Crony Capitalism and Antitrust

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Civil antitrust in the United States recently awoke from its years of slumber. In August, 2011, the United States brought a landmark lawsuit to prevent the merger of two of the nation’s four largest mobile wireless telecommunications services providers, AT&T Inc. and T-Mobile USA, Inc. After prosecuting Intel, the Federal Trade Commission (“FTC”) is currently investigating Google for monopolistic abuses. And the U.S. Senate antitrust subcommittee recently joined the fray in questioning Google’s CEO.

Although antitrust’s resurgence is welcomed, it is especially welcomed by lobbyists. For example, before its antitrust headaches, Microsoft devoted little energy to lobbying efforts. As the Washington Post commented, “For a couple of embarrassing years in the mid-1990s, Microsoft’s primary lobbying presence was ‘Jack and his Jeep’ — Jack Krumholz, the software giant’s lone in-house lobbyist, who drove a Jeep Grand Cherokee to lobbying visits.” After the United States filed its antitrust lawsuit in 1998, Microsoft quickly built up its government-affairs office. Microsoft now spends millions of dollars annually on lobbying.

Thus it is not surprising that Google currently is spending even more on lobbying (over $2 million alone between April and June 2011). Likewise, AT&T and T-Mobile increased their lobbying efforts during the antitrust review of their merger. AT&T spent $11.69 million in the
first six months of 2011. It also lobbied lawmakers with $52 steaks and $15 gin-and-cucumber puree cocktails.

And amid AT&T and T-Mobile’s lobbying effort comes a letter from fifteen Democratic lawmakers, led by Congressman Heath Shuler, to President Barack Obama. They “urge the Administration to resolve expeditiously your concerns and approve the proposed merger between AT&T and T-Mobile USA.” Likewise one hundred Republican House of Representatives members, led by Congressman Pete Olson, urged President Obama to intercede in the Department of Justice’s lawsuit to force a settlement. Republican Congressman Pete Sessions went even further. He called the AT&T lawsuit “the latest example of the Obama Administration’s continued assault on the American economy” and the Administration’s “continued commitment to preventing and impeding job growth at every opportunity.”

These are unusual statements about a proposed merger that reduces the number of national competitors from 4 to 3 in an already highly concentrated industry. The merger, as we discuss elsewhere, is presumptively anticompetitive and illegal. AT&T and T-Mobile in their public submissions have failed to overcome that presumption. The American Antitrust Institute, among others, likewise has found that the merger violates section 7 of the Clayton Act.

So why are so many elected officials asking the U.S. Department of Justice (“DOJ”) to approve a merger that would likely lead to higher prices, fewer jobs, less innovation, and higher excise taxes (to the extent the taxes are based on higher cost of services) for their constituents? AT&T was Representative Shuler’s second largest corporate donor (giving him $10,000 in 2009-10). AT&T gave even more money to Shuler’s Political Action Committees (“PACs”). All the

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other Democratic signatories received donations from AT&T as well. On the Republican side, AT&T was Congressman Olson’s second largest corporate donor (giving him $14,000 in 2009-10),\footnote{In the 2009-10 cycle, AT&T gave $9,000 to Shuler’s PAC, 3rd and Long. It gave $10,000 to the Blue Dog PAC (which gave in turn some of the proceeds to Shuler). AT&T also gave to other PACs of which Shuler was a recipient. Center for Responsive Politics, AT&T Inc. http://www.opensecrets.org/pacs/pac2pac.php?cycle=2010&cmte=C00109017 (last visited Sept. 29, 2011).} with additional money flowing to him through PACs. Bloomberg, in reviewing the campaign finance records, found that 99 of the 100 Republican signatories received political donations from AT&T’s PAC since 2009.\footnote{Center for Responsive Politics, Pete Olson, Summary Data, http://www.opensecrets.org/politicians/summary.php?cid=N00029285&cycle=2010 (last visited Sept. 29, 2011).} In all, the Republicans received $953,275 from AT&T’s Federal Political Action Committee.\footnote{Todd Shields & Jonathan D. Salant, AT&T Gave $963,275 to U.S. Lawmakers Urging Approval of T-Mobile USA Deal, BLOOMBERG, Sept. 21, 2011, available at http://www.bloomberg.com/news/2011-09-21/at-t-gave-963-275-to-lawmakers-urging-uss-approval-of-t-mobile-purchase.html.} As for the outspoken Congressman Pete Sessions, AT&T’s Federal PAC hosted at least three fundraising dinners for him this year alone.\footnote{Martyn Griffen, AT&T Campaign Donations to Signatories of Sept. 20, 2011, House Republican Letter, PUBLIC KNOWLEDGE (Sept. 20, 2011), available at http://www.publicknowledge.org/att-campaign-donation-information (examing campaign donation data for 2009/10 and 2011/12).}

But it is easy to attack the lobbyists, the companies that hire them, and the elected officials who respond to them. Lobbyists are not the problem. Companies like AT&T and Google enjoy significant market power. They spend money on lobbying because it makes economic sense. Lobbying can affect outcomes.\footnote{One dinner was on September 20, 2011 at Ruth’s Chris Steakhouse (requesting contributions of Co-Host $2500, PAC $1000, Personal $5000); the second dinner was on July 27, 2011 at Bobby Vans Grille (requesting contributions of $2,500 PAC, $1,000 Personal); and the third was on June 23, 2011 at Ruth’s Chris Steakhouse (requesting contributions of $2,500 PAC; $1,000 Personal). Copies of the invitations are available at the Sunlight Foundation’s Party Time website, http://politicalpartyt ime.org/party/28825/#invite. AT&T also hosted a recent fundraiser for Democratic Rep. Cardoza (suggested admittance $1000 PAC, $8500 Personal), available at http://politicalpartyt ime.org/party/28825/#invite.} (Otherwise companies would not waste millions of dollars annually on these expenditures.) Why does lobbying affect the outcome? It is basic economics that the more discretion the government has in bringing and determining antitrust violations, the more prone their policies are to distortion by lobbyists. The vaguer the legal standard, the more subjective input it allows from lobbyists. The less transparent the antitrust review and its objectives, the less predictable the antitrust enforcement becomes.

Consequently, the problem is not lobbyists. The problem is the combination of lax campaign finance rules and antitrust’s prevailing legal standard. Recent decisions by the U.S. Supreme Court have substantially worsened the situation. In Citizens United, the limitations on corporate political spending were substantially weakened, thereby vastly increasing the importance of pleasing large donors in order to win elections.\footnote{In Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 966 (2010) (Stevens, J., concurring and dissenting in part).} In antitrust, the Court recently

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stated that the fact-specific rule of reason is the “usual” and “accepted standard” for evaluating conduct under the Sherman Act. This standard, as the courts have described, involves a “flexible” factual inquiry into a restraint’s overall competitive effect and “the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.” The rule of reason also “varies in focus and detail depending on the nature of the agreement and market circumstances.” Despite its label, the rule of reason is not a directive that businesses and consumers can readily understand and internalize (such as clear prohibitions on agreeing with one’s competitors to fix prices). Instead, the term embraces antitrust’s most open-ended principles, making prospective compliance with its requirements exceedingly difficult. The Horizontal Merger Guidelines and section 7 case law bring merger review somewhat closer to rule-of-law principles than the Court’s rule-of-reason analysis. But both are sufficiently pliable to fatten lobbyists.

This flexibility in legal standards is attractive to testifying experts, lobbyists, and antitrust counsel who “know” and “can work” with the FTC and the DOJ to get the merger through. It is far from desirable for corporate executives who need to know what is legal or illegal, as well as customers and competitors who need to know what is reasonable and unreasonable competitive behavior.

So the recent antitrust activity is refreshing. But what would be especially refreshing is if the courts provided clearer antitrust rules than its current rule of reason. Clearer standards on what is or is not permissible will yield greater predictability, objectivity, and transparency in antitrust enforcement. While companies and customers would benefit, lobbyists might have reason to complain.

In contrast, the dissenting justices found that
go forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court’s ruling thus dramatically enhances the role of corporations and unions-and the narrow interests they represent—vis-à-vis the role of political parties—and the broad coalitions they represent-in determining who will hold public office.

Id. at 940.

25 Id. at 885.