

ARIZONA STATE UNIVERSITY

CORPORATE & BUSINESS LAW JOURNAL FORUM

VOLUME 3

SEPTEMBER 2022

NUMBER 24

COMMENTARY

A Look at President Biden's Antitrust Enforcement Efforts

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President Biden made clear during his campaign and early in his presidency that he wanted to “take on growing economic concentration and monopoly power.”¹ The president codified this stance when he released an executive order titled “Executive Order on Promoting Competition in the American Economy” in July of his first year in office.² President Biden stated specifically in the order “that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets, agricultural markets, Internet platform industries, *healthcare markets* (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.”³ (emphasis added).

President Biden has taken his antitrust enforcement promises seriously and has taken multiple steps to make good on this promise.⁴ The Department of Justice (“DOJ”)’s antitrust division has brought on five partners from outside firms and at least a dozen associates to beef of its ranks in antitrust litigation.⁵ These hires have been brought in from some of the largest antitrust players in the country: Kirkland & Ellis, Latham & Watkins, Davis Polk & Wardwell (“Davis Polk”), and Paul, Weiss, Rifkind, Wharton & Garrison

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¹ Cat Zakrzewski, *Biden Inherits Bipartisan Momentum to Crack Down on Large Tech Companies’ Power*, WASH. POST (Jan. 18, 2021), <https://www.washingtonpost.com/politics/2021/01/18/biden-antitrust-big-tech/>.

² Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 14, 2021).

³ *Id.*

⁴ *Biden Administration Steps Up Antitrust Enforcement*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/news/abanews/aba-news-archives/2021/11/antitrust-enforcement/> (last visited Sept. 28, 2022).

⁵ Dan Papszun & Sam Skolnik, *Looming Antitrust Enforcement Spurs DOJ Hiring Binge (Correct)*, BLOOMBERG L. (Sept. 12, 2022), <https://news.bloomberglaw.com/antitrust/looming-tough-antitrust-enforcement-spurs-doj-hiring-binge>.

(“Paul Weiss”).⁶ The hirings come as the DOJ looks towards litigation against companies like Google and American Airlines and faces its largest ever amount of merger notifications.⁷

With all of this heightened activity and hiring, how has the current administration fared in the courtroom? It’s been rocky, to say the least. Davis Polk released an article last month stating that the primary effect of Biden’s antitrust push “has been to create uncertainty, as the agencies struggle with institutional constraints and have yet to achieve groundbreaking victories in court.”⁸ In just the one month since the writing of the Davis Polk article, President Biden has lost two large scale antitrust cases.⁹ These cases included two of the largest sugar refiners in the United States and UnitedHealth Group’s acquisition of Change Healthcare.¹⁰ The UnitedHealth Group deal was of particular importance to the Biden administration as it dealt with the U.S. healthcare system, specifically healthcare insurance.¹¹

The D.C. federal judge in the UnitedHealth Group case not only rejected the government’s argument that the merger would “substantially lessen competition” but also proposed a new legal standard when looking at divestitures and what it would take for the government to meet its *prima facie* burden.¹² This loss not only hurts the look of the administration, but the ruling also may make it more difficult for the government to shift the burden of persuasion to defendants in future divestiture deals, only adding to the challenges DOJ already faces. To add to the pain, longtime DOJ antitrust attorney Frank Nabs left the agency this week for private practice.¹³ These losses, mixed with the administration’s increased costs of bulking up the DOJ’s antitrust division, aren’t a good look for the Biden administration.

However, President Biden’s hope to crack down on business has a chance to spring to life shortly. Trial began on Tuesday, September 27th to challenge an American Airlines-JetBlue alliance in the northeast.¹⁴ That trial is expected to last until mid-October.¹⁵ Large tests also loom in the future when the government begins to tackle antitrust cases against

⁶ *Id.*

⁷ *Id.*

⁸ *President Biden’s Executive Order on Competition: One Year Later*, DAVIS POLK (Aug. 25, 2022), <https://www.davispolk.com/insights/client-update/president-bidens-executive-order-competition-one-year-later>.

⁹ *American, JetBlue Poised for Antitrust Battle With US Enforcers*, BLOOMBERG L. (Sept. 26, 2022), <https://www.bloomberglaw.com/bloomberglawnews/>.

¹⁰ *Id.*

¹¹ *See* Exec. Order No. 14036, *supra* note 2.

¹² *United States v. UnitedHealth Grp. Inc.*, 2022 U.S. Dist. LEXIS 170934 1, 31 (D.D.C. 2022)

¹³ Dan Papsun, *Fried Frank Nabs Longtime DOJ Antitrust Division Deputy Powers*, BLOOMBERG L. (Sept. 28, 2022), <https://www.bloomberglaw.com/bloomberglawnews/>.

¹⁴ Nate Raymond, David Shepardson, & Diane Bartz, *U.S. Challenges American Airlines-JetBlue Alliance as Antitrust Trial Begins*, REUTERS (Sept. 27, 2022), <https://www.reuters.com/legal/us-antitrust-trial-against-american-airlines-jetblue-alliance-kicks-off-2022-09-27/>.

¹⁵ *Id.*

Big Tech (Alphabet, Facebook, Apple, etc.).¹⁶ The Biden administration has a chance to make good on its promises to crack down on economic concentration and needs some big wins now if it hopes to keep its promise before the November midterms and his own reelection on the horizon.

Conflict Disclosure: The author of this article worked on the defense team for Change Healthcare in the UnitedHealth Group litigation and will be returning to the firm this summer.

¹⁶ See Derek Saul, *Feds Reportedly Preparing Antitrust Suit Against Apple*, FORBES (Aug. 26, 2022), <https://www.forbes.com/sites/dereksaul/2022/08/26/feds-reportedly-preparing-antitrust-suit-against-apple/>.