ACC Association of Corporate Counsel
NORTHEAST

DECEMBER 6, 2022

The New Antitrust

Presenter

Ryan Sandrock, Antitrust Practice Co-Chair,
Shook Hardy & Bacon (San Francisco)

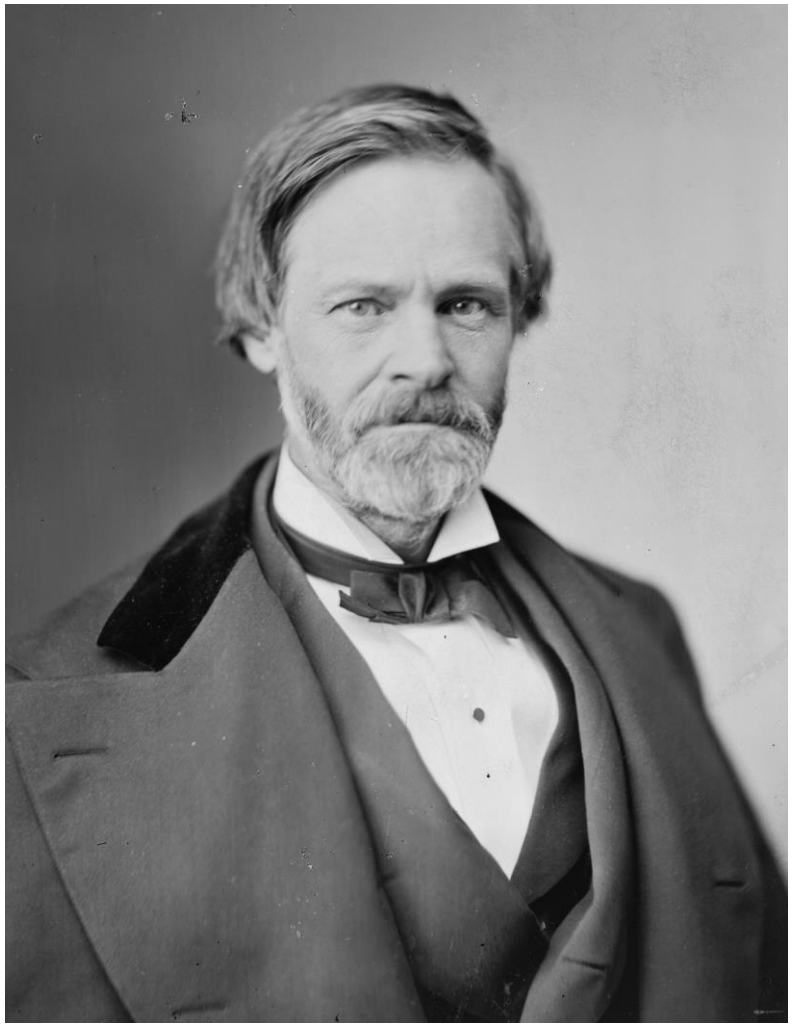
Overview

1. The Old Antitrust
2. The New Antitrust
3. The Next Antitrust
4. What to Do

1

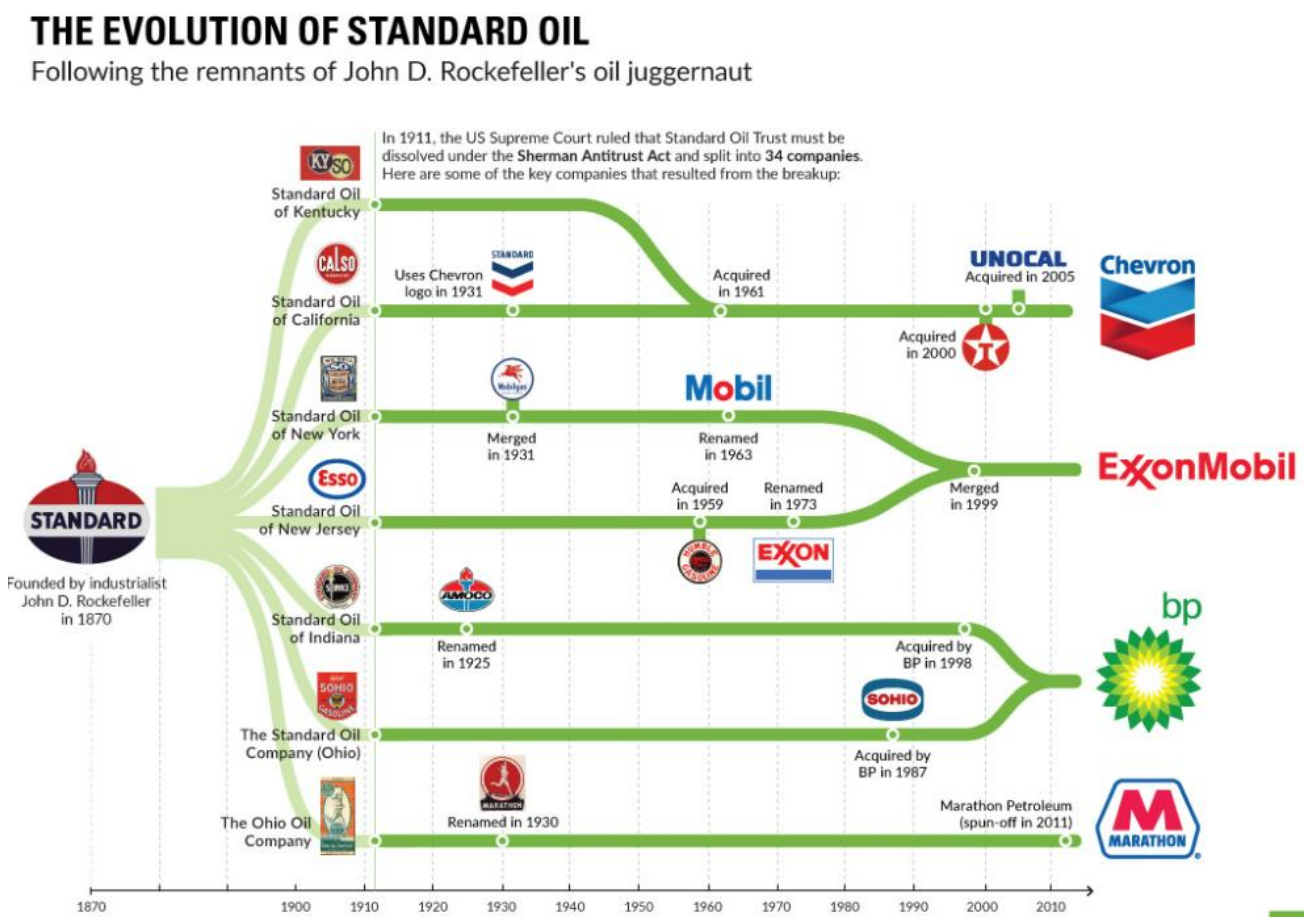
The Old Antitrust

The Ohio School

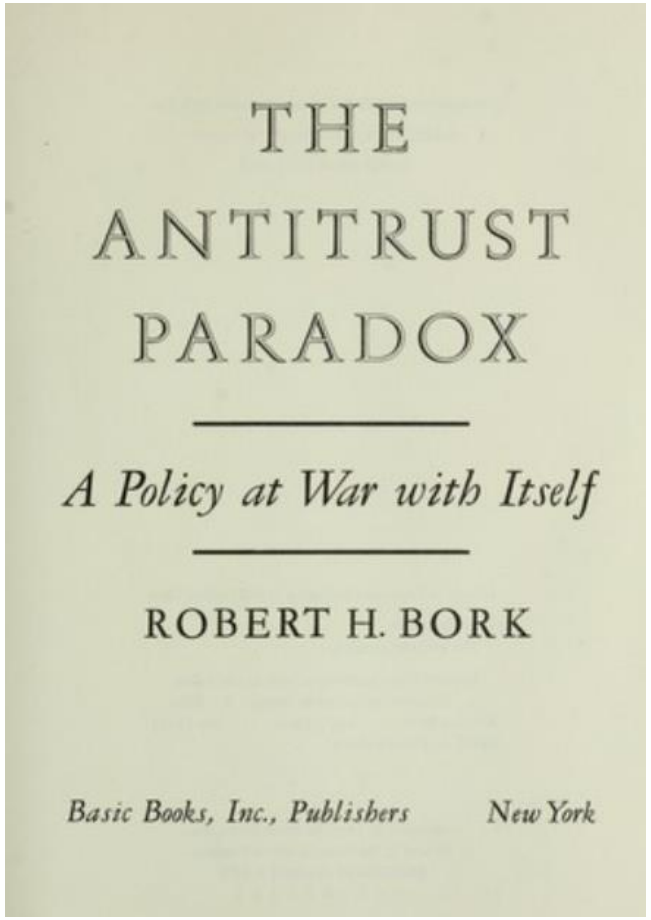


- Sherman Act, Section 1: Agreements
- Sherman Act, Section 2: Monopolization
- Clayton Act, Section 7: Mergers

Busted Trusts Are Still Around



The Chicago School



"But as we've seen, experience teaches that the process of firms investing in their own infrastructure and intellectual property and competing rather than colluding normally promotes competition and consumer gains — and the intent to undo a competitor in this process should hardly surprise. 'Competition,' after all, 'is a ruthless process.' *Ball Memorial*, 784 F.2d at 1338. 'Most businessmen don't like their competitors' and the antitrust laws aren't designed to be a guide to good manners. *Olympia*, 797 F.2d at 379. Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring vigorous competition"

Novell v. Microsoft (10th Circ.) (Gorsuch, J.)

Historic Antitrust Cases

"All the News That's Fit to Print"

The New York Times

LATE CITY EDITION

Weather: Windy and cold, chance of flurries today; clear, cold tonight. Temperature range today 0-23; yesterday 22-31. Details are on page 22.

VOL. CXXXI . . . No. 45,188 NEW YORK, SATURDAY, JANUARY 9, 1982 25 CENTS

U.S. SETTLES PHONE SUIT, DROPS I.B.M. CASE; A.T.&T. TO SPLIT UP, TRANSFORMING INDUSTRY

NEW LAYOFFS PUSH U.S. JOBLESS RATE TO 8.9% FROM 8.4%

Impact in Heavy Industry Puts Level for Adult Males at a Post World War II High

By SETH S. KING

WASHINGTON, Jan. 8 — Layoffs of 461,000 workers in December pushed the nation's unemployment rate from 8.4 percent of the labor force to 8.9 percent, the second highest monthly level since the beginning of World War II. The number of unemployed Americans climbed to a nearly 9.5 million.

At the same time, the total number employed last month fell to 97,168,000, a decline of 840,000 from November, when the total fell 190,000 from the preceding month.

The Bureau of Labor Statistics reported today that the unemployment total, seasonally adjusted, was 9,462,000, an increase of half a percentage point above the November rate. The 8.9 percent rate for December was within a tenth of a percentage point of the post-war monthly high of 9 percent reached in May 1975 in the deepest recession of the postwar years.

Rate in Region Increased

The job market in New York and New Jersey showed some weakness last month, as the unemployment rate rose

U.S. Drops Rule On Tax Penalty For Racial Bias

By STUART TAYLOR Jr.

WASHINGTON, Jan. 8 — The Reagan Administration, reversing an 11-year-old Federal policy, announced today that it would no longer deny tax-exempt status to private schools, colleges and certain other nonprofit institutions that practice racial discrimination.

The decision on the interpretation of the tax laws will apparently entitle more than 100 schools and other organizations whose tax exemptions were revoked in the last decade to receive favorable tax treatment as charitable organizations. It is also expected to open the door to tax exemptions for many other private segregated schools that have never had them.

Justice and Treasury Department officials said that the reason for the policy change was that policies against racial discrimination should be enforced by Congress, not the tax authorities.

Reversal Since September

Allowing tax exemptions to racially discriminatory institutions is the opposite of the legal position the Justice Department took in the Supreme Court last September in a case involving a university and a school that had been denied tax exemptions for racially discriminatory admissions policies.

The department argued then that the Federal tax laws required the Government to deny tax exemptions to racially discriminatory organizations.

Today the Justice Department noti-

William F. Baxter, Assistant Attorney General, above left, and Charles L. Brown, chairman of the American Telephone and Telegraph Company, at a Washington news conference on the settlement.

IBM

Thomas Barr, right, chief attorney for the International Business Machines Corporation, outside Federal court in New York after the Government dropped its antitrust suit.

The New York Times/George Tames, United Press International

COURT HEARING SET

$80 Billion Divestiture Is Required — Rises in Local Rates Seen

By ERNEST HOLSENDOLPH

WASHINGTON, Jan. 8 — The American Telephone and Telegraph Company settled the Justice Department's antitrust lawsuit today by agreeing to give up the 22 Bell System companies that provide most of the nation's local telephone service.

On a landmark antitrust day, the Justice Department also dropped its marathon case against the International Business Machines Corporation, a suit

Excerpts from decree, page 36.

that had sought to break up the company that has dominated the computer industry. The Justice Department said the suit was "without merit and should be dismissed."

The A.T.&T. agreement, if finally approved by a Federal court, would be the largest and most significant antitrust settlement in decades. It is likely to be compared with the 1911 settlement that divided the Rockefeller family's Standard Oil Company into 33 subsidiaries, some of them huge oil companies in their own right.

Two-Thirds of Total Assets

The heart of the agreement requires A.T.&T. to give up all its wholly owned

Historic Antitrust Cases

Antitrust Cases That Never Happened

- Google-DoubleClick
- Facebook-Instagram
- Facebook-WhatsApp
- Amazon-Whole Foods
- Sprint-T-Mobile*

* States did pursue action

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The New Antitrust

THIS IS A SENATE
OF THE MONOPOLISTS
BY THE MONOPOLISTS AND
FOR THE MONOPOLISTS!
MONOPOL
SUGAR TRUST.
STANDARD OIL TRUST.
COPPER TRUST.
STEEL BEAM TRUST.
NAIL TRUST.

More Than Consumer Welfare?

Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture

New York, NY ~ Wednesday, May 18, 2022

Three aspects of the consumer welfare standard have been the most problematic. First, there are some versions that assert the antitrust laws were never intended to protect our democracy from corporate power, or to promote choice and opportunity for individuals and small businesses. In this view, the antitrust laws are meant to promote wealth and output, but do nothing for the liberty of our nation.

The second problem with the consumer welfare standard is the idea that, as a practical matter, antitrust cases should be reduced to econometric quantification of the price or output effects of the specific conduct at issue. I call this the "central planning standard."

The third problem is that the consumer welfare standard has a blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy. Senator Sherman himself expressed a goal of protecting not only consumers, but also sellers of necessary inputs, such as farmers.[6] We have heard in our recent guidelines listening

How Is New Antitrust Going? Section 1

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FILED
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COUNSEL/PARTIES OF RECORD
MAR 26 2021
CLERK US DISTRICT COURT
DISTRICT OF NEVADA
BY: DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RYAN HEE; and VDA OC, LLC, formerly ADVANTAGE ON CALL, LLC,

Defendants.

CRIMINAL INDICTMENT

Case No. 98

VIOLATION:

Conspiracy in Restraint of Trade
(15 U.S.C. § 1)

DESCRIPTION OF THE OFFENSE

12. Beginning in or around October 2016 and continuing until at least in or around July 2017, the exact dates being unknown to the Grand Jury, in the District of Nevada and elsewhere, AOC, HEE, and others known and unknown to the Grand Jury, knowingly entered into and engaged in a conspiracy to suppress and eliminate competition for the services of nurses by agreeing to allocate nurses and to fix the wages of those nurses. The combination and conspiracy engaged in by the defendants and their co-conspirators was a *per se* unlawful, and thus unreasonable, restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

13. The charged conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and their co-conspirators, the substantial terms of which were that AOC and Company A would allocate nurse employees by not recruiting or hiring each other's nurses assigned to CCSD and would refrain from raising the wages of those nurses.

How Is New Antitrust Going? Section 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 21-cr-00229-RBJ
UNITED STATES OF AMERICA

Plaintiff,

v.
1. DAVITA INC.,
2. KENT THIRY,

Defendants

INDICTMENT

The Grand Jury charges that:

COUNT 1
Conspiracy in Restraint of Trade to Allocate Employees
(Violation of 15 U.S.C. § 1)

At times relevant to this Count:

1. Defendant DAVITA INC., formerly DAVITA HEALTHCARE PARTNERS INC., ("DAVITA") was a company organized and existing under the laws of Delaware with its principal place of business in Denver, Colorado. DAVITA was also sometimes referred to as "The Village" or "DVA." DAVITA owned and operated outpatient medical care facilities across the United States. DAVITA employed individuals to operate its business at its headquarters location and at other locations across the United States.

2. Defendant KENT THIRY served as the Chief Executive Officer ("CEO") of DAVITA and the Chairman or Co-Chairman of the board of directors of DAVITA. THIRY was also sometimes referred to as "KT."

(e) informed senior-level employees of DAVITA and SCA who were candidates for employment at the other company that they were required to provide such notice to their current employer—for example, on or about April 26, 2016, SCA's human resources executive emailed a candidate from DAVITA who was based in Dallas, Texas, that she could not recruit from DAVITA "unless candidates have been given explicit permission by their employers that they can be considered for employment with us.";

(f) alerted co-conspirators about instances of recruitment of employees of DAVITA and SCA and took steps to remedy violations of the agreement—for example, on or about June 13, 2016, an employee of SCA relayed a recruitment noting that "I thought there was a gentlemen's agreement between us and DaVita re: poaching talent." An executive for SCA replied

How Is New Antitrust Going? Section 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA §
§
v. § No. 4:20cr358
§ Mazzant
NEERAJ JINDAL §

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 9 – 2020
BY DEPUTY

INDICTMENT

THE UNITED STATES GRAND JURY CHARGES:

Count One

Violation: 15 U.S.C. § 1
(Antitrust Conspiracy: Price Fixing)

Introduction

At all times relevant to this Count:

1. Home health agencies arrange for home health care workers to provide health care services to patients in their home or assisted living facility. Home health care can include physical therapy, which is provided by physical therapists ("PTs") and physical therapist assistants ("PTAs") who travel to patients' homes or assisted living facilities to provide care.

2. Home health agencies often contract with therapist staffing companies to provide PT and PTA services to home health patients. Therapist staffing companies, in turn, contract with or employ the PTs and PTAs who perform the physical therapy. The

(a) The **Defendant** directed Individual 1 to reach out to Individual 2, the owner of a competing therapist staffing company, regarding the rates that Company A and Company B paid their PTs and PTAs. On March 10, 2017, at approximately 1:36 p.m. CST, Individual 1, acting at the direction of and on behalf of the **Defendant**, texted with Individual 2. Individual 1 texted: "Have you considered lowering PTA reimbursement. . . . ." Individual 2's response stated, in part, "the therapists are overpaid." Individual 1 texted: "I think we're going to lower PTA rates to $45." Individual 2 responded by texting: "Yes I agree," "I'll do it with u," "I think the PT's need to go back to 60 . . . . Our margins are disappearing." Individual 1 responded: "[thumbs up emoji] I feel like if we're all on the same page, there won't be a bunch of flip-flopping and industry may stay stable." Individual 1 reported back to the **Defendant** regarding this text message conversation with Individual 2.

How Is New Antitrust Going? Section 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE OUTPATIENT MEDICAL CENTER EMPLOYEE ANTITRUST LITIGATION	)	Master Docket No. 21-cv-00305
	)	Judge Andrea R. Wood

MEMORANDUM OPINION AND ORDER

The plaintiffs in these consolidated actions allege that the defendant outpatient medical centers entered into an illegal agreement not to solicit or hire proactively each other's senior employees, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Now, Defendants Surgical Care Affiliates, LLC and SCAI Holdings, LLC (together, "SCA"), UnitedHealth Group Inc. ("UHG"), DaVita, Inc. ("DaVita"), and Kent Thiry (together, with DaVita, "DaVita Defendants") have filed a motion to dismiss the Consolidated Amended Class Action Complaint ("CAC") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), a motion which Defendant Andrew Hayek joins in part. (Dkt. Nos. 75, 82.) In addition, UHG has filed a separate motion to dismiss (Dkt. No. 77) and DaVita Defendants have submitted a separate supplemental memorandum in support of Defendants' motion to dismiss (Dkt. No. 80). Both UHG's and DaVita Defendants' filings advance arguments for why those parties should be dismissed even if the CAC otherwise survives. (Dkt. Nos. 77, 78.) For the reasons that follow, Defendants' joint motion to dismiss is denied but UHG's separate motion to dismiss is granted.

Defendants' alleged conspiracy only came to light on January 7, 2021, when the U.S. Department of Justice ("DOJ") announced that it had indicted SCA on charges of orchestrating an antitrust conspiracy with USPI and DaVita (both identified pseudonymously in the indictment), in violation of 15 U.S.C. § 1. (CAC ¶¶ 2, 96; *United States v. Surgical Care Affiliates, LLC*, No. 3:21-cr-00011 (N.D. Tex. Jan. 5, 2021).) The charges arose from SCA's agreements with USPI and DaVita not to solicit or hire each other's employees without the consent of the employee's current employer. (CAC ¶ 2.) Later that year, the DOJ announced that it had indicted DaVita and Thiry on antitrust conspiracy charges based on DaVita's agreements with SCA and Doe 1. (CAC ¶¶ 7–8, 46; *United States v. DaVita Inc.*, No. 21-cr-00229-RBJ (D. Colo. July 14, 2021), ECF No. 1.)[4]

[4] The criminal case against DaVita Defendants proceeded to a jury trial, which resulted in the jury finding DaVita and Thiry not guilty on all counts. (*DaVita*, No. 21-cr-00229-RBJ (Apr. 15, 2022), ECF No. 262.) Subsequently, the district court entered judgments of acquittal as to both DaVita and Thiry. (*DaVita*, No. 21-cr-00229-RBJ (Apr. 20, 2022), ECF Nos. 266, 267; *see also* Notice of J. of Acquittal, Dkt. No. 127.)

How Is New Antitrust Going? Section 7

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2603

FEDERAL TRADE COMMISSION

v.

HACKENSACK MERIDIAN HEALTH, INC.;
ENGLEWOOD HEALTHCARE FOUNDATION,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D. C. No. 2-20-cv-18140)
District Judge: Honorable John M. Vazquez

Argued December 7, 2021
Before: SHWARTZ, PORTER and FISHER, *Circuit Judges*.

(Filed: March 22, 2022)

Alison M. Agnew
John L. Roach, IV
Jonathan Todt
Kenneth M. Vorrasi

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

DOCKET NO. 9401

In the Matter of

ILLUMINA, INC.,
a corporation, and

GRAIL, INC.,
a corporation,

Respondents.

INITIAL DECISION

D. Michael Chappell
Chief Administrative Law Judge

Date: September 9, 2022

How Is New Antitrust Going? Section 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

UNITEDHEALTH GROUP INCORPORATED
and
CHANGE HEALTHCARE, INC.,

Defendants.

Civil Action No. 1:22-cv-0481 (CJN)

MEMORANDUM OPINION

The United States, joined by New York and Minnesota (collectively, "the Government"), seeks to enjoin UnitedHealth Group's proposed acquisition of Change Healthcare. In its Complaint and pretrial filings, the Government made several allegations that, if proven, would raise serious questions about whether the proposed merger violates Section 7 of the Clayton Act. But after a thorough trial on the merits—which lasted over two weeks, included testimony from over two dozen witnesses, and introduced more than 1,000 exhibits—the Court concludes that the Government has not met its burden of proving that the transaction is likely to substantially lessen competition in the relevant markets. The Court therefore enters judgment for Defendants. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law. *See* Fed. R. Civ. P. 52(a).

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The Next Antitrust

2023—Google Trial

STATE OF TEXAS
P.O. Box 12548
Austin, TX 78711

Plaintiffs,

v.

GOOGLE LLC
1600 Amphitheatre Parkway
Mountain View, CA 94043

Defendant.

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the States of Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas, acting through their respective Attorneys General, bring this action under Section 2 of the Sherman Act, 15 U.S.C. § 2, to restrain Google LLC (Google) from unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices, and to remedy the effects of this conduct.

VII. VIOLATIONS ALLEGED

First Claim for Relief: Maintaining Monopoly of General Search Services in Violation of Sherman Act § 2

173. Plaintiffs incorporate the allegations of paragraphs 1 through 172 above.

174. General search services in the United States is a relevant antitrust market and Google has monopoly power in that market.

175. Google has willfully maintained and abused its monopoly power in general search services through anticompetitive and exclusionary distribution agreements that lock up the preset default positions for search access points on browsers, mobile devices, computers, and other devices; require preinstallation and prominent placement of Google's apps; tie Google's search access points to Google Play and Google APIs; and other restrictions that drive queries to Google at the expense of search rivals.

176. Google's exclusionary conduct has foreclosed a substantial share of the general search services market.

2023—New Areas for Investigations

FTC Launches Inquiry Into Prescription Drug Middlemen Industry

Agency to Scrutinize the Impact of Vertically Integrated Pharmacy Benefit Managers on the Access and Affordability of Medicine

June 7, 2022

Statement of Chair Lina M. Khan
Regarding 6(b) Study of Pharmacy Benefit Managers
Commission File No. P221200

June 8, 2022

The Federal Trade Commission has voted to order the six largest pharmacy benefit managers ("PBMs") in the U.S. to provide documents and data as part of an FTC inquiry into the impact of PBM practices on competing pharmacies, payers, doctors, and patients. This is a critical step to increase scrutiny of powerful companies within the U.S. pharmaceutical system.

While unknown to much of the American public, PBMs are powerful intermediaries at the center of the U.S. prescription drug system. In many instances, PBMs practically determine which medicines are prescribed, which pharmacies patients can use, and the amount patients will pay at the pharmacy counter. As drug prices have soared and independent pharmacies have shuttered, scrutinizing the practices of PBMs is more critical than ever.[1]

2023—New/Old Issues

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro M. Bedoya

In the Matter of **WEBER-STEPHEN PRODUCTS LLC, a limited liability company.**	**DOCKET NO.**

COMPLAINT

The Federal Trade Commission, having reason to believe that Weber-Stephen Products LLC, a limited liability company, has violated the provisions of the Federal Trade Commission Act, and the Magnuson-Moss Warranty Act ("Warranty Act"), 15 U.S.C. § 2301 et seq., and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Weber-Stephen Products LLC ("Weber" or "Respondent") is a limited liability company with its principal office or place of business at 1415 South Roselle Road, Palatine, Illinois 60067.

2. Respondent has manufactured, advertised, offered for sale, sold, and distributed charcoal, gas, and electric grills and accessories to consumers throughout the United States.

3. The acts and practices of Respondent alleged in this Complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

2023—New/Old Issues

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALLIANCE FOR AUTOMOTIVE INNOVATION Plaintiff, vs. MAURA HEALEY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS in her official capacity, Defendant.	C.A. No. 1:20-cv-12090-DPW

2023—New Merger Guidelines

Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers

Agencies Launch Joint Public Inquiry Aimed at Modernizing Merger Guidelines to Better Detect and Prevent Anticompetitive Deals

PhRMA
RESEARCH • PROGRESS • HOPE

950 F STREET, NW, SUITE 300 • WASHINGTON, DC 20004 • 202-835-3400 • PhRMA.org

Comments of the Pharmaceutical Research and Manufacturers of America (PhRMA) in Response to the Federal Trade Commission and Antitrust Division of the Department of Justice Request for Information on Merger Enforcement

April 21, 2022

Request for Information on Merger Enforcement

Public Comments of 23 State Attorneys General

April 21, 2022

2023—New Legislation?

Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement

February 4, 2021

WASHINGTON – U.S. Senator Amy Klobuchar (D-MN), the lead Democrat on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, introduced sweeping new legislation today to reinvigorate America's antitrust laws and restore competition to American markets. The *Competition and Antitrust Law Enforcement Reform Act* will give federal enforcers the resources they need to do their jobs, strengthen prohibitions on anticompetitive conduct and mergers, and make additional reforms to improve enforcement.

2023—New Legislation?

SEC. 9. EXCLUSIONARY CONDUCT.

(a) IN GENERAL.—The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 26 (15 U.S.C. 26a) the following:

"SEC. 26A. EXCLUSIONARY CONDUCT.

"(a) DEFINITIONS.—In this section:

"(1) EXCLUSIONARY CONDUCT.—

"(A) IN GENERAL.—The term 'exclusionary conduct' means conduct that—

"(i) materially disadvantages 1 or more actual or potential competitors; or

"(ii) tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete.

2023—New Legislation?

SEC. 9. EXCLUSIONARY CONDUCT.

(a) IN GENERAL.—The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 26 (15 U.S.C. 26a) the following:

"SEC. 26A. EXCLUSIONARY CONDUCT.

"(a) DEFINITIONS.—In this section:

"(1) EXCLUSIONARY CONDUCT.—

"(A) IN GENERAL.—The term 'exclusionary conduct' means conduct that—

"(A) has a market share of greater than 50 percent as a seller or a buyer in the relevant market; or

"(B) otherwise has significant market power in the relevant market.

4

What (Not) to Do

Antitrust Issue Spotter

- **Agreeing Not to Compete**. It is a *crime* to *agree* with competitor to set prices or not to discount or to allocate markets ("we won't compete there if you don't compete here"). Other types of agreements like no-poach or no-solicit agreements may raise issues under Section 1 of the Sherman Act. Agreement does not have to be in writing or work.
- **Communicating with Competitors**. It is legal to communicate with competitors but any communications with competitor raise antitrust risks because plaintiffs/enforcers might see communications as agreements with competitors.
- **Forming a Joint Venture.** Joint ventures with competitors are generally legal and procompetitive but in some instances they may raise antitrust concerns.

Antitrust Issue Spotter

- **Pricing Too Low**. Discounting generally considered a good thing but in some instances, usually under state law, discounting intended to destroy a competitor may be exclusionary conduct.
- **Pricing Too High**. Charging high prices may be considered anti-competitive conduct in itself; the issue frequently arises in the context of SEP (Standard Essential Patents)
- **Requiring Exclusivity**. Exclusive dealing provisions are common and generally lawful, but in some circumstances provisions requiring exclusivity may be exclusionary acts.
- **Denying Access**. Companies generally have a right to deny competitors' access to their systems/products (e.g. by not having an API) but in some instances denying access may be exclusionary conduct.

Antitrust Issue Spotter

- **Making Products Technically Incompatible**. "Razor and blades" strategies in which the razor requires a particular type of blade are common and generally lawful but in some instances may be exclusionary conduct.
- **Selling Products Together.** If a company has a high market share in product A and then requires that product A and product B be bought together, this may be considered unlawful "tying."
- **Setting Defaults.** The historic tech cases—*Microsoft* and *Google*—have focused on setting defaults (e.g. for Microsoft Internet Explorer and for Google search engine)
- **Delaying Competition**. Delaying entry of generic competitor may be considered unlawful "pay for delay"—this type of claim is generally pharma only
- **Filing Sham Litigation**. Filing litigation (or engaging in political process) is generally protected by *Noerr-Pennington* immunity but filing objectively baseless litigation may be exclusionary conduct
- **Defrauding Patent Office**. Enforcing a patent that was obtained by knowing and willful fraud on patent office may give rise to a "Walker Process" claim.