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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.² 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.³

Although antitrust's resurgence is welcomed,⁴ 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."⁵ 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.⁶

Thus it is not surprising that Google currently is spending even more on lobbying (over \$2 million alone between April and June 2011).⁷ Likewise, AT&T and T-Mobile increased their lobbying efforts during the antitrust review of their merger.⁸ AT&T spent \$11.69 million in the

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² Compl., United States v. AT&T, Inc., Civ. Act. No. 1:11-cv-01560-ESH (D.D.C. Aug. 31, 2011), *available at* <http://www.justice.gov/atr/cases/f274600/274613.htm>.

³ *The Power of Google: Serving Consumers or Threatening Competition? Hearing Before Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy & Consumer Rights* (Sept. 21, 2011), <http://judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba64d93cb>.

⁴ Some are disappointed in the Obama administration's otherwise lackluster antitrust efforts. They would like to see more civil enforcement before characterizing the recent activity as a revival or resurgence.

⁵ Jeffrey H. Birnbaum, *Learning From Microsoft's Error, Google Builds a Lobbying Engine*, WASH. POST, at D1 (June 20, 2007). Lobbyists have sought to influence antitrust decisions for years. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1446-56 (2009). If anything is new (starting with *Microsoft*), observed Bert Foer, it is probably the fairly standard retention in large antitrust cases of public relation firms and media strategists, who have an easier time in the absence of a dedicated and expert antitrust media.

⁶ Center for Responsive Politics, Heavy Hitters, Microsoft Corp., <http://www.opensecrets.org/orgs/summary.php?cycle=A&type=P&id=D000000115> (last visited Sept. 29, 2011) ("Between 2000 and 2010, Microsoft spent at least \$6 million each year on federal lobbying efforts.").

⁷ Michael Liedtke, *Google's Lobbying Bill Tops Previous Record*, ASSOCIATED PRESS, (July 21, 2011), http://www.huffingtonpost.com/2011/07/21/googles-lobbying-bill-q2-2011_n_906149.html.

⁸ Simon Maloy, *The AT&T/T-Mobile Lobbyist Army*, MEDIAMATTERS, (Aug. 2, 2011), <http://mediamatters.org/blog/201108020022> (noting how T-Mobile "increased its lobbying expenditures from \$602,000 in the second quarter of 2010 to \$1 million in second quarter of 2011").

first six months of 2011.⁹ It also lobbied lawmakers with \$52 steaks and \$15 gin-and-cucumber puree cocktails.¹⁰

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."¹¹ 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.¹² 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."¹³

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,¹⁴ 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.¹⁵

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).¹⁶ AT&T gave even more money to Shuler's Political Action Committees ("PACs").¹⁷ All the

⁹ Center for Responsive Politics, Heavy Hitters, AT&T Inc., <http://www.opensecrets.org/orgs/summary.php?cycle=A&type=P&id=D000000076> (last visited Sept. 29, 2011). Sprint has been lobbying to oppose the merger, spending nearly \$2 million in 2011. Center for Responsive Politics, Lobbying, Sprint Nextel, <http://www.opensecrets.org/lobby/clientsum.php?id=D000000179> (last visited Oct. 2, 2011).

¹⁰ Jonathan D. Salant & Todd Shields, *\$52 Steaks on Menu as AT&T Feted Lawmakers During T-Mobile*, BLOOMBERG, (Sept. 2, 2011), <http://www.bloomberg.com/news/2011-09-02/-52-steaks-on-menu-as-at-t-feted-lawmakers-during-t-mobile-push.html>.

¹¹ Press Release, Rep. Heath Shuler, Rep. Shuler Urges Obama Administration to Settle Proposed AT&T/T-Mobile USA Merger (Sept. 15, 2011), available at <http://shuler.house.gov/2011/09/rep-shuler-urges-obama-administration-to-settle-proposed-att-mobile-usa-merger.shtml>. The other signatories were Representatives John Barrow, Mike Ross, Dan Boren, Dennis Cardoza, Joe Baca, Leonard Boswell, Ben Chandler, Jim Costa, Henry Cuellar, Mike McIntyre, Mike Michaud, Collin Peterson, Loretta Sanchez, and David Scott.

¹² Letter from Rep. Pete Olson et al. to President Barack Obama (Sept. 20, 2011), available at <http://www.publicknowledge.org/sept-20-house-gop-letter-supporting-att-takeover-t>.

¹³ Rep. Pete Sessions, Statement in Response to the Justice Department's Lawsuit to Prevent AT&T Merger with T-Mobile (Aug. 31, 2011), available at http://sessions.house.gov/index.cfm?FuseAction=Newsroom.PressReleases&ContentRecord_id=407148c1-19b9-b4b1-12ca-cbba8d945182&IsPrint=true.

¹⁴ Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction*, 64 FED. COMM. L.J. (forthcoming 2011), available at <http://ssrn.com/abstract=1850103>.

¹⁵ American Antitrust Institute, White Paper: The Effect of AT&T's Acquisition of T-Mobile Is Likely to Substantially Lessen Competition (Aug. 2011), available at <http://www.antitrustinstitute.org/content/aai-white-paper-att-mobile-merger>.

¹⁶ Center for Responsive Politics, Heath Shuler, Summary Data, <http://www.opensecrets.org/politicians/summary.php?cid=N00027655&cycle=2010> (last visited Sept. 29, 2011).

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),¹⁸ 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 2009.¹⁹ In all, the Republicans received \$953,275 from AT&T's Federal Political Action Committee.²⁰ As for the outspoken Congressman Pete Sessions, AT&T's Federal PAC hosted at least three fundraising dinners for him this year alone.²¹

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.²² (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.²³ In antitrust, the Court recently

¹⁷ 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).

¹⁸ Center for Responsive Politics, Pete Olson, Summary Data, <http://www.opensecrets.org/politicians/summary.php?cid=N00029285&cycle=2010> (last visited Sept. 29, 2011).

¹⁹ 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-u-s-approval-of-t-mobile-purchase.html>.

²⁰ 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> (examining campaign donation data for 2009/10 and 2011/12).

²¹ 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://politicalpartytime.org/party/28825/#invite>. AT&T also hosted a recent fundraiser for Democratic Rep. Cardoza (suggested admittance \$1000 PAC, \$8500 Personal), available at <http://politicalpartytime.org/party/28825/#invite>.

²² *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 966 (2010) (Stevens, J., concurring and dissenting in part).

²³ *Citizens United*, 130 S. Ct. at 910. The Court, however, found that the appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.

Id. (internal citations omitted).

stated that the fact-specific rule of reason is the “usual”²⁴ and “accepted standard”²⁵ for evaluating conduct under the Sherman Act.²⁶ 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.”²⁷ The rule of reason also “varies in focus and detail depending on the nature of the agreement and market circumstances.”²⁸ 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.²⁹ The Horizontal Merger Guidelines³⁰ 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 [g]oing 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.

²⁴ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

²⁵ *Id.* at 885.

²⁶ *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“Court presumptively applies rule of reason analysis”).

²⁷ *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2217 (2010) (quoting *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918)).

²⁸ Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 1.2, at 4 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

²⁹ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

³⁰ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (Aug. 19, 2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.