The AIPLA Antitrust News

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Chair's Corner

Happy new year! We hope 2020 opened well for all committee members and will mark another great year in the book of the antitrust-IP interface.

It was great to see so many of you at the AIPLA annual Meeting in Washington DC's national harbor in October. Our Committee's joint meeting with the IP in China and IP in Europe Committees, entitled "Global Licensing - How to Avoid Antitrust Pitfalls," turned out to be a great success with excellent attendance.

The AIPLA mid-winter institute will be held from January 29 through February 1, 2020, at the Sheraton Grand at Wild Horse Pass, in Phoenix Arizona. While our committee will not be holding a meeting at the mid-winter institute, we hope many of you will be able to benefit from it. In addition to cutting edge I.P. developments, it will also include a wellness session on "Positive Psychology for Lawyers."

The current newsletter contains two topical articles. The first article, by Dina Kallay, summarizes and analyzes the December 2019 U.S. Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, that was issued jointly by the USPTO, DOJ and National Institute for Standards and Technology (NIST). The Statement replaces a narrower 2013 statement in this area that has been misinterpreted and misunderstood, especially overseas.

The second article, by Radhika Raman and Stephen Larson, examines a recently announced FTC probe into state exemptions for local hospital mergers. Gathered data will inform a formal FTC review on the impact of a set of state statutes known as certificates of public advantage (COPAs). The study follows an ongoing assessment of COPAs that the FTC began in 2017.

Our Committee publishes this newsletter three times each year. We welcome articles on any relevant topic. To contribute, please contact Stephen Larson at Stephen.Larson@knobbe.com.

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The New U.S. Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments

Dina Kallay[1]

On December 19, 2019, the U.S. Patent & Trademark Office (USPTO), the National Institute of Standards and Technology (NIST), and the U.S. Department of Justice, Antitrust Division (DOJ) announced a joint U.S. government policy statement ("Policy Statement" or "Statement") on remedies for standards-essential patents that are subject to voluntary fair, reasonable and non-discriminatory commitments[2] ("F/RAND"). A product of extensive consultations with stakeholders, as well as comprehensive discussions among its signatory agencies and with others in the U.S. Administration,[3] the Statement summarizes the U.S Government policy positions on remedies for infringement of these patents.[4]

The Previous Policy Statement

The Policy Statement succeeds a now-withdrawn January 2013 DOJ-USPTO policy statement ("2013 Statement") on a similar topic[5]. The 2013 Statement not only had fewer signatories but was also narrower in scope than the Policy Statement. It expressed former DOJ-USPTO views on how the International Trade Commission (ITC) should consider the existence of F/RAND commitments when considering "injunctive relief…or exclusion orders in investigations under section 337 of the Tariff Act of 1930" where the asserted patents were essential patents subject to such commitments[6].

The release of the 2013 Statement was not accompanied by press releases or statements by the heads of its two signatory

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[1] Head of Antitrust (IPR, Americas & Asia-Pacific), Ericsson. Statements and views presented in this paper are solely the author's and do not represent her employer.

[2] Department of Justice, *United States Patent and Trademark Office, and National Institute of Standards and Technology Announce Joint Policy Statement on Remedies for Standard-Essential Patents* (Dec. 19, 2019) https://www.justice.gov/opa/pr/department-justice-united-states-patent-and-trademark-office-and-national-institute-standards ("DOJ Press Release"); U.S. Patent and Trademark Office, *U.S. Patent and Trademark Office releases policy statement on standards-essential patents subject to voluntary F/RAND commitments: Extensive Discussions Yield Balanced Policy* (Dec. 19, 2019) https://www.uspto.gov/about-us/news-updates/us-patent-and-trademark-office-releases-policy-statement-standards-essential ("UPSTO Press Release").

[3] *See* the title of USPTO Press release ("Extensive Discussions Yield Balanced Policy") as well as in its second paragraph ("The statement was the product of extensive consultations with stakeholders, including diversely situated business entities and trade groups, in addition to comprehensive discussions among the signatory agencies and others in the Administration").

[4] Available on the UPSTO and DOJ websites, respectively, at https://www.uspto.gov/sites/default/files/documents/SEP%20policy%20statement%20signed.pdf or https://www.justice.gov/atr/page/file/1228016/download.

[5] Policy Statement on Remedies for Standards Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013) (withdrawn).

[6] *Id.* at 1 ("[DOJ and USPTO] provide the following perspectives on a topic of…: whether injunctive relief in judicial proceedings or exclusion orders in investigations under section 337 of the Tariff Act of 1930"); *see also* Policy Statement at 3 note 6.

agencies. However, its issuance was widely thought to have been tied to the prior administration's support for Apple's legal positions in extensive U.S. and worldwide patent litigation with its rival Samsung Electronics (and other rivals).[7] As part of the Samsung-Apple litigation, Samsung brought a Section 337 case against Apple at the ITC, seeking an exclusionary order against the latter's alleged infringement of Samsung patents and alleging that Apple failed to negotiate in good faith towards a license. Apple brought similar allegations against Samsung's negotiation conduct as a defense.[8] The DOJ Antitrust Division had opened an antitrust investigation into Samsung's patent-related conduct in its battle with Apple, which it later closed without action or any finding that Samsung's efforts to enforce its standards-essential patent rights had violated the antitrust laws. DOJ referenced the 2013 Statement in the press release announcing the close of the Samsung investigation.[9]

In June 2013, five months after the 2013 Statement was released, the ITC determined that Samsung negotiated in good faith and that Apple did not prove that Samsung have breached its F/RAND commitment.[10] Conversely, it found that Apple has failed to negotiate in good faith through engaging in "reverse patent hold-

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[7] Around the same time, Apple was also involved in extensive patent litigation with Motorola in both Federal courts and at the ITC. A then-majority of the Federal Trade Commission intervened in these cases, expressing substantive positions that supported Apple's positions. See Inv. No. 337-TA-745, *In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, Third Party Federal Trade Commission's Statement on The Public Interest (June 6, 2012) https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-united-states-international-trade-commission-concerning-certain-wireless-communication/1206ftcwirelesscom.pdf; Nos. 2012-1548, 2012-1549 Apple Inc. v. Motorola Inc., Brief of Amicus Curiae Federal Trade Commission supporting Neither Party (Dec. 4, 2012), https://www.ftc.gov/sites/default/files/documents/amicus_briefs/apple-inc.and-next-software-inc.v.motorola-inc.and-motorola-mobility-inc./121205apple-motorolaamicusbrief.pdf.

In addition to these statements, the FTC investigated Motorola's assertion of its patents against Apple under its enforcement authority, an investigation it was able to conclude through a two-prong consent order agreed to by Google after the latter had bought Motorola's patent portfolio. The other prong of the consent order terminated an FTC investigation of non-patent alleged Google practices related to its search engine, see Federal Trade Commission, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3 2013), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc.

[8] *See* Inv. 337-TA-794 In *re Certain Electronic Devices, including Wireless Communication Devices, Portable Music and Data Processing Devices and Tablet Computers* (public version issued July 5, 2013) https://essentialpatentblog.lexblogplatform.com/wp-content/uploads/sites/64/2013/07/337-TA-794-Commission-Opinion-Public-Version.pdf.

[9] Department of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Samsung's Use of Its Standards-Essential Patents (Febr. 7, 2014), https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-samsung.

[10] *In re Certain Electronic Devices*, supra note 8, at 59.

up".[11] The ITC concluded that Samsung has proven Apple's violation of section 337, and that the appropriate remedy should be an exclusion order prohibiting Apple from continuing to import its infringing devices into the U.S.[12]

In an August 2013 rare proactive exercise of the U.S. President's authority to evaluate ITC decisions to issue exclusion orders,[13] then-U.S. Trade Representative, Michael Froman ("USTR"), vetoed the ITC's June 2013 exclusion order against Apple before it took effect. The USTR repeal of the order was executed through the issuance of a policy letter "disapproving" the issuance of an exclusion order in that matter, which heavily relied on the 2013 Statement.[14]

DOJ and USPTO Withdraw from the 2013 Policy Statement

On December 7, 2018, Assistant Attorney General for Antitrust Makan Delrahim announced DOJ's withdrawal of its assent to the 2013 Statement.[15] Explaining the reasons behind the withdrawal, AAG Delrahim noted that "patent law already strikes a careful balance that optimizes the incentive to innovate, for the benefit of the public. The test was articulated by the Supreme Court in *eBay v. MercExchange*."

He therefore noted that the 2013 Statement created "confusion" as it "should not [have] be[en] read as a limitation on the careful balance that patent law strikes to optimize the incentive to innovate." Finally, AAG Delrahim also noted that the "potential for confusion remains high" because the "2013 [Statement] indicated that an injunction or exclusion order 'may harm competition and consumers,' seeming

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[11] *Id.* at 62-63 ("Apple's submission to the Commission...indicates that Apple has no intention of paying Samsung any royalties until after the conclusion of litigation… Apple's position illustrates the potential problem of so-called reverse patent hold-up, a concern identified in many of the pubic comments received by the Commission. In reverse patent hold-up, an implementer utilizes declared-essential technology without compensation to the patent owner under the guise that the patent owner's offers to license were not fair or reasonable. The patent owner is therefore forced to defend its rights through expensive litigation.").

[12] *See* https://www.usitc.gov/secretary/fed_reg_notices/337/337-794_notice06042013sgl.pdf

[13] The previous occurrence of such a USTR "veto" of an ITC exclusionary order occurred 26 years earlier, by President Ronald Reagan in 1987, *see* Angelo Young, Barack Obama Overrides US Global Trade Watchdog's Ruling on Apple Products; The Last President To Veto ITC Ruling Was Ronald Reagan In 1987, Int'l Business Times (Aug. 4, 2013), https://www.ibtimes.com/barack-obama-overrides-us-global-trade-watchdogs-ruling-apple-products-last-president-1371073.

[14] Michael Froman, Disapproval of the U.S. International Trade Commission's Determination in the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Investigation No. 337-TA-794 (Aug. 3 2013), https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF. The USTR letter clarified that it did not "revisit the [International Trade] Commission's legal analysis or its findings based on its record." and that the it was "not an endorsement or a criticism of the Commission's decision or analysis."

[15] Assistant Attorney General for Antitrust, Makan Delrahim, "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law", Remarks Delivered at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute (Dec. 7, 2018), https://www.justice.gov/opa/speech/file/1117686/download

somehow to suggest an antitrust inquiry that is distinct from the goal of optimizing the incentives for innovation—namely, dynamic competition". The DOJ also announced that it "will be engaging with the USPTO to draft a new joint statement that better provides clarity and predictability"[16] in this area.

In a September 2019 speech, Under Secretary of Commerce for Intellectual Property and Director of the USPTO, Andrei Iancu, revealed that "the USPTO [was then] carefully studying the issue and discussing it" nothing that "[u]ltimately, if we are to state a new policy, it should be balanced and structured to incentivize technological development and growth of the standards-based industries. …. [A]ny policy statement should incentivize good faith negotiations and dis-incentivize threats of either patent hold-up or patent hold-out."[17]

Director Iancu further explained that "[g]overnment policy must ensure balance between patent owners and potential licensees, so that patented innovations can continue to contribute to voluntary consensus standards organizations thereby continuing to maximize benefits to consumers. To that end, per se rules, or tipped scales, regarding remedies can lead to perverse incentives."[18]

In issuing the December 2019 policy Statement, the USPTO formally withdrew from the 2013 Statement;[19] NIST was never a signatory.[20]

Key Elements of The U.S. Policy Statement

The Policy Statement and accompanying press releases deliver the following key messages:

1. **Remedies for Standards-Essential Patents Are No Different Than Remedies for Non-Essential Patents.** "The agencies make clear that no "special set of legal rules" apply to [standard essential patents] and the courts, the U.S. International Trade Commission, and other decision makers are able to assess appropriate remedies based on current law and relevant facts;"[21] "The statement makes it clear that standards-essential patents should be treated no differently than any other patents, such that all remedies are available depending on the facts of the case."[22]

2. **The Equal Treatment Applies to All Remedies, Including Injunctive Relief, Damages and Others.** "All remedies available under national law, including

[16] All quotes in this paragraph are from the "Telegraph Road" speech, *id*.

[17] Remarks delivered at the Standard-Essential Patents Strategy Conference, Under Secretary of Commerce for Intellectual Property and Director of the USPTO Andrei Iancu (Sep. 10, 2019), https://www.uspto.gov/about-us/news-updates/remarks-director-iancu-standard-essential-patents-strategy-conference

[18] *Id.*

[19] Policy Statement at 4 ("Accordingly, the USPTO and the DOJ withdraw the 2013 policy statement, and together with NIST issue the present statement….").

[20] *Id*. at 4 n.8 ("NIST did not join in the 2013 policy statement").

[21] DOJ Press Release, *supra* note 2, third paragraph.

[22] USPTO Press release, *supra* note 2, first paragraph.

injunctive relief and adequate damages, should be available for infringement of standard-essential patents subject to a F/RAND commitment;"[23] "[T]he remedies that may apply in a given patent case include injunctive relief, reasonable royalties, lost profits, enhanced damages for willful infringement, and exclusion orders issued by the U.S. International Trade Commission. These remedies are equally available in patent litigation involving standards-essential patents…. [T]he general framework for deciding these issues remains the same as in other [non-essential] patent cases."[24]

The Statement cites case law holding that the same set of *Georgia-Pacific* damages factors apply to essential patents and non-essential patents.[25]

3. **Good Faith Negotiations, by Both Licensees and Licensors, Are Encouraged**. "As a general matter, to help reduce the costs and other burdens associated with litigation, we encourage both standards-essential patent owners and potential licensees of standards essential patents to engage in good-faith negotiations to reach F/RAND license terms."[26]

4. **When Licensing Negotiations Fail, Appropriate Remedies Should Be Available to Owners of Standards-Essential Patents** "When licensing negotiations fail, however, appropriate remedies should be available to preserve competition, and incentives for innovation and for continued participation in voluntary, consensus-based, standards-setting activities."[27]

F/RAND Commitments and Disputes Regarding Them Raise Contractual Issues, Not Antitrust Issues. The Statement confirms that the scope of F/RAND commitments and their enforcement are a contractual matter, not an antitrust law matter. "[T]he particular F/RAND commitment made by a patent owner, the [Standard Development Organization's] intellectual property policies, and the individual circumstances of licensing negotiations between patent owners and implementers all may be relevant in determining remedies for infringing a standards-essential patent, depending on the circumstances of each case. Further, individual parties may voluntarily contract for or agree to specific dispute resolution mechanisms".[28]

The Statement explains that "[t]he 2013 policy statement may also have been

[23] Policy Statement at 4-5.

[24] *Id.* at 5.

[25] *Id.* at 6 (citing *Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201, 1232 (Fed. Cir. 2014)).

[26] Policy Statement at 4; *see also id.* at 1, 5 ("Steps that encourage good-faith licensing negotiations between standards essential patent owners and those who seek to implement technologies subject to F/RAND commitments by the parties will promote technology innovation, further consumer choice, and enable industry competitiveness"; "Similarly, good faith in negotiations involving F/RAND commitments, supported by availability of data and application of best practices, can promote licensing efficiency, just as it can in negotiations involving commitments for patents that are not essential to standards").

[27] *Id.* at 1-2.

[28] *Id.* at 7.

misinterpreted to suggest that antitrust law is applicable to F/RAND disputes. Although the U.S. International Trade Commission may consider "competitive conditions in the United States economy" as part of its public interest analysis…that does not signify that F/RAND licensing disputes raise antitrust concerns.[29]

This position is consistent with the DOJ recent statement of interest in the *Lenovo v IPCOM* matter where it explained that "[i]t is not a violation of United States antitrust law for a [standard essential patent] holder to seek an injunction for patent infringement."[30] It is also consistent with the joint DOJ-USPTO statement in *HTC v. Ericsson* where the two agencies explained that "[t]he obligation to offer a license on FRAND terms sounds in contract law, not patent law… each contract may contain slightly different terms depending on the [standards development organization] involved. Thus, the determination of a FRAND royalty should begin with the applicable FRAND commitment at issue."[31]

5. **The U.S. Government is Taking Its Thumb Off the Scale**. As Under Secretary of Commerce for Intellectual Property and Director of USPTO explains, "The new joint statement effectively takes the government's thumb off the scale"; "The statement is balanced and structured to incentivize technological development and growth of standards-based industries."[32]

Other Noteworthy Aspects of the Policy Statement

In addition to the key elements described above, the Statement illuminates two other noteworthy issues.

First, it touches on collusionary practices between technology users in the context of standards-essential patent licensing, an area of focus to the DOJ Antitrust Division over the past two years, as has been reflected through multiple speeches[33]. The Statement

[29] *Id.* at 4 n.9.

[30] Statement of Interest of the United States, Lenovo (United States) Inc. et al. v. IPCOM GMBH (N. Dist. Cal. San Jose Div.) (Oct. 25, 2019) at 7 et seq. https://www.justice.gov/atr/case-document/file/1213856/download.

[31] Brief for the United States of America as Amicus Curiae in Support of Neither Party, *HTC Corporation v. Telefonaktiebolaget LM Ericsson* (5th Cir.) (Oct. 30, 2019) at 11 https://www.justice.gov/atr/case-document/file/1214541/download citing to Ericsson, Inc. v. D-Link Sys, 773 F.3d at 1231. The brief was signed by both the DOJ and USPTO.

[32] USPTO Press Release, supra note 2, 3rd paragraph.

[33] *See, e.g.*, Assistant Attorney General for Antitrust, Makan Delrahim, Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law, Remarks as Prepared for Delivery at USC Gould School of Law - Application of Competition Policy to Technology and IP Licensing (Nov. 10, 2017) at 10, https://www.justice.gov/opa/speech/file/1010746/download ("enforcers should carefully examine and recognize the risk that SSO participants might engage in a form of buyer's cartel, what economists call a monopsony effect".); Assistant Attorney General for Antitrust, Makan Delrahim, Don't Stop Thinking About Tomorrow: Promoting Innovation by Ensuring Market-Based Application of Antitrust to Intellectual Property, Organisation for Economic Co-operation and

notes that "[r]egardless of a patent holder's F/RAND commitments, under some circumstances, such as coordinated delay in agreeing to a license to drive down its cost, the DOJ could find such joint conduct to cause competitive harm, for example, through the collective exertion of monopsony power over a patent holder".[34]

Second, the Statement highlights another U.S. government policy document which is less known to professionals working outside the standard policy area. The document is Office of Management and Budget Circular A-119,[35] which "states that [SDO] intellectual property rights policies 'should be easily accessible, set out clear rules governing the disclosure and licensing of the relevant IPR, and take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard.'"[36] The Policy Statement thus complements the U.S. government's lead standards policy document which also mandates a balanced approach which takes into account the interests of both technology contributors and technology users.

Conclusion

The product of extensive discussions with stakeholders and within the U.S. Government, the Policy Statement is a major development, providing significant guidance on remedies for the infringement of standards-essential patents subject to voluntary F/RAND commitments. The Statement's guidance takes the thumb of the Administrative Branch off the scale, allowing U.S. courts and the ITC to develop further evidence-based case law in this area. The Statement "sets a positive example for [non-U.S.] jurisdictions that have sought to diminish the value of [standards-essential patents]"[37] based on misinterpretation of a prior policy. One would hope that other jurisdictions follow a similar neutral evidence-based approach to licensing disputes involving such patents.

Development "Licensing of IP Rights and Competition Law (June 6, 2019) at 5, https://www.justice.gov/opa/speech/file/1170241/download ("To that end, the Antitrust Division recognizes that concerted action among implementers or innovators at the same level of the supply chain could constitute an antitrust violation. Implementers could use their collective power in standard setting bodies to create a monopsony effect, driving down licensing rates. Conversely, patent-holders could exert power through joint monopolistic conduct that drives up licensing rates. We will not and should not hesitate to take action in these circumstances").

[34] Policy Statement at 2 n.3.

[35] Office of Management and Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities 81 FR 4673 (January 27, 2016) https://www.govinfo.gov/content/pkg/FR-2016-01-27/pdf/2016-01606.pdf. Full text of the Circular available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_circular_a-119_as_of_1_22.pdf.

[36] Statement Policy at 5-6.

[37] USPTO Press Release, supra note 2, fourth paragraph.

FTC Impact Study on State Hospital Mergers to Consider Role of Certificates of Public Advantage ("COPA")

Radhika Raman & Stephen Larson[1]

In October of 2019, the Federal Trade Commission ("FTC") issued seven "Provision of Information" orders to five health insurance companies and two state healthcare systems.[2] Aetna, BlueCross BlueShield of Tennessee, United Healthcare, Anthem, Cigna, Ballad Health, and Cabell Huntington Hospital will provide the FTC data about patient billings, discharges, and employee wages as a result of the orders.[3] The orders also mandate that these entities provide "other information relevant for analyzing the health systems' prices, quality, access, and innovation."[4] Once the FTC receives this information, it intends to conduct a retrospective analysis and publish the results.[5]

The study appears a reactionary measure to mounting concerns by both the FTC and third parties about potential negative effects of the immunity that state healthcare systems seem to enjoy from federal antitrust enforcement action. That perceived immunity is largely the result of a body of state laws known as certificates of public advantage ("COPA").[6] The data the FTC collects will guide both the agency and individual states in their respective regulation and enactment/use of COPAs.[7]

1. Background: The Birth of the COPA

Under US law, legal authority over regulating healthcare delivery is a states' right.[8] State regulation of healthcare is not automatically preempted by federal antitrust law because federal legislation does not intend to limit states' sovereignty over "traditional matters."[9] Thus, state legislatures may authorize anticompetitive actions which meet a judicial standard outlined by the Supreme Court.[10]

A state's policy choice will stand if the state both (1) clearly articulates its alternative policy and (2) provides for "active supervision" of private actions pursuant to the articulated policy.[11] In the 1970's and

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[2] *See* https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] http://www.urban.org/sites/default/files/publication/42226/2000111-Certificates-of-Public-Advantage.pdf.

[7] *See* https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage (stating "The FTC is interested in developing a better understanding of the actual benefits and harms associated with COPAs, and the information obtained through this workshop may help advance the agency's policy and enforcement strategies.").

[8] *See* https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copashttp://www.urban.org/sites/default/files/publication/42226/2000111-Certificates-of-Public-Advantage.pdf

[9] *Parker v. Brown*, 317 US 341 (1943).

[10] *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 US 97 (1980).

[11] *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101,1114 (2015); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1013 (2013).

1980's, states tried to levy this power in the form of unsuccessful rate regulation in their healthcare systems. [12]

Then, in the 1990s, a number of states responded to concerns about rising healthcare costs and failing rate regulation measures by enacting COPA laws.[13] The stated value proposition of these statutes is reducing redundancy, increasing efficiency, and thus lowering healthcare costs within state healthcare networks.[14] "Typically, COPA statutes allow hospitals and other healthcare providers to enter into cooperative agreements if the state determines that the likely benefits outweigh any disadvantages attributable to a reduction in competition."[15]

Prerequisite "conduct remedies" for COPA approval are usually written into statutes.[16] Enhanced quality of care benchmarks, regulation of payment rates, and covenants to re-invest cost savings into community health are all common examples.[17] COPAs are applicable to either (1) some form of healthcare provider collaboration, or (2) hospital mergers that might attract antitrust scrutiny. Renewed FTC interest in COPAs relates to hospital mergers. The primary concern underlying COPA-approved mergers is states eliminating competition without meeting promised conduct remedies for healthcare systems.

2. A Rising Concern Over COPAs

The FTC's October announcement of its study follows a June 2019 event hosted by the agency entitled "A Health Check on COPAs: Assessing the Impact of Certificates of Public Advantage in Healthcare Markets."[18] The purpose of the event was to draw any possible general conclusions "from existing research on the effects of COPAs, as well as suggestions for additional research that may be useful."[19]

Interestingly, by the FTC's own admission, relatively few (an estimated seven) hospital mergers that might otherwise violate federal antitrust laws have ever been approved pursuant to state COPA regulation.[20] So why the sudden concern?

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[12] Atkinson, Graham, "State Hospital Rate-Setting Revisited," Issue Brief 1332. New York: The Commonwealth Fund (2013), http://www.commonwealthfund.org/publications/issue-briefs/2009/oct/state-hospital-rate-settingrevisited.

[13] Blumstein, James F., "Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation." Cornell Law Review 79: 1459–1506, (1994), http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Blumstein.pdf (stating that between 1992-1995, at least 19 states enacted COPA legislation).

[14] https://www.ftc.gov/system/files/attachments/press-releases/ftc-staff-seeks-empirical-research-public-comments-regarding-impact-certificates-public-advantage/copa_assessment_public_notice_11-1-17_revised_3-27-19.pdf

[15] *Id.*

[16] http://www.urban.org/sites/default/files/publication/42226/2000111-Certificates-of-Public-Advantage.pdf

[17] *Id.*

[18] https://www.ftc.gov/news-events/events-calendar/health-check-copas-assessing-impact-certificates-public-advantage

[19] *Id.*

[20] https://www.ftc.gov/system/files/attachments/press-releases/ftc-staff-seeks-empirical-research-public-comments-regarding-impact-certificates-public-advantage/copa_assessment_public_notice_11-1-17_revised_3-27-19.pdf

The likely answer is that two of those seven mergers occurred within the last 5 years, after a nearly two decade cool-off period from such mergers.[21] Those two recent mergers happened in the two hospital systems the FTC filed Provision of Information orders on for its study. Weakened enforcement capability against state COPA power coupled with a growing body of conflicting economic data about COPA effects on pricing present understandable conditions for the FTC to commission its own study to base future policy proposals upon.

3. Ineffective FTC Enforcement Power in the Wake of COPAs

Cabell Huntington in West Virginia, one of the two hospital systems the FTC will mandate data from as part of its study, was once the subject of an FTC blocking action.[22] In November of 2015, the FTC authorized action to block Cabell Huntington Hospital's proposed acquisition of St. Mary's Medical Center.[23] The two hospitals were located three miles apart.[24] In its administrative complaint, the FTC alleged that the merger would "create a dominant firm with a near monopoly over general acute care inpatient hospital services and outpatient surgical services in the adjacent counties of Cabell, Wayne, and Lincoln, West Virginia and Lawrence County, Ohio likely leading to higher prices and lower quality of care than would be the case without the acquisition."[25]

The complaint further alleged that both hospitals were "each other's closest competitor for health plans and patients, and that the acquisition would substantially lessen competition between the hospitals for patients and for inclusion in health plan networks."[26] Further, the complaint asserted that, both parties to the transaction had "attempted to limit their intense head-to-head competition through collusive conduct, such as restrictive marketing agreements."[27]

In conjunction with its complaint, the Commission authorized seeking a temporary restraining order and a preliminary injunction in federal court if needed to prevent the parties from completing the acquisition."[28] Regarding its choice to bring an enforcement action, the FTC stated: "If this proposed acquisition goes forward, it would eliminate important competition that has yielded tremendous benefits for Huntington-area residents."[29] Additionally, "The merged hospitals would have a market share of more than 75%, and local employers and residents are likely to face higher prices and reduced quality and service at the combined hospital."[30]

Less than a year later, in July of 2016, the FTC voted to dismiss its administrative complaint against Cabell Huntington without prejudice.[31] The reason for the dismissal? West Virginia passed COPA legislation (SB

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[21] *Id.*
[22] https://www.ftc.gov/news-events/press-releases/2015/11/ftc-challenges-proposed-merger-two-west-virginia-hospitals
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] https://www.ftc.gov/news-events/press-releases/2016/07/ftc-dismisses-complaint-challenging-merger-cabell-huntington

597) in March of 2016, and state authorities approved the merger under the new law.[32] Despite dropping the complaint, the FTC expressed its distaste for West Virginia's actions in a separate written statement.[33] "This case presents another example of healthcare providers attempting to use state legislation to shield potentially anticompetitive combinations from antitrust enforcement…[T]he Commission believes that state cooperative agreement laws such as SB 597 are likely to harm communities through higher healthcare prices and lower healthcare quality."[34]

The dismissed complaint shows the FTC's faltering power to block hospital mergers in the face of COPAs. The Commission's statement following its dismissal demonstrates escalating concerns over states potentially facilitating anticompetitive practices using a "COPA shield."

4. Inconsistent Economic Findings on COPAs

One motivator for commissioning a formal impact report on COPAs is the currently slim, inconsistent body of available research on COPA effects. Data presented[35] at the FTC's June 2019 COPA workshop is inconclusive as to whether COPAs drive down healthcare prices for consumers.[36]

One researcher's case study of COPA legislation and subsequent repeal in Montana found that post-repeal, commercial inpatient prices increased "at least 20% relative to control trend."[37] However, the study was limited by inability to study outpatient prices, quality of care, and access to healthcare.[38] Still, the study pointed to price savings for Montana consumers under a COPA regime.

In contrast, another presenter's study of the Palmetto Healthcare System in South Carolina found "a very large inpatient price increase" post COPA enactment.[39] Notably, that price increase "was statistically indistinguishable from controls,"[40] signaling a general trend of rising U.S. healthcare costs.[41] The Palmetto study was similarly lacking outpatient pricing numbers and general metrics on quality and access.[42]

These inconsistent pricing figures paired with missing care metrics pose another justification for the FTC to use its administrative authority to mandate a richer data set from hospitals and insurers which could inform a more conclusive COPA study.

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Presenters included various university affiliate researchers and a graduate fellow in the FTC Bureau of Economics.
[36] https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] https://www.pgpf.org/blog/2019/05/healthcare-costs-for-americans-projected-to-grow-at-an-alarmingly-high-rate
[42] https://www.ftc.gov/system/files/documents/public_events/1508753/slides-copa-jun_19.pdf

5. Conclusion

The state action doctrine enabling states to enact and approve hospital mergers through COPAs poses a roadblock for FTC antitrust enforcement. This tension is exacerbated by states like West Virginia and Tennessee enacting COPA statutes or using existing COPA statutes to gain state approvals *after* the FTC opens investigations into their proposed mergers. Existing research is limited by incomplete data sets and conflicting findings on cost savings under COPA regimes. An FTC impact study on COPAs based on a robust set of data collected through Provisions of Information could lead to a better understanding of COPA benefits and drawbacks. The FTC has not posted an update on data collection since announcing the study in October. Once the study is complete, if the results show favorable pricing effects post-COPA enactment, state administrators can likely expect less pressure from federal antitrust regulators.

If, however, the FTC finds that COPAs are more akin to a shield for anti-competitive healthcare practices and increased costs to consumers, a battle to rollback state regulatory power over healthcare might be forthcoming. A battle of this scale, backed by compelling data, could have the potential to fundamentally reshape the balance of power between state and federal regulatory bodies. Antitrust practitioners with a focus on healthcare should check the FTC website regularly for updates.