

Recent Legislation Opens the Door for More State Antitrust Lawsuits

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On December 29, 2022, President Biden signed into law the State Antitrust Enforcement Venue Act (the "State AG Venue Act"). This law puts all businesses at risk of defending antitrust lawsuits across different jurisdictions simultaneously by preventing defendants from transferring state antitrust lawsuits to more favorable venues. This regulatory action is part of a broader legislative scheme that seeks to target giant tech monopolies and streamline litigation for state prosecutors. This law allows states to pursue anticompetitive activity at all levels of commerce, placing businesses of all sizes at greater risk of state antitrust actions. The passage of the bill also included an amendment eliminating the previous retroactive date of June 1, 2021.

Background

The State AG Venue Act is primarily a reaction to Google and other significant tech companies' recent efforts to transfer state actions to venues that some perceive as more favorable forums for litigation. See [Executive Business Meeting](#), Committee on the Judiciary (September 23, 2021). Specifically, Google sought to transfer various lawsuits, alleging anticompetitive practices (relating to app store fees, search engine distribution channels, and purportedly illegal agreements with competitors to drive out competition) from Texas to California. Google argued that California was a more appropriate venue for such litigation, given the pendency of several other similar or related lawsuits, the location of Google's Northern California headquarters, and the location of many relevant witnesses.

Plaintiffs' attorneys often view motions to transfer as a common strategy by defendants facing state and private lawsuits arising under federal antitrust laws to slow the pace of litigation and disrupt the plaintiff/prosecution's litigation strategy. On the other hand, defendants, facing dozens of antitrust lawsuits based on the same or common facts, view consolidation or transfer of such litigation as a cost-saving mechanism that minimizes the risk of conflicting decisions.

28 U.S.C. § 1407

Federal antitrust laws prohibit companies from engaging in anticompetitive activity, including agreements to unreasonably restrain trade like price and wage fixing, market allocations, or mergers and acquisitions that may substantially lessen competition. While the federal government only prosecutes or brings antitrust claims arising under federal law, states can bring actions under both federal and state law, and generally bring such claims in federal court. Section 1407 allows defendants to seek to consolidate antitrust cases, including those brought by state attorneys general and lawsuits brought by private plaintiffs and filed in different jurisdictions in multidistrict

litigation (MDL) proceedings. When enacted, Section 1407 intended to increase judicial efficiency and coordination, while also helping the parties avoid inconsistent rulings across different jurisdictions.

The State AG Venue Act: A Brief History

The State AG Venue Act prohibits private companies from invoking the MDL statute to transfer state attorneys general's lawsuits between federal courts. The proposed amendment effectively shields state antitrust challenges from MDL transfers, an immunity previously only enjoyed by the Department of Justice, Antitrust Division.

The State AG Venue Act received substantial bipartisan support in both houses of Congress. Proponents of the legislation cited the delay and conflict of interest resulting when states are forced to prosecute their case alongside private plaintiffs. Similarly, those supporting the law argued that state and private plaintiffs often have different litigation objectives and seek different remedies for different groups of beneficiaries.

Those opposed to the State AG Venue Act argued that the retroactive nature of the proposed amendment, which would require that state actions already transferred to another district be transferred back to the initial district, would defeat the intended goal of judicial efficiency. Additionally, the U.S. Chamber of Commerce expressed concern for the increased exposure businesses may face in defending against the same claims across many jurisdictions. The Chamber further noted that the substantial costs of litigating the same claims across various jurisdictions could lead companies to agree to large settlements for meritless claims to avoid burdensome litigation costs.

Eventually, the House passed the bill as part of a three-bill antitrust package on September 29, 2022. On December 22, 2022, the Senate voted to include the three antitrust bills in the Consolidated Appropriations Act, 2023, with the President signing the bills into law on December 29, 2022.

Implications

The State AG Venue Act could expose businesses of all sizes to liability for the same underlying conduct across multiple jurisdictions with inconsistent decisions. Without the ability to consolidate state actions, companies accused of anticompetitive behavior will be forced to defend each lawsuit in federal courts in every state they are sued, rather than consolidating the actions into one pre-trial proceeding. Moreover, the legislation could disrupt the coordination of discovery often required between federal criminal prosecutions and the related various civil lawsuits. Frequently, the Antitrust Division obtains discovery stays or is heard on the management of discovery to protect the criminal prosecution. Accordingly, the State AG Venue Act could result in the Antitrust Division litigating discovery management in multiple courts instead of only the situs of the MDL. Further, the burden on defendants to litigate the same claims in multiple jurisdictions, with the risk of inconsistent decisions on the merits and the application of the Antitrust Criminal Penalty Enhancement and Reform Act, would be another factor that businesses will need to consider when deciding whether to seek leniency under the Antitrust Division's Corporate Leniency Policy.

Amendment to Strike the Retroactive Date

The Senate passed the State AG Venue Act after adopting a proposed amendment by Senator Mike Lee, which

struck the previous retroactive date of June 1, 2021. This change is significant for defendants who have already consolidated their state antitrust actions into a single venue. As written, the bill now protects these defendants' pending matters from being reinstated in their original, separate jurisdictions.

Conclusion

The State AG Venue Act allows states to choose the venue in which they challenge alleged anticompetitive conduct, increasing the cost and risk of antitrust litigation across different jurisdictions for businesses of all sizes. Companies engaged in interstate commerce should secure legal counsel to aid in the review or implementation of antitrust compliance training and materials to minimize the risk of violations of the antitrust laws and the possibility of being forced to defend against multiple lawsuits across different jurisdictions.

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