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Litigators of the Week: With $26B Merger on the Line, This Trio Won Approval for T-Mobile/ Sprint in Unprecedented Challenge

'Our core argument was simple: the world with the merger is more competitive and consumer-friendly than the world without the merger.'

By Jenna Greene
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Our Litigators of the Week are Wilmer Cutler Pickering Hale and Dorr's Hallie Levin; Cleary Gottlieb Steen & Hamilton's Mark Nelson and Gibson, Dunn & Crutcher's Richard Parker, who led a small army of lawyers in persuading U.S. District Judge Victor Marrero in the Southern District of New York to approve the $26 billion merger of T-Mobile and Sprint.

Representing acquiring party T-Mobile and its parent company Deutsche Telekom, they convinced Marrero to approve the union, which will affect 100 million customers.

The Justice Department and Federal Communications Commission signed off on the merger months ago, but in an unprecedented move, attorneys general from 13 states and the District of Columbia sued to block it.

It was a formidable challenge, and many onlookers predicted the states would prevail. The Wall Street Journal, for example, ran an op-ed on Jan. 31 headlined "Why Hope Is Fading for Sprint and T-Mobile: A lousy strategy by the Trump administration is leading to a court loss and a loss for consumers."

Instead, Marrero on Tuesday greenlighted the deal.

The T-Mobile/ Deutsche Telekom trio went deep in discussing the case with Lit Daily.

Who is your client and what was at stake?

Hallie Levin: WilmerHale and Cleary Gottlieb represented both T-Mobile and Deutsche Telekom. What was at stake in this case was actually the entire landscape of the wireless telecommunications industry in the United States.

But more specifically, this case was to decide whether T-Mobile could merge with Sprint to create a world-leading, nationwide 5G network that will deliver unprecedented service and value to consumers, increasingly disrupt the wireless industry to advance positive change, and enhance competition.

Rich Parker: We represented Deutsche Telekom, the German parent company of T-Mobile. The case was critically important to DT because this merger will give T-Mobile the spectrum, scale, and assets to become a serious competitive threat to the wireless industry's two largest players, Verizon and AT&T, for the first time.

Up until now, T-Mobile has done its best to compete against the big two, but it has not been as successful as it will be as a result of this merger. Those two companies still dominate the U.S. market, generate the vast majority of the market's free cash flow, and earn incredibly high service margins. This merger is designed to disrupt that.

Hallie Levin. Mark Nelson. Richard Parker

Normally, if there are concerns about a merger being anti-competitive, the case gets litigated by the feds. What happened here when the DOJ and FCC reviewed the deal? What commitments did T-Mobile make to assuage their concerns?

Mark Nelson: The FCC and the DOJ conducted extensive investigations of the merger, and both agencies cleared the deal, concluding that the merger, subject to certain commitments, will increase competition, lead to massive benefits for consumers, and is in the public interest.

To ensure that the benefits of the merger are realized, the FCC and DOJ conditioned their approvals on commitments from New T-Mobile that it will build the network that it plans to build and will do so on schedule. The DOJ also required the parties to divest Sprint's Boost business to DISH and provide DISH with access to the New T-Mobile network on extremely favorable wholesale terms.

The merger challenge by the state AGs and District of Columbia has been described as unprecedented. What's the closest state enforcers in the past have come to such an action? Is there anything comparable?

Mark Nelson: In some ways, the "unprecedented" label is accurate because, to our knowledge, it is the first time in history where state AGs have sued to block a nationwide merger after the parties agreed to a significant divestiture and received approval from two expert federal agencies.

That said, it is not the first time that state AGs have brought challenges to mergers independently of the federal agencies. For

example, in 2017, the California Attorney General filed a complaint seeking to enjoin the proposed purchase by Valero Energy Corporation of a petroleum storage and distribution terminal owned by Plains All American Pipeline, after the FTC investigated the merger and found it would not reduce competition. The court denied California's request for a preliminary injunction, but the parties decided to abandon the transaction while discovery was still ongoing.

How did it affect your strategy to litigate against a coalition of states versus the federal government? Did you feel like you were in uncharted waters?

Rich Parker: In a sense, yes, we were in uncharted waters because states never fully litigate a merger of nationwide companies when the federal government has approved the merger.

However, at trial, the parties' strategies were not that unusual. The states used the same general litigation strategy that the U.S. Department of Justice typically uses in merger trials. The states relied heavily on market shares and on experts who opined that economic theory suggests that having fewer competitors might create incentives to compete less aggressively.

Mark Nelson: Regardless of who we were litigating against, we would have approached the core of our case the same way. That is, we would have led with our business people explaining the rationale for the transaction, their business plan for the combined company, how the transformational change from the transaction would allow New T-Mobile to better take on Verizon and AT&T, and how the merger will lead to lower costs, more capacity, higher quality, and greater innovation, including the acceleration of 5G.

Our view throughout—both during the regulatory review phase and in the litigation—has been that the better the decision makers understand the technology and the business plans, the better off we will be, as they will understand how compelling an opportunity this merger is for the parties and for consumers.

Hallie Levin. We had to win the case on the facts and the law no matter who the plaintiffs, so our strategy was not affected by whom we faced across the courtroom. And, while the posture of the case was indeed unprecedented, we had to overcome the states' arguments under the antitrust law just as we would have had to against the federal government. We referenced the federal approvals at certain moments during the trial, but we still had to win the case on the facts and the law.

Who represented Sprint?

Mark Nelson: Karen Lent and Steve Sunshine of Skadden Arps represented Sprint and did a fantastic job with their witnesses. David Meyer of Morrison & Foerster was also instrumental in helping prepare witnesses for trial and shaping the overall trial strategy.

This case involved a small army of defense-side lawyers from multiple firms. How did you handle coordination/ working together? Any lessons learned?

Hallie Levin: We may have been a small army, but the State AGs were a huge army! I think that we were able to work so effectively together because we truly like and admire each other—as lawyers and as people.

That alchemy is rare in joint defense groups, especially when the stakes were as high as they were here. There was genuine friendship and camaraderie throughout the process, and I think that showed in the courtroom. The exceptional leadership of T-Mobile's in-house counsel, chief among them Laura Buckland and Melissa Scanlan, was crucial to the success of the trial team. And I would be remiss not to give tremendous thanks to my partners, David Gringer and Peter Neiman, who were instrumental in achieving this victory.

Mark Nelson: It was a large defense team, but the states also had a very significant team on their side. They hired an outside law firm and had effectively unlimited resources to draw on from the offices of 13 attorneys general. They also hired four experts to present at trial vs. the one expert that the defendants put forward. In addition, they were able to leverage more than a year of investigatory work done by the DOJ and the FCC.

The defense team worked together remarkably well. A critical part of our success is that we had a strong overall strategic lead in Laura Buckland, the head of litigation for T-Mobile. Laura was deeply involved in the day-to-day preparation leading up to trial and was on the ground in the war room every day during trial driving our strategy and coordinating the various law firms and other in house counsel from the various defendants, and making calls on what would and would not happen at trial as needed.

The Cleary team (George Cary, Dave Gelfand, and I) were co-lead counsel for the trial with WilmerHale (Hallie Levin), and we worked seamlessly with each other as if we were one firm, which was enormously helpful in making things run smoothly. My partners Dan Culley and Matt Solomon were also critical to our witness preparation and a major reason for our success.

Rich Parker: This is never easy in any defense group, but we made it work with constant communication and a division of labor. While we also worked on a few of the experts, our DT team focused primarily on preparing the DT and DISH witnesses for their deposition and trial testimony.

Brian Robison (Gibson Dunn) played a critical role with the DT and DISH witnesses, while Rod Stone (Gibson Dunn) and Brian Ryoo (Gibson Dunn) played key roles with several experts.

It's not hard to see why this merger—involving direct competitors in a highly concentrated market—would trigger antitrust concerns. What was your big-picture message to counter that?

Hallie Levin: Our core argument was simple: the world with the merger is more competitive and consumer-friendly than the world without the merger. With the merger, New T-Mobile will have a vast amount of additional capacity, greatly reduced costs, and a dramatically improved network that will give it the incentive and the ability to "supercharge" its Un-carrier strategy, and DISH will emerge as another strong entrant in the retail wireless market.

Rich Parker: Sprint is a fading firm. The evidence showed that its network quality is poor, it is deeply in debt, it has no way to obtain the spectrum assets it needs to be a threat in the 5G world, and it will not be a serious competitor in the future without this

merger. The states tried to portray Sprint as a serious rival, but the court rejected that idea.

So the court had a choice between a world without the merger—where Verizon and AT&T dominate and do not have to innovate, where T-Mobile is doing its best to compete but does not have the scale or spectrum to attack the big two, and where Sprint is fading – and the world with the merger—where New T-Mobile finally has the ability to attack the big two, the big two have to respond with competitive moves of their own, and DISH emerges as a better competitor in the future than Sprint could have been.

This merger will create more competition than this market has ever seen because the big two (Verizon and AT&T) will now face a competitor with the size, scale, and spectrum to attack them in ways they have never been attacked before. No amount of economic theory about 4-3 mergers could refute the facts.

What do you think were some of the key turning points during the trial?

Mark Nelson: I am not sure there was a "turning point" in the sense that I don't think the plaintiffs ever got much traction with their affirmative case. As a result, the tide seemed to turn in favor of the defense when the string of T-Mobile executives—John Legere, Mike Sievert, Neville Ray, and Ankur Kapoor—took the stand and gave compelling explanations of their business plan and the rigor of their engineering work and analyses.

The fate of the case seemed further sealed when plaintiffs presented their experts. In both their direct and cross examinations, plaintiffs' experts made clear that there was little of substance behind each of their opinions. We managed to undercut the foundation of each of the key experts, which led the court to greatly discount or even dismiss the testimony as not probative.

Hallie Levin: I don't feel like there was really one "turning point," but when T-Mobile's CEO John Legere took the stand on the fourth day of trial as our first witness for the defense, I did feel like there was real electricity in the courtroom. And then T-Mobile President Mike Sievert followed with a brilliant explanation of how New T-Mobile would amplify that strategy in the rapidly evolving telecommunications industry to the benefit of consumers and the competitive landscape.

Rich Parker: It is hard to determine whether there was a turning point because Judge Marrero did not show his cards during trial. But from our perspective, it seemed like the testimony of the two DISH witnesses was critical.

DISH was a central feature of the settlement with the DOJ, and the plaintiffs attacked DISH as an unreliable company that would not be a real competitor in the future. Both DISH witnesses did an outstanding job of explaining DISH's extensive preparations to enter the market, its massive spectrum portfolio, its ability to finance a network buildout, and the overwhelming response from vendors wanting to help DISH build its network.

The states had no real answer for that testimony. There was no fact or expert witness who said DISH cannot enter the market or its business plan is not reasonable. The plaintiffs were left with trying to poke holes in DISH's story on cross, but that was not enough to undermine a business plan that won approval from the DOJ and has earned support in the market.

Some reports have surmised that this case ultimately turned on the testimony of DISH founder and chairman Charlie Ergen's testimony. Did you know this going in? How did you prepare for such a high stakes witness?

Rich Parker: Yes, before trial, we thought the two DISH witnesses would be the most important witnesses. DISH was an important component of the DOJ settlement, and given how much the states were going to attack DISH, we knew we would have to convince the court that DISH could enter the market and be a disruptive competitor on day one.

Both DISH executives are brilliant, successful businessmen, and we realized quickly that they would be strong witnesses on the stand. We did not alter our usual game plan in preparing them. Their testimony on direct came naturally; they simply told the truth about DISH's preparations to enter the market and plans to disrupt the incumbents. So we focused a lot more time preparing them for the questions they would get on cross. There was a lot of role-playing how cross-examination might go.

Were there any other key moments at trial that had particular resonance?

Mark Nelson: When the plaintiffs called a Sprint employee, Roger Sole, as their first witness, their case began by validating the defense position on one of the key issues in the case. On both direct and cross examination, the judge saw a very sincere Sprint businessperson speak to the challenges his company is facing and the dire circumstances they are in. Angela Rittgers from Sprint—also presented by plaintiffs—was another strong witness for the defense, which again got the plaintiffs' case off on a weak footing.

The court ultimately said the experts were effectively a wash and decided to focus on the fact witnesses–the executives. Did you anticipate this?

Rich Parker: Yes, 100%. We prepared for trial with the idea that the experts on both sides would cancel each other out and the court would decide the case based on the documents and the fact witnesses.

Courts typically decide these cases based on the facts and not the experts, but Judge Marrero was more blatant about it than some other judges have been. Antitrust lawyers live in the world of economists and econometric models, speak economist jargon, and use experts to convince agencies about the economic effects of a merger.

Because of that, there is a tendency to think that judges will be fascinated by models and PhD economists and decide cases based upon them. But in our experience, that is not how these merger cases are decided. Both sides usually retain outstanding economists with stellar credentials, but as Judge Marrero said here, they usually do not move the needle much for either side. The facts, fact witnesses, and party documents decide the case.

Your strategy in this case, through the witnesses you presented, was to rely on real-world practices of T-Mobile in the marketplace to drive your arguments. Why did you believe this would be convincing, as it clearly was?

Hallie Levin: As a trial lawyer, I was always convinced that, despite the predictive nature of antitrust law and its emphasis on economic analysis, the real-world facts should and would matter here. And the real-world evidence in this case is unambiguously that New T-Mobile will enhance, not lessen, competition.

I was singularly focused on presenting those facts, chiefly through my witness examinations of John Legere and Mike Sievert, in a way that allowed them to really bring to the courtroom the spirit and commitment of the company they lead.

Judge Marrero wrote a 173-page opinion. What's one sentence that resonated with you and why?

Mark Nelson: It is difficult to pick just one sentence, as there is so much in the opinion that is powerful, but here is one that resonated with me: "Having observed the presentations of the T-Mobile executives at trial, watched their demeanor, assessed their credibility, and weighed their testimony in its totality … the Court finds that the portrayal of the likely post-merger competitive posture New T-Mobile would adopt warrants credit as believable and consistent with the realities of competition in the [Retail Mobile Wireless Telecommunications Services] market."

I think this sums up why we won and why we should have won. It also validated our strategy of leading with our business people and the compelling logic of the New T-Mobile business plan. The court understood that what really matters is the business realities faced by these executives in the real world and that it was a far more complex assessment than simply calling this a "4-to-3" transaction and assuming that the transaction is somehow inherently bad thing for consumers.

Hallie Levin: This description of how New T-Mobile will behave in the marketplace: "[W]hat the Court observed at trial in the testimony and documentary evidence credibly presented by T-Mobile executives reveal[ed] … a company reinforced with a massive infusion of spectrum, capacity, capital, and other resources, and chomping to take on its new market peers and rivals in head-on competition." (Op. 161).

This quote captures the fact that the real world indeed mattered to the outcome in this case, and that T-Mobile truly was able to convey its pro-competitive and pro-consumer identity and intent.

Rich Parker: On pages 155-56, Judge Marrero used a boxing analogy that perfectly captured our trial theme. He wrote: "[A] boxer who has strived and sweated for years to reach the title prize fight is not likely to pull punches and take a dive the moment he steps into the ring against the reigning champ."

That was exactly our point. In preparing for trial, Brian Robison and I constantly pushed a boxing analogy, and it was nice to see the court pick up on that. For almost a decade, T-Mobile has been fighting Verizon and AT&T with every creative trick in the book, but it has never had the tools it needed to disrupt their hold on the market, their high margins, and their free cash flow.

This merger finally gives T-Mobile the tools it has always needed to bring serious competition to the big two. T-Mobile is the boxer who has always needed that one extra punch, a devastating left hook, to take down the champ. With this merger, T-Mobile will get that left hook, and it plans to throw it early and often.

What happens next?

Mark Nelson: As T-Mobile announced a few days ago following the court's decision, "the companies are now taking final steps to complete their merger to create the New T-Mobile." The companies are preparing for closing and look forward to getting on with the transaction and starting to execute on their plans to "supercharge" the Un-carrier strategy with New T-Mobile's transformative new network.

What will you remember most about this case?

Rich Parker: I will remember the DT and DISH witnesses doing so well on the stand at trial, explaining how this merger will transform this market and make it far more competitive than it has ever been. And I will remember the great team we had. The in-house and outside lawyers on the DT team were first-class. We had a good story to tell on the facts, but that did not make the case an easy one to win. The presumption is hard to overcome, but we had the facts and the team to do it.

Mark Nelson: There are enough memories from this case to fill volumes, but I think what I will remember most is the feeling of camaraderie among the joint defense teams. I have participated in many joint defense efforts over the years, but none compared to this in terms of how seamlessly the group worked together and how much the group simply enjoyed working with each other.

The members of the defense team were laser-focused on getting to the right outcome. They were uniformly generous in sharing their time and were always eager to help out others wherever they could, without regard to who is getting "credit." This was as close as I have seen to multiple firms running a defense as if they were a single firm.

Hallie Levin: Two things. First, I came into this group of antitrust law giants with a great deal of trial experience, but not their antitrust experience. I will never forget the receptivity of those colleagues to my own insights and strategic judgments borne of my trial practice.

I think that our combined instincts and histories were critical to the shape and presentation of our case. Second, the war room during trial. The collegiality and camaraderie working late into the night with the whole joint defense group was unlike anything I've experienced before and likely won't again.

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