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The Antitrust Conduct Cases To Watch In 2022

By **Bryan Koenig**

Law360 (January 3, 2022, 12:03 PM EST) -- U.S. antitrust enforcers carried out dramatic efforts to combat anticompetitive conduct last year, and all signs show that the aggressive efforts will continue in 2022.

Among the areas to watch will be criminal and civil cases accusing companies of anticompetitive collusion to restrict their workers' wages and mobility. Important developments in the cases against Big Tech and a key decision on the intellectual property strategies of pharmaceutical giants are also expected.

Here, Law360 looks at the major antitrust conduct cases to watch in 2022.

A Labor Of Enforcement

Like 2021 before it, 2022 is expected to see major developments in labor-side antitrust enforcement.

After years of promising that it was no longer satisfied with purely civil enforcement and would be pursuing labor-side criminal enforcement as well, the Department of Justice declared the first such indictment in late 2020.

The department has also brought charges against alleged wage-fixing, with most charges so far brought in the healthcare space. In December, the DOJ also crucially announced a major expansion of its prosecutions in the form of criminal charges beyond the healthcare space, accusing an apparent former Pratt & Whitney global engineering services director of participating in a conspiracy to restrict the hiring of engineers and other skilled laborers working for engineering services suppliers.

Some of the DOJ's new criminal prosecutions will go to trial in 2022.

UnitedHealth Group unit Surgical Care Affiliates, for instance, is scheduled to go to trial in May in the DOJ's first criminal case targeting "no-poach" deals between direct competitors restricting the recruitment and hiring of each other's workers. Of particular interest there is whether the Texas federal judge will deem alleged nonsolicitation agreements a per se, or automatic, antitrust violation, which would allow the DOJ to continue pursuing the case criminally.

As a matter of policy, the department only pursues harder-to-prove rule of reason cases, which balance allegedly anticompetitive conduct against outcomes and consumer prices, through civil litigation. So far,

the DOJ has managed to get per se treatment in at least one wage-fixing case — scheduled for trial in April — but nonsolicitation agreements may be trickier.

"DOJ's authority to bring no-poach cases under its criminal authority I think will be tested in the next year," said Megan Gerking of Morrison & Foerster LLP.

Beyond Criminal Cases

The DOJ likely won't be alone in targeting labor-side conduct as anticompetitive in the new year. The Federal Trade Commission has similarly expressed an interest in protecting workers, including through rulemakings.

Davis Wright Tremaine LLP's David Maas said enforcers have shown every sign they're not done with labor-side enforcement, which has worked its way into major policy statements at both the DOJ and FTC.

"They're very active in the space," Maas said. "I would expect to see significant enforcement actions."

The efforts to expand labor-side enforcement is driven by President Joe Biden's summer executive order aimed at bolstering competition across the economy. David Shaw of Morrison & Foerster notes that the executive order also called for initiatives by other government agencies, too, imposing mandates on and making requests of "a whole bunch of regulators and offices scattered throughout the executive branch."

Nor are government agencies the only ones making a mark in labor-side enforcement. State attorneys general and private plaintiffs have been making waves for several years now against major franchisors, especially chain restaurants, accused of baking into their no-poach agreements language restricting individual franchisees from recruiting and hiring from others within the chain. Dozens of chains have sworn off the practice under pressure from state enforcers.

In terms of private cases, Christopher G. Renner of Jenner & Block LLP is watching the Eleventh Circuit, where a proposed class of Burger King workers is trying to revive a suit over no-poach provisions in the chain's franchise agreements. The court heard oral arguments in September. According to Renner, the case is one of the first that could shed light on key questions, including the district judge's findings that a franchisor and franchisee are legally incapable of conspiring over the terms of their franchise agreement.

Tech Cases Moving Forward

The new year is certain to see important developments in the array of litigation moving forward against online platforms, amid a broader reckoning over the power of Big Tech and the ability of antitrust law as written to keep it in check. Practitioners will also be watching Capitol Hill closely for what if any legislation lawmakers manage to finalize as part of that reckoning.

The litigation includes the various state and federal enforcement actions against Google and Facebook, as well as the D.C. Attorney General's solo suit against Amazon.

Also important is the private litigation against Apple, especially the competing Ninth Circuit appeals from the iPhone-maker and Epic Games after a California federal judge said that Apple wasn't a

"monopolist" but barred it from enforcing "anti-steering" provisions meant to keep purchases within the App Store and thus subject to Apple's commissions of up to 30%. The ruling against the anti-steering provisions has been put on hold pending the appeal.

Michael Murray of Paul Hastings LLP said that the Ninth Circuit case is "very important for the business community in terms of understanding the relationship of state law to federal law." The reason: U.S. District Judge Yvonne Gonzalez Rogers found that, under federal law, Epic hadn't made out its case, concluding that only under California's Unfair Competition Law could the anti-steering provisions be deemed anticompetitive for their rules barring app developers from telling users about, or directing them to, alternative payment options beyond the App Store.

Most of the government enforcement actions against Google will not see trial in the new year. However, one suit from state enforcers consolidated with Epic's claims and proposed classes of Android consumers and developers of apps for the Play Store is eyeing trial in the Fall of 2022 over the search giant's Play Store policies, although that timing could change.

A separate group of state attorneys general led by Texas had been eying trial for March or April 2022 on allegations centered on Google's facilitation of and alleged control over the market for placing ads displayed on third-party websites, well ahead of the private lawsuits or other enforcement actions, including one by the DOJ targeting Google's search and search advertising business. But the consolidation of the Texas-led suit with private cases in New York federal court, at least for pretrial purposes, has likely upended those plans, setting back the trial clock significantly.

Nevertheless, there is still likely to be a great deal of progress in the cases in 2022, including the continuously contentious discovery process in the DOJ and state attorneys general case accusing Google of monopolizing search and search advertising through a web of contracts with phone companies and others.

Evidence gleaned from third parties, according to Jim Mutchnik of Kirkland & Ellis LLP, "can take these cases in a variety of directions."

Kirkland's Andrea Agathoklis Murino agrees. Third-party discovery, she said, helps "shine the spotlight." Even so, according to Murino, "the most compelling evidence is from the parties themselves," evidence Mutchnik said enforcers likely already gleaned from their pre-suit investigations.

Waiting On The 7th Circuit's 'Patent Thicket' Decision

Almost a year after a Seventh Circuit panel heard oral arguments, a decision could come at any time on whether to revive Humira buyers' suit accusing AbbVie of using a "patent thicket" to illegally shield the blockbuster immunosuppressant from competition.

The Humira purchasers launched their first-of-its-kind suit in March 2019, alleging that AbbVie's colossal "patent thicket" had empowered it to block less-expensive versions of the biologic treatment, called biosimilars, in violation of antitrust law. According to the suit, AbbVie also convinced companies such as Amgen Inc. and Sandoz Inc. to drop patent litigation over Humira and stay out of the U.S. until 2023 by giving them access to the $4 billion European market in October 2018.

U.S. District Judge Manish Shah tossed the suit in June 2020 after finding AbbVie's patent litigation was not objectively baseless and was largely protected by the Noerr-Pennington doctrine, which shields

certain activity intended to influence legislation or the enforcement of existing laws. The judge also found that AbbVie's settlements with potential biosimilar competitors were lawful because they allowed immediate entry in Europe in exchange for staying out of the U.S., and that the buyers failed to prove they were injured by the alleged activity.

The closely watched appeal could send important signals about the legal footing for biologics' patent practices.

Buyers seemed to encounter a divided panel in February oral arguments, with Circuit Judge Frank H. Easterbrook pressing plaintiffs to explain how they can accuse AbbVie of protecting the world's best-selling drug with a thicket containing many allegedly "overlapping and non-inventive" patents even though they were granted by the U.S. Patent Office.

Conversely, Circuit Judge Diane P. Wood noted that, given the limited selection of patents from the thicket asserted in a given biosimilar case, it wouldn't matter if a patent outside that group was invalid.

The plaintiffs argue it's enough to show that at least one company trying to produce a substitute biosimilar version would have prevailed in a challenge to Humira's exclusivity if not for the thicket comprised of some 132 patents — which appears to be the largest of any biologic treatment.

That thicket, according to the plaintiffs, forced biosimilar companies, several of which are also being sued in the current case, to cut deals allowing earlier entry in European markets in 2018 — access valued in the hundreds of millions of dollars — in exchange for delaying entry into U.S. markets until 2023.

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