



## ABA ANTITRUST SECTION CORPORATE COMPLIANCE MONTHLY UPDATE

RECORDED: November 15, 2022

During this program, McDermott lawyers [Stephen Wu](#) (Partner, Antitrust), [Greg Heltzer](#) (Partner, Antitrust), [Nicole Castle](#) (Partner, Antitrust) and [Zach Sproull](#) (Associate, Antitrust) discussed recent updates in criminal, merger and civil antitrust enforcement.

### 1 Criminal Antitrust Enforcement Updates

- **Criminal Monopolization Charges:** On October 31, 2022, the US Department of Justice (DOJ) Antitrust Division announced that for the first time in decades, a defendant pled guilty to a criminal charge of attempted monopolization under Sherman Act §1. The plea, which was entered by an executive from paving and asphalt contractor Z&Z Asphalt, represents a shift away from the long-standing DOJ policy to only pursue criminal charges against multi-firm cartel activity. *For more information, see our [recent article](#).*
- **First Ever “No-Poach” Guilty Plea:** On October 27, 2022, the DOJ announced that it secured its first-ever criminal guilty plea in a “no-poach” case. Despite its limited success in the past, this victory will likely encourage the DOJ to continue pursuing criminal charges for anticompetitive conduct in the labor and employment spaces.
- **The Long-Running Broiler Chicken Price Fixing Probe Ends:** On October 17, 2022, following mistrials in December 2021 and March 2022, and an acquittal in July 2022, the DOJ dismissed the charges against the last two individual defendants remaining in its broiler chicken price fixing case, bringing the years-long criminal probe to an end.

### 2 Merger Enforcement Updates

- **U.S. Sugar:** The DOJ lost its challenge to U.S. Sugar’s acquisition of Imperial Sugar and is appealing the district court decision.
- **Residential Hardware:** The DOJ sued to block residential hardware producer Assa Abloy’s acquisition of Spectrum Brands’ home improvement division.
- **National Security Contracting:** A district court recently permitted Booz Allen Hamilton to acquire competitor Everwatch, despite the DOJ’s objections that the transaction would hinder competitive bidding for a key NSA contract.
- **UnitedHealth Group and Change Healthcare:** Siding with the defendants, the court found that the DOJ failed to make out a *prima facie* case that the transaction would substantially reduce competition. Of note, the court placed substantial weight behind United’s plan to divest Change’s competing claims editing business upon closing which eliminated a horizontal overlap. The court also credited United’s internal information firewalls, which would prevent the sharing of competitively sensitive information across service lines and address vertical information misuse concerns. After our update, the DOJ decided to appeal the decision despite the fact that the transaction has now closed.
- **DOJ Blocks’ Book Publishing Merger:** In an October 31, 2022, order, the court ruled that Penguin Random House’s proposed \$2.2 billion acquisition of Simon & Schuster would substantially lessen competition for the publication of top-selling books. Among other things, the DOJ demonstrated that competition among the top publishers raises the advances paid to best-selling authors. Of note, the court gave no weight to the companies’ proffered “fix”—a behavioral remedy by the CEO of Penguin Random House to authors’ agents in which he promised that the merging publishing houses would continue to bid independently. *For more information, see our [recent article](#).*
- **DOJ Renews Focus on Interlocking Directorates:** Seven directors resigned from the corporate boards of five companies following warnings that the DOJ would take action under Section 8 of the Clayton Act, which prohibits interlocking directorates. This has been an area of focus for government agencies recently, and we can expect enforcement to continue in this space. Beyond government enforcement, there is also a substantial risk that an interlock among directors will serve as the predicate for antitrust conspiracy claims.
- *For more information, see our [Q2 2022 Antitrust M&A Snapshot](#).*



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## Civil Enforcement Updates

- **Class Certification in Canned Tuna Price Fixing Case:** The US Supreme Court recently declined to hear Starkist's appeal from the certification of three large purchaser classes in the long-running canned tuna price-fixing case. Starkist argued that class certification was improper because, among other reasons, economic evidence showed that as much as 30% of the class members may have been injured by the conspiracy. The Supreme Court's decision not to hear the case leaves a potential circuit split—and the resulting uncertainty—regarding the viability of classes that potentially include more than a *de minimis* number of uninjured members and the level of evidence required to prove class-wide impact at the class certification stage.
- **FTC and State AGs Sue Pesticide Producers Over Pay-To Block Scheme:** On September 29, 2022, the Federal Trade Commission (FTC) and 10 State Attorneys General sued Syngenta and Corteva over the companies' loyalty discount programs, which allegedly exclude competition from generic pesticide producers. According to the complaint, the companies used loyalty discounts to reward wholesalers who make the bulk of their purchases from the companies, effectively limiting competition from generic pesticide and herbicide producers. The decision to challenge a loyalty discount distribution agreement, which would generally be considered procompetitive, may be a sign of broader government enforcement to come.
- **FTC's New Policy Signals Expanded Enforcement:** On November 10, 2022, the FTC issued a policy statement that signaled the agency's plans to aggressively enforce Section 5 of the FTC Act, which broadly prohibits unfair competition. The statement suggests that the FTC intends to exercise broad discretion in determining what constitutes "unfair" conduct. And importantly, the FTC does not believe that Section 5 requires the agency to prove anticompetitive intent or harm, as would be required under the other federal antitrust laws. Despite its aggressive legal underpinnings, this reading of Section 5 potentially enables the FTC to challenge conduct that would otherwise be beyond the reach of Sherman Act. *For more information, see our [recent article](#).*