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Senate Proposal Opens the Door for Increase in State Attorneys General Antitrust Lawsuits

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On September 23, the U.S. Senate advanced legislation that puts all businesses at risk of defending antitrust lawsuits across different jurisdictions at the same time. Senate Bill 1787 (S. 1787) — the Antitrust Enforcement Venue Act of 2021 — prevents 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. As referenced in an earlier post, this legislation has been the subject of a recent push by state Attorneys General for more authority in this space. If enacted, S. 1787 would allow states to pursue anticompetitive activity at all levels of commerce, placing businesses of all sizes at greater risk of state antitrust prosecutions.

Background

S. 1787 is primarily a reaction to Google and other significant tech companies' recent efforts to transfer state prosecutions 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 was intended to increase judicial efficiency and coordination, while also helping the parties avoid inconsistent rulings across different jurisdictions.

S. 1787: Proponent and Opponent Arguments

S. 1787 prohibits private companies' invocation of 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.

S. 1787 received substantial bipartisan support at the September 23 Senate subcommittee hearing. Proponents of S. 1787 cited the delay and conflict of interest that results when states are forced to prosecute their case alongside private plaintiffs in support of the amendment. Similarly, those in support of S. 1787 argued that state and private plaintiffs often have different litigation objectives and seek different remedies for different groups of beneficiaries.

The House Committee on the Judiciary also simultaneously introduced an identical bill in H.R. 3460. Despite slightly more opposition to the bill, the overwhelming majority of attendees advocated bipartisan support for its passage. *See* H.R. 3460, the State Antitrust Enforcement Venue Act of 2021, House Committee on the Judiciary (June 23, 2021). Although the White House has yet to speak on this particular bill, the Biden administration's most recent executive orders to increase competition and strengthen antitrust enforcement suggest that the president would likely support S. 1787. *See* Executive Order on Promoting Competition in the American Economy, The White House (July 29, 2021).

Those opposed to S. 1787 argued that the retroactive nature of the proposed amendment, which would require that state prosecutions already transferred to another district be transferred back to the initial district of filing, 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.

Implications of S. 1787

S. 1787, if enacted, could expose businesses of all sizes to liability for the same underlying conduct across

multiple jurisdictions and inconsistent decisions. Without the ability to consolidate state prosecutions, companies accused of anticompetitive behavior will be forced to defend each lawsuit in federal courts in every state in which they are sued, rather than consolidating the actions into one pre-trial proceeding. Moreover, S. 1787 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, S. 1787 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 a factor that businesses will need to consider when deciding whether to seek leniency under the Antitrust Division's Corporate Leniency Policy.

Conclusion

S. 1787 would allow 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.