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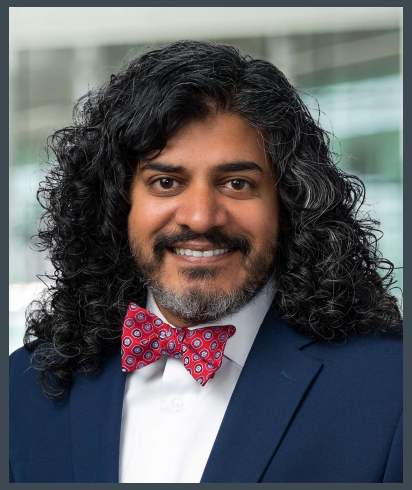
Antitrust Developments and Solutions for In-House Counsel

Speaker:



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Introduction

- President Biden's executive order: a "whole of government approach" to remedy "overconcentration, monopolization and unfair competition."
- Changes in merger review policy and procedure.
- New threats of criminal antitrust enforcement: no-solicitation, no-hire, and wage-fixing agreements.
- Legislative update.

President Biden's Executive Order Directs New Focus on Antitrust Enforcement

- The Order calls for a "whole-of-government approach … to address overconcentration, monopolization, and unfair competition" with specific emphasis on "healthcare markets (including insurance, hospital, and prescription drug markets)."
- Order also focuses on competition in labor, transportation, food and agriculture, technology, and banking/finance.

President Biden's Executive Order Directs New Focus on Antitrust Enforcement *(continued)*

- Order directs the FTC and DOJ to "review the horizontal and vertical merger guidelines and consider whether to revise those guidelines."
  - FTC (but not DOJ) rescinded the vertical merger guidelines in July 2021.
  - FTC and DOJ announced a formal review of both the horizontal and vertical merger guidelines in January 2022.
  - FTC and DOJ "Listening Forums" to gather input for horizontal merger guidelines reform, focusing on agriculture, healthcare, entertainment and media, and technology.
  - DOJ-USDA initiative to review competition in food and agriculture in January 2022.
    - Monopsony issues
    - Labor
  - Order "reaffirms that the United States retains the authority to challenge transactions whose previous consummation was in violation" of the antitrust laws.

Significant Developments in Antitrust Enforcement Against Mergers

- 2021 cases:
  - The FTC lost its challenge to the merger of Jefferson Health and Albert Einstein Healthcare Network. This was the FTC's first loss in a hospital merger challenge in 20 years.
  - The FTC also won two cases, Atrium and Hackensack.
- 2022 update:
  - At least four additional hospital deals were abandoned due to antitrust concerns;
  - Two significant cases show changes in the enforcers' theories of harm from mergers.

Significant Developments in Antitrust Enforcement Against Mergers *(continued)*

- *Lifespan/Care New England*
  - In February, the FTC sued to enjoin the merger of Lifespan and Care New England.
  - The FTC alleged that the merged entity would have 70% of the Rhode Island market for inpatient general acute care hospital services.
  - The FTC also alleged that the parties had at least 70% of the market for inpatient behavioral health services.
  - That would be a sufficient basis of the merger challenge.

Significant Developments in Antitrust Enforcement Against Mergers *(continued)*

- New labor market theory in *Lifespan/Care New England*
  - FTC Chair Lina Khan and Commissioner Rebecca Slaughter would have also challenged the merger because of its effect in the ***labor market***.
  - "Empirical research suggests that increased employer labor market power via hospital mergers can contribute to wage stagnation for skilled health care professionals."
  - These democratic appointees did not have a majority of the Commission.
    - But now they do with Alvaro Bedoya's confirmation; plus Noah Phillips resignation.
  - The FTC won the case on March 2, when the parties abandoned their proposed merger.

Significant Developments in Antitrust Enforcement Against Mergers *(continued)*

- In March, the DOJ challenged UnitedHealth Group's proposed acquisition of Change Healthcare.
  - Although that transaction is a merger of competitors that presents straightforward horizontal issues, the DOJ chose to challenge it mainly on a vertical theory.
  - Change provides claims processing software and services to insurers that compete with United.
    - DOJ argues that the transaction would give United access to a vast amount of health care claims data (bills submitted by providers to insurers).
    - This data would reveal information about providers' prices, competing insurers' costs, and benefit design.
    - It would give United a huge advantage over competing insurers when negotiating prices with providers, selling health plans to employers, etc.

Labor Markets are a New Target of Antitrust Enforcers

- Criminal prosecution of agreements among employers fixing wages or promising not to hire employees were a big new enforcement priority in 2021, and that continues in 2022.
  - Wage-fixing cases allege that competing employers agreed to fix the rates they pay to their employees or independent contractors.
  - “No poach” cases allege that competing employers agreed not to solicit, or not to hire, each other’s employees.
  - The defendants need not compete for patients or for customers – they are competitors if they compete for employees.
  - Criminal enforcement is limited to “naked” agreements.

Labor Markets are a New Target of Antitrust Enforcers *(continued)*

- Five criminal prosecutions for labor market agreements in 2021.
- Some defendants argue that their agreements are not crimes (or that they could not have known that they are crimes).
- This argument has not succeeded.
  - "Just because this is the first time the Government has prosecuted for this type of offense does not mean that the conduct at issue has not been illegal until now. Rather, . . . price-fixing agreements—even among buyers in the labor market—have been *per se* illegal for years."

Labor Markets are a New Target of Antitrust Enforcers *(continued)*

- 2022 criminal enforcement update:
  - New indictment in January: *US v Manahe*.
    - Wage fixing and no-poach agreement.
  - Treasury Department report on "The State of Labor Market Competition" in March.
    - DOJ has "more active labor market investigations currently underway."
  - Not guilty verdicts in *US v DaVita* and *US v. Jindal* in April.
    - Verdicts do not affect DOJ's legal theory but may affect trial strategy.
    - Jindal was convicted of obstruction of justice.

Labor Markets are a New Target of Antitrust Enforcers *(continued)*

- 2022 civil enforcement update:
  - *Lifespan* shows that labor market effects will be an important part of FTC civil merger investigations.
  - WMS, Cargill/Wayne Farms and Sanderson consent decree
    - Conspired to exchange information for wages in addition to violations of the Packers & Stockyards Act
    - 10-year monitor
    - $85 million fine
  - The FTC's review of the Merger Guidelines will focus on the "impact of monopsony power, including in labor markets."
    - Lower market share thresholds?
    - Non-competes in M&A agreements?
  - DOJ and FTC revise "Antitrust Guidance for HR."
    - New rules for information-sharing among employers?

Developments in FTC Merger Review Procedure

- The FTC Allows Deals Close While Under Active Investigation
  - A “tidal wave” of merger filings has strained the FTC’s ability to review transactions.
    - 4,130 transactions were reported to federal antitrust enforcers under the Hart-Scott-Rodino Act in 2021.
    - This is double the number of annual filings over the previous 5 years.
  - In response, the FTC has begun allowing transactions to close while under “open and ongoing” investigation.
  - This represents a significant change in FTC policy. FTC has rarely challenged transactions after they have closed.

Developments in FTC Merger Review Procedure *(continued)*

- FTC pre-consummation warning letter language
  - "Although the waiting period will expire imminently, the Commission's investigation remains open and ongoing. Please be advised that if the parties consummate this transaction before the Commission has completed its investigation, they would do so at their own risk."
  - "The parties cannot stop the investigation or avoid an enforcement action by consummating. To the contrary, and in keeping with its commitment to aggressive enforcement, the Commission may challenge transactions—before or after their consummation—that threaten to reduce competition and harm consumers, workers, and honest businesses."

Developments in FTC Merger Review Procedure *(continued)*

- Suspension of early termination
  - The agencies suspended the discretionary practice of “early termination” of the HSR waiting period.
  - Under the “early termination” procedure, the agencies may allow a transaction to close before the statutory 30-day waiting period has expired.
  - This is another response to the “tidal wave” of merger filings.

Developments in FTC Merger Review Procedure *(continued)*

- The FTC Requires Pre-approval Provisions in Consent Decrees
  - FTC announced it would "routinely require merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged."
  - As a practical matter, this pre-approval provision will give the FTC veto power over future acquisitions by the acquiring party in the same market for a period of at least ten years.

Developments in FTC Merger Review Procedure *(continued)*

X. Prior Approval

IT IS FURTHERED ORDERED that Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Clinic, within the 6 months prior to the date of such proposed acquisition, within the State of Utah;

B. Acquire any ownership interest in any Person that owns any interest in or operates a Clinic within the State of Utah, *provided, however*, Respondents are not required to obtain the prior approval of the Commission if the only Clinic ownership interest is a Clinic owned or operated by Respondents within the State of Utah; and

C. Enter into any contract for Respondents to participate in the management or Dialysis Business of a Clinic located in within the State of Utah;

Federal Legislation

- American Innovation and Choice Online Act
  - Klobuchar; Grassley
    - Out of Judiciary Committee 16-6
  - Focuses on competition in online marketplaces and platforms.
- Open App Markets Act
  - Blumenthal; Blackburn
    - Out of Judiciary Committee 20-2
  - Focuses on online apps.
- No Oil Producing and Exporting Cartels Act
  - Durbin; Grassley
    - Out of Judiciary Committee 17-4
  - Amends the Sherman Act to address cartels.

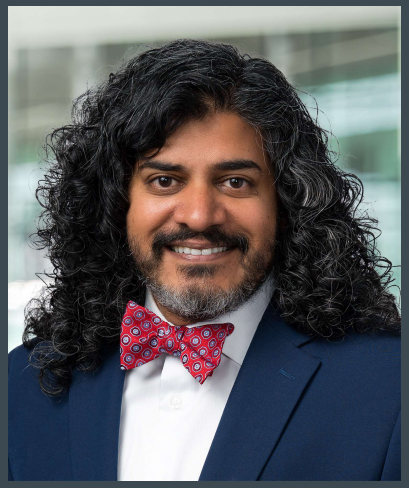
Proposed New York Antitrust Law

- New York S-933-A, the "Twenty-First Century Anti-Trust Act."
  - Prohibits “abuse of a dominant position” in any market, including labor markets.
    - “Dominance” is presumed based on market shares of 40% as a seller, or 30% as a buyer.
    - A firm’s “use of non-compete clauses or no-poach agreements” is evidence of both “dominance” and “abuse of dominance” in labor markets.
    - “Evidence of pro-competitive effects shall not be a defense.”
  - Require premerger notification to the NY Attorney General of any acquisition valued at 10% of the HSR threshold ($10.1 million), of a business with sales or assets in New York valued at 2.5% of the HSR threshold ($2.525 million).
  - Approved by Senate but died in the Assembly; will be brought up next session with no changes.

Conclusions and Practical Solutions/Takeaways

- Expect delays in merger-review timelines, and so balance management's expectations on timing on deals that, previously, may have moved quickly (nuts and bolts: LOI, regulatory clearance timing in deal documents).
- Prepare for enforcers to challenge deals on vertical and labor-market theories, in addition to traditional horizontal theories (i.e., engage antitrust counsel to assess strategic plans and with document creation guidance).
- Carefully evaluate risk-sharing provisions in merger agreements.
- Update your antitrust compliance program—it is your single best proactive tool to mitigate risk; this includes training (make sure HR is included) and an internal audit.
  - Create simple, straightforward guidelines and/or policies to help executives and employees on how to handle situations
    - E.g., competitive intelligence guidelines; board governance policies
    - Pricing strategies by channel

Thank You:



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