



2023 REGULATORY FORECAST

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ANTITRUST LITIGATION

In 2022, the US Department of Justice (DOJ) and Federal Trade Commission (FTC) took boundary-shifting antitrust enforcement positions and proved they are not afraid to pursue novel legal theories. The DOJ alone has more open grand jury investigations and charged more cases in 2022 than it has in decades. The DOJ and the FTC also requested historic budget increases to support their aggressive agendas. Additional resources mean more regulators are available to investigate and litigate alleged anticompetitive conduct. Expect to see aggressive enforcement by the antitrust agencies and private plaintiffs continue in 2023.

CONTINUED FOCUS ON LABOR MARKET ISSUES

Pursuing criminal liability for anti-competitive labor market practices remains a top priority for the DOJ. In October 2022, the DOJ announced that it secured its first-ever criminal guilty plea in a “no-poach” case.

WHAT TO WATCH: This victory will likely encourage the DOJ to continue pursuing criminal charges for anticompetitive conduct in the labor and employment spaces, despite its limited success in the past. Kicking off 2023, the FTC just proposed a new rule that would ban almost all noncompete agreements between employers and workers.

ADDITIONAL CRIMINAL CHARGES UNDER SECTION 2 OF THE SHERMAN ACT

In early 2022, the DOJ indicated that it was going to revive criminal enforcement of Section 2 of the Sherman Act for the first time in approximately 50 years. In October 2022, the DOJ made good on that promise and announced that a defendant pleaded guilty to a criminal charge of attempted monopolization under Section 2. The DOJ charged a second criminal monopolization case in December 2022.

WHAT TO WATCH: Expect to see more Section 2 criminal charges in 2023.

INCREASED FOCUS ON INTERLOCKING DIRECTORATES

Seven directors resigned from the corporate boards of five companies following warnings that the DOJ would take action under Section 8 of the Clayton Act, which prohibits interlocking directorates.

WHAT TO WATCH: This recent trend will continue to be an area of focus for government agencies in 2023. There is also a substantial risk that an interlock among directors could serve as the predicate for antitrust conspiracy claims.

AGGRESSIVE ENFORCEMENT OF SECTION 5 OF THE FTC ACT

In November 2022, the FTC issued a policy statement that signals its plans to aggressively enforce Section 5 of the FTC Act, which broadly prohibits unfair competition. The statement suggests that the FTC intends to exercise broad discretion in determining what constitutes “unfair” conduct. Importantly, the FTC does not believe that Section 5 requires the agency to prove anticompetitive intent or harm, as would be required under the other federal antitrust laws.

WHAT TO WATCH: The FTC’s reading of Section 5 potentially enables the FTC to challenge conduct that would otherwise be beyond the Sherman Act’s reach. The FTC also just filed complaints against three companies and two individuals alleging Section 5 violations relating to noncompete restrictions.

CASES TO WATCH IN 2023

The coming year will see movement in several important cases:

- *In re Generics Pharmaceuticals Pricing Antitrust Litigation* – This broad and long-running multidistrict litigation is a must-watch in 2023. Class certification briefing in the drug specific bellwether cases is expected to take place in the coming year.
- *US v. Surgical Care Affiliates LLC* – This labor market allocation trial will likely take place in 2023. The DOJ will have a tough fight after DaVita went to trial and was acquitted in 2022.
- *US v. Teva Pharmaceuticals USA, Inc. and Glenmark Pharmaceuticals, USA* – These criminal cases alleging price fixing for generic drugs are expected to move forward in 2023. Keep an eye out for trial dates and schedules.
- *RealPage* – The property technology company faces several lawsuits, including a new DOJ investigation, concerning its rental pricing algorithm. Various lawsuits against RealPage and the nation’s largest landlords began to be filed in October 2022 and are expected to be consolidated for pretrial proceedings in 2023.
- *US et al. v. Google LLC* – The DOJ and various state attorney general’s antitrust lawsuit over Google’s control of search engines is likely to go to trial in 2023.

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