


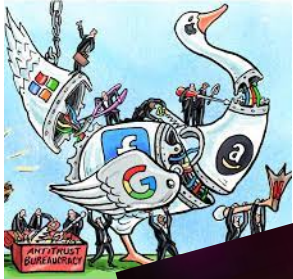
# Antitrust Update: Cutting Through the Chaos



Pete Schwingler and J. Nicci Warr with

B. Scott Eidson | August 27, 2021

# Antitrust Goes Mainstream



The New York Times  
*Biden's Antitrust Team Signals a Big Swing  
at Corporate Titans*



# The Game Plan

## OVERVIEW OF CURRENT ENFORCEMENT CLIMATE

- DOJ, FTC, and State Attorneys General
- Executive Order

## PROPOSED LEGISLATION

## HEADLINE CASES

## WHAT DOES IT MEAN

# Antitrust Basics

- Three categories of federal enforcement
  - Criminal (DOJ only)
  - Civil merger (DOJ and FTC)
  - Civil non-merger (DOJ and FTC)
- Generally non-partisan
  - Preserves competitive markets
  - Protects consumers
  - Less intrusive than regulation

Regulate Organization Conduct  
Consumers Justice Power  
Abuse ANTITRUST Cartels Trade  
LAWS Price-Fixing Civil Courts  
Predatory Pricing Big Enforcement  
Acquisitions Monopoly Abuse  
Business Corporations Big  
Competition Trade Collusion Debate

# Enforcement Trends: 2009-2020

## SIGNIFICANT UPTICK IN FEDERAL ENFORCEMENT

- Aggressive merger litigation
  - Health insurance (DOJ)
  - Hospital mergers (FTC)
  - Telecom, foodservice distribution, tax software, oilfield services
  - Etc., etc., etc. . . .



# Enforcement Trends: 2009-2020

## SIGNIFICANT UPTICK IN FEDERAL ENFORCEMENT

- Aggressive conduct litigation
  - Traditional cartel activity
    - *eBooks*, no-poach, generic drugs (DOJ)
  - Dominant firm activity
    - *Amex*, *Google* (DOJ), *Facebook* (FTC)
  - IP-related activity
    - Pay-for-delay, *Qualcomm*, *1-800 Contacts* (FTC)

# Enforcement Trends: 2009-2020

## TREND TOWARD POLICING LABOR MARKETS

- 2016 Joint Guidelines for HR Professionals
  - “Naked” wage-fixing and no-poach agreements *per se* illegal
  - Criminal actions threatened (first one filed 2020)

## INCREMENTAL PROCEDURAL REFORMS

- New consent decree provisions
- Commitment to shorter merger investigations
- Shift from conduct remedies to structural remedies

## FOCUS ON PROSECUTING EXECUTIVES, NOT JUST COMPANIES

- Yates memo

# Enforcement Trends: 2009-2020

## SIGNIFICANT UPTICK IN STATE ENFORCEMENT

- Generic drugs, *Facebook*, *Google*
- Follow on state investigations from civil litigation
- Unsuccessful challenge to Sprint/T-Mobile deal
- Challenges to no-poach clauses in franchise agreements
  - Major departure from federal guidelines
  - DOJ wrote defense-friendly amicus briefs



# 2021 Developments

## DOJ

- Delay in appointing AAG to lead Antitrust Division
  - Anti-“big tech” sentiment
- Relatively quiet on civil side
- Aggressive criminal enforcement
  - Wage-fixing cases in healthcare
  - Price-fixing cases in pharma and ag, among others



# 2021 Developments

## FTC

- New leadership critical of big tech
- Rewriting the “rulebook”
  - Rescinded bipartisan policy statement on Section 5
    - No replacement yet
  - Unwinding prior administration’s efforts to speed up merger reviews
  - Continuing merger investigations after HSR waiting period expires



# 2021 Developments

## PRESIDENT BIDEN'S EXECUTIVE ORDER

- “Promoting Competition in the American Economy”
- 72 directives to over a dozen federal agencies
  - Aimed at perceived anticompetitive practices in major industry segments, *e.g.*, ag, tech, healthcare, telecom
- Calls for legislative action
- Encourages FTC to implement more regulations



# Proposed Legislation

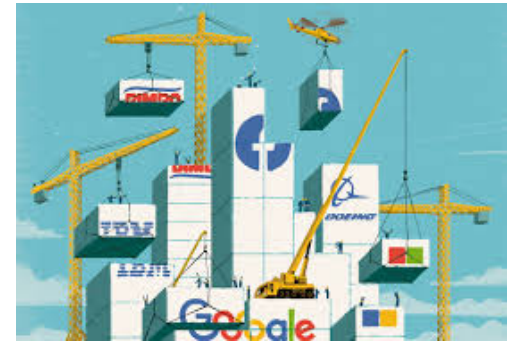
## CALERA – KLOBUCHAR (D – MN)

- Lower standard to block a merger
- Shift burden of proof to merging parties in certain cases
- Prohibit “exclusionary conduct” by dominant firms
- Redefine market power; remove requirement for plaintiff to define relevant market

# Proposed Legislation

## TRUST-BUSTING ACT – HAWLEY (R – MO)

- Focused on “dominant digital firms”
- Prohibit mergers by companies with market cap greater than \$100B
- Prohibit acquisition of emerging competitors
- Prohibit promotion of own products over competitors



# Proposed Legislation

## PHARMA BILLS

- Create presumption that reverse-payment settlements illegal
- Create presumption that “hard switches” are illegal
- Give FDA presumptive authority to determine whether citizen petition is a sham

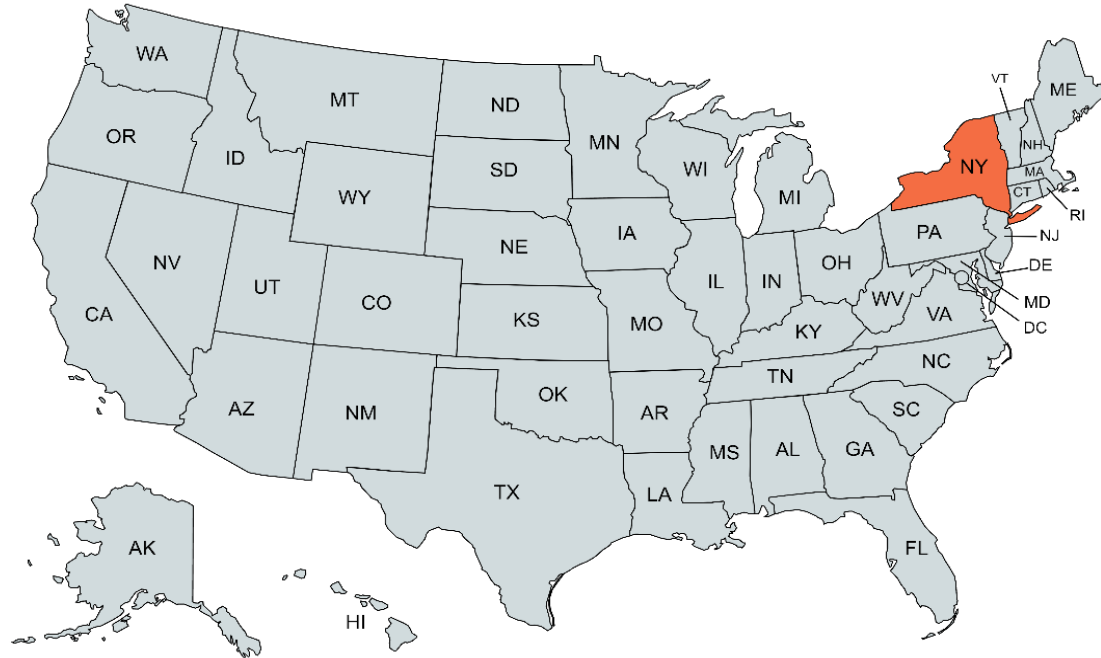
## MFFMA– GRASSLEY (R – IA) AND KLOBUCHAR (D – MN)

- Increase HSR fees for large transactions; decrease fees for small transactions

# Proposed Legislation

## STATE PROPOSALS

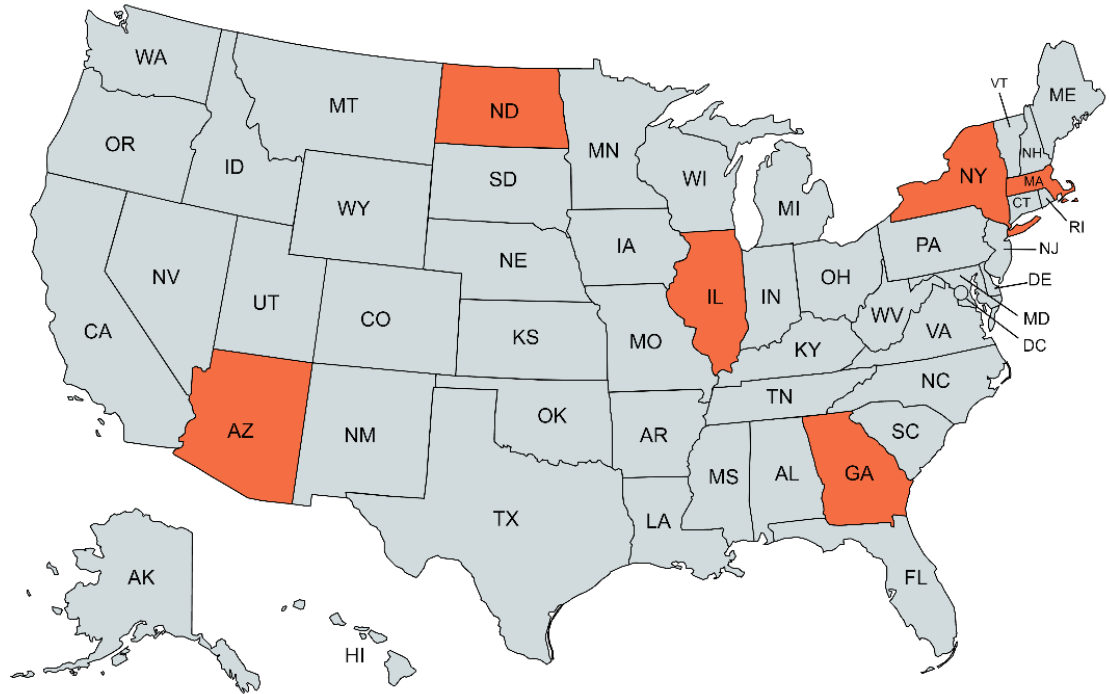
- Add European “abuse of dominance” prohibitions
- Add first state-level pre-merger notification requirement



# Proposed Legislation

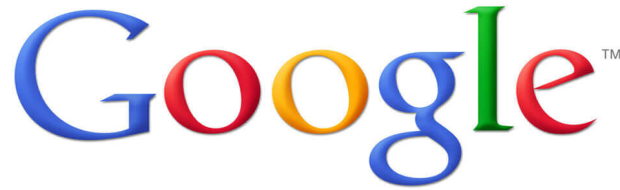
## STATE PROPOSALS

- Prohibit platforms from requiring use of platform payment system





# Headline Cases



- Three “sets” of cases in three locations
  - DOJ and state AGs (DC) - alleging illegally maintained monopoly over search
  - Other group of state AGs (NY) – alleging illegally maintained monopoly over search advertising
  - Still other group of state AGs (CA) – alleging illegally used monopoly power over Play Store to lock app developers into Google Play Billing
- All currently ongoing

# Headline Cases



- FTC and state AGs (DC) - Alleging Facebook maintained illegal monopoly by buying up competitors, including WhatsApp and Instagram
- Asking to have acquisitions unwound
- Status
  - Judge granted dismissal finding allegations of market power in social networking insufficient and (as to the states) that they waited too long
  - New complaint filed by FTC in mid-August in 3-2 party-line vote
  - States appealing the dismissal of their claims

# Headline Cases



- Multiple civil litigations alleging various issues with Apple's control over the App Store
- *Epic* bench trial in May 2021; awaiting decision
- *Pepper* plaintiffs asked court to certify classes of consumers and developers in June 2021

## ONGOING INVESTIGATIONS

- Apple (DOJ)
- Amazon (FTC)

# What Does It All Mean

## WITH SO MUCH NOISE, WHAT DO IN-HOUSE COUNSEL REALLY NEED TO KNOW AND FOCUS ON?

- Human resources!!!
  - High area of interest from regulators, legislators, and plaintiffs' bar
  - Important to conduct training as many HR professionals don't have experience with antitrust concepts
- M&A transactions will likely face more scrutiny
  - Potential additional scrutiny by states
  - Potentially more difficult environment to obtain approval and longer wait times
  - Must be well prepared from the beginning of the deal to provide justification
  - Conduct trainings to prevent inadvertent pitfalls

# What Does It All Mean

## WITH SO MUCH NOISE, WHAT DO IN-HOUSE COUNSEL REALLY NEED TO KNOW AND FOCUS ON?

- Watch for changes in limitations on conduct of dominant firms (including definitions of what is a dominant firm)
  - Regulators and plaintiffs pushing to change the doctrine, but will be slow
  - More immediate changes more likely to come from legislation
- Potential for increased litigation from plaintiffs' bar but also competitors
- For those in technology, watch for decisions affecting the trade off between security and competition

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# There are a lot of headlines about antitrust and I don't know what they all mean (or if what I am reading is accurate). What should I do?

Nothing – Since I am not a “big tech” firm I don’t need to worry about any of this

Continue (or start) to train appropriate employees (including HR personnel) on antitrust compliance

Consult with antitrust counsel about the specifics of my business and the market in which it operates to identify any high risk areas

Both 2 and 3

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# Audience Poll

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1. Nothing – Since I am not a “big tech” firm I don't need to worry about any of this
2. Continue (or start) to train appropriate employees (including HR personnel) on antitrust compliance
3. Consult with antitrust counsel about the specifics of my business and the market in which it operates to identify any high risk areas
4. Both 2 and 3

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# My company may have specific antitrust risk that should be assessed if I operate in which of the following industries:

Technology/software

Agriculture

Transportation

Chemical/industrial

All industries have specific risk that varies by industry and should be assessed

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# Audience Poll

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1. Technology/software
2. Agriculture
3. Transportation
4. Chemical/industrial
5. All industries have specific risk that varies by industry and should be assessed

# My company may be a dominant firm if:

My business has more than 30% market share

My business sells a very popular product

This is a fact-dependent question that requires a nuanced analysis of the competitive features of the market in which my company operates

My business dominates the local softball league

# Audience Poll

My company may be a dominant firm if:

1. My business has more than 30% market share
2. My business sells a very popular product
3. This is a fact-dependent question that requires a nuanced analysis of the competitive features of the market in which my company operates
4. My business dominates the local softball league

# I want to stay abreast of what is happening with regard to antitrust enforcement and legislation. What can I do?

Read every news article containing the word “antitrust”

Read every law review article about antitrust

Read the Antitrust Source published by the ABA Antitrust Section

Contact my friendly antitrust lawyer periodically to find out what developments may affect my company specifically

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# Audience Poll

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1. Read every news article containing the word “antitrust”
2. Read every law review article about antitrust
3. Give up as there is no way to keep track with so much happening
4. Read the Antitrust Source published by the ABA Antitrust Section
5. Contact my friendly antitrust lawyer periodically to find out what developments may affect my company specifically

*Any Questions?*

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# Thank You



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