Hughes Hubbard & Reed

Year-End Summary of Key U.S. Antitrust Developments

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December 22, 2022 - Whether measured by the number of cases brought, the theories of liability pursued, or the relief sought, 2022 witnessed the most aggressive federal antitrust enforcement since the 1970s. While the agencies have prevailed in a few cases, overall their reach has exceeded their grasp. Meanwhile federal courts continue to grapple with the standards governing private antitrust class actions. Some of the highlights—

AGENCY DEVELOPMENTS

- **Assistant Attorney General Jonathan Cantor, head of the DOJ Antitrust Division, and Federal Trade Commission Chair Lina Kahn have been pursuing merger enforcement aggressively over the past year** to combat what they view as increasing market concentration in the U.S. economy, especially in key industries. This has translated into a general suspicion of merger activity at the enforcement agencies and a focus on deterring potentially anticompetitive mergers. The agencies have been issuing second requests regarding transactions implicating lower market shares than has been the case in recent years. They have also been pursuing broader theories of harm, including effects on labor markets and "killer" acquisitions of nascent competitors. The agencies have announced their opposition to structural remedies in horizontal mergers and behavioral remedies in vertical mergers and have a strong appetite for litigating transactions to block transactions outright. One consequence is that the merger review process is taking significantly longer.

- **The FTC and DOJ have implemented a number of procedural changes over the past year that increase the burden of merger review and are designed to deter potentially anticompetitive mergers**. The agencies have conditioned deal approval on the inclusion in consent orders of prior approval and prior notice provisions regarding future transactions. The agencies have also begun issuing warning letters to parties that, despite expiration of the Hart-Scott-Rodino (HSR) waiting period, the government's investigation into a transaction remains open and while the parties are free to close, they do so at the risk of later agency action. The FTC has directed staff to use compulsory process, such as subpoenas and civil investigative demands, to further its investigative efforts and authorized them to do so under the supervision of a single Commissioner, instead of all five. The temporary suspension of early termination of the initial 30-day waiting period under the Hart-Scott-Rodino (HSR) Act remains in place.

- **The FTC and DOJ are expected to announce proposed new Merger Enforcement Guidelines in early 2023** which will detail the standards the agencies will use when reviewing proposed mergers and acquisitions. The proposed Guidelines, on which the agencies will seek public comment, are likely to constitute the most comprehensive overhaul of the Guidelines since the Reagan administration. The proposed revisions are expected to establish much more restrictive review merger policies, including:
  - a more expansive view of the purpose and scope of merger review
  - a narrower view of the distinctions between horizontal and vertical transactions
  - lower thresholds for agency presumptions that certain transactions are anticompetitive
  - updates to market definition analysis to better account for non-price competition
  - a more expansive view of threats to potential and nascent competition
  - a more aggressive stance towards monopsony power, including in labor markets, and
  - a great willingness to address the unique characteristics of digital markets.

MERGER LITIGATION

- **DOJ secured a significant victory in November** when it secured a permanent injunction in the U.S. District Court for the District of Columbia blocking a $2.2 billion merger between rival publishing companies **Penguin Random House and Simon and Schuster**. The Court determined that the merger, which would have given the merged entity control of nearly half of the market for blockbuster books, would have substantially lessened competition in the market for U.S. publishing rights to anticipated top-selling books by reducing compensation for authors. After initially indicating an intent to appeal, the parties instead abandoned the merger.

- **In the second half of 2022, DOJ suffered a string of defeats in merger challenges** in federal courts, frustrating DOJ's efforts to block the mergers of UnitedHealth and Change Healthcare, U.S. Sugar and Imperial Sugar, and Booz Allen and EverWatch. DOJ has appealed the U.S. Sugar/Imperial Sugar decision; the other two transactions have closed.

- **The FTC challenged a vertical merger** in the market for early cancer detection tests involving DNA sequencing company **Illumina, Inc.** and detection test maker **Grail, Inc.** The case was dismissed in December by an FTC Administrative Law Judge (ALJ) who rejected the FTC's theory that the merger would lessen competition by incentivizing Illumina to disadvantage Grail's competitors. An appeal to the FTC Commissioners remains pending.

- **The FTC challenged a series of agreements between Juul Labs and Altria Group**, including an agreement by which Altria acquired a 35% stake in Juul in exchange for an agreement to not compete in the U.S. market for closed-system e-cigarettes. An ALJ dismissed the complaint, noting that competition in the U.S. e-cigarette market has increased since the acquisition. An appeal to the FTC Commissioners is pending.

- **The FTC sued to block the acquisition by Meta Platforms, Inc. (formerly Facebook) of Within Unlimited**, a VR studio that produces a VR fitness app. Meta produces the leading VR platform, owns an app store, and is a VR developer. The FTC alleges that Meta is a potential entrant in the VR fitness app market and is attempting to purchase Within Unlimited rather than compete in that market, which would increase consumer choice, advance product innovation and intensify competition for employees. The case is currently pending.

- **In December, the FTC sued to block Microsoft Corp., maker of the Xbox video game console, from acquiring Activision Blizzard, Inc.**, a video game studio that produces several of the most popular video game franchises. Microsoft also operates its own studio and typically publishes games exclusively for the Xbox. The FTC alleges that this vertical merger will enable Microsoft to withhold or degrade Activision games on video game platforms that compete with the Xbox, such as Sony's PlayStation. The FTC points to a European Commission review of a March 2021 Microsoft acquisition of another studio in which Microsoft assured the European Commission that it would not make acquired titles exclusive to Microsoft consoles, but allegedly did just that after the acquisition closed.

CRIMINAL ANTITRUST CASES

- **DOJ suffered a major setback in its efforts to prosecute alleged price fixing in the broiler chicken industry**. In July, five executives from two companies were acquitted at a trial in the U.S. District Court for the District of Colorado. This was DOJ's third attempt to secure convictions in the case. Two previous trials ended in mistrials, and DOJ dropped charges against several defendants after the second attempt.

- DOJ is continuing its efforts to set precedents in labor markets, in particular through the **criminal prosecution of "no-poach" agreements** between competitors to refrain from hiring each other's employees. These efforts have produced mixed results. In April, DOJ lost two trials involving agreements in healthcare labor markets, although in one case one defendant was convicted of obstructing the underlying FTC investigation. In October, DOJ obtained its first guilty plea in a no-poach case when VDA, a healthcare staffing company, pleaded guilty to a conspiracy to suppress the wages of nurses. The company was sentenced to pay a $62,000 fine and $72,000 in restitution. The case is still pending against the company's owner, who did not plead guilty. In another criminal no-poach case involving a former Raytheon manager, a Connecticut federal judge denied the defendants' motion to dismiss and held that the alleged no-poach agreement could be prosecuted as a per se illegal market allocation rather than under the rule of reason.

- In October, DOJ announced the **first federal criminal prosecution in five decades for attempted monopolization in violation of Section 2 of the Sherman Act**. A Montana paving and asphalt contractor pled guilty to attempting to reach a market allocation agreement with a competitor. While the case, which resulted in only a $27,000 fine, is not significant in size, it provides a modern precedent for criminal prosecution for attempted monopolization and is the first effort to institute a new DOJ policy to charge certain unilateral conduct criminally under Section 2.

CIVIL ANTITRUST LITIGATION

- **In April, the Ninth Circuit, sitting en banc, reinstated class certification in *Olean Wholesale Grocery v. Bumble Bee Foods***, involving price fixing in the market for canned tuna. A Ninth Circuit panel had denied class certification last year because it had concluded that plaintiffs' evidence of common impact showed that more than a *de minimis* number of class members may have been uninjured. The en banc court rejected the *de minimis* standard, upholding class certification even though plaintiffs' evidence indicated that as many as 28 percent of the class members may not have been injured. The Supreme Court declined to review the Ninth Circuit's decision.

- **In August, in the Local TV Advertising Antitrust Litigation, a class action alleging that ten major broadcast TV station owners conspired to fix the prices for spot advertising, the court granted dismissal of defendant ShareBuilders, Inc.** Plaintiffs alleged that ShareBuilders, a yield management services provider, served as a conduit for an exchange of competitively sensitive information that facilitated the alleged conspiracy by providing yield management reports to the defendants' local TV stations. The court held that the information provided to the stations was too highly aggregated to be used to fix prices and thus could not be the basis of a Section 1 claim.

- Several civil antitrust cases are currently pending against large tech companies:
  - In October 2020, **DOJ and eleven state Attorneys General sued Google, alleging illegal monopolization of the online search market**. Google chose not to file a motion to dismiss, and the case is progressing through discovery.
  - In September, **a civil suit against Google led by sixteen state Attorneys General alleging monopolization of the digital ad market survived a motion to dismiss**. The complaint accused Google of an unlawful agreement with Facebook in violation of Section 1 of the Sherman Act as well as monopolization in violation of Section 2, but the court found that the complaint only plausibly alleged the Section 2 claims.
  - Following an initial dismissal in 2021, FTC and a coalition of 48 state Attorneys General filed an amended **complaint against Facebook's parent company, Meta, alleging that the social media platform illegally**

monopolized the social media market by acquiring nascent competitors Instagram and WhatsApp rather than compete with the new platforms. The amended complaint **survived a motion to dismiss in January**.

- In June, a Pennsylvania district court judge **partially dismissed a class action filed by 47 state enforcers alleging that companies that manufacture generic drugs fixed prices**. The judge ruled that the injunctive relief provided in Section 16 of the Clayton Act does not include disgorgement or restitution, but otherwise allowed the case to proceed, finding that the states have standing to pursue other injunctive relief on behalf of their citizens as well as damages.
- In August, **the Seventh Circuit upheld the dismissal of a lawsuit alleging that a "patent thicket" illegally shielded a pharmaceutical company from competition** in violation of Sections 1 and 2. Plaintiffs alleged that the defendant amassed 132 patents covering a drug in order to deter competitors from producing similar drugs for fear of expensive patent litigation. The Seventh Circuit found that holding valid patents, even a large number, does not violate the Sherman Act because potential competitors were free to challenge and invalidate them.

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