

Antitrust Tips for In-house Counsel – A Practical Guide

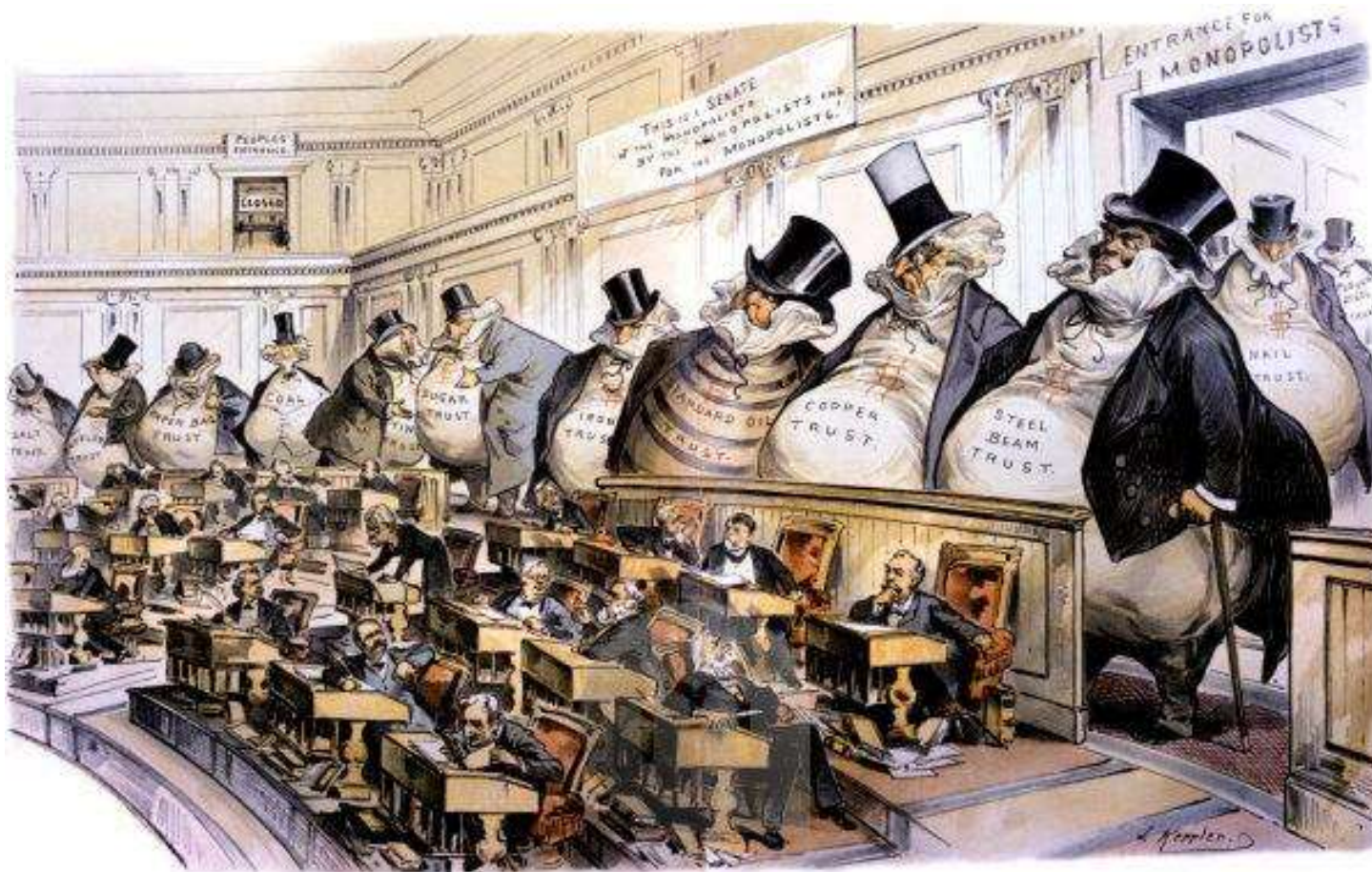
Lawrence Silverman

Dee Dee Fischer

October 19, 2021


akerman

Antitrust – The More Things Change . . .



Core Antitrust Statutes

- The Sherman Act of 1890
- The Clayton Act of 1914
- Robinson Patman Act (1936)
- Hart Scott Rodino (1976)
- The FTC Act (1914)

Biden's Antitrust Agenda – A Sea Change



New Leadership

Lina Khan (FTC)

Jonathan Kanter (DOJ)

Tim Wu (White House)



Biden's July 9, 2021 Executive Order

72 Proposed Initiatives including

- Making it easier to change jobs and help raise wages by limiting non-competes.
- Lowering prescription drug prices by allowing importation of drugs from Canada.
- Allowing hearing aids to be sold over the counter.
- Regulating the amount internet companies can charge in fees
- Requiring airlines to be more transparent as to add-on fees.
- Limiting manufacturers from barring self-repairs or third-party repairs
- Allowing portability of banking information to make switching banks easier.
- Promoting Agriculture Dept's efforts to stop abusive practices by meat processors.

Key Antitrust Guidance to Agencies

- Encourages DOJ and FTC to challenge prior mergers that past administrations did not challenge.
- Enforcement should focus on labor markets, agricultural markets, healthcare markets (drugs, hospital consolidation, and insurance), and of course, the tech sector.
- Establishes a White House Competition Council to monitor finalizing initiatives in the Executive Order.

Legislative Proposals

- **Competition and Antitrust Enforcement Act of 2021** (Sen. Amy Klobuchar)
- **Trust-Busting for the Twenty-First Century Act** (Senator Josh Hawley (R-MO))
- **Ending Platform Monopolies Act** (co-sponsored by Reps. Lance Gooden of TX and Pramila Jayapal (D-Wash))
- **American Innovation and Choice Online Act** (co-sponsored by Reps. Cicilline (D-R.I.) and Gooden)
- **Platform Competition and Opportunity Act** (Reps. Hakeem Jeffries D-NY and Ken Buck (R-Colo.).)
- **Merger Filing Fee Modernization Act** (Reps Joe Neguse (D-Colo) and Victoria Spartz (R-In))
- **Augmenting Compatibility and Competing by Enabling Service Switching Act (“ACCESS Act”)** (22 co-sponsors)
- **State Antitrust Enforcement Venue Act** (Ken Buck, R-Colo and four co-sponsors)

Antitrust Changes Since Biden Took Office

- **Surge in mergers and related HSR filings.** In the first three quarters of FY2021, agencies have processed more HSR filings than in any year since 2000.
- **Slow down of merger reviews.**
 - Previously, agencies had discretionary authority to grant early termination for the 30-day Hart Scott Rodino waiting period. In Feb. 2021, FTC suspended early termination.
 - All transactions are covered under the full 30 days period
 - This has led to an increase of filings based on an letters of intent (LOI).
- **FTC announces review of PNO informal interpretations.**

Compliance Tips



Don't Invite Yourself to the Party

- The antitrust laws can result in criminal penalties
- The primary basis for criminal and/or civil liability is Sherman Act Section 1
 - Combination, contract or conspiracy in restraint of trade
 - This means being careful when dealing with “horizontal competitors”
 - Salespeople in the field
 - Trade associations
 - Conventions
 - Prohibitions include price fixing, group boycotts, refusals to deal
 - Your traditional compliance program should cover all that
- Avoidance of unnecessary contacts – much of our advice concerns things that don't directly violate the law
 - Primary goal – don't invite yourself to the party...

The “Law and Order” Problem...



You can get investigated for things that aren't “especially heinous”

The Nightmare:

- This specific scenario happened to three different clients last year!!
 - Random governmental investigation on unrelated topic 1.
 - Just like the opening scene of any Law & Order episode
 - Leads to investigation on topic 2 - antitrust.
 - Allegations of conspiracy to fix sales prices or fix amounts paid to suppliers
 - Lots of industry coordination – on purely innocent questions
 - Includes best practices/tips chats between GCs
 - Chats amongst salespeople as to pure gossip
 - Grand Jury subpoenas issued
 - Including subpoenas to GCs!
 - Employees have to retain multiple sets of white collar firms
 - Discussions were innocent, but you can't mess around with a criminal grand jury subpoena
 - Don't invite yourself to this party!

Pricing and Distribution Law



The Robinson-Patman Act (“RP”)

- “Price Discrimination” - so obscure that you didn’t even cover it in antitrust class in law school
- Passed in 1936 to protect small retailers from the big bad chain stores (A&P)
 - In the sale of commodity goods, price discrimination isn’t allowed
 - Lots and lots of exceptions
- If you are a manufacturer, this is your excuse to decline a request for discounts
 - For example, all car dealers pay the same amount, whether big or small
- Lots of exceptions, and it’s very difficult to bring a lawsuit enforcing RP
 - If a customer goes bankrupt, then they sue their suppliers and that’s when we see these case.
- Some portions of the RP Act require special care, because they don’t require proof of injury to competition – these should be consistent between customers
 - Promotional allowances
 - Rebates to end users
 - Advertising and cooperative payments

RP- Basic Guidelines

- Requires same economic terms be provided to all purchasers
 - Nonprofit buyers are exempt
- For a lawsuit based on pricing, there needs to be “adverse effect on competition”
 - Different sale prices to consumers wouldn’t result in adverse effect on competition
 - Effect on competition not necessary for promotional allowances
- Only applies to the exact same “commodity” product
 - Different sizes can be a sufficient difference for different prices
- Meeting (but not beating) competition can be a defense
- Volume discounts are supposed to be limited to the amount actually saved by buying in bulk
- Rebates and other promotional allowances need to be identical
- If a manufacturer makes discount available to everybody, that is enough of a defense (even if most people are too small to take advantage)

RP – A Revenue-Positive Opportunity



RP – A Revenue-Positive Opportunity

- There are lots of ways to obtain a discount
 - A good opportunity to train your employees
 - Specialized goods – get your own SKUs
 - If you can differentiate, it's not the same product
 - Different formats/packaging/services
 - Volume purchases (up to a point)
 - Doing something extra (demos/extra services)
 - Exclusive seller
 - If you are the only seller of a SKU, there's no adverse effect on competition
 - Seller can meet (but not beat) a competitive offer
 - But seller cannot “confirm” that competitive offer with a competitor

Antitrust Potpourri



Helpful but Obscure Advice, Vol. 1

- **Clayton Act Section 8** - If you have over \$37m in assets or sales, your officers and board members cannot be officers or directors of a competitor.
 - Very common in retailing industries
 - No useful definition of what is a competitor.
 - Establish a process to keep track when your people want to take board positions in other companies.
- **Price Gouging**
 - No federal law but many state laws.
 - Prohibits unconscionable raising of prices in an emergency.
 - Usually applies to goods and services deemed “necessary.”
 - Automatic or algorithmic pricing can be triggered inadvertently.
 - If price increases are increased costs, keep careful records.

Helpful but Obscure Advice, Vol. 2

- **Non-Solicit (No-Poach) agreements**

- “Naked” no-poach agreements are per se illegal.
- Any restriction needs to be ancillary to another agreement.
- Must be reasonably necessary and narrowly tailored.
- Avoid sharing sensitive employment-related information
- “Competitor” – companies that compete for the same employees. Not necessarily in the same industry.

- **Competitive Intelligence**

- It’s OK, subject to common sense limitations
- Keep track of where it came from
 - Customers supply their vendors with competitor information
 - “The gift from god”™
- Don’t ask customers to obtain items that are covered by confidentiality

Questions?

Contact Us



Lawrence Silverman

Partner, Litigation

305.982.5666

lawrence.silverman@akerman.com



Dee Dee Fischer

Partner, Litigation

305.982.5570

deedee.fischer@akerman.com

Akerman LLP
700+ Lawyers
24 Offices

akerman.com