tiff was required to call into question the independence of at least five members of the 10-person board, not four of the six non-Liberty designees.

ENDNOTES:

[1] https://courts.delaware.gov/Opinions/Download.aspx?id=276390.

[2] 906 A.2d 91 (Del. 2006).

[3] 152 A.3d 1248 (Del. 2016).

[4] 2018 WL 3388398 (Del. July 11, 2018) (emphasis added).

[5] https://courts.delaware.gov/Opinions/Download.aspx?id=270830.

COURT REJECTS DOJ CHALLENGE TO AT&T/TIME WARNER VERTICAL MERGER

By Nathaniel L. Asker, Aleksandr B. Livshits and Matthew E. Joseph

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In a much anticipated decision, Judge Richard Leon on June 12, 2018, rejected the Department of Justice's challenge of AT&T Inc.'s acquisition of Time Warner Inc. The case represents the first opinion in four decades addressing an antitrust challenge to a "vertical" merger, which combines firms that participate at different levels of the supply chain and do not compete.

In October 2016, AT&T agreed to a $108 billion acquisition of Time Warner. AT&T owns a range of businesses, including satellite television distributor DirecTV. Time Warner does not compete with AT&T, but provides television content such as TBS, TNT, CNN and HBO to DirecTV and rival distributors. The DOJ's primary theory of harm was that the transaction would enable the merged firm to extract higher prices from rival distributors in television programming negotiations. According to the DOJ, the merger would increase Time Warner's bargaining leverage because rival distributors would recognize that, if they fail to reach a deal for Time Warner's "must have" content and face a blackout, some of their customers would switch to DirecTV. This switching would increase DirecTV's revenues, partially offsetting Time Warner's lost affiliate fees and advertising revenues. Similar concerns in prior vertical mergers in this and other industries had been resolved through consent decrees requiring the merged firm to commit to supply its rivals on nondiscriminatory terms and arbitrate disputes. Such "behavioral remedies" allow merging parties to close their transaction without divesting assets.

The DOJ took a different approach in this transaction, arguing that behavioral remedies were ineffective and contrary to the DOJ's mandate as a law enforcer rather than regulator. This represented a significant departure from the DOJ's approach in Comcast's 2011 acquisition of NBC Universal,[1] the Federal Trade Commission's resolution of vertical concerns arising from combining Time Warner's predecessor cable distribution business with Turner in 1996,[2] and many other vertical transactions in a variety of industries. Instead, the DOJ insisted on a "structural remedy" that would have required AT&T to divest its entire DirecTV business or Time Warner's Turner business. When AT&T refused, the DOJ in November 2017 filed litigation seeking to enjoin the transaction.

After a six-week trial, Judge Leon of the U.S. District Court for the District of Columbia found that the DOJ had failed to meet its burden to show that the transaction would likely substantially harm competition in violation of Section 7 of the Clayton Act. Un-

like horizontal mergers where, if the DOJ establishes high market shares, there is a presumption of harm to competition under well-established case law, the DOJ benefited from no presumption of harm under the sparse case law addressing vertical mergers. Without this presumption, the DOJ relied heavily on statements from the parties' internal documents and filings with regulators, complaints from competing distributors, and its economic expert's model predicting price increases. The court found this evidence lacking. Instead, the court determined that "real-world pricing data and the experiences of individuals who have negotiated on behalf of vertically integrated entities all fail to support the Government's increased-leverage theory."

Notwithstanding this decision, vertical mergers combining firms that control critical inputs or otherwise enjoy market power will continue to generate significant antitrust scrutiny. In fact, Judge Leon cautioned readers to resist the "temptation" to view this decision as "more than a resolution of this specific case." Even so, this decision makes clear that vertical theories of competitive harm require strong support based on real-world evidence. Further, the decision is likely to embolden merging parties to resist demands from antitrust regulators to remedy vertical concerns through divestitures of material assets, rather than behavioral commitments.

The decision is also a reminder that the antitrust agencies and courts continue to rely heavily on companies' internal documents to assess anticompetitive intent or effects of mergers—whether vertical or horizontal. Here, the court specifically contrasted this case with other recent merger challenges, stating this was not a transaction where documents of senior executives contained "direct, probative evidence of anticompetitive intent." Instead, the court found the "snippets" cited by the DOJ from interim drafts authored by lower-level employees unpersuasive. As always, it will continue to behoove parties to exercise caution and consult counsel when drafting documents explaining the rationale for their transactions. Finally, this case shows that parties that commit to defend their mergers in litigation and are able to endure a prolonged antitrust review may be rewarded.

The DOJ is appealing Judge Leon's decision.

ENDNOTES:

[1] https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions.

[2] https://www.ftc.gov/news-events/press-releases/1996/09/ftc-requires-restructuring-time-warnerturner-deal-settlement.

REPRESENTATION AND WARRANTY INSURANCE IN JAPANESE M&A TRANSACTIONS

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Japan is one of the few developed M&A markets that has eschewed the usage of insurance to cover breaches of representations and warranties in local acquisition agreements. While the utilization of this insurance took its roots over 20 years ago in the United States as a solution for private equity sellers seeking to escape tying up acquisition agreement sales proceeds in an indemnity escrow account, its use by both private equity and strategic buyers and sellers has grown substantially in recent years. For example, Marsh LLC placed over 700 policies worldwide in 2017 (with a total worldwide market issuance estimated at approximately 2,800 during 2017), representing a 28% increase from 2016. During 2017, Japanese companies utilized insurance to cover breaches of representations and warranties on an estimated 10%

