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BLOG

Bipartisan Efforts to Strengthen State Antitrust Enforcement Gather Steam

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The "State Antitrust Enforcement Venue Act of 2021," a bill designed to bolster states' ability to enforce federal antitrust laws, has recently been introduced in both houses of Congress. First introduced in the House of Representatives on May 21, 2021, it has bipartisan sponsorship by House antitrust subcommittee members Ken Buck (R-CO, ranking member), David Cicilline (D-RI, chairman), Dan Bishop (R-NC), Burgess Owens (R-UT), and Joseph Neguse (D-CO). An identical version of the bill was introduced on May 24, 2021 by Senate antitrust subcommittee leaders Amy Klobuchar (D-MN, chair) and Mike Lee (R-UT, ranking member).

If enacted, the bill would prevent actions brought by state entities to enforce federal antitrust law from being transferred, under the multidistrict litigation rules, to other federal district courts and consolidated with related cases —which would grant state enforcers an exception to transfer similar to that which already exists for certain antitrust actions brought by the federal government. The intent of the bill is to eliminate "many of the inefficiencies and obstacles the states face in enforcing the federal antitrust laws," which will result in "quicker resolution" of these actions, according to Representative Buck, who explained that states "play a critical role in enforcing federal antitrust laws" and should be able to "select and remain in their preferred venue."

Under existing law, actions brought under federal antitrust law by state enforcers are subject to transfer by the Judicial Panel on Multidistrict Litigation (JPML) for pretrial consolidation with other cases "involving one or more common questions of fact" into a single multidistrict litigation (MDL). Transfer and consolidation by the JPML occurs regularly, and generally results in beneficial efficiency gains, especially through consolidated discovery.

However, MDL consolidation may particularly disadvantage state enforcers. Because the JPML has the authority to transfer cases to any district nationwide, the process may prevent state enforcers from proceeding in federal courts located in their own states for pretrial proceedings.[1] Moreover, MDL plaintiffs "often exercise less control over their cases,"[2] and transfer and consolidation can significantly delay the resolution of the consolidated actions.[3] For instance, MDL transfer can occur even when state enforcement actions are further along than the actions with which they are consolidated.

In contrast, antitrust actions brought by federal enforcers are not subject to transfer by the JPML so long as the actions are criminal or for injunctive relief.[4] As noted by Rep. Buck, this exception facilitates more prompt resolution of such actions because MDLs "traditionally run much more slowly." Indeed, Congress originally created

this exception to the transfer rules so that the United States could resolve its antitrust cases "as quickly as possible . . . to protect the public from [ongoing] competitive injury."[5]

The bill would extend the benefits afforded by this exception to state enforcers when they bring actions under federal antitrust law.[6] Notably, in its current form, the bill does not limit the exception to criminal actions and actions seeking injunctive relief, unlike the existing exception for federal enforcers, and therefore would also cover damages actions brought by state enforcers. However, if the bill advances in Congress, it could be tailored to exclude damages actions and conform to the scope of the pre-existing exception consistent with the underlying policy of 28 U.S.C. § 1407(g) that criminal and injunctive antitrust enforcement actions "are of special urgency and serve a different purpose than private damages suits because they seek to enjoin ongoing anticompetitive conduct."[7]

The issues that this bill seeks to address are illustrated in currently pending antitrust litigation against Google. There, fifteen states and territories brought an antitrust enforcement action in the Eastern District of Texas. However, in April, Google moved to transfer and consolidate the states' action with others, including private class actions, currently pending in the Northern District of California. Google argued that consolidation was warranted because it would be convenient for the parties and witnesses and promote just and efficient resolution of the actions. The states opposed this move, arguing that Google is supplanting their "sovereign choice" of court and that their action "has long since left the starting gate and is already barreling down the track" following a "substantial eighteen-month investigation," in contrast to the infancy of the other actions.[8]

This bill is also a point of contention in the Google case. The states assert that this bill, if enacted, would prevent or undo any transfer of their lawsuit, as the bill's effective date is June 1, 2021. Google responded that the bill is not law and, if enacted, it could present due process and separation of powers issues as applied to pending cases like Google's. The JPML has yet to rule on the MDL consolidation motion as of the release of this post, but it illustrates the potential real-world impact of the bill.

This bill is a further example of recent congressional attention on antitrust enforcement. As discussed in prior Competition Corner posts, several recent congressional efforts focus on big technology companies, with some bills aiming to break up big technology companies, shift the burden of proof to defendants with "substantial market power" to prove the competitiveness of their challenged conduct, and eliminate the requirement of defining a relevant market. This bipartisan bill, however, is comparatively less ambitious as it focuses on a narrow and limited change to the JPML's procedural rules.

We will continue to monitor and report on developments in Congress to reform antitrust laws and their implications for businesses.

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[1] *See* 28 U.S.C. § 1407.

[2] Jenifer J. Norwalk, *The Case Against MDL Rulemaking*, 169 U. Pa. L. Rev. 275, 292 (2020).

[3] *See* H.R. Rep. No. 90-1130, 1968 U.S.C.C.A.N. 1898, 1902, 1968 WL 4929 (1968) (noting consolidation of government antitrust actions and those of private plaintiffs would delay resolution of the government's case).

[4] 28 U.S.C. § 1407(a), (g) (antitrust actions "involving one or more common questions of fact . . . may be transferred to any district for coordinated or consolidated pretrial proceedings," except when the United States is the plaintiff and seeks injunctive relief or criminal penalties).

[5] H.R. Rep. No. 90-1130, at 1905 (1968) (letter by Deputy Att'y Gen. Ramsey Clark).

[6] *See* State Antitrust Enforcement Venue Act of 2021, H.R. 3460, 117th Cong. (2021) (noting phrase "or a State" would be added after term "United States" in 28 U.S.C. § 1407(g)).

[7] *See United States v. Dentsply Int'l, Inc.*, 190 F.R.D. 140, 145 (D. Del. 1999) (citing H.R. Rep. No. 90–1130, 1968 U.S.C.C.A.N. at 1905, 1968 WL 4929 (letter of Deputy Att'y Gen. Ramsey Clark, incorporated into the Report)).

[8] Pls.' Resp. in Opp'n at 1-2, *In re Digital Advertising Antitrust Litig.*, No. MDL 3010 (U.S. Jud. Pan. Mult. Lit. May 26, 2021), ECF No. 71.

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