Hughes Hubbard & Reed

Summary of Key Recent U.S. Antitrust Developments

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March 20, 2024 – Over the past 12 months, the Biden administration continued its aggressive enforcement of the federal antitrust laws, although the rate at which the enforcement agencies have filed cases has slowed down compared to the first two years of President Biden's term. The FTC and DOJ's focus on the technology sector has continued, even though both agencies have also filed substantial cases across a range of other industries. The two enforcement agencies closed out 2023 with several significant wins. Their successes, however, have been tempered by a federal judiciary that is generally skeptical of the Biden administration's expansive views of antitrust enforcement. 2023 also saw an emboldened plaintiffs' bar targeting a range of industries, including the real estate sector, technology, and healthcare industries.

We expect these antitrust enforcement trends to continue through the end of President Biden's current term, with the longer term outlook depending in part on the results of the upcoming presidential election and any changes in agency leadership early next year. Below is a summary of some of the most significant recent developments.

Agency Developments

- **At the close of 2023, the FTC and DOJ Antitrust Division published their long anticipated updated Merger Guidelines.** The Guidelines reflect the heightened antitrust scrutiny the Biden administration believes is necessary to combat increasing consolidation that it claims has reduced competition in the U.S. economy over the past several decades. The Guidelines adopt a revised structure compared to the guidelines promulgated in 1982 during the Reagan administration and revised in 1992 and 2010 during the Clinton and Obama administrations. Importantly, for the first time since 1992, the two agencies will now have a single set of Merger Guidelines that, in different sections, address both horizontal and vertical mergers and acquisitions, as well as mergers with or of potential competitors.
- **The FTC published a proposed rulemaking in June overhauling pre-merger notification requirements under the Hart-Scott-Rodino (HSR) Act.** FTC Chair Lina Khan described the proposal as the culmination of the first "top-to-bottom review" since the HSR Act was passed in 1976. The changes are generally expected to make the preparation of HSR filings a lengthier and more burdensome process. Among the proposed changes, the new rule would require filing parties to make additional disclosures, including information about a transaction's "strategic rationale," "information about existing or potential vertical, or supply, relationships between the filing persons," information on how the transaction may impact the relevant labor markets, and details regarding previous acquisitions by the merging parties. The comment period for the proposed rulemaking has closed, but the FTC has yet to announce when it will issue its final rule.
- **In January of 2023, the FTC proposed a rule that would ban post-employment non-compete clauses in agreements between employers and workers.** The rule would make an exception in limited cases in connection with the sale of a business. In public comments, many business groups expressed strong objections to classifying such non-competes as

"unfair methods of competition." The FTC is expected to take a final vote on the proposed rule in April 2024. If the FTC issues the rule in its current form, these groups are expected to bring court challenges to the commission's authority to impose the restrictions.

Merger Litigation

- **FTC data show increased scrutiny of pharmaceutical and healthcare mergers.** Data released by the FTC in December indicates that since 2020, DOJ and the FTC have been much more likely to issue second requests in pharmaceutical and healthcare mergers than in previous years. Enforcement actions in other industries appear not to have spiked to the same extent, perhaps because the Biden administration's pledges to strengthen enforcement have deterred potentially anticompetitive mergers across the board. The FTC data show that HSR filings involving producers of products and services within the same industry classification code has declined by 50% since a recent peak in 2019.
- **The DOJ secured two notable wins in the District of Massachusetts in the airline industry.** In May, Judge Sorokin ordered JetBlue and American Airlines to terminate their joint venture, the Northeast Alliance, following a September 2022 trial in which DOJ and several state attorneys general challenged the alliance as a de facto merger. The court rejected the airlines' contention that the alliance would increase competition with market leaders Delta and United. It found instead that the alliance violated Section 1 of the Sherman Act because it increased fares and reduced choices for flights between Boston and New York. In January 2024, Judge Young blocked JetBlue's proposed acquisition of Spirit Airlines, finding at trial that the deal would harm cost-conscious flyers and reduce competition in multiple markets nationwide.
- **In October, a federal court in San Francisco denied the FTC's request for a preliminary injunction to block Microsoft's acquisition of videogame developer Activision Blizzard.** The FTC argued that the vertical combination of Microsoft's Xbox gaming system and Activision's Call of Duty game within one firm would harm competition by allowing and incentivizing Microsoft to withhold the game from rival consoles. The defendants attempted to address the FTC's concerns with a "fix," the specific terms of which were not publicly disclosed but reportedly included a commitment to make Call of Duty available on Sony PlayStation and Nintendo Switch consoles. The court considered the proposed fix at the liability stage of the litigation over objections from the FTC, arguing that it should wait until the remedy stage of litigation. The court declined to issue a preliminary injunction, ultimately finding that Microsoft lacked sufficient incentive to make access to Call of Duty exclusive. The parties closed the transaction in October 2023.
- **In late December, the Fifth Circuit affirmed the viability of the FTC's theory of vertical harm in one of its merger challenges and set out standards for litigating proposed deal fixes.** The case, Illumina v. FTC, centered on the FTC's challenge to Illumina's vertical acquisition of Grail, the producer of early detection cancer tests that use gene sequencers made by Illumina. The FTC alleged that the transaction would harm Grail's competitors by foreclosing their access to Illumina's next-generation gene sequencing platform. The appeals court upheld the FTC's decision to block the transaction, finding, among other things, that Illumina bore the burden to show the remedy rebutted the government's prima facie case. Illumina has announced plans to unwind the transaction, making it the first time in decades that either the FTC or DOJ successfully challenged a vertical merger in court.
- **In February 2024, the FTC filed an enforcement action to block Kroger's proposed acquisition of Albertsons, the largest supermarket merger in U.S. history.** In its complaint filed in the District of Oregon, the FTC alleged that the deal would eliminate competition between the grocery chains in multiple local markets nationwide, leading to higher prices for groceries and other household goods and, in a novel claim, that the combination would threaten employees' ability to secure higher pay and better working conditions. This is the first time the FTC has challenged a merger in court due to its impact on labor markets. As in other recent merger challenges, the FTC alleged that the parties' proposed fixes to address the agency's antitrust concerns were inadequate. The court has scheduled a hearing on the FTC's request for a preliminary injunction for the end of August.

Criminal Antitrust Cases

- **In April, a Connecticut federal judge entered a judgment of acquittal at the trial of several aerospace executives in a no-poach case.** The court tossed out allegations by DOJ that the defendants had orchestrated an employee "no-poach" agreement that would unlawfully restrict recruitment and hiring among subcontractors to Pratt & Whitney. The court, in United States v. Patel, found that "no reasonable juror could conclude that there was a 'cessation of meaningful competition in the allocated market.'" The decision was a further blow to DOJ's efforts to bring "no-poach" claims, having failed to win a single jury conviction to date.

- **The Fourth Circuit Court of Appeals overturned an antitrust conviction of an engineering firm executive in December.** In United States v. Brewbaker, the court found that the DOJ's allegation of a "hybrid" restraint involving two firms with both vertical and horizontal relationships did not constitute a per se antitrust violation. The case involved allegations that two firms—**Contech Engineered Solutions** (Contech) and **Pomona Pipe Products** (Pomona)—coordinated their bids for work with the North Carolina Department of Transportation. DOJ alleged that Contech and one of its executives, Brent Brewbaker, asked Pomona for its anticipated bid prices so that it could deliberately submit a higher bid, ensuring that Pomona secured the contract and enabling Contech to profit from the scheme by supplying Pomona with aluminum parts. The court held that because the alleged restraint had both vertical and horizontal components, the alleged conduct was subject to the rule of reason and that only purely horizontal restraints are subject to the per se standard. The Fourth Circuit denied the DOJ's petition for rehearing en banc.

Civil Antitrust Cases

- **Google is facing a flurry of civil lawsuits alleging anticompetitive conduct involving a range of products.** In November, the evidentiary phase of a bench trial concluded in a case brought by DOJ and 49 state attorneys general in the District of D.C., alleging that Google has maintained monopolies in the internet search market, including in general search services, search advertising, and general search text advertising. Closing arguments are scheduled for May 2024, with the decision likely to come later this year. Google faces another upcoming trial in a Virginia federal court on allegations by DOJ and several states that the company maintained a monopoly in digital advertising technologies. The complaint, filed in January of 2023, alleges that Google violated Sections 1 and 2 of the Sherman Act by eliminating ad-tech competitors through acquisitions, wielding its market dominance to force more firms to use its products and to thwart their ability to use competing tools. Google has also faced multiple private lawsuits alleging that its control over its Play app store on Android devices was anticompetitive. In December, a San Francisco jury found in favor Epic Games, developer of the game Fortnite, finding that the fees Google charges on in-app transactions violated U.S. antitrust laws. Google has asked the court to either overturn the jury verdict or grant a new trial. In September, Google settled similar claims regarding its app store that were brought by 30 state attorneys general. Google also faces claims by multiple newspaper publishers, including Gannett, that it maintains a monopoly in the digital advertising marketplace.
- **In an antitrust class action in the Western District of Missouri, a jury found that the National Association of Realtors (NAR) and certain other residential real estate brokerages conspired to maintain artificially high commissions on residential real estate transactions.** The jury awarded the class of affected homeowners in three states nearly $1.8 billion in damages. The allegations centered on certain provisions of NAR's listing rules for regional Multiple Listing Services (MLS), where most homes are listed for sale. The rules required that listing brokers make offers of compensation for buyers' broker commissions, which plaintiffs alleged were essentially nonnegotiable and artificially raised the commissions that sellers had to pay to buyers' brokers. The jury found that the provisions had the effect of raising buyer brokers' commission rates, resulting in higher costs for the sellers, and therefore constituting an unreasonable restraint on trade. Since the decision in Missouri, numerous class actions making similar allegations against NAR and regional real-estate associations and brokers have been filed in other courts across the country. Forsaking its right to appeal the jury verdict, NAR reached a settlement with the home seller plaintiffs, which, if approved by the court, would release NAR and most of its members from liability in the Missouri action and related nationwide class actions in exchange for NAR's payment of $418 million to aggrieved home sellers and for changing its listing rules. Relatedly, the DOJ sought to reopen an antitrust investigation into NAR last year, asking the DC Circuit to overturn a decision that a settlement between DOJ and NAR was still in force, after DOJ pulled out of the settlement in 2021. At a hearing in December, a panel of circuit judges appeared skeptical that the settlement prevented DOJ from reopening its probe.
- **Last spring, dozens of class action lawsuits were filed alleging that software vendor RealPage and certain large property management companies conspired to raise the price of rental apartments.** The complaints, consolidated in the Middle District of Tennessee, allege that the defendants colluded to raise prices through use of RealPage's AI Revenue Management software, which allegedly increased rental prices by increasing vacancies. The DOJ filed a statement of interest in support of the plaintiffs' claims late last year. Attorneys General for the District of Columbia, Arizona and Washington have since filed separate cases against RealPage and various property managers, making similar price fixing allegations on behalf of state residents.
- **Ten out of 17 elite universities recently settled claims that they conspired to fix the level of the financial aid packages.** The plaintiffs, a proposed class of students, allege that the schools engaged in price fixing and unfairly limited student aid through use of a shared methodology to calculate admitted students' financial needs. The plaintiffs also allege

that during the admissions process the defendants agreed to consider some applicants' ability to pay, when considering students on the waitlist or through legacy admissions, thereby disqualifying the schools from an antitrust exemption under federal law.

Additional developments to watch for later this year:

- The FTC's case alleging that **Facebook** parent **Meta** maintained a monopoly through its acquisitions of **WhatsApp** and **Instagram** may go to trial later this year, in another test of the Biden administration's efforts to crack down on large technology companies.
- Continuing its focus on large technology companies, the FTC opened an investigation in January 2024 into five specific companies' investments in artificial intelligence. The FTC ordered the companies to provide information "regarding recent investments and partnerships involving generative AI companies and major cloud service providers." FTC Chair Lina Khan expects that the study "will shed light on whether investments and partnerships pursued by dominant companies risk distorting innovation and undermining fair competition."
- The DOJ reportedly opened an antitrust investigation into **UnitedHealth**, the healthcare conglomerate that owns the largest U.S. health insurer, a leading manager of drug benefits, and **Optum Health**, an extensive network of a providers. The investigation reportedly centers on the relationships and potential favoritism between the health insurance unit and **Optum Health** and is examining the effects of the company's acquisition of physician groups. The investigation exemplifies the Biden administration's continued attention to increasing competition and reducing prices in the healthcare sector, and 2024 may see the investigation evolve into litigation.

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