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'Pay for delay' cases illustrate struggle between competition vs. regulation policies

By DAN MOGIN

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Editor's note: This is the second of a two-part series. Read part 1 here.

The day after the Supreme Court denied review of the Cipro decision, Jon Leibowitz, chair of the FTC, said that stopping collusive "pay-for-delay" settlements would save consumers $3.5 billion a year and also reap significant savings for the federal government, which pays approximately one-third of all prescription drug costs.

Leibowitz urged Congress to pass legislation to ban or restrict such settlements. "From my perspective ... the decision about whether to restrict pay-for-delay settlements should be simple," Leibowitz said. "On the one hand, you have savings to American consumers of $35 billion or more over 10 years - about $12 billion of which would be savings to the federal government - and the prospect of helping to pay for health care reform as well as the ability to set a clear national standard to stop anticompetitive conduct. On the other hand, you have a permissive legal regime that allows competitors to make collusive deals on the backs of consumers."

A few days later in another part of the Cipro litigation, the DOJ's Antitrust Division filed an amicus brief in the Second Circuit, asserting that reverse payment settlements presumptively violate the antitrust laws. (Notably, the San Diego Superior Court recently issued a ruling that echoes the district court's findings at issue in the Second Circuit appeal). The very next day, it was reported that the European Union Competition Commission was investigating pay-for-delay deals believed to have cost EU healthcare providers 3 billion euros ($4.2 billion), between 2000 and 2007.

Thus, the competition agencies appear unanimous in the view that pay-for-delay settlements are unlawful and antithetical to healthcare consumer welfare. Congress too has joined in with the Protecting Consumer Access to Generic Drugs Act presently under consideration. But, the courts continue as the FTC chair says, to "allow competitors to make collusive deals on the backs of consumers." And other parts of the Administration appear willing to let the art of the health care deal trump the welfare of drug consumers. In fact, turning away from competition is consistent with economic history and was anticipated by the new head of the Antitrust Division, Assistant Attorney General Christine Varney, who reminded us in her maiden speech that the Great Depression led to passage of the National Industrial Recovery Act "that effectively foreclosed competition" and allowed industries to create "codes of fair competition" that set "prices and wages, established production quotas, and imposed restrictions on entry."

As a result "competition was relegated to the sidelines, as the welfare of firms took priority over the welfare of consumers. It is not surprising that the industrial codes resulted in restricted output, higher prices, and reduced consumer purchasing power." But during the second Roosevelt Administration, the country saw a revival of antitrust enforcement that became "a cornerstone of the New Deal's economic agenda and a part of that era's legacy for modern economic policy."

Thus, the antitrust chief concluded that economic history teaches, "First, there is no adequate substitute for a competitive market, particularly during times of economic distress.

Second, vigorous antitrust enforcement must play a significant role in the Government's response to economic crises to ensure that markets remain competitive."

It was the Supreme Court's decision in the Schechter Poultry case that struck down the industrial codes which led to FDR's ill-fated court expansion scheme and the "switch in time that saved nine" decision in West Coast Hotels. There, an earlier Justice Roberts switched his vote to uncharacteristically uphold legislatively enacted economic regulation.

In terms of antitrust, the contemporary Roberts' Court has imposed stringent threshold pleading requirements (upsetting over 50 years of Supreme Court precedents), restricted circumstantial evidence, made vertical price-fixing or resale price maintenance more difficult to prove and immunized securities and telecomm markets from antitrust liability, contrary to at least 55 years of the court's jurisprudence that disfavored implied immunities.

Based on the record so far, it could be argued the Supreme Court prefers government regulation to antitrust's competition mandate and that subsequent healthcare and other economic initiatives of the Obama Administration, including the promise to re-invigorate antitrust may meet a similar fate in the Supreme Court as FDR's New Deal legislation.

And, just as FDR's New Dealers vacillated between cooperation and competition, the same debate appears to continue to be waged within the current administration. The Antitrust Division recently lost out to "assisting corporate America in a time of recession and helping larger companies form industry alliances to provide consumer benefits by making their businesses more efficient" and in the financial sector the White House is reported to have "rejected a significant antitrust role as a way to reduce the size of large companies considered too big to be allowed to fail," prompting the *New York Times*' headline, "Antitrust Chief Hits Resistance in Crackdown."

Given judicial and political resistance and preference for the deal (cooperation), what are the prospects that competition and antitrust will play a significant role in healthcare reform? Like FDR's New Dealers, we may face a Supreme Court "switch in time" and a competition epiphany before that the rhetoric of free markets becomes a legal reality.

Mogin is the managing attorney of The Mogin Law Firm in San Diego; teaches antitrust at University of San Diego School of Law; chaired the Antitrust and Unfair Competition Law Section of the State Bar; and co-authored "California Antitrust and Unfair Competition Law."