

The New Antitrust, 2022-2023

Antitrust is in the news. Old cartoons showing octopus-monopolist tentacles destroying Washington are no longer just for American history textbooks. Lina Khan—who rose to prominence with an article attacking the Chicago School of antitrust caution—chairs the FTC. Anti-tech crusader Jonathan Kanter is the head of the Antitrust Division. The DOJ is litigating a historic case against Google. Senators are declaring economic concentration to be the root cause of inflation, Main Street decline, and many other ills. But, at the same time, defendants have prevailed in cases against the DOJ and FTC and commentators are warning against government overreach. What has happened in antitrust in the past year? What might happen next year?

DOJ Section 1 Wins and Losses

There has been a flurry of verdicts in Section 1 criminal cases. The DOJ targeted alleged anti-competitive agreements in labor markets, including “no poach” cases where the claim is that competitors have agreed not to recruit or hire each other’s employees. The DOJ successfully prosecuted VDA, a health staffing company, for agreeing to not poach the competitor’s nurses. The case involved two staffing agencies competing to provide school nurses. The indictment included the allegation that these companies agreed that “Per our conversation, we will not recruit any of your active [] nurses” and assured each other that “we will not let the field employees run our businesses going forward.”¹

But the DOJ has been less successful in other cases. A prosecution against DaVita and its CEO involving an alleged no-poach agreement with competitor Surgical Care Affiliates resulted in an acquittal. The alleged conduct was “a gentleman’s agreement” not to poach talent.² There also was an acquittal in a case against Neeraj Jindal, a former owner of a Texas healthcare company. The alleged agreement there involved texts about home health therapists being over-paid.³ These healthcare labor losses do not stand alone. The DOJ also lost a series of cases in the District of Colorado (also the site of the DaVita case) involving alleged price-fixing among the nation’s biggest chicken broiler suppliers. Some have questioned the DOJ’s tactics in bringing and trying these cases.

Conduct Investigations

Another bucket of antitrust cases involves single company conduct (as opposed to the bucket described above: Section 1 cases involving agreements among multiple companies). The DOJ and FTC are focused on many “conduct” cases. And the agencies are giving signals that they are interested in some conduct that previously might not been thought notable.

One such area involves claimed limits on the “right to repair.” There is a growing “Right to Repair” movement pushing for state legislation to give consumers the right and ability to unlock, fix, and share diagnostic information from phones, cars, and other products. There is also renewed emphasis on Section 2302(c) of the 1975 Magnusson-Moss Warranty Act, which makes it illegal to condition a warranty “on the consumer’s using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name.”⁴

In 2021, the FTC issued its “Nixing the Fix” report which concluded that “repair restrictions have diluted the effectiveness” of the anti-tying provision of Magnusson-Moss and promised that the FTC would consider “reinvigorated regulatory and law enforcement options.”⁵ Following its own direction, the FTC filed three right-to-repair cases in June and July 2022.⁶

Right to repair is just one area of increased enforcer interest. There are many others. For example, the FTC has also announced investigations into pharmacy benefit managers⁷ and the DOJ has touted reinvigorated commitment to policing the Clayton Act’s ban on interlocking directorates (board members sitting on the board of competitors).⁸

Continued Merger Challenges

A third bucket of antitrust cases involves mergers. There also has been a flurry of merger rulings in DOJ and FTC cases, most recently several losses (pending possible appeals) for the agencies.

The FTC suffered a high-profile defeat in the Illumina/Grail case when the FTC’s in-house administrative law judge ordered dismissal of the complaint. This is a vertical merger—Illumina and Grail do not compete directly against each other. Grail is developing a multi-cancer early detection test that analyzes DNA to identify cancerous cells at early stages. Grail relies on Illumina’s DNA sequencing

platforms to analyze the DNA. The administrative judge rejected the FTC's argument that Illumina's acquisition of Grail would decrease competition in the market for those tests. The FTC's theory was that Grail and its competitors need Illumina's DNA sequencing but that post-merger Grail could make it harder for its competitors to access Illumina's DNA sequencing. The judge found among other things that there are not many cancer-detection competitors to Grail now and that, in any event, Illumina has made clear that it will provide its technology to those competitors.⁹

The DOJ also suffered a defeat in a vertical merger case involving UnitedHealthcare and Change Healthcare. United is an insurer. Change controls data pipes between physicians and insurers. One DOJ theory was that United, by gaining access to the data pipes, would get information about claims and payments involving its rivals and use that information to harm those rivals. The court rejected the DOJ's theories, finding that they were "unsupported by any real-world evidence" of possible anticompetitive effects.¹⁰

Next Shoes to Drop

2023 will no doubt bring more activity from the DOJ and FTC. There is little reason to think that Jonathan Kanter and Lina Khan will slow down what they started or reconsider their prior positions. So what's next?

First, the challenges to "Big Tech" that launched the new antitrust movement will continue. Judge Amit P. Mehta will decide the challenge to Google, and other tech cases remain pending.¹¹

There also should be new merger guidelines in 2023. The horizontal merger guidelines were last revised in 2010 and the vertical merger guidelines were revised in 2020, although the FTC has withdrawn its support of those guidelines. The agencies no doubt hope that stricter merger guidelines, though not law, could increase the chances that the government prevails in future merger challenges.

Finally, there are also proposals to change antitrust law. Senator Klobuchar's CALERA bill, if passed, could have dramatic impact on antitrust law. The proposed bill, for example, defines "exclusionary conduct" to be conduct that "materially disadvantages 1 or more actual or potential competitors; or tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete." This broad definition could increase the number of "conduct" cases. Of course, it will be much easier for the DOJ and FTC to issue new, more aggressive merger guidelines than it will be for Congress to pass aggressive antitrust legislation. ●

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ENDNOTES

1. *United States v. Hee and VDA OC*, No. 2:21-cr-00098-RFB-BNW (D. Nev.)
2. *United States v. Davita Inc. and Thiry*, No. 1:21-cr-00229-RBJ (D. Col.)
3. *United States v. Jindal and Rogers*, Case No. 4:20-cr-00358-ALM-KPJ (E.D. Tex.)
4. 15 U.S.C. § 2302(c)
5. FTC Staff, "Nixing the Fix: An FTC Report to Congress on Repair Restrictions," Federal Trade Commission (May 2021) at p. 6, available at: https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.
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7. FTC Staff, "FTC Launches Inquiry Into Prescription Drug Middlemen Industry" (June 7, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry>.
8. "Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates" (October 19, 2022), available at <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially>.
9. Initial Decision, *In the Matter of Illumina, Inc. and GRAIL, Inc.*, No. 9401 (Sept. 9, 2022)
10. *Memorandum Opinion, U.S. v. UnitedHealth Group Inc.*, No. 1:22-cv-0481 (D.D.C. Sept. 21, 2022)
11. *United States v. Google*, No. 1:20-cv-03010 (D.D.C.).

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