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GUEST COLUMN

Bill may reconcile antitrust review

By Howard Morse, Megan Browdie and Sarah Swain

U.S. antitrust law — which prohibits mergers and acquisitions that may lessen competition — is enforced by both the Department of Justice and Federal Trade Commission. The agencies apply the same substantive guidelines, but seek preliminary injunctions to block proposed transactions under different laws. Critics argue the result at times depends upon which agency reviews a deal.

That may change. Pending legislation, approved by the House Judiciary Committee, would address perceived discrepancies by applying the standard now imposed on the DOJ to obtain an injunction to the FTC and removing the FTC's ability to bring administrative challenges to proposed deals. With the Senate and the House in Republican control, that bill appears more likely to become law.

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CRIMINAL LAW

Criminal Law and Procedure: Trial court judge may not reduce 'wobbler' felony charges to misdemeanors after preliminary hearing but before offender's guilty pleas. *People v. Superior Court (Jalalipour)*, C.A. 4th/3, DAR p. 244

Prisoners Rights: Alleged mislabeling as sex offender allows prisoner to proceed in forma pauperis on appeal. *Williams v. Paramo*, U.S.C.A. 9th, DAR p. 238

CIVIL LAW

Constitutional Law: Former NFL players' claims for unauthorized use of their likenesses against video game company not barred by 'incidental use' defense. *Davis v. Electronic Arts Inc.*, U.S.C.A. 9th, DAR p. 229

Constitutional Law: Solicitors may be enjoined from soliciting donations on sidewalks next to store entrances at private shopping center because such area is not 'public forum.' *Donahue Schriber Realty Group Inc. v. Nu Creation Outreach*, C.A. 5th, DAR p. 217

Government: Lake County Sheriff entitled to independent counsel in dispute with district attorney for entirety of his tenure as sheriff. *Rivero v. Lake County Board of Supervisors*, C.A. 1st/3, DAR p. 233

Immigration: Board of Immigration Appeals' mixed decision is not a final order of removal that triggers 30-day window in which petitioner must appeal. *Abdisalan v. Holder*, BIA, DAR p. 223

Daily Journal photo

Martin Hoshino, director of the state courts' administrative functions, says changes are being implemented. Days ahead of Gov. Jerry Brown's budget proposal, an annual review of the courts found millions of spending questionable.

State auditor blasts court leaders' spending

By Paul Jones
Daily Journal Staff Writer

SACRAMENTO — Echoing frequent criticisms, a state audit released Wednesday faulted California judicial leaders for poor management that led to $30 million in misspent funds.

The four-year review by the state auditor found court administrators turned over to staff too much control of important decisions, spent too much on salaries and engaged in other inefficient practices at the same time the court system struggled to absorb $1.2 billion in cuts that left courthouses shuttered and court staff without jobs.

In response, court administration leaders said they've been implementing over the last two years many reforms called for in the audit. Those reforms were first suggested in a report by a committee of judges critical of court administrators. Nevertheless, Chief Justice Tani Cantil-Sakauye on Wednesday announced the formation of a working group to review issues raised by the auditor. The group will report back to the Judicial Council in February.

The audit, which was instigated last year by court employee unions, comes just days before Gov. Jerry Brown's January budget proposal and is sure to impact court administrators' spring budget negotiations by drawing renewed scrutiny to their spending decisions.

Perhaps most devastating, the audit pointed out that Steven E. Jahr, the court's now-retired executive director, drew a salary of $227,196 in 2013 while the governor was paid $173,987. In fact, eight court executives earned more than Brown that year, and the average staff salary was $82,000, while the average was $62,000 in the governor's administration. Martin Hoshino, who took Jahr's position on Oct. 1, draws a salary of $240,828.

The audit also accused the court of needlessly maintaining three offices -- in Sacramento, San Francisco and Burbank —when a single office in Sacramento would do. The courts would save $5 million annually be closing the offices in San Francisco and Burbank, the auditor found.

The auditor also said court administrators' use of contractors cost $7 million more last year than if they had used state employees.

"The Judicial Council failed to adequately oversee the Administrative Office of the Courts," the auditor said. "In the absence of adequate oversight, the AOC engaged in questionable compensation and business practices."

Jahr, a retired Shasta County Superior Court judge who held the executive director's post between October 2012 and September 2014, said he wished auditor had talked to him.

"It's suggested [in the audit] that the Judicial Council relies heavily on staff" for budget decisions, Jahr said. But following recommendations of the committee of judges, "That entire structure has been changed," Jahr said.

Jahr said comparing his and other staff salaries to the salaries at other state agencies would have painted a different picture that comparing them to pay in the governor's office. Nevertheless, he said an independent review of the court administration's compensation was underway and changes were being made. He said court administrators also reduced their reliance on contractors over the past year but that they have had trouble hiring staff computer and construction specialists.

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New look for state's high court

Justices Mariano-Florentino Cuellar and Leondra Kruger display differences in first oral argument

By Emily Green
Daily Journal Staff Writer

SAN FRANCISCO — A younger, revamped state Supreme Court took the bench for the first time on Wednesday, as Justices Mariano-Florentino Cuellar and Leondra Kruger participated in oral argument just two days after being sworn in.

Wednesday's session, consisting of five criminal cases, was a lively one, even if the cases were less than blockbuster. During oral argument a security guard admonished a high school student on a class trip to wake up.

Sitting on opposite sides of the bench, the new justices were a study in small differences.

Cuellar has an uncommonly expressive face. His eyebrows were in constant motion, he frequently nodded, and his natural expression was that of a smile.

Kruger, sitting in the seat reserved for the junior-most justice, hardly stirred or gave any indication of what she was thinking.

Both asked a number of questions. During the morning session, which consisted of three oral arguments, a rough tally showed that Cuellar asked 15 questions and Kruger seven.

In one question, Kruger referred the attorney to the argument made by "your friend on the other side," a reference to opposing counsel.

The rest of the justices were also animated, arguably more so than usual. The court appeared likely to rule:

— That terminally ill or medically incapacitated inmates can appeal a judge's ruling denying them compassionate release.

— That in DUI cases, circumstantial evidence can be used to help prove the driver's blood alcohol content.

— That trial judges have no independent duty to instruct jurors to consider a defendant's self-incriminating statements with caution if the defense attorney doesn't request the instruction.

In the last case of the day, a death penalty appeal, oral argument was devoted to claims of racial bias in jury selection. While the justices appeared likely to rule against death row inmate Scott Royce Lyn, they did express concern about the selection process.

Cuellar asked whether the trial judge failed to give adequate reasons for excluding two African-American potential jurors.

"In this case, do you think the court passed on that?" he asked.

No, answered Deputy Attorney General Jennifer A. Jadovitz.

"All black people were excluded," Chief Justice Tani Cantil-Sakauye later said, suggesting that that fact distinguished the case from the court's prior rulings.

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Sacramento market appears to be emerging from recession beating

By Joshua Sebold
Daily Journal Staff Writer

The Sacramento legal market appears to be roaring back to life and nothing symbolizes that better than the resurgence at Downey Brand LLP.

At this time last year, many observers wondered if Sacramento's largest indigenous firm would be around in 2015.

But both the firm and the broader Central Valley legal market have rebounded. Downey dropped from more than 120 attorneys to less than 80 between 2013 and 2014, but has risen back to 90 in the last eight months.

"They have come out of this circumstance where they lost top-tier talent and have done exceptionally well," said legal recruiter Wayne Russell. "Most firms in Sacramento that have experienced the exodus of attorneys that Downey did are no longer functioning."

That was the fate of McDonough Holland & Allen PC, which previously held the title of largest Sacramento firm before it folded during the financial downturn in 2010.

Scott L. Shapiro, Downey's managing parter, said the firm's business law practice group has seen a large uptick in work as the economy has recovered.

"In past few year we had noticed it was really hard for the associates in our business group to make their hours and this last year they knocked it out of the park," he said. "We paid out more associate bonuses last year than we have in many years."

Shapiro said the firm got the impression that outside observers expected it to abandon its 2014 summer associate class during the rough times but the firm stuck with its commitments and was rewarded.

The economic uptick also created a good climate for the spinoff started by former members of Downey's executive committee, Delfino Madden O'Malley Coyle Koewler. The firm added three attorneys in the last few months of 2014, bringing its headcount to 12, and moved into permanent office space in December.

Chris Delfino, a partner with the firm, said more deals are being done and the firm had to expand quicker than anticipated to meet client needs.

The Sacramento region has experienced a slower recovery than coastal regions but the good times finally appear to be returning, Delfino said.

"There were two main areas that were the linchpin here, real estate and the government sector, so when both of those went heavy into the tank it's a slow growth to get back," he said.

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Harmonize DOJ, FTC merger review?

Continued from page 1

The New York Times

Edith Ramirez, chair of the FTC, at the agency's headquarters in Washington in 2014. Ramirez says a bill that would modify the agency's merger authority would have significant unintended consequences.

Dual Agency Enforcement

The DOJ challenges deals under the Sherman and Clayton Acts. The FTC, created in response to concerns about deficiencies in the Sherman Act and a desire for an expert administrative agency, relies on Section 5 of the FTC Act. Both agencies regularly seek injunctions in federal court. The FTC also litigates before administrative law judges, whose decisions are reviewed by the commission and appealable to the federal courts of appeal.

Most deals valued over about $75 million must be reported to the DOJ and FTC under the Hart-Scott-Rodino Act. The agencies divide review of such deals based on "expertise" — their experience investigating the same industry — under a "clearance agreement," last revised in 1995. In some industries, which agency will get clearance is clear: beer and steel to the DOJ; hard liquor and pharmaceuticals to the FTC. In others, such as computers and telecommunications, "clearance disputes" sometimes arise.

Those who believe which agency reviews a deal matters point to perceived differences in the standard the agencies confront in seeking injunctions and the additional burden parties may face in administrative litigation with the FTC.

Preliminary Injunction Standards

When seeking a preliminary injunction, the DOJ relies on the Clayton Act, which authorizes "proceedings in equity" to prevent violations but contains no standard for issuing a preliminary injunction. Rather, courts apply the traditional four-part test, commonly described as weighing (1) the likelihood of success on the merits, (2) the threat of irreparable injury, (3) the possibility of harm to other interested parties, and (4) the public interest.

The FTC, on the other hand, typically relies on Section 13(b) of the FTC Act, pending administrative litigation. That statute requires "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."

The differences between the standards are subject to debate, as at least some courts have held that DOJ need not prove irreparable harm or harm to the public, have recognized the "public interest in having competitive markets," and have required only "serious questions ... requiring further probing" or that are "fair grounds for thorough investigation." Critics, however, argue that the different standards make it easier for the FTC to prevail than the DOJ.

Procedural Differences

There are also procedural differences. In DOJ cases, courts may order the merits trial be consolidated with the preliminary injunction hearing. In such cases, the DOJ must prove the proposed merger may substantially lessen competition by a preponderance of the evidence. When not consolidated, the DOJ may continue to seek a permanent injunction when it loses at the preliminary injunction phase, but it would be in front of the same federal judge, and even if DOJ won, it would have to unwind a consummated transaction.

While the FTC is also authorized to seek permanent injunctions in federal court, it has never done so in challenging a proposed merger. Rather, the agency generally seeks a preliminary injunction pending an administrative trial. The agency often drops administrative proceedings after losing a preliminary injunction, but the fear of lengthy administrative challenges leads some to argue the FTC has a procedural advantage, making parties less likely to challenge FTC threats to block transactions.

The Path to Legislation

Congress is considering the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act, following a recommendation of the Antitrust Modernization Commission (the AMC).

The AMC was created to "examine whether the need exists to modernize the antitrust laws" and prepare a report and recommendations for changes. The AMC found the potential divergence between DOJ and FTC standards created the "impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction." It recommended in 2007 that Congress "ensur[e] that courts apply the same standard in ruling on a motion for a preliminary injunction."

Court decisions have fueled additional calls for legislation. In reversing a district court decision denying a preliminary injunction against Whole Foods' acquisition of Wild Oats, the U.S. Court of Appeals for the D.C. Circuit in 2008 emphasized that the district court's role was not to decide the merits but to "balance the likelihood of the FTC's success against the equities" and held that 13(b) creates a "presumption in favor of preliminary injunction relief." The court reasoned that preliminary injunctions should "be readily available to preserve the status quo while the FTC develops its ultimate case."

Lower courts have cited the *Whole Foods* case and invoked the "serious questions" standard, holding that an injunction should issue if the FTC "has raised questions that are so 'serious, substantial, difficult and doubtful' that they are fair ground for thorough investigation, study, deliberation and determination by the FTC."

While that language dates back to at least 1953, and was first used by the FTC in 1977, some argue that the courts are applying a "substantially reduced standard" for granting a preliminary injunction in FTC merger challenges.

Proposed Legislation

The House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing last April, and the full committee voted in September to approve the SMARTER Act. The act was introduced two days earlier as H.R. 5402 by Subcommittee Vice-Chair Blake Farenthold, R-Texas, and cosponsored by Committee Chair Bob Goodlatte, R-Va.

The act would modify the FTC's merger authority in two key respects. It would authorize the FTC to bring merger challenges in federal court under the Clayton Act, like the DOJ, and it would remove the FTC's ability to bring administrative actions against "the consummation of a proposed merger, acquisition, joint venture, or similar transaction subject to Section 7 of the Clayton Act."

The strongest argument favoring the legislation is that companies should not face disparate legal standards or processes depending on which agency obtains clearance. The strongest argument against it is that it prevents the FTC from serving as an expert administrative agency.

FTC Chairwoman Edith Ramirez argues the bill would "fundamentally alter the nature and function of the FTC" and has the "potential for significant unintended consequences."

The commission is not unanimous, however, in its opposition. Republican Commissioner Joshua Wright, for instance, supports "the general attempt to equalize the standards," arguing that "eliminating even the perception that exists that the standard that might be applied to one's merger is different depending on whether one draws the FTC or DOJ."

Interestingly, the American Antitrust Institute, a nonprofit think tank, says that if the goal is to reconcile DOJ and FTC standards, perhaps Section 13(b) should apply to DOJ actions as well.

So What Now?

With Republican control of both the House and Senate, the SMARTER Act has an increased chance of becoming law, but enactment is far from certain.

The Senate Judiciary Committee is now chaired by Chuck Grassley, R-Iowa, who says he "champions antitrust enforcement" and wants legislation that "protects consumers" but also legislation that "reduces regulatory burdens on businesses."

Senator Mike Lee, R-Utah, is expected to chair the Subcommittee on Antitrust, Competition Policy and Consumer Rights, after serving as the ranking member for two years. Lee's spokesman said Lee will see if the legislation aligns with the priorities of the incoming Senate Majority Leader Mitch McConnell before deciding to sponsor it.

The bill must be reintroduced in and passed by the full House, and the Senate, and other priorities may take precedence. A filibuster in the Senate or veto by the president could also prevent enactment.

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