Hughes Hubbard & Reed

Five Takeaways from the ABA Antitrust Spring Meeting

Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

April 19, 2024 - Earlier this month, the Antitrust Section of the American Bar Association (ABA) convened for its 72nd Spring Meeting, which is the largest annual gathering of antitrust professionals in the world. This year's Spring Meeting boasted a record breaking attendance of over 4,100 and included 70 panels covering a variety of antitrust issues, one of which featured Hughes Hubbard partner Marc Weinstein discussing the Firm's trial victory last year against the U.S. Department of Justice. Here are five takeaways from the Spring Meeting to know:

1. **AI's Impact on Antitrust Compliance**
   Artificial intelligence was the sole focus of the 2023 ABA Antitrust Fall Forum this past November, and it remained center-stage at the Spring Meeting as well. Eight separate panels were devoted to the intersection of AI and antitrust law, including the keynote "Chair's Showcase," which featured a debate on whether the current global antitrust framework is adequate to regulate this emerging technology. Another panel discussed use cases for AI tools to assist in-house lawyers in their compliance work, highlighting how AI could be used to flag potential antitrust violations, so that businesses could address them earlier and more effectively. Other panels discussed the use of algorithmic tools across an array of industries, including entertainment, media and agriculture. While business leaders offered several pro-competitive uses of algorithmic "benchmarking" tools, plaintiffs' attorneys were quick to counter, claiming that such tools facilitate collusive practices. So, while regulators appear to be moving cautiously, companies must still be wary of any AI uses that might give plaintiffs' firms the opportunity to file an antitrust class action lawsuit.
2. **Continued Emphasis from FTC & DOJ on the New Merger Guidelines**
   Last year, the Federal Trade Commission and the U.S. Department of Justice Antitrust Division finalized their new Merger Guidelines, which reflect the heightened antitrust scrutiny that the agencies will apply when reviewing mergers. While the stated purpose of the Guidelines is to provide market participants with transparency into the agencies' merger review process and the substantive standards they employ, the FTC and DOJ have consistently touted the Guidelines as a "framework that courts . . . can apply" in merger cases. At the Spring Meeting, FTC and DOJ officials continued to tout the Guidelines as an authoritative guide for judges. At the "Enforcers' Roundtable," for example, DOJ Assistant Attorney General for Antitrust Jonathan Kanter argued that there was nothing "new" about these new Guidelines, and that they simply reflect existing antitrust law. It remains to be seen whether the courts agree with this interpretation, but we should know more soon, as the FTC and DOJ have cited their new Guidelines in several recent court filings, including the FTC's complaint challenging the Kroger-Albertsons merger.

3. **Increased Antitrust Enforcement Activity from State Attorneys General**
   Not to be outdone by their federal counterparts, representatives from the offices of State attorneys general also made clear to Spring Meeting attendees that they were looking to increase their antitrust enforcement efforts at the State level. Speaking at the "Enforcers' Roundtable," Gwendolyn Lindsay Cooley (the National Chair of the Multistate Antitrust Task Force) succinctly declared, "The States are not going away." She cited the recently enacted State Antitrust Enforcement Venue Act (which gives state AGs more power to keep their antitrust cases in their preferred venue) as one of the tools emboldening State AGs to take a more aggressive approach to antitrust issues. Other State enforcers spoke on other panels about the increased willingness of their offices to conduct their own merger reviews and antitrust investigations, separate and apart from those undertaken at the federal level.
4. **Rule 702 Amendment and Its Impact on Class Certification**
   In December 2023, Federal Rule of Evidence 702 was amended to clarify the test for determining the admissibility of expert testimony in federal courts. The amendment explicitly states that the proponent of the expert testimony bears the burden of proving its admissibility by a preponderance of the evidence, and that the expert's opinion itself must reflect a reliable application of reliable principles and methods to the facts at issue. The Rules Advisory Committee included a note to the amendment that states, "Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify[.]"
   Spring Meeting panelists were quick to note their disagreement with this characterization. The panelists noted this change to Rule 702, however minor, will inevitably have an outsized impact on antitrust class actions, where class certification often rises or falls on the admissibility of expert testimony. The judges at the "Views from the Bench" panel also explained how expert testimony is crucial for them in learning the complexities of the industries at play in the antitrust cases over which they preside. While the judges agreed that greater clarity for the expert opinion admissibility analysis was a positive development, Judge Jon Tigar of the Northern District of California spoke on a separate panel where he predicted that the amendment would lead to an increase in the already high number of challenges to the admissibility of expert testimony (also known as "*Daubert*" challenges). Judge Tigar voiced his skepticism of such challenges, saying that they are too often brought as a matter of course; he counseled litigants to be more selective in deciding what expert opinions to challenge under the revised rule.
5. **No Final Revised HSR Form (Yet)**
   Last summer, the FTC and DOJ published proposed revisions to the pre-merger notification process under the Hart-Scott-Rodino (HSR) Act that would dramatically expand the HSR Form that companies are required to file to notify the agencies of proposed mergers valued above the statutory thresholds. The FTC estimates that the proposed rules would increase the average time to complete the HSR from 37 hours to 144 hours, a nearly four-fold increase. Not surprisingly, the proposal has drawn significant criticism and pushback from businesses and antitrust practitioners alike, and a final version of the updated HSR Form has still not yet been published. At the Spring Meeting, FTC and DOJ officials reported that the agencies were still working to address these concerns, noting that the expanded HSR Form would also require more resources on the agencies' side to review. The officials did not give any indication, however, as to whether the reporting requirements might be scaled back, and they reiterated their commitment to all of the enforcement philosophies animating the expanded requirements. The officials also did not give any hints as to when the final revised HSR form would be published.

Related People

William J. Kolasky

Marc A. Weinstein

Philip A. Giordano

Kristin Millay

Winthrop S. Jordan

Related Areas of Focus

Litigation
Antitrust & Competition
Mergers & Acquisitions
White Collar & Regulatory Defense