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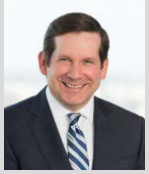

Sister Company Liability for Antitrust Conspiracies: Open Questions in Reconciling *Copperweld* and *Twombly*

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I. INTRODUCTION

In today's modern business world, where companies often have complex corporate structures with numerous subsidiaries, holding companies and disparate business forms across the world, plaintiffs often allege antitrust claims against multiple affiliated defendants sharing at least some degree of common ownership or control. When plaintiffs allege claims against affiliated defendants under Section 1 of the Sherman Act, which prohibits contracts, combinations and conspiracies in restraint of trade,[1] two questions frequently arise. The first is whether the affiliated companies are legally capable of conspiring. The second is whether the plaintiff sufficiently pleads facts plausibly showing that each affiliated company individually joined a conspiracy.

Taken separately, the U.S. Supreme Court has provided relatively straightforward answers to each question. On the first, the Court held in *Copperweld Corp. v. Independence Tube Corp.*[2] that a parent company and its wholly-owned subsidiaries are legally incapable of conspiring with each other because they constitute a single enterprise under the antitrust laws.[3] On the

[1] 15 U.S.C. § 1.
[2] 467 U.S. 752 (1984).
[3] *See id.* at 771, 777.

second, the Court concluded in *Bell Atlantic Corp. v. Twombly*[4] that to state a Section 1 claim, a complaint must contain "enough [non-conclusory] factual matter (taken as true) to suggest an agreement was made" and "plausible grounds to infer an agreement" by a defendant.[5] In so ruling, the Court suggested in a footnote that a complaint cannot simply "furnish[] no clue" as to which defendant entered an agreement "or when and where the illicit agreement took place."[6]

Both lines of authority frequently intersect in cases involving conspiracy claims against multiple affiliated companies. Suppose, for instance, that a plaintiff alleges that a global parent company dominates and closely controls all of its wholly-owned subsidiaries such that they constitute a "single enterprise," but only presents facts suggesting a foreign subsidiary joined a conspiracy and nothing implying a U.S. subsidiary did.

In that scenario, should a court hold that a plaintiff may state a claim against the U.S. sister company based on the affiliate's acts because they are part of a "single enterprise" under *Copperweld*? Or should a court instead hold that the plaintiff must present factual allegations suggesting *each* affiliated company joined or participated in a conspiracy under *Twombly*?

Faced with reconciling *Copperweld* and *Twombly*, courts have struggled with those questions and have reached decisions in considerable tension with each other. Until the U.S. Supreme Court clarifies a plaintiff's burden in presenting allegations against multiple affiliated companies that allegedly are part of a "single enterprise," companies with complex corporate structures would be well-advised to monitor developments in the case law and be cognizant of the different approaches courts have taken.

Below, this Article discusses general principles of corporate liability under *Copperweld*, which form a backdrop to "single enterprise" theories asserted by some plaintiffs. The Article then summarizes examples of two divergent lines of authority weighing in different directions on whether a sister company can be held liable for an affiliate's conduct. It concludes by identifying a number of open questions that might arise in litigation over a sister company's liability for an affiliate's actions in a Sherman Act conspiracy.

II. GENERAL PRINCIPLES OF CORPORATE LIABILITY UNDER COPPERWELD

The U.S. Supreme Court held in *Copperweld* that "as a matter of law, a corporation and its wholly owned subsidiaries 'are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.'"[7] In so ruling, the Court reasoned, in part, that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise," because both shared "a complete unity of interest."[8] The Court added that a parent and a wholly owned subsidiary also "share a common purpose"

[4] 550 U.S. 544 (2007).
[5] *Id.* at 556-57.
[6] *Id.* at 565 n.10.
[7] ABA Section of Antitrust Law, *Antitrust Law Dev.* 31 (8th ed. 2017) (quoting *Copperweld*, 467 U.S. at 777).
[8] *Id.* at 771.

because "the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."[9] Based on the Court's reasoning in *Copperweld*, many lower courts have recognized that wholly-owned sister companies are incapable of conspiring with each other.[10] As the U.S. Court of Appeals for the Tenth Circuit recently put it, wholly-owned sister companies, "along with their parent, constitute a single economic enterprise for antitrust purposes."[11]

A very different question, however, is whether a sister company may be liable for the conspiratorial acts of affiliated companies that are neither parents nor subsidiaries. In other words, can affiliated corporate defendants simultaneously assert that they are a single enterprise such that they are legally incapable of conspiring with each other under *Copperweld*, but different entities such that plaintiff must allege "specifics as to the role each played in the alleged conspiracy" under *Twombly*?[12]

III. AUTHORITY SUGGESTING SISTER COMPANY LIABILITY

Some cases suggest that in certain circumstances, courts may consider an entire corporate family to constitute a single enterprise (i.e., that all members of the corporate family, including the parent and all subsidiaries, are alter egos of each other) such that individualized allegations regarding each affiliate's decision to join and role in a Sherman Act conspiracy might be unnecessary.

Perhaps the most notable example in the Section 1 context is the U.S. Court of Appeals for the Sixth Circuit's opinion in *Carrier Corp. v. Outokumpu Oyj*.[13] There, the Sixth Circuit suggested that when a plaintiff alleges that a parent company operated an entire corporate family as a single enterprise through domination and control, detailed factual allegations about each affiliate's role in a conspiracy might be unnecessary.

In *Carrier Corp.*, the plaintiff alleged Section 1 claims against two Finnish parent companies and their U.S. subsidiaries.[14] According to the complaint, the European Commission found that the two Finnish parent companies had participated in a price-fixing and market allocation conspiracy in Europe.[15] The complaint further alleged that the ultimate Finnish parent company "had effective control over the commercial policy and business decisions of its subsidiaries, and did business through its subsidiaries."[16]

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[9] *Id.* at 771-72.

[10] *See, e.g.*, *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1233 (10th Cir. 2017) ("[T]he majority of our sister circuits (indeed, every circuit to address the question) . . . have held that *Copperweld*'s rationale and underlying policy apply with equal force to sister corporations that are wholly owned subsidiaries of the same parent . . . ." (citations and internal quotation marks omitted)); ABA Section of Antitrust Law, *supra*, at 32 ("Most courts have held that the *Copperweld* rule extends to agreements between sister corporations.").

[11] *Lenox*, 847 F.3d at 1233.

[12] *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008); *see also In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1170 (D. Idaho 2011) (discussing case law "holding that an antitrust plaintiff must 'allege that each individual defendant joined the conspiracy and played some role in it . . . ." (quoting *In re Elec. Carbon Prods.*, 333 F. Supp. 2d 303, 311-12 (D.N.J. 2004)).

[13] 673 F.3d 430 (6th Cir. 2012).

[14] *See id.* at 435.

[15] *See id.*at 435-36.

[16] *Id.* at 435.

On appeal, the Sixth Circuit held that the absence of direct allegations regarding the U.S. subsidiaries was not dispositive of the Section 1 claims against them.[17] Rather, the court explained that, in its view, "the court may look beyond th[e] entities' corporate forms if the complaint presents facts to support a determination that the subsidiaries were alter egos of the parent corporation."[18] According to the court, the relevant question was whether the Finish companies' control "was sufficiently extensive to permit imputation of the conspiracy to the U.S. entities."[19]

Deeming the "[m]ost important[]" allegation to be "that the various [defendant] entities were operated and deliberately portrayed to the outside world as a 'single global enterprise'" with overlapping, rotating personnel between the U.S. and European entities, the court held that "[u]nder such circumstances, requiring [plaintiff] to delineate in the complaint the role each subsidiary played in the conspiracy is unnecessary."[20] Accordingly, the court held that the plaintiff had stated a viable Section 1 claim against the U.S. subsidiaries.[21]

Relying on *Carrier Corp.*, a district court reached a similar holding in *In re Automotive Parts Antitrust Litigation*.[22] In that case, the court denied the defendants' motion to dismiss and held that "[b]ecause the complaints must be viewed as a whole, detailed allegations about the involvement of each [subsidiary] are not needed" in light of allegations that the parent company coordinated and controlled its two subsidiaries.[23]

Additionally, a few cases involving claims under Section 2 of the Sherman Act, which prohibits unlawful monopolization, attempted monopolization and conspiracies to monopolize,[24] suggest that a single enterprise theory might be viable in some circumstances to hold sister companies liable for affiliates' acts in Section 1 cases. In *In re Zinc Antitrust Litigation*, for instance, the district court held that two affiliates of a global conglomerate "cannot have it both ways," by arguing that they cannot conspire with each other under *Cooperweld*, but then argue that "[one] may not be individually liable for playing a direct and key role in [the other's] ability to control prices in a market in which it competes."[25] In so ruling, the court stated that, in its view, "neither *Copperweld* nor its progeny state that corporate affiliates may never be treated together where the allegations indicate that such treatment is appropriate."[26]

Similarly, in *Lenox MacLaren Surgical Corporation v. Medtronic, Inc.*, the U.S. Court of Appeals for the Tenth Circuit held that "*Copperweld*'s reasoning necessarily denounces Defendants' belief that [plaintiff] could directly

[17] *See id.* at 444-46.
[18] *Id.* at 445 (citations omitted).
[19] *Id.*
[20] *See id.* at 445-46.
[21] *See id.* at 446.
[22] No. 12-md-02311, 2013 WL 2456613 (E.D. Mich. June 6, 2013).
[23] *Id.* at *1, 4.
[24] *See* 15 U.S.C. § 2.
[25] No. 14-cv-3728 (KBF), 2016 WL 3167192, at *14 (S.D.N.Y. June 6, 2016).
[26] *Id.* at *21.

establish its non-conspiracy § 2 claims only by proving that '*specific* Defendants independently satisfied each necessary element of the claims.'"[27] Instead, the Tenth Circuit explained that "in a single-enterprise situation, it is the affiliated corporations' collective conduct—i.e., the conduct of the *enterprise* they jointly compose—that matters; it is the *enterprise* which must be shown to satisfy the elements of a monopolization or attempted monopolization claim."[28]

IV. AUTHORITY SUGGESTING NO SISTER COMPANY LIABILITY

In contrast, a number of courts have dismissed cases against sister companies where no facts suggested they knew of or joined a conspiracy in which an affiliate allegedly participated. Reasoning that a plaintiff cannot simply group together related corporate entities, those courts have instead held that to state a viable Section 1 claim, a complaint must contain factual allegations suggesting *each* affiliate's role in a conspiracy.[29]

In *Processed Egg Products*, a district court held that class plaintiffs had failed to state a claim against three entities (Hillandale Gettysburg L.P., Hillandale Farms Inc., and Hillandale Farms East, Inc.) because the plaintiffs did not allege specific facts connecting each entity to the overarching entity or satisfy the requirements to impute another affiliated entity's (Hillandale Farms) liability to them.[30] In so ruling, the court rejected application of the "single enterprise" theory as "unsupported by legal authority" and insufficient to disregard their separate corporate forms.[31]

Although the complaint "alleged conduct that ostensibly advanced the conspiracy to 'Hillandale Farms'" (e.g., allegedly signing a commitment sheet to either reduce flock size or dispose of hens), it did not directly allege that any of the three other defendants "individually agreed to or participated in the conspiracy to reduce the supply of eggs."[32] The plaintiffs maintained that doing so was unnecessary because the complaint alleged "that through vertical integration and overlapping owners and management each of the [four] entities is a part of an integrated enterprise."[33]

The court rejected the plaintiffs' argument for several reasons.[34] *First*, the court explained that, in its view, the U.S. Court of Appeals for the Third Circuit had rejected a virtually identical argument line of argument by holding that "it does not follow from *Copperweld* that subsidiary entities are automatically liable under § 1 for any agreements to which the parent is a party," and other

[27] 847 F.3d 1221, 1236 (10th Cir. 2017).
[28] *Id.* (citation omitted). *But see id.* at 1237 (explaining that a corporation cannot be held liable under Section 2 "merely by virtue of its place in the same corporate family" without evidence of its involvement in the challenged conduct).
[29] *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.44 (3d Cir. 2010) ("As a matter of well-settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship.").
[30] 821 F.Supp.2d 709 at 745.
[31] *Id.* at 749.
[32] *Id.* at 746-47.
[33] *Id.* at 747-48.
[34] *Id.* at 748.

courts have similarly rejected attempts "to draw a 'single enterprise' theory from *Copperweld*."[35] *Second*, the court held that allegations of vertical integration and overlapping ownership and control did not intimate that the three entities were "so linked that they effectively function as [a] single entity with respect to alleged antitrust conduct."[36] Thus, the court concluded that the allegations did not plausibly suggest that the three entities were "under common ownership or control such that a single decision-making source exercises definitive control over each of them."[37] *Lastly*, the district court noted that "the mere 'fact that two corporations have common shareholders, officers or directors, or that their names are similar,' does not 'impose liability on one for the torts of the other or its agents."[38]

Similarly, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*,[39] another district court considered whether a plaintiff had stated a claim against a related corporate entity. There, Defendant Philips Electronics North America Corporation ("PENAC") moved for dismissal, arguing that the complaint did not contain any allegations suggesting its participation in an alleged price-fixing conspiracy.[40] PENAC was allegedly a wholly-owned subsidiary of Philips International B.V., which in turn was allegedly a wholly-owned subsidiary of Royal Philips Electronics N.V. ("Royal Phillips"), an alleged co-conspirator.[41] Plaintiffs responded, in part, that they had stated a claim based on allegations that Royal Phillips and Royal Phillips' joint venture LG Display had agreed with other defendants to fix prices.[42]

The court concluded that the complaint fell short of alleging PENAC's role in the alleged conspiracy, because it contained no allegations suggesting how PENAC had participated.[43] In addition, the court held that the allegations regarding Royal Phillips and LG Display were insufficient to connect PENAC to the alleged conspiracy.[44] Although the court noted that the complaint "need not include elaborate detail about PENAC's role," the complaint was insufficient because it did not specifically plead that PENAC had joined the conspiracy.[45] Accordingly, the district court granted PENAC's motion to dismiss.[46]

V. CONCLUSION AND OPEN QUESTIONS

As shown above, a sister's company's Section 1 liability for conspiracies in which affiliates allegedly participated raises a host of difficult questions and divergent authority in reconciling *Twombly* and *Copperweld*, particularly when plaintiffs present "single enterprise" theories. Perhaps unsurprisingly given

[35] *Id.* (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 341 n.44).
[36] *Id.* at 749.
[37] *Id.* (citations omitted).
[38] *Id.* (citing 10 *Fletcher Cyclopedia of the Law of Corp.* § 4878).
[39] Nos., 07-1827 SI, 09-5609 SI, 2010 WL 2629728 (N.D. Cal. June 29, 2010).
[40] *Id.* at *6.
[41] *Id.*
[42] *Id.* at *7.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at *8.

the unsettled state of the case law, a number of open questions might arise in litigating "single enterprise" arguments against sister companies. Below are several examples:

- What role do traditional corporate veil-piercing principles play if plaintiffs allege a "single enterprise" theory? To hold a sister company liable, after all, a court would need to engage in "triangular" veil piercing (through veil-piercing[47] from an affiliate to a parent, and then reverse veil-piercing[48] a parent's veil to reach a sister company), an approach that some jurisdictions have expressly rejected.[49]

- If veil-piercing rules still apply, what choice of law rules should govern, especially in cases involving foreign affiliates or parents? What if there are intermediate holding companies incorporated elsewhere? And what if any link in the veil-piercing chain is domiciled in a jurisdiction that would not permit veil piercing or reverse veil piercing based on the complaint's allegations?

- May a plaintiff establish personal jurisdiction over an entire corporate family by naming a U.S. subsidiary with no connection to an alleged conspiracy in which its foreign sister companies allegedly participated and claiming that all family members constitute a single enterprise?

- What if the sister company, affiliates or intermediate holding companies are not wholly-owned subsidiaries of a common parent, but instead partially or majority-owned by other companies?

- If a court accepts the "single enterprise" theory for global corporations, does it need to carve out sales by foreign subsidiaries that would otherwise be beyond the reach of U.S. antitrust law under the Foreign Trade Antitrust Improvements Act of 1982[50] for liability and damages purposes?

Those questions and more remain unsettled and debatable. Nevertheless, companies would be well-advised to be aware of the different arguments that plaintiffs might make to try to establish liability over sister companies, and to monitor developments in case law reconciling *Copperweld* and *Twombly*.

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[47] Veil piercing is a "tool of equity" that in some circumstances permits "disregard of the corporate entity to impose liability on the corporation's shareholders." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001) (citation omitted).
[48] In reverse veil-piercing, "the plaintiff seeks to hold the corporation liable for the actions of its shareholder or someone who controls the entity." William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corp.* § 41.70 (Sept. 2017 update).
[49] *See, e.g.*, *Donastorg v. Daily News Publish. Co.*, No. ST-2002-CV-1177, 2015 WL 5399263, at *73 (V.I. Super. Aug. 19, 2015) (listing state cases rejecting the single enterprise theory); *Minno v. Pro-Fab, Inc.*, 905 N.E.2d 613, 617 (Ohio 2009) ("[A] plaintiff cannot pierce the corporate veil of one corporation to reach its sister corporation.")
[50] 15 U.S.C. § 6(a).

The New Chief Enforcers

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I. INTRODUCTION

Makan Delrahim was recently appointed and approved as the Assistant Attorney General, Antitrust Division, of the Department of Justice ("DOJ"), and Joseph Simons has been announced as the intended nominee for Chair of the the Federal Trade Commission (the "Commission"). Below is a summary of each of their professional backgrounds, along with some observations on what we might expect during their tenures as the new chief antitrust enforcers.

II. MAKAN DELRAHIM

President Trump selected Makan Delrahim to fill this role in March 2017, fairly early in this administration's appointment process. Mr. Delrahim was confirmed by the Senate on September 27, 2017.

A. CAREER TO DATE

Mr. Delrahim graduated from UCLA in 1991 with a bachelor's degree in Kinesiology. He later matriculated to the George Washington School of Law where he earned his law degree in 1995. He earned a Master of Science in Biotechnology from Johns Hopkins University in 2002.

Mr. Delrahim's career boasts experience in both private practice and various governmental roles. He began his legal career in 1995 as a litigation and regulatory associate at the law firm Patton Boggs, LLP, remaining there until 1998 when he transitioned to the government. Mr. Delrahim served as a staffer for the Senate Judiciary Committee from 1998 through 2003. While there, he worked on legislation updating federal laws affecting which transactions require government review for competitive concerns. Mr. Delrahim joined the Antitrust Division of the DOJ for the first time during the George W. Bush administration as a deputy Assistant Attorney General from 2003 until 2005. At that time, his work focused on international, policy, and appellate projects. Mr. Delrahim returned to law firm life in 2005, this time as

a partner, when he joined Brownstein Hyatt Farber Schreck, LLP. His practice focused on antitrust matters, providing both counseling and lobbying services to his clients. Mr. Delrahim served big names like Anthem, Qualcomm, Comcast, Google, T-Mobile, and Microsoft.

Mr. Delrahim, at different points in his career, has shaped, evaluated, worked within, and taught the laws that he is now responsible for enforcing. For example, Mr. Delrahim served as a Commissioner of the Antitrust Modernization Commission ("AMC"), a newly-chartered independent group charged with investigating the need to update the antitrust laws and report to the Congress and President. His deep experience in both law and politics should serve him well as he takes on this new role. Mr. Delrahim's prior experiences also suggest a certain perspective he is likely to have on the antitrust issues that will confront him as the DOJ's chief antitrust.[51]

B. NOMINATION AND CONFIRMATION

Mr. Delrahim's appointment was subject to the same Senate confirmation process as Cabinet-level officials. His initial Senate hearing took place on May 10, 2017.[52] Commentators deemed it a success, and Mr. Delrahim's nomination was officially approved by the Committee on June 1 by a vote of 19 to 1.

The remainder of the approval process observed some delays, though, due to concerns about potential conflicts in light of his varied areas of previous practice. There is a possibility that one or more of Mr. Delrahim's former clients had come before the Division for investigation or regulation. Also, his recent service with the administration caused some initial reservations among commentators because of the specter of political influence. For his part, Mr. Delrahim has pledged to work with ethics professionals to address and navigate any circumstances that could create a potential conflict of interest in regard to his former clients or former firm. Ultimately, Mr. Delrahim was confirmed by a Senate vote of 73 to 21 on September 27, 2017. Currently, Mr. Delrahim remains the only confirmed antitrust chief selected by the current administration.

C. ANTITRUST ETHOS

Republican administrations have historically been less interventionist in their manner of antitrust enforcement than Democratic ones. Mr. Delrahim's views on antitrust matters align with traditionally conservative positions, and he has often demonstrated his pragmatism, taking for instance his initial alliance with then-Candidate Trump.[53]

Mr. Delrahim sees the Antitrust Division's job as pursuing justice in the

[51] Background information on Mr. Delrahim was sourced from, in part, and verified through, public filings prepared in connection with Mr. Delrahim's nomination for AAG. *See* United States Senate Judiciary Committee on the Judiciary, Questionnaire for Non-Judicial Nominees (2017).

[52] Justice Department Nominations, C-SPAN (May 10, 2017)https://www.c-span.org/video/?428279-1/senate-judiciary-committee-considers-justice-department-nominations.

[53] *See* Makan Delrahim, *To Save the Supreme Court, Vote Trump over Clinton*, N.Y. Post (March 9, 2016), https://nypost.com/2016/03/09/to-save-the-supreme-court-vote-trump-over-clinton/.

marketplace through creating "an environment where rules are clear, rather than opaque and arbitrary."[54] According to Mr. Delrahim, the "role of antitrust law is not to keep everybody in business. The whole goal is to protect competition."[55] He has a strong belief that the Division does not always need to intervene to offer this protection because "competitive markets are generally self-regulating. Competition reduces the need for intrusive industry-wide regulation with the attendant risks of bureaucratic overreach, agency capture, and unintended consequences."[56] The ultimate yardstick for Mr. Delrahim is the consumer-welfare test.

As for his own role in the Antitrust Division, Mr. Delrahim recently described himself as "a law enforcer, not a regulator through consents."[57] This account sheds some light on his preferred regulatory tools. To the extent that antitrust agencies must police corporate action, Mr. Delrahim has expressed a consistent preference for structural fixes—such as divestitures—over behavioral ones—such as agreements by companies to continue making products available to competitors. Behavioral remedies generally require ongoing oversight by the regulating authority. Moreover, these behavioral solutions have broadly come under fire from those who favor more limited forms of government intervention. Mr. Delrahim reiterated his position on the topic in his remarks to the American Bar Association's fall antitrust forum, arguing that behavioral fixes fail because they "supplant[] competition with regulation" "instead of protecting the competition that might be lost in an unlawful merger."[58] Mr. Delrahim made certain to note that this concern was "one of the core insights of the 2004 Remedies Guidelines," published during his first time at the DOJ.

D. LESSONS FROM THE FIRST TWO MONTHS

Mr. Delrahim's pragmatism and conservative approach have already been apparent in his brief tenure as AAG, Antitrust Division. Within his first month on the job, Mr. Delrahim ordered the review of approximately 1,400 consent decrees previously entered into by the Department. These consent decrees can contain behavioral fixes and will be reviewed for their appropriateness and efficacy. Mr. Delrahim is wary of misapplying antitrust law in attempts to protect competition because a too-heavy hand can "cause great harm to innovation, the competitive process, and the consumer."[59]

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[54] U.S. Dep't. of Justice, Assistant Attorney General Makan Delrahim Delivers Remarks at New York University School of Law (Oct. 27, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-law.

[55] Cogan Schneier, *Five Things Makan Delrahim Has Said About Antitrust Policy*, The National Law Journal, (Nov. 9, 2017)https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/11/09/five-things-makan-delrahim-has-said-about-antitrust-policy/.

[56] *See supra* note 54.

[57] Liz Crampton, *Justice Dept. Reviewing 1,400 Antitrust Settlements*, Antitrust on Bloomberg Law (Oct. 27, 2017) https://www.bna.com/justice-dept-reviewing-n73014471446/.

[58] U.S. Dep't. of Justice, Assistant Attorney General Makan Delrahim Delivers 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.

[59] U.S. Dep't. of Justice, Assistant Attorney General Makan Delrahim Delivers Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference (Nov. 10, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center.

One of Mr. Delrahim's first major enforcement matters comes in the form of the AT&T, Inc. and Time Warner, Inc. proposed merger, valued at $85.4 billion. This combination is of particular interest because it exposes fundamental views on the role of antitrust enforcement. In 2016, then-Candidate Trump expressed concerns about this combination, noting the concentration of power in the hands of the few. At about the same time, Mr. Delrahim, who was a professor at the time, indicated that he had few concerns over the combination in an interview with a Canadian outlet.[60] On one hand, this is a classic vertical merger because the two companies are not competitors with each other and offer complementary services. Such integrations have not typically inspired much enforcement because the DOJ scrutinizes vertical mergers with an eye to whether the deal would "'eliminate a key supplier or customer,' allowing the merged entity to raise rival costs."[61] On the other hand, some have concerns that Time Warner's massive library of digital content, combined with AT&T, Inc.'s ability to deliver this content to consumers, could have anticompetitive effects.

While Mr. Delrahim originally had few concerns about the merger, his perspective appears to have shifted since taking his place at the Division. The New York Times first reported that the DOJ had approached state attorneys general to sign on to a complaint on November 15.[62] Now, the merger matter is officially headed to the courts; the DOJ brought suit to block the deal on November 20, 2017. This development suggests a tension between the goal of establishing clear antitrust enforcement rules and the necessary real-world considerations of an enforcement official. As Mr. Delrahim observed before he assumed his current regulatory role: "Antitrust enforcers should [strive to eliminate] unnecessary uncertainties . . . , as those uncertainties can also reduce the incentives for innovation."[63]

E. EXPECTATIONS GOING FORWARD

Going forward, many expect that the Antitrust Division under Mr. Delrahim's guidance will likely function in accord with its leader's conservative view on limited intervention. This means that observers can expect careful application of the Division's powers. Moreover, when enforcement matters are initiated, the Division is expected to rely on the regulatory tools favored by Mr. Delrahim. Mr. Delrahim has said that "we should guard against traditional forms of anticompetitive behavior" but must be careful not to "inject antitrust law where it does not belong" because "it can actually subvert the competitive process and do serious harm to American consumers and to innovation itself."[64]

[60] Interview with Mark Delrahim, *No Big Worries in AT&T Deal for Time Warner*, BNN, http://www.bnn.ca/video/no-big-worries-in-at-t-deal-for-time-warner~978794.
[61] *See supra* note 55.
[62] Reuters, *Department of Justice Approaches State AGs to Block AT&T-Time Warner Deal: Source*, N.Y. Times (Nov. 15, 2017), https://www.nytimes.com/reuters/2017/11/15/business/15reuters-time-warner-m-a.html.
[63] U.S. Dep't. of Justice, *supra* note 59.
[64] *Id.*

Observers can expect criminal enforcement to remain high. Mr. Delrahim has promised to continue to investigate wrongdoing[65] and actively seek to curb cartel behavior.

There may well be a new and strong emphasis on intellectual property. Mr. Delrahim is the first head of the Antitrust Division to be a registered patent lawyer.[66] Since taking on his new role, he has remarked that the intersection of intellectual property and antitrust is "ripe for deeper discussion.[67] We need to be sure that antitrust enforcement does not impede the incentives for innovation that intellectual property laws provide."[68] Mr. Delrahim worries that current enforcement trends had catered to technology implementers, potentially alienating and undermining incentives to technology creators.[69] He plans to "foster debate toward a more systematic balance between the seemingly dueling policy concerns between intellectual property and antitrust law."[70]

Finally, Mr. Delrahim seems intent on increasing efforts to foster international cooperation and understanding on antitrust. This aspiration has a personal connection to the AAG; as a child, he emigrated with his family from Tehran to California. "The stakes here are high and very real: we need to work together on a mutual consensus toward non-discriminatory enforcement of antitrust laws worldwide."[71] Mr. Delrahim is a firm believer that American consumers and businesses will benefit from such a global approach.[72]

In an article written during his time as a lobbyist, Mr. Delrahim noted that "it is critical to understand that the decision makers (and the capital markets) are influenced by public and private pressures from interested members of Congress as well as from other components of the government (both federal and state)."[73] In sum, the Division has gained an experienced and pragmatic antitrust regulator in Mr. Delrahim, who will bring to the agency both a diverse legal background and a great deal of political savvy.

III. JOSEPH SIMONS

Joseph Simons is the Trump administration's intended nominee for Chair of the Federal Trade Commission. He is an attorney with experience as both a private antitrust practitioner and a former Director of the Commission's Bureau of Competition. Mr. Simons' previous time at the Commission reflected active, yet thoughtful enforcement. Will his next stint at the Commission be similar?

A. JOSEPH SIMONS' ANTICIPATED NOMINATION TO THE

[65] Brian Stelter & Jackie Wattles, *Who is Makan Delrahim, the Trump Antitrust Chief?*, CNN Money (Nov. 9, 2017),http://money.cnn.com/2017/11/09/media/antitrust-trump-makan-delrahim/index.html.
[66] U.S. Dep't. of Justice, *supra* note 59.
[67] U.S. Dep't. of Justice, See *supra* note 54.
[68] *Id.*
[69] U.S. Dep't. of Justice, *supra* note 59.
[70] *Id.*
[71] U.S. Dep't. of Justice, *supra* note 54.
[72] *See id.*
[73] M. Delrahim, *Antitrust and Lobbying*, Competition Law Int'l (Nov. 2011).

COMMISSION

President Trump announced his intention to nominate Joseph Simons as Chair of the Commission on October 19, 2017.[74] Mr. Simons is expected to be formally nominated and his nomination is expected to be approved by the Senate, but his path to nomination has already been fraught with some complexity.

In contrast to the appointment of one chief enforcer at the Department of Justice, the Federal Trade Commission is headed up by five Commissioners, each of whom is nominated by the President and confirmed by the Senate for a staggered, seven-year term. The President also selects one Commissioner to serve as the Chair. By law, no more than three Commissioners may be from the same political party. Notably, if a Commissioner departs mid-term, his or her successor does not receive a full, seven-year term; rather, the successor serves only until the end of the former Commissioner's term. A Commissioner may also serve beyond the expiration of his or her term until a new Commissioner is approved.[75]

The Commission, however, has been short-handed as of late—only two Commissioners have been serving since the end of the Obama administration. One of the current Commissioners is Terrell McSweeney, whose term was set to expire in September 2017. The current acting Chair of the Commission is Maureen Olhausen, who has been with the Commission since 2012.[76] Although these two Commissioners may open and oversee new cases, these leadership vacancies have likely resulted in delays in the Commission's enforcement initiatives.

In addition to Mr. Simons, President Trump has also announced an intention to nominate two others to round out the Commission. Rohit Chopra, a Senior Fellow at the Consumer Federation of America, was selected to fill a seat as a Democrat. Chopra has a background in consumer protection, financial services, and education, and he previously served at the Consumer Financial Protection Bureau. Chopra's term will end in September 2019.[77] It has been widely reported that Noah Phillips, Chief Counsel for Senator John Cornyn of Texas, will be nominated to fill the remaining seat open for Republicans.[78]

B. BACKGROUND AND PRIVATE PRACTICE

Mr. Simons attended Cornell University, where he received a Bachelor's degree in Economics and History in 1980. He then earned his law degree from Georgetown University Law Center in 1983. Since then, Mr. Simons has practiced law in both the private sector and with the government.

[74] Press Release, White House, President Donald J. Trump Announces Intent to Nominate Personnel to Key Administration Posts (Oct. 19, 2017), https://www.whitehouse.gov/the-press-office/2017/10/19/president-donald-j-trump-announces-intent-nominate-personnel-key.
[75] Fed. Trade Comm'n, About the FTC, https://www.ftc.gov/about-ftc/commissioners (last visited Nov. 16, 2017).
[76] *See id.*; Cecilia Kang, *Trump Picks Joseph Simons, Corporate Antitrust Lawyer, to Lead F.T.C.*, N.Y. Times (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/business/trump-ftc-simons.html.
[77] *See* Kang, *supra* note 76; *Press Release, White House, supra* note 74.
[78] *See* Kang, *supra* note 76.

In the 1990s, Mr. Simons was a partner at Clifford Chance LLP.

Mr. Simons is currently a partner and co-chair of the Antitrust Group at Paul Weiss. He represents clients before federal agencies, in Congress, and in other antitrust and regulatory matters. Some of his notable engagements include representing MasterCard in a class action suit regarding merchant fees and defending multi-billion dollar acquisitions by Ericsson, Microsoft, RIM, and Sony. Mr. Simons also represents clients in the defense, transportation, music, and telecommunications industries.

C. PRIOR COMMISSION EXPERIENCE

Mr. Simons is no stranger to the Commission, having worked at the Commission on two prior occasions. In the 1980s, Mr. Simons was the Assistant Director of Evaluation at the Bureau of Competition, responsible for overseeing analysis of all of the Bureau's non-merger matters. In 1989, he became the Associate Director for Mergers at the Bureau of Competition, where he was responsible for supervising merger investigations and enforcement actions.[79]

From 2001 to 2003, Mr. Simons served as the Director of the Bureau of Competition in the George W. Bush administration. During Mr. Simons' tenure, the Commission was known for being particularly active in both merger and non-merger enforcement activities. On the merger side, Mr. Simons had a high success rate in both horizontal and vertical merger reviews, and he worked to expand the Commission's review of consummated mergers. The Commission largely focused on blocking horizontal mergers in the health care, energy, and food sectors, as well as improving the process for negotiating merger remedies.[80] In addition to filing challenges in federal court, Mr. Simons also advocated for the use of administrative litigation under the Commission's Part 3 regulations. Specifically, Mr. Simons has touted administrative litigation as a means for the Commission to develop public policy, "increase the transparency of the Commission's decision-making process" and "create sound antitrust jurisprudence."[81]

On the non-merger side, Mr. Simons initiated more than 100 investigations in his two years as Director. Mr. Simons' enforcement activities were largely focused on areas "where consumers get the biggest bang for the taxpayer buck,"[82] such as health care, prescription drugs, the oil and gas industry, and intellectual property. For example, the Commission took action against pharmaceutical companies based on allegations that they improperly acquired patent licenses and interfered with the production and marketing of low-

[79] *See* Press Release, Fed. Trade Comm'n, FTC Chairman Timothy J. Muris Appoints Senior Staff (June 11, 2001), https://www.ftc.gov/news-events/press-releases/2001/06/ftc-chairman-timothy-j-muris-appoints-senior-staff.
[80] *See* Joseph J. Simons, Former Director, Bureau of Competition, Fed. Trade Comm'n, Address at the 51st Annual ABA Antitrust Section Spring Meeting (April 4, 2003), https://www.ftc.gov/public-statements/2003/04/report-bureau-competition ("ABA Spring Meeting Report"); *see also* Joseph J. Simons, Former Director, Bureau of Competition, Fed. Trade Comm'n, Keynote Address to the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute (Oct. 24, 2002), https://www.ftc.gov/public-statements/2002/10/merger-enforcement-ftc.
[81] Interview with Joseph Simons, Antitrust Source, May 2003, at 1–3 ("Simons Interview"); *see* ABA Spring Meeting Report, *supra* note 80.
[82] ABA Spring Meeting Report, *supra* note 80.

priced generic drugs. The Commission also pursued action against abuses of intellectual property rights, including during the standard-setting process.[83] In addition, the Commission's agenda included an emphasis on the role of state and local governments in antitrust, whereby the Commission sought to limit the use of doctrines such as *Noerr-Pennington* immunity, which permits firms to petition the government for anticompetitive policies or a grant of monopoly rights, and the state action doctrine, which shields from antitrust liability private action taken pursuant to state policy.[84]

Mr. Simons' experience at the Commission was heavily influenced by his academic and economic achievements. In the late 1980s, Mr. Simons, along with a former chief economist in the DOJ's Antitrust Division, developed critical loss analysis, a technique for market definition that often complements the hypothetical monopolist test.[85] Critical loss analysis is a "break-even analysis" that asks whether the imposition of a small but significant nontransitory increase in price would raise or lower the hypothetical monopolist's profits.[86] Despite some academic criticism over time, critical loss analysis was incorporated into the 2010 Horizontal Merger Guidelines published by the DOJ and the Commission. The Commission has since used critical loss analysis in many enforcement actions, and it has been applied in several federal court decisions. Mr. Simons also contributed to the development of the "Raising Rivals' Costs" theory, which he used in practice to evaluate monopolistic practices and vertical restraints.

D. IS PAST REALLY PROLOGUE[87]

Even with his prior history at the Commission, it remains an open question what the focus will be of Mr. Simon's enforcement initiatives if and when confirmed as Chair.

Some analysts predict that Mr. Simons' approach will be marked by a belief in free-market economics, with a significant priority placed on consumer welfare and market efficiencies. In the past, Mr. Simons has articulated that economic

[83] *See id.*; Joseph J. Simons & David Scheffman, *Nonmerger Enforcement at the FTC: An Aggressive Proconsumer Agenda*, Antitrust Bull. 471 (Fall 2004); Simons Interview, *supra* note 81, at 3–5.

[84] *See* Simons & Scheffman, *supra* note 8383, at 498–502; ABA Spring Meeting Report, *supra* note 80; Simons Interview, *supra* note 83, at 6–7.

[85] *See* Barry C. Harris & Joseph J. Simons, *Focusing on Market Definition: How Much Substitution is Enough?*, 12 Res. L. & Econ. 207 (1989). The hypothetical monopolist test is used to determine the breadth of a market in a merger case: the market is no broader than the group of products (or geographic areas) such that a hypothetical profit-maximizing firm could impose a small but significant and nontransitory price increase. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), at 9.

[86] In short, critical loss analysis involves three steps: (1) Estimate the incremental margin and calculate the volume the hypothetical monopolist would have to lose to make the hypothesized price increase unprofitable (the critical loss); (2) Determine what the actual loss in volume is likely to be as a result of the hypothesized price increase; and (3) Compare the estimates of the critical loss and the actual loss—If the actual loss is larger than the critical loss, then the market must be expanded. David T. Scheffman & Joseph J. Simons, *The State of Critical Loss Analysis: Let's Make Sure We Understand the Whole Story*, Antitrust Source (Nov. 2003), at 2–4; *see also* Jay Ezrielev & Joseph J. Simons, *The 2010 Merger Guidelines, Critical Loss, and Linear Demand*, 7 J. Comp. L. & Econ. 497, 501–02 (2011).

[87] In 2003, when Simons was the Director of the Bureau of Competition, he remarked that the Commission's enforcement agenda was foreshadowed by cases brought when the then-Chair had previously served as the Director of the Bureau of Competition: "One of the things that I'm fond of saying is that, in terms of our enforcement agenda under Chairman Muris, the past is prologue." Simons Interview, *supra* note83, at 5. Will the same be said of Simons as future Chair of the Commission?

efficiencies are important in the Commission's merger reviews, both to demonstrate a party's motivations for a transaction, thereby making the Commission more comfortable with declining to challenge a close case, and to establish an efficiencies defense, demonstrating that the merger will produce efficiencies that counterbalance the merger's potential anticompetitive effects.[88]

Which industries will be the focus of the Commission under Mr. Simons' leadership remains a subject of much debate. In the past, Mr. Simons' enforcement activities were focused on the areas of the economy "that have the biggest impact on consumers in their everyday lives."[89] In the early 2000s, this was the health care industry, prescription drugs, and intellectual property. Although much has changed since then, these industries still have a major impact on consumers and the economy. For example, in recent years, there has been substantial focus from politicians, governments, and the public regarding the increasing cost of generic and prescription drugs. In addition, large technology companies, growing ever larger through a web of acquisitions, have drawn increasing scrutiny from politicians and commentators.

In sum, if his nomination is made formal and approved by the Senate, Mr. Simons will bring to the Commission extensive antitrust experience, academic and economic expertise, and a strong understanding of enforcement and merger review processes. As Chair of the Commission, Mr. Simons can be expected to develop an active enforcement agenda that places consumer welfare at the center of the inquiry.

[88] Simons Interview, *supra* note 83, at 9–10; *see* Kang, *supra* note 76.
[89] ABA Spring Meeting Report, *supra* note 80.

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