business combinations of various types. The broad and potentially flexible language of that section states:

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[21] Liz Crampton, *Here's What We Know About DOJ Antitrust Nominee's Views*, May 25, 2017, ANTITRUST ON BLOOMBERG LAW, https://www.bna.com/heres-know-doj-n73014451496/.

[22] Dylan Byers, *President Trump speaks on AT&T-Time Warner deal: "not good for the country,"* CNNMONEY, Nov. 21, 2017, http://money.cnn.com/2017/11/21/media/trump-comments-att-time-warner/index.html.

[23] Press Release, AT&T Inc., With Tax Reform, AT&T Plans to Increase U.S. Capital Spending $1 Billion and Provide $1,000 Special Bonus to more than 200,000 U.S. Employees (Dec. 20, 2017), http://about.att.com/story/att_tax_reform.html.

[24] Cristiano Lima, *Trump praises tax-related AT&T bonuses amid merger dispute,* POLITICO, Dec. 20, 2017, https://www.politico.com/story/2017/12/20/trump-att-tax-bonuses-merger-308656.

[25] Drew FitzGerald & Jonathan D. Rockoff, *Companies Paid Cohen $1.8 Million*, WALL ST. J., May 10, 2018, at A4.

[26] Pub. L. 63–212, 38 Stat. 730, *codified at* 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53. By contrast, the Sherman Act of 1890 primarily addresses collusion between companies and monopolistic behavior.

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital … of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[27]

It is important to note that this statutory language allows for rejecting a proposed merger that could fall far short of actually creating a monopoly. Rather, the legal standard set in Section 7 of the Clayton Act is whether the effect of the combination "may be substantially to lessen competition."[28] Merely the probability – not certainty – of substantial anticompetitive effects may be enough to block a merger, and the statute's wording leaves much to the interpretation of government regulators and federal courts.

However, there is only limited case law precedent on the issue of vertical mergers, as Judge Leon would note in his ruling.[29] In part that is because so few merger cases of any type – horizontal, vertical, or conglomerate – are fully adjudicated in the courts. For the businesses involved, an extended court review process is usually far too time-consuming to endure. Thus the initial administrative decision by government regulators is often more important practically than how the courts might interpret and apply Section 7 of the Clayton Act.

Even in the fairly rare setting when companies decide to fight a governmental attempt to block a merger, the case usually will go no further than the initial federal district court ruling. Appealing to higher courts would just extend the time the companies would be left in limbo over whether their merger would ever be allowed. Especially since the chances of overturning an initial trial court decision to enjoin a merger would not be good, most companies facing such a ruling choose either to give up on the planned merger entirely, or to accept whatever divestitures and conditions that government regulators might require to approve the merger.

Supreme Court Precedent

Recent Supreme Court precedent directly on vertical mergers is non-existent, in part due to a change of law. Federal law used to provide for direct appeal to the Supreme Court of a district court ruling in a civil antitrust case brought by the U.S. government, but that direct appeal right was eliminated in 1974.[30] Thus it is not surprising that the only three Supreme Court precedents directly on vertical mergers came before 1974. Further limiting the court precedents that might be useful in judging the AT&T-Time Warner case is that so few vertical mergers in recent decades have even been challenged by the government, at any court level. Especially since the rise of the Chicago School approach to antitrust law in the 1980s, the strong tendency of regulators has been to approve vertical mergers without a court challenge, or at most to require some conditions to gain government approval.

That is why AT&T executives often pointed out that the last successful court challenge to a vertical merger came in 1972, in the Supreme Court case of *Ford Motor Co. v. United States.*[31]

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[27] 15 U.S.C. § 18.
[28] *Id.*
[29] U.S. v. AT&T Inc., 2018 U.S. Dist. LEXIS 100023 (D.D.C. 2018), at 75.
[30] R. Hewitt Pate, Address at the British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004), https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court.
[31] Ford Motor Co. v. U.S., 405 U.S. 562 (1972).

That case arose because Ford, the second largest automaker in the United States, in 1961 had bought many of the assets of Electric Autolite, the nation's second largest spark plug manufacturer. The Federal Trade Commission then ordered Ford to divest the Autolite spark plug business. Both the district court and Supreme Court ruled against this vertical merger.[32] The high court's ruling was somewhat splintered, and two justices did not participate in the case. Still, all seven other justices agreed that Ford should divest the Autolite business. The only disagreements were over the rationale and the additional remedies beyond divestiture imposed by the lower court.

The majority opinion for four justices, written by Justice William O. Douglas, was not willing to consider Ford's argument that the purchase "had some beneficial effect in making Autolite a more vigorous and effective competitor" against two other spark plug makers.[33] That argument might have resonated more a decade later, as the Chicago School approach to antitrust law began to gain prominence in the federal courts. But in this 1972 case, the majority opinion cited precedent that a "merger is not saved from illegality under § 7 … because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."[34] Quoting from a 1963 precedent involving a horizontal merger in the banking industry, Douglas said of Section 7: "Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and malignant alike."[35]

The *Ford* ruling also cited an earlier Supreme Court decision in a merger with both vertical and horizontal aspects. In the 1962 case of *Brown Shoe Co. v. United States*, the court affirmed the government's effort to reverse Brown Shoe's acquisition of Kinney Co.[36] Brown Shoe was the fourth largest shoe manufacturer in the United States, as well as a retailer. Kinney had a small manufacturing business, but was primarily a retailer, with the nation's largest independent chain of family shoe stores. Kinney had bought no shoes from Brown Shoe before the merger, but Brown Shoe became the Kinney stores' largest outside supplier after the merger. Thus the merger combined supplier Brown Shoe with retailer Kinney, while also increasing concentration in the retail store market.

Noting the increased consolidation in the shoe industry, Chief Justice Earl Warren's majority opinion said that in "light of the trends in this industry we agree with the Government and the court below that this is an appropriate place at which to call a halt."[37] While the court considered both the vertical and horizontal aspects of the merger, the *Brown Shoe* ruling is significant for helping establish what remains a key factor in evaluating a vertical merger – the likelihood for foreclosed competition due to the merger. Warren wrote:

> The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition," which "deprive[s] … rivals of a fair opportunity to compete" (internal citations omitted).[38]

The only other Supreme Court precedent on vertical mergers is the 1957 case of *United States v. E.I. du Pont de Nemours & Co.*[39] This case involved the purchase by du Pont, a maker

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[32] *Id.*
[33] *Id.* at 569-70.
[34] *Id.* at 570, *quoting from* U.S. v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).
[35] *Id.*
[36] Brown Shoe Co., Inc. v. U.S., 370 U.S. 294 (1962).
[37] *Id.* at 346.
[38] *Id.* at 323-24.

of automotive finishes and fabrics, of 23 percent of the stock of General Motors, a du Pont customer and the nation's largest automaker. Notably, the du Pont stock purchases were made between 1917 and 1919, but the government did not bring its antitrust suit until three decades later, in 1949. In this case, the district court had rejected the government's antitrust suit, but the Supreme Court found a Clayton Act violation and reversed the lower court ruling.

The *du Pont* case was important for clearly establishing that Section 7 of the Clayton Act applies to vertical mergers, as well as horizontal ones. The court said that was true despite the fact that the FTC had not previously brought any vertical merger cases since the Clayton Act became law in 1914. As for the anticompetitive effect of du Pont's stock ownership of GM, the majority opinion by Justice William Brennan noted:

> The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest, and was not gained solely on competitive merit.[40]

It is useful to note that all three opinions were written by liberal icons of the Supreme Court's Warren Court era – Justices Douglas, Brennan, and Warren himself. Whether these decades-old precedents would remain significant today, in a more conservative judicial era, is uncertain. However, they are the only Supreme Court precedents available, and in all three cases the U.S. government was successful in undoing mergers or acquisitions.

Justice Department's Arguments

This lack of recent precedent on vertical mergers may have made it more difficult for the Justice Department to develop its legal arguments for blocking the merger. Antitrust law has changed greatly in the past 40 years, and the media and communications industries are evolving at a much faster pace than antitrust law. Still, the Justice Department's November 2017 press release to announce the lawsuit put its case in the best possible light. While most media reports initially valued the deal at $85.4 billion, the Justice Department labeled it a $108 billion acquisition by including Time Warner's assumed debt. The press release noted that the combination would be "one of the largest mergers in American history," and contended that it would result in "higher prices and less innovation for millions of Americans."[41] It called AT&T "the largest telecommunications company in the world," and pointed out that Time Warner's "most popular networks reach over 90 million households – of the nearly 100 million households that subscribe to traditional subscription television."[42]

However, the official court complaint was somewhat weaker than the press release. Of course, it made the requisite Clayton Act argument that the merger would violate Section 7 because the combination's effect "may be substantially to lessen competition."[43] But the complaint itself was a relatively brief 23 pages, and still managed to seem mildly repetitive at times. The arguments for blocking the merger were far from overwhelming.

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[39] U.S. v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).
[40] *Id.* at 605.
[41] Press Release, Dep't of Justice, Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner (Nov. 20, 2017), https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner.
[42] *Id.*
[43] Complaint at 2, U.S. v. AT&T, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017).

The complaint noted that AT&T's 25 million video subscribers (most through its ownership of DirecTV) make it the nation's largest multichannel video programming distributor, or MVPD. That is part of the "Multichannel Video Distribution" product market identified by the government, and later accepted by Judge Leon.[44] The complaint was careful to recount past antitrust issues encountered by AT&T, which itself is the result of a Baby Bell, Southwest Bell, purchasing the original Ma Bell, two decades after the breakup of the original AT&T. As for Time Warner, the government alleged that it had "market power" – generally speaking, the power to exclude competitors or control prices – due to Time Warner's ownership of three of the top five basic cable networks, its highly valuable sports rights and news programming, and the No. 1 premium cable network, HBO.

Using AT&T's own words against it, the Justice Department complaint contended that "the newly combined firm likely would – just as AT&T/DirecTV has already predicted – use its control of Time Warner's popular programming as a weapon to harm competition."[45] Specifically, the government argued that a combined AT&T-Time Warner would have the power and leverage to raise prices for Time Warner programming to competing video distributors.[46] If the DirecTV competitor refused to pay the higher price, even though that would initially cost AT&T some immediate revenue, the government alleged that AT&T could attempt to use the removal of those channels on a competing video service to convert some of that competitor's customers to DirecTV subscribers. If instead the competitor paid the higher prices demanded for Time Warner networks, those higher costs would likely be passed on to consumers. The inference was that AT&T would win either way, and consumers would likely pay more.

The government's second major contention addressed the potential anticompetitive effect on emerging competitors in the online distribution industry, such as Netflix and Amazon Prime. In the Justice Department's view, the combined AT&T-Time Warner would be able to "impede disruptive competition from online video distributors – competition that has allowed greater choices at cheaper prices."[47]

An argument that seemed to have more potential was almost buried near the end of the complaint – the overall trend of consolidation of various levels of the industry. Once again relying on AT&T's own words, the government contended that "after the merger, the merged company and just three other companies would control a large portion of all three levels of the industry: television studio revenue, network revenue, and distribution revenue."[48] Further, the two biggest players, Comcast and AT&T, would have almost half of the nation's MVPD customers. The result would be increased concentration of ownership within the industry as a whole, and the potential for coordination and oligopolistic behavior in the future.

Defense Arguments

The answer filed by AT&T and Time Warner demonstrated more vigor, at least, than the Justice Department's complaint. Despite contending that the government's use of their own words against them had been taken out of context, the companies returned the favor by quoting from the Justice Department's statements in allowing the Comcast-NBC Universal merger to

[44] *Id.* at 13.
[45] *Id.* at 2.
[46] *Id.* at 3-4.
[47] *Id.* at 6.
[48] *Id.* at 20.

happen. In fact, that was a central theme of their response – the government allowed a similar merger to occur, so it should not now change course and block this merger. Asserting "improper selective enforcement of the antitrust laws," AT&T and Time Warner said that "the merging parties cannot explain the Government's abrupt departure from precedent."[49] The defendants did not directly allege political influence in the answer, and the judge ultimately did not allow that political question to be raised at trial. Nevertheless, this language in the answer appeared to be a veiled reference to the issue.

On the specific legal issues related to the Clayton Act, the companies insisted that neither AT&T nor Time Warner has sufficient market power needed to invoke Section 7 to block a vertical merger. "This is not a vertical combination of two firms with an imposing market share or anything near it," the answer stated.[50]

As for whether AT&T could use Time Warner's programming to harm DirecTV's cable competitors, the government's argument was viewed as impractical from a business standpoint. Logically, AT&T would want the viewing audience for its Time Warner networks to be as large and broad-based as possible, making it unlikely that it would charge such high prices that other distributors would refuse to carry Time Warner programming. Still, the companies offered a proposed solution for the government's concern. Using the same terms that the Justice Department had agreed to in the Comcast-NBCU merger, AT&T committed to offer binding arbitration of any Time Warner network price disputes with other distributors for seven years after the merger closes. Further, it promised not to "go dark" by removing Time Warner networks from DirectTV's rival distributors during that time.

Regarding the potential anticompetitive effect on emerging online competitors, critics of the government's case noted that online providers such as Netflix with 125 million customers and Amazon Prime with 100 million are much stronger than just emerging competitors. Moreover, disruption to the industry has already happened, and the rapidly growing trend toward cord-cutting and over-the-top options for programming shows the limits on the potential market power of AT&T. Similarly, AT&T and Time Warner in their answer cited the video programming efforts of Netflix, Amazon, Apple, Google, and Facebook to demonstrate that the way consumers watch television "has radically and irreversibly changed" in just the past seven years since the Comcast-NBCU merger.[51]

As a result, AT&T and Time Warner argued that their merger would in fact be "a pro-competitive, pro-consumer response to an intensely competitive and rapidly changing video marketplace."[52] In essence, they argued that this merger was needed to allow AT&T to better compete against their powerful new rivals in the video distribution business.

Trial Court's Ruling

The non-jury trial before District Court Judge Leon began on March 19, 2018, and concluded six weeks later on April 30. Appointed to the court by President George W. Bush in 2002, Leon is a former Justice Department attorney, congressional staffer, and law firm partner.

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[49] Answer at 4, 28, U.S. v. AT&T, No. 1:17-cv-02511 (D.D.C. Nov. 28, 2017).
[50] *Id.* at 2.
[51] *Id.* at 1.
[52] *Id.* at 2.

Legal observers say he has developed "a reputation for his assertive and often brusque approach that cuts across ideological lines."[53]

The trial featured dueling testimony by economics experts for each side, in particular on the likely effect on prices if the merger happened. The chief executive officers of AT&T and Time Warner, Randall Stephenson and Jeffrey Bewkes respectively, both testified in defense of the merger. They reiterated the argument that the merger was needed to aid the companies to compete in the evolving industry, rather than to harm and dominate their competitors.

In general, most observers of the trial thought that the defense testimony was stronger than the government's case.[54] That view was unintentionally reinforced by the government's closing argument, when the Justice Department's lead attorney provided the judge with other options to consider, should he choose not to block the entire merger. As a *Wall Street Journal* editorial opined: "You can tell a lawyer is losing a case when he offers the court an exit ramp even before the verdict. That's how the Justice Department is trying to save its floundering antitrust case against an AT&T-Time Warner merger."[55]

Those commentators proved to be correct. On June 12, 2018, six weeks after the end of the trial, Judge Leon denied the government's request for an injunction to block the merger. His 172-page ruling forcefully and thoroughly rejected the Justice Department's arguments, while also questioning the reliability of much of the government's expert testimony. In a sign of the judge's apparent exasperation with portions of the Justice Department's case, his lively worded opinion would occasionally throw in a "Please!" or "Poppycock!" comment following his recitation of some government contention.[56]

The opinion began with a brief history of the merger and a discussion of both industry trends and the legal rules applicable to the case. Judge Leon then meticulously examined the evidence presented by the government, including testimony from industry competitors and expert testimony from a well-known antitrust economist. Occasionally, he would acknowledge a few minor evidentiary points made by the government in support of its arguments. But far more frequently, he would find the evidence presented by the government to fell far short of what was needed to carry its burden of proof to block the merger. Judge Leon rejected the government's various arguments for why the merger might raise prices, hurt competitors, or otherwise be likely to substantially lessen competition. Quoting at times from the government's own Non-Horizontal Merger Guidelines, Leon summarized his ruling:

> To sum up, the Court accepts that vertical mergers "are not invariably innocuous," but instead can generate competitive harm "[i]n certain circumstances." … The case at hand therefore turns on whether, notwithstanding the proposed merger's conceded pro-competitive effects, the Government has met its burden of proof of establishing, through "case-specific evidence," that the merger of AT&T and Time Warner, at this time and in this remarkably dynamic industry, is likely to substantially lessen competition in the manner it predicts. Unfortunately for the Government … it did not meet its burden.[57]

Interestingly, Leon did not stop there. In what could be interpreted as a rebuke against the Justice Department, the judge strongly advised the government against seeking a stay of his

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[53] Jacob Gershman, *AT&T-Justice Department Clash Puts Outspoken Judge Back in Spotlight*, WALL ST. J., Nov. 27, 2017, https://www.wsj.com/articles/at-t-justice-department-clash-puts-outspoken-judge-back-in-spotlight-1511778600.

[54] *See, e.g.*, *Trump's Antitrust Bust*, WALL ST. J., May 2, 2018, at A16.

[55] *Id.*

[56] U.S. v. AT&T Inc., 2018 U.S. Dist. LEXIS 100023 (D.D.C. 2018), at 141, 143.

[57] *Id.* at 76-77.

court order, which would further delay the long-pending merger. While he fully recognized the government's right to appeal his ruling, Judge Leon opined that "a stay pending appeal would be a manifestly unjust outcome in this case. … As such, I could not, and would not, grant such a stay … I hope and trust that the Government will have the good judgment, wisdom, and courage to avoid such a manifest injustice."[58]

The Justice Department got the message, choosing not to seek a stay of his ruling once AT&T committed to operate the Time Warner cable networks as a separate business unit until 2019. That would make it somewhat easier to unwind the combination later, should the decision be reversed on appeal. Thus AT&T completed the merger on June 14, nearly 20 months after the deal was first announced. But the legal dispute is still not over, as the Justice Department filed an appeal to the D.C. Circuit Court of Appeals on July 12, one month after the trial court's ruling.[59] Even with an expedited appeal, it will likely be many more months before the case is decided by the D.C. Circuit. By appealing, the Justice Department may be signaling that it remains deeply concerned about vertical mergers, and wants to discourage other companies from pursuing similar deals. Moreover, one might conclude that the antitrust division has little to lose by appealing the adverse ruling, and much to gain if it could overturn Judge Leon's decision. That is not necessarily the case, for several reasons.

First, since Leon's decision was based primarily on the facts of the case, rather than legal principles alone, it will likely be difficult to convince the D.C. Circuit to overturn the trial judge. Further, the ruling of one federal district court judge based mainly on the evidence presented at trial has only limited precedential value. By contrast, if the D.C. Circuit affirms that decision, that will leave a far more significant court precedent against the position of the Justice Department antitrust division. At least on federal regulatory matters, the D.C. Circuit is arguably the second most important court in the nation, just below the Supreme Court. Finally, bringing what appears to be a long-shot appeal after suffering such a complete defeat at the trial court might reinvigorate speculation that the government's continuing effort to block the now-completed merger was motivated by political influence or by an effort to punish media critics of the Trump Administration. In the long run, the Justice Department's better approach might have been to cut its losses – to let the trial court decision stand, and then try to explain it away as an aberration based on the specific facts of the case and the views of the individual judge involved.

Far-Reaching Implications

If the Justice Department had won at trial against AT&T, that very likely would have put a damper on the mergers and acquisition world. At a minimum, it would have made companies still seeking to merge more willing to make divestitures or other concessions to gain Justice Department approval without a court battle. But it is less certain that AT&T's victory to date will have the opposite result – spurring much greater consolidation, especially in the media and telecommunications field. That is because Judge Leon's ruling focused primarily and specifically on weaknesses in the government's case against AT&T's merger, rather than on interpreting case law or analyzing anticompetitive concerns raised by vertical mergers more generally. This point is highlighted by the court's own words, as Judge Leon wrote: "But the

[58] *Id.* at 220-22.
[59] Brent Kendall & Drew FitzGerald. *U.S. Again Seeks to Halt AT&T Merger*, WALL ST. J., July 13, 2018, at A1.

temptation by some to view this decision as being something more than a resolution of this specific case should be resisted by one and all!"[60]

Still, the favorable outcome for AT&T was definitely encouraging to other large companies already considering or seeking approval for vertical mergers, and that may have factored into the government's decision to appeal. In particular, two predominantly vertical pending mergers in the healthcare field may be affected by the result. In December 2017, just two weeks after the Justice Department moved to block the AT&T merger, drug store chain CVS Health Corp. agreed to buy health insurer Aetna Corp. in a $69 billion deal.[61] Then in March 2018, insurance giant Cigna Corp. announced a $52 billion acquisition of Express Scripts Holding Co., a pharmacy benefit manager.[62] Now that AT&T has prevailed at trial, the antitrust division may need to be more cautious in challenging future vertical mergers, not wanting to suffer another defeat. However, healthcare is another sensitive industry, like the media, and the potential effect of these proposed mergers on healthcare prices will have to be considered.

Horizontal mergers could also be impacted by the AT&T ruling, though in a less direct manner. In the telecommunications world, T-Mobile US Inc. in April 2018 announced plans to buy Sprint Corp., which would combine the No. 3 and No. 4 wireless carriers in a four-company nationwide market.[63] Normally, any "4 to 3" horizontal merger would face stiff antitrust scrutiny, especially when one of the merging companies had been an aggressive cost-cutter like T-Mobile. Further, in 2011 the Obama Justice Department blocked AT&T's effort to buy T-Mobile, which would have combined what were then the second and fourth largest wireless companies. The argument in support of the new T-Mobile-Sprint deal is that allowing the merger of two weaker players could create a stronger competitor to the two real powerhouses in the wireless business, Verizon and AT&T. Now that AT&T has merged with Time Warner, there may be an even better argument for creating a more powerful competitor to AT&T. On the other hand, if the Justice Department is looking for a more winnable merger case to improve its court record, this "4 to 3" horizontal merger would be a prime choice for its next challenge.

The AT&T case also tangentially affected a horizontal merger involving two of the former Time Warner's programming competitors. The Walt Disney Company in December 2017 agreed to buy many of the entertainment assets of 21st Century Fox Inc. for $52 billion.[64] Fox had previously turned down a higher offer from Comcast, in part because of concerns by Fox that a vertical combination with the more diversified Comcast might not receive antitrust approval.[65] After waiting for the result of the AT&T trial, Comcast was encouraged enough by that outcome to announce a $65 billion offer for the same Fox assets one day after Judge Leon's ruling.[66] Disney responded by raising its offer to $71 million the following week, and the Fox board accepted the higher offer from Disney.[67]

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[60] U.S. v. AT&T Inc., 2018 U.S. Dist. LEXIS 100023 (D.D.C. 2018), at 222.

[61] Michael J. de la Merced & Reed Abelson, *Buying Aetna, CVS Envisions a Shift in Care*, N.Y. TIMES, Dec. 4, 2017, at A1.

[62] Katie Thomas, Reed Abelson & Chad Bray, *Cigna to Pay $52 Billion to Diversify*, N.Y. TIMES, Mar. 9, 2018, at B1.

[63] Drew FitzGerald & Brent Kendall, *Sprint-T-Mobile Face Tough Sell*, WALL ST. J., May 1, 2018, at B1.

[64] Ben Fritz, Amol Sharma & Sarah Rabil, *Disney and Fox Seal Deal*, WALL ST. J., Dec. 15, 2017, at A1.

[65] Shalini Ramachandran & Ben Fritz, *Fox Rejected Bid on Antitrust Fear*, WALL ST. J., April 19, 2018, at B1.

[66] Shalini Ramachandran & Erich Schwartzel, *Comcast Challenges Disney for Fox*, WALL ST. J., June 14, 2018, at A1.

[67] Keach Hagey & Erich Schwartzel, *Fox Accepts Disney's Cash-Enhanced Bid*, WALL ST. J., June 21, 2018, at A1.

Even before Comcast had decided not to continue the bidding war for the Fox assets, the Justice Department approved the proposed Disney-Fox combination in late June – only six months after the deal was originally announced.[68] The approval was conditioned on Disney's agreement to divest 22 regional sports networks owned by Fox, as Disney already owns the ESPN networks. One possible explanation for the different result from the AT&T merger is that Disney and Fox agreed to a significant divestiture of overlapping assets, while AT&T and Time Warner refused to accept similar conditions for their deal. On the other hand, the relatively quick approval for the Disney-Fox deal has once again reignited conjecture about political influence in the merger review process.[69] That is because the Justice Department has now approved a *horizontal* merger involving 21st Century Fox, controlled by Trump friend and Fox News Channel executive chairman Rupert Murdoch, while continuing to try to block a *vertical* merger involving Time Warner's CNN, perceived to be a critic of Trump.

Conclusion

The Justice Department's attempt to block the AT&T-Time Warner combination was unusual from a historical perspective, but not unprecedented. Judge Leon colorfully summarized that point in a pretrial order, writing of the government's challenge of a vertical merger: "So while it may, indeed, be a rare breed of horse, it is not exactly a unicorn."[70] The merger challenge was at least theoretically plausible in terms of the potential anticompetitive effects of combining two powerful communications and media companies, and in the process creating two industry superpowers in AT&T-Time Warner and Comcast-NBCU. However, from a practical standpoint, the government's legal arguments and trial testimony did not present a strong case against the merger, as Judge Leon's ruling made clear.

It should also be noted that Assistant Attorney General Delrahim, a few days before the judge's ruling, said the Justice Department's AT&T lawsuit should not be seen as a "bellwether to new vertical merger views."[71] He noted that some vertical mergers can benefit consumers, adding: "There is concern that the antitrust division no longer believes vertical mergers can be beneficial. These concerns are misplaced."[72] Further, the approval of the horizontal Disney-Fox merger, though conditioned on divestitures, adds to the mixed messages being sent by the Trump Justice Department's antitrust division to date.

Until the D.C. Circuit rules on the AT&T appeal, it is too early to say just how significant Judge Leon's ruling will be on future merger reviews and on antitrust law in general. A federal court ruling to block AT&T's merger would have been a potential landmark decision, in terms of both legal precedent and regulatory review. But Judge Leon's ruling in favor of AT&T could still be explained away as an anomaly – based on either a potentially flawed decision by the

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[68] Press Release, Dep't of Justice, The Walt Disney Company Required to Divest Twenty-Two Regional Sports Networks in Order to Complete Acquisition of Certain Assets from Twenty-First Century Fox (June 27, 2018), https://www.justice.gov/opa/pr/walt-disney-company-required-divest-twenty-two-regional-sports-networks-order-complete.

[69] *See, e.g.,* Editorial Board, *The Disney-Fox Deal Sails Through*, N.Y. TIMES, July 1, 2018, at A22.

[70] Brent Kendall, *Judge Denies AT&T Access to Government Discussions on Time Warner*, WALL ST. J., Feb. 20, 2018, https://www.wsj.com/articles/judge-denies-at-t-bid-for-information-on-internal-government-discussions-about-time-warner-deal-1519156444.

[71] Victoria Graham, *Disney-Fox Deal "Carved Out Surgically" to Pass: Antitrust Cop*, ANTITRUST ON BLOOMBERG LAW, June 7, 2018, https://www.bna.com/disneyfox-deal-carved-n73014476329/.

[72] *Id.*

government to challenge the merger in the first place, or on the weakness of the government's case as presented at trial. Further, the rapid disruption already happening in the video distribution industry might be another argument for limiting the AT&T decision to the specific facts of that one case.

Still, the Justice Department suffered a painful defeat at the AT&T trial, while the big winners to date are AT&T and Time Warner. AT&T now owns and can benefit from the content of the Time Warner cable networks and Warner Bros. movie studio. But in terms that those Warner Bros. executives might appreciate, it remains to be seen whether AT&T's court victory will be a one-time blockbuster with no sequel, or instead the first episode in a continuing series of regulatory rulings that could change the tone of merger reviews. Until that is known with certainty, businesses may still have to wonder if the "art of the deal" in the merger world has entered a new regulatory or even political regime.