Overview of Antitrust Law and the Regulatory Landscape

Professional Liability Underwriting Society

Eastern Chapter

Antitrust and the Marketplace

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I. Primary Focus of Antitrust and Other Competition Law Regimes

Antitrust law is focused on ensuring that markets throughout the United States are competitive so that consumers are protected. It is centered on the principle that society is better off where markets behave competitively, as opposed to behaving via: (1) concerted actions among market participants (e.g., coordination amongst sellers); or (2) concentrated markets where a powerful market participant is able to abuse its power in order to subvert competition.

In order to advance the foregoing goals, antitrust law generally seeks to regulate producers and suppliers of products and services by prohibiting certain activities and scenarios that undermine healthy competition. Antitrust laws have evolved over the past, with more and more of an intersection of economics and law in order to advance those goals. With this evolution, there has been much debate as to what level of regulation is appropriate, and whether antitrust law may actually impede healthy markets. For this reason, antitrust law is often intertwined with matters that are politically charged, as regulators often use antitrust law as a political tool (e.g., most recently, to fight inflation or protect competition in labor markets).

II. Key Federal Legislation and State Corollaries

The scope and reach of antitrust law is vast. In the United States alone, there are numerous statutes and regulations that create serious penalties for various antitrust violations.

A. The Sherman Antitrust Act

The Sherman Antitrust Act of 1890 was the first measure passed by the U.S. Congress to prohibit trusts. Several states passed similar laws as well. The Sherman Act was designed generally to restore competition, but used loose terms such as "trust," "combination," and "monopoly," which later had to be refined by courts. The Sherman Act has two Sections, the first of which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Section two prohibits monopolization or attempts at monopolizing any aspect of interstate trade or commerce.

More specifically, Section One of the Sherman Act is aimed at prohibiting certain coordinated conduct among market participants, as indicated by its targeting of "contracts, combinations, or conspiracies." Such conduct must therefore involve two or more competitors that come together to engage in anticompetitive conduct. Prohibited activities can take many forms, but include the following, among other things: (1) price-fixing; (2) bid-rigging; (3) market allocation; and (4) group boycotts.

Section Two of the Sherman Act, on the other hand, is aimed at unilateral, as opposed to bilateral, conduct. It concerns ensuring that companies with market power, or monopoly power, do not abuse their market position to undermine competition. Importantly, this section does not intend to punish companies who become natural monopolies, but rather, seeks to ensure that companies do not seek or abuse market power for the purpose of preventing healthy competition.

B. The Clayton Act and the HSR Act

The Clayton Act was subsequently adopted by Congress in 1914, with the intention of strengthening the Sherman Antitrust Act. In order to strengthen earlier antitrust legislation, the act prohibited, among other things; (1) mergers and acquisitions where the effect may substantially lessen competition in certain markets; (2) exclusive dealing arrangements that would substantially lessen competition; and (3) predatory and discriminatory pricing, as well as other forms of unethical corporate behavior. Relatedly, the HSR Act also requires companies to notify antitrust authorities prior to consummating acquisitions and mergers of certain sizes so that regulators have the chance to investigate whether such transactions would impede competition in a relevant market.

C. State Antitrust Law and Other Competition Laws Internationally

In addition to the federal regulatory landscape, numerous state regimes have enacted their own antitrust laws, many of which largely mirror legislation at the federal level. However, there are many nuances at the state level that may also need to be considered from a compliance perspective. In the same vein, there are numerous antitrust law regimes throughout the world, each with their own version of laws, regulations, and enforcement mechanisms and policies. Indeed, more than one-hundred-and-twenty-five countries have their own competition laws, for example, which must further be considered to the extent transactions involve foreign commerce.

III. Practical Examples of Prohibited Conduct

A. Prohibited Concerted Activity under Sherman Act Section 1: "Hardcore" Violations Subject to Strict Liability Versus The "Rule of Reason" Approach

Antitrust law recognizes that certain conduct may have no redeeming qualities, whereas other conduct may have legitimate business motivations that actually enhance competition. Accordingly, whereas some conduct is "per se" illegal—with no defense, other conduct is judged on a case-by-case basis under what is nicknamed a "rule of reason," analysis, which essentially weighs pro-competitive effects with anti-competitive effects.

Conduct that is "per se" illegal represents activity that has been recognized as having no competitive justification. For this reason, this conduct has no defense, and results in "strict liability," and substantial fines. Conduct falling within this category includes agreements by direct competitors to restrain trade by allocating markets, setting prices, boycotting competitors, or fixing bidding auctions, among other things. If competitors engage in the foregoing, there can be severe penalties. Importantly, an "agreement" among competitors to engage in such activity does not have to be express, but can be implied based on the circumstances.

On the other hand, antitrust laws have evolved to recognize that not all coordinated conduct deserves such *per se* illegality. In that regard, courts and regulators have observed that some conduct deserves a more detailed analysis, which includes evaluating whether or not such activity has redeeming qualities from a competition perspective. This analysis is often undertaken with the help of experts (e.g., economists) who opine on the economic effect of the conduct in question. Conduct falling within this category includes joint ventures among competitors, which could actually help consumers (e.g., by providing more and better options, cost efficiencies, etc.), vertical pricing arrangements (i.e., restrictions on pricing that do not involve direct competitors, but companies at different parts of the supply chain), or certain exclusive dealing joint purchasing arrangements.

IV. Antitrust Penalties and Enforcement

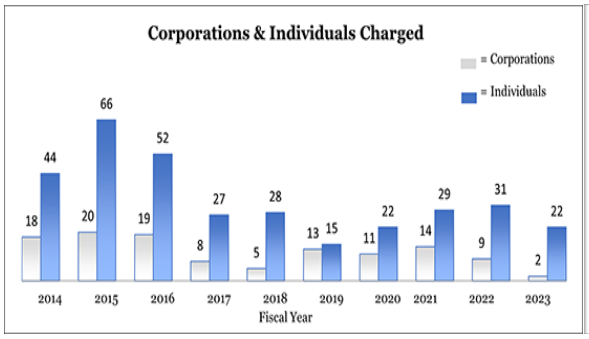
Violating United States antitrust laws can carry both criminal and civil penalties. Antitrust laws are enforced by numerous agencies, including the Department of Justice, the Federal Trade Commission, as well as state attorneys general in each state. At the state level, for example, attorneys general can bring lawsuits on behalf of harmed consumers (i.e., *parens patriae* actions). At the federal level, criminal penalties are capped at 10 years of jail time, and $100,000,000 per violation.

In addition to the foregoing penalties, federal antitrust law can also have severe civil penalties, which can be enforced either by the market participant harmed, or a group of consumers (e.g., via class actions). Damages can include "treble" or triple damages, which can result in crippling liability. This is intended, as Congress permitted private actions in an attempt to create private enforcers who can, in conjunction with federal enforcers, enhance competition throughout the United States. Often, such private enforcers will bring class actions that are triggered by government investigations, as noted below.

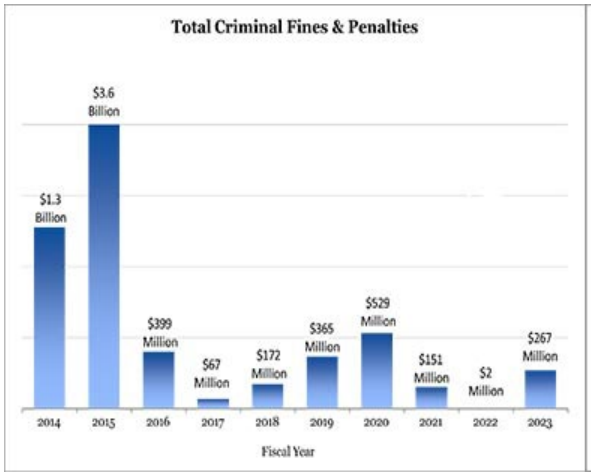
V. Antitrust Trends

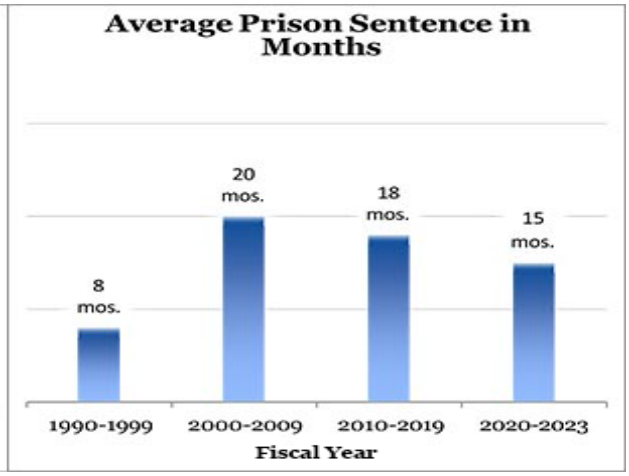
A. Criminal Enforcement Trends

Criminal enforcement of antitrust laws has been fairly consistent over the past decade, though overall enforcement is down from 2014, 2015, and 2016. In 2023, there was also a drop as to the number of individual corporate representatives charged. The total number of criminal cases filed also dropped in 2023. *See infra*.



Although criminal enforcement dropped from 2022 to 2023, the number of criminal fines and penalties increased notably. In 2023, there were $267 million in criminal fines and penalties imposed, a sharp increase from the prior year. The average prison sentence for antitrust violations was fifteen months between 2020 to 2023, a slight decrease from the prior period. *See infra*.





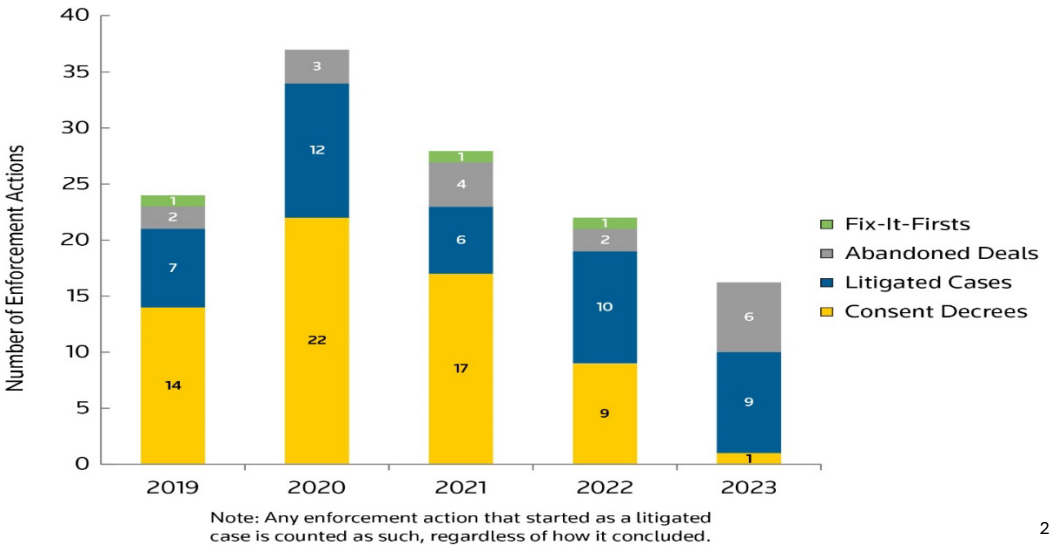
[1]

[1] *See Criminal Enforcement Trends Charts,* available at Antitrust Division | Criminal Enforcement Trends Charts (justice.gov).

B. Federal Merger Control Trends

With respect to federal merger control, the agencies announced enforcement activity in connection with sixteen transactions in 2023. Such activity included litigation, as well as consent decrees and other remedies by the agencies to mitigate alleged anticompetitive harm. *See infra*.

FIGURE A: FEDERAL MERGER ENFORCEMENT ACTIONS BY TYPE



Note: Any enforcement action that started as a litigated case is counted as such, regardless of how it concluded.

[2]

The average length of investigations in enforcement actions in 2023 increased to 12.9 months from 11.3 months in 2022, continuing a trend of merger investigations that are increasingly time-consuming. *See infra*.

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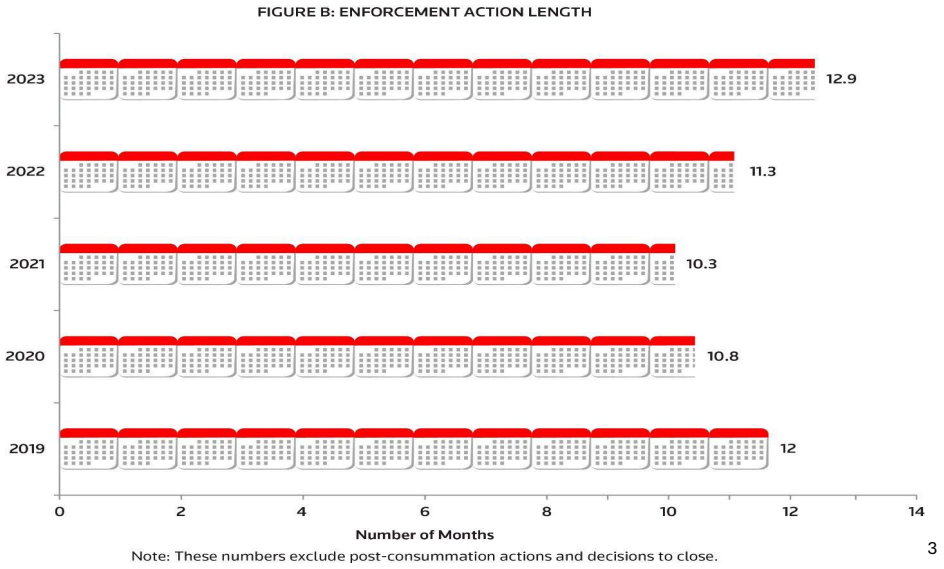
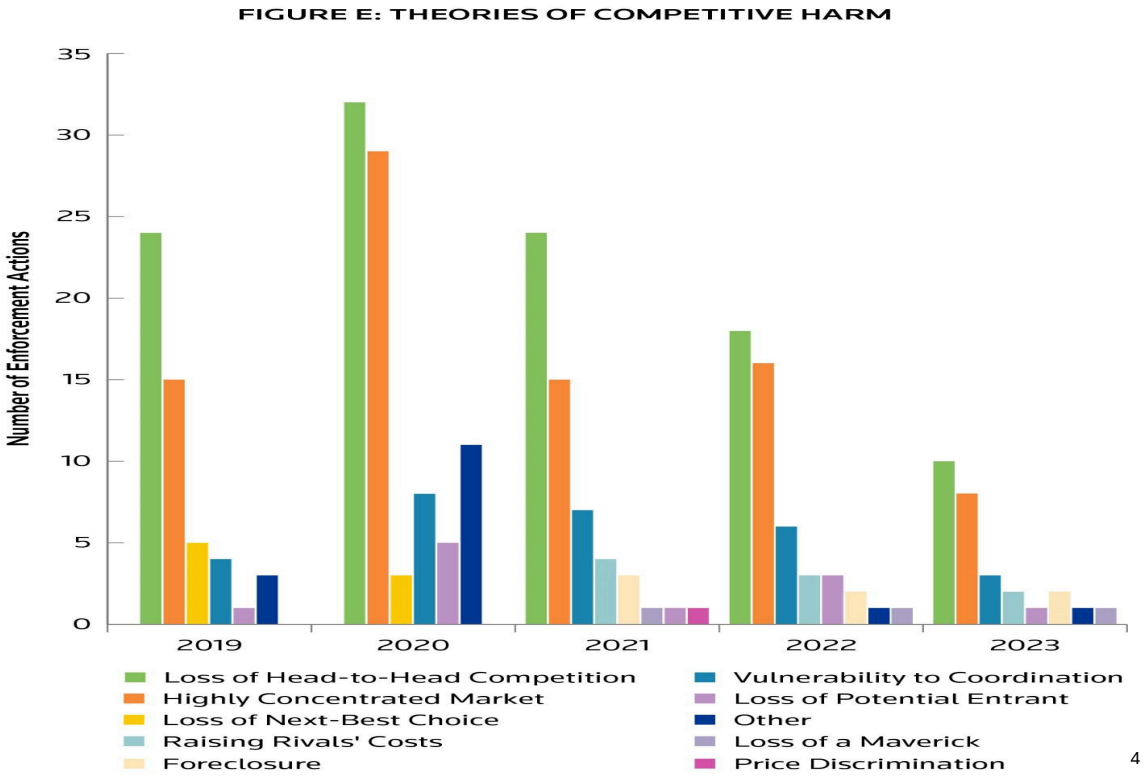
[2] *See* 2023 Federal Merger Enforcement by the Numbers, *available at* laab6f433a98311ee8921fbef1a541940.jpg (1429×972) (westlaw.com).



[3]

Theories of competitive harm in merger actions have remained consistent over the years, with agencies focusing on loss of head-to-head competition amongst competitors and highly concentrated markets, more so than other theories of harm. *See infra*.



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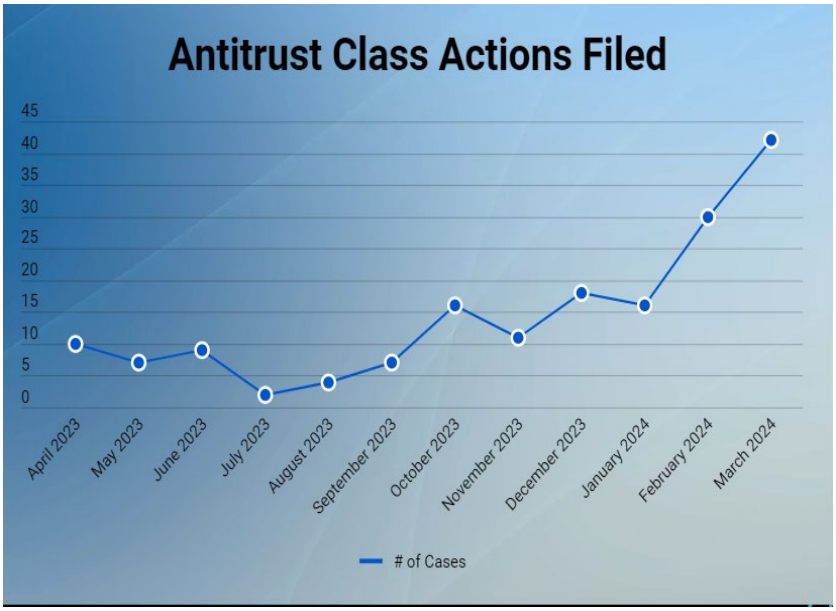
[3] *See* 2023 Federal Merger Enforcement by the Numbers, *available at* laab6f433a98311ee8921fbef1a541940.jpg (1429×972) (westlaw.com)

[4] *See* 2023 Federal Merger Enforcement by the Numbers, *available at* laab6f433a98311ee8921fbef1a541940.jpg (1429×972) (westlaw.com)

C. Private Enforcement Trends

In terms of private enforcement actions, 2024 brought with it a sharp increase in antitrust class actions. In particular, from January 2024 to March 2024, the number of antitrust class actions more than doubled, indicating a trend of increased private enforcement activity. *See infra*.



The type of class action lawsuits brought, as in the past, has largely mirrored enforcement activity at the federal level. Recently, the U.S. Justice Department and Federal Trade Commission have focused not only on Big Tech, but also on the food and labor markets, inasmuch as regulators view antitrust enforcement as a means to battle high inflation. The foregoing has, and will likely continue to drive, private class actions in these sectors.