

DOJ and FTC Using New Weapons to Attack Antitrust Conduct

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By Carl Hittinger and Michael Neminski

In spring 2022, the Department of Justice (the DOJ) announced its intention to aggressively pursue monopolization cases. While the DOJ is continuing its aggressive prosecution of criminal cases, it is also now utilizing alternative methods to pursue alleged monopolistic conduct.

Specifically, the DOJ is using its amicus brief program to advocate for favorable positions in civil litigation. In the past year alone, the DOJ has filed amicus briefs in civil suits involving claims under both Section 1 and Section 2 of the Sherman Act. In some of these cases, the DOJ was ultimately successful in getting circuit courts to adopt its interpretation of the relevant antitrust issues. Assistant Attorney General Jonathan Kanter praised the decisions and noted they were “great examples” of the impact that the DOJ’s amicus program can have. Kanter stressed that “when we think we have something to add, or when we care deeply about an issue, our amicus program steps in.” Indeed, the administration has intervened in 25 cases in which it is not a party.

Not to be outdone, the Federal Trade Commission (the FTC) is also resorting to new tactics in its fight against alleged

monopolistic practices. In December 2021, at the DOJ and FTC Joint Public Workshop on Promoting Competition in Labor Markets, FTC Chair Lina Khan advocated for enhanced federal agency rule-making to curtail perceived anticompetitive practices in labor markets. On Sept. 21, the FTC expanded the tools it can use to curtail these practices.

This past Thursday, the FTC and the Department of Labor (the DOL) announced a previously signed memorandum of understanding (the MOU) regarding the coordination of the two agencies in connection with the investigation of unfair labor practices.

Specifically, the MOU notes the FTC’s and DOL’s shared interest “in protecting and promoting competition in labor markets and promoting the welfare of American workers.” Under the terms of the MOU, the FTC and the DOL each will appoint an internal designee. Those designees will meet “with sufficient regularity to carry out the purposes of the MOU” and plan to discuss topics such as “approaches to identifying and remedying violations of employment protections administered and enforced by DOL which may have effects on competition, have effects on consumer protection, or are related to DOL’s worker protection statutes.”

The DOJ and the FTC also vow to coordinate potential investigations and enforcement actions. The MOU indicates that this might include “periodically consulting on specific complaints, including reviewing information obtained during an investigation or coordinating requests for information, as permitted by law, regulation, Agency policy, and this MOU.” There may also be interagency referrals for potential violations of the other agency’s rules. The agencies also agreed to refer potential enforcement actions to each other and share nonpublic information related to “matters of common legal interest.”

Ultimately, the MOU is a nonbinding document, and neither agency is required to act in the manner outlined above. However, the FTC's efforts in partnering with the DOL demonstrate that the FTC is committed to taking an aggressive stance against what it perceives to be unfair labor practices.

Antitrust enforcers are ultimately expanding the tools in the toolbox available to them in their pursuit of monopolistic conduct. Monopoly conduct appears to be a priority for antitrust enforcers, as they seem willing to look for whatever tools possible to exert influence on labor practices. Observers would be prudent to keep a sharp eye on when and where the Antitrust Division of the DOJ files its amicus briefs, and how the DOL and FTC implement their new partnership. Stay tuned.

Carl W. Hittinger is a senior partner at Baker & Hostetler and serves as the firm's antitrust and competition practice national team leader and also litigation group leader for the Philadelphia office. He concentrates his practice on complex antitrust and unfair competition matters, including class actions. His experience also includes a judicial clerkship with Chief Judge Emeritus Louis C. Bechtle of the U.S. District Court for the Eastern District of Pennsylvania. He was appointed a special master in several complex matters by Bechtle. He can be reached at 215-564-2898 or chittinger@bakerlaw.com.

Michael Neminski is an associate in the firm's general litigation group focusing on commercial, antitrust and data privacy litigation. Neminski is licensed to practice in Delaware, New Jersey and Pennsylvania. He has experience litigating corporate disputes in the Delaware Court of Chancery and District of Delaware. He can be reached at 215-564-1457 or mneminski@bakerlaw.com.

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