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BLOG

DOJ's Revival of Section 2 Litigation is Part of "New Era of Vigorous and Effective" Antitrust Enforcement

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On April 21, 2022, Assistant Attorney General Jonathan Kanter gave a spirited keynote address at the University of Chicago, declaring "that the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun." Of particular interest, Kanter signaled that the U.S. Department of Justice (DOJ) intended to revive monopolization cases under Section 2 of the Sherman Act not by settling these cases, but by litigating them to a decision. These are potentially seminal words coming from the head of the DOJ's Antitrust Division.

In his address, Kanter claimed that "Section 2 was very near death" merely five years ago, with "no significant cases in nearly twenty years." History proves him correct, and the timeline is telling. In fact, Federal Trade Commission (FTC)-led Section 2 cases generated only a handful of written decisions[1] in the five years prior to April 21, 2017, Kanter's chosen demarcation line. In just over the last year, there have been just as many.[2] And while the FTC has recently become active, the DOJ has not brought a significant monopolization case since the early 2000s.[3] Kanter promised to "vigorously enforce Section 2 of the Sherman Act," and it seems clear that he intends for the DOJ to follow in the FTC's recent, and busy, path.

One way the DOJ might distinguish itself from the FTC is through the criminal prosecution of monopolization offenses. On March 2, 2022, Deputy Assistant Attorney General for Criminal Enforcement Richard Powers remarked during a panel discussion on white-collar crime that "market concentration and consolidation is not only a civil antitrust issue," and answered in the affirmative when asked whether the DOJ was prepared to bring criminal charges in monopolization cases. Then, in April, the DOJ quietly updated its Justice Manual adding, among other revisions, the following italicized language to its Sherman Act statute section: "While a violation of this Act may be prosecuted as a felony, in general, the Department reserves criminal prosecution under Section 1 for "per se" unlawful restraints of trade among competitors, e.g., price-fixing, bid-rigging, and market allocation agreements. *It may also bring, and has brought, criminal charges under Section 2*."[4]

Kanter also indicated that the DOJ intends to focus on monopoly maintenance cases. Per Kanter: "Monopoly maintenance, in the form of moat-building strategies, helps to prevent the erosion of monopoly positions and thereby harms competition. Enforcers and courts need to do a better job of assessing the overall scheme of monopoly maintenance, including through acquisitions of nascent competitors and the threat of discrimination."

Finally, Kanter stated that the DOJ has an "affirmative 'duty' to 'prevent and restrain' antitrust violations," which he interpreted as a duty to "litigate, not settle," cases, explaining that "settlements [and even divestitures] fail to preserve competition." Further, where a defendant has violated the law, the DOJ will "litigate to remedy the entire harm to competition," usually by "seeking an injunction to stop the anticompetitive conduct or block an anticompetitive merger." This duty to litigate is part of a holistic strategy to ensure that the law will not "stagnate," as it had through past failure to enforce and litigate Section 2 cases.

On May 18, 2022, Kanter delivered the New York City Bar Association's Milton Handler Lecture in which he reiterated several themes from his earlier address, in both his prepared remarks and the Q & A session that followed. Notably, Kanter emphasized the importance of this duty to litigate to merits determinations and argued for the use of "flexible tools that are administrable by the agencies and the courts." In practice, Kanter indicated this would work by asserting more presumptions, found in the case law from the past 110 plus years of enforcement since *Standard Oil*.[5] He proffered that this method of litigation relying on presumptions would provide predictability for businesses and save all parties the months of analysis for complex econometric models pervasive in recent years. Indeed, Kanter quoted Professor Milton Handler himself in remarks made in 1990, at the centennial of the Sherman Act, noting that "the combination of a policy of minimal antitrust enforcement and the glorification of efficiency ha[d] reduced antitrust to [a] parlous condition." If one takes Kanter for his word, the monopoly maintenance case law is about to grow immensely under the DOJ's guidance over the next several years.

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[1] *See FTC v. AbbVie Inc.*, 107 F. Supp. 3d 428 (E.D. Pa. May 6, 2015); *McWane, Inc. v. FTC*, 783 F.3d 814 (11 Cir. 2015); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, Nos. 2:06–cv–1797, 2:06–cv–1833, 2:06–cv–2768, 2:08–cv–2141, 2014 WL 982848 (E.D. Pa. Mar. 13, 2014) (consolidated case including case brought by FTC).

[2] *See FTC v. Endo Pharms. Inc.*, No. 1:21-cv-217-RCL, 2022 WL 951640 (D.D.C. Mar. 30, 2022); *FTC v. Shkreli*, No. 20-cv-00706-DLC, 2022 WL 135026 (S.D.N.Y. Jan. 14, 2022); *FTC v. Facebook, Inc.*, No. 20-3590-JEB, 2022 WL 103308 (D.D.C. Jan. 11, 2022).

[3] *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[4] *Cf.* Feb. 27, 2022 Wayback Machine Internet Archive capture, at https://web.archive.org/web/20220227215901/https://www.justice.gov/jm/jm-7-2000-prior-approvals.

[5] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 58 (1911).

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