Antitrust Developments Update for April 2025

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Publications

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Updates from Prior Antitrust Developments

Chamber Challenges New HSR Rules

In our last antitrust developments publication, we commented on the challenge to the new Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) final rule brought by the U.S. Chamber of Commerce and other parties in the United States District Court for the Eastern District of Texas.[1] The case is currently pending in the Eastern District of Texas. On April 10, 2025, the Federal Trade Commission (FTC) formally responded to the lawsuit with a motion to dismiss.

The motion to dismiss provides key insights into the FTC's rationale on the purpose and application of the new rule. The FTC stated that the rule was promulgated to address "gaps between the information collected on the prior form and the information the antitrust agencies need."[2] The FTC claims that "mandatory premerger review affects only a small subset of M&A transactions, and only a fraction of businesses in the United States even engage in any M&A activity at all in any given year."[3] Interestingly, the FTC addressed the unwieldiness of the Second Request process, stating, "The in-depth Second Request process, although helpful in identifying likely antitrust violations, can involve millions of documents and terabytes of data. It is thus a time- and resource-intensive process for both the agencies and the merging parties, and it imposes costs on third parties."[4] While the FTC seems to rely on that as a justification for the new and more burdensome scheme, arguing that it will reduce the need for Second Requests, the final rule has been criticized as essentially forcing all qualified merging parties to submit a Second Request on the front end of the premerger notification process.

In addition to providing critical insight into the internal justifications for the final rule, the motion argues that the case should be transferred to the U.S. District Court for the District of Columbia,

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where all but one of the parties resides. In response, the U.S. Chamber of Commerce has filed a notice of intent to file an amended complaint. It is expected that the amended complaint will address the procedural issues highlighted in the FTC's motion in an attempt to keep the litigation in the Eastern District of Texas, a jurisdiction widely recognized as being favorable to parties challenging federal regulations.

President Trump Fires Both Democratic FTC Commissioners

Last month, we also addressed President Trump's firing of the two democratic FTC commissioners, Rebecca Kelly Slaughter and Alvaro Bedoya. Since the time of publication, both have filed a complaint for declaratory and injunctive relief against the president and the remaining FTC commissioners in the United States District Court of the District of Columbia.[5] The plaintiffs seek a declaration that their termination was unlawful, that FTC commissioners can only be removed for cause, and that they are still commissioners of the FTC. They further seek an injunction against the remaining FTC commissioners ordering them to return access to their offices, staff, and compensation. The plaintiffs cite long-standing authority, including the seminal 1935 U.S. Supreme Court opinion in *Humprey's Executor*,[6] holding that FTC commissioners are immune from presidential removal absent a showing of cause.

On April 11, 2025, the plaintiffs filed a motion for expedited summary judgment, citing concerns shared amongst the plaintiffs, citizens, regulated businesses, and the FTC itself over the continued operation of the commission in the wake of the firings. The motion contrasts the administration's barebones justification for the terminations to the long-standing history of cause-based removal and bipartisan cooperation within the FTC's leadership. The administration and remaining FTC officials have since filed a cross-motion for summary judgment, arguing that the FTC commissioners exercised substantial executive power and thus were removable under Trump's authority.

At the time of this article's publication, the motions have yet to be decided. Numerous interested parties, including members of Congress, states, and legal scholars, have filed *amicus* briefs arguing

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both for and against the reinstatement of the commissioners. We will continue to monitor this important litigation, which seems almost certain to end up at the United States Supreme Court.

DOJ Antitrust Division Alleges HSR Act Avoidance by Private Equity Firm

Finally, also in our March 2025 antitrust update, we addressed the enforcement action brought by the Department of Justice Antitrust Division (DOJ) in the U.S. District Court for the Southern District of New York against KKR & Co, Inc. and 14 related entities, alleging that the defendants "systematically flouted the requirements of the HSR Act."[7] On April 17, 2025, the defendants (collectively, KKR) filed a motion to dismiss the action, which seeks more than $500,000,000 in civil penalties for KKR's alleged misconduct relating to 16 transactions where premerger notification was required.

In its motion, KKR posits that "[t]he HSR Act is simply a notice requirement."[8] Substantively, KKR argues that the DOJ's position is incompatible with the plain text of the HSR Act itself. KKR highlights the HSR Act's requirement that merging entities come to "substantial compliance" and not perfection.[9] KKR insists that the DOJ failed to identify any transactions in which KKR did not substantially comply with the HSR Act's obligations. The motion also challenges the constitutionality of the regulations promulgated by the FTC in administering the HSR Act's premerger notification process, including the new final rule discussed above, arguing that the FTC exceeded its statutory authority in both the promulgation and application of the rules. Highlighting the complexity of the premerger notification rules, KKR alleges that even the DOJ is incapable of articulating the standard for compliance with the "confusing . . . broad language subject to a range of interpretations." [10] Finally, KKR attacks two counts of the DOJ's complaint because they relate to transactions that were never consummated.

In the separate action brought by KKR in the Southern District of New York against Doha Meeki, in her official capacity as Acting Assistant Attorney General of the United States, the FTC, and the United States,[11] where KKR seeks declarations that it did not violate the HSR Act, that the government's HSR guidance is

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unconstitutionally vague, and that the fines the Antitrust Division seeks are unconstitutionally excessive. The government defendants filed a motion to dismiss on April 23, 2025.[12] The motion argues that the action is duplicative of the enforcement action and should be dismissed. According to KKR's own Statement of Relatedness, "Each of these actions involves the same parties and (i) arises from closely related transactions, happenings, or events; and (ii) calls for determination of some of the same or substantially related or similar questions of law and fact."[13] In the alternative, the government seeks a stay of the case pending the resolution of the enforcement action filed by the DOJ.

Burger King Workers Permitted to Pursue Sherman Act Claims in Conspiracy Alleged between Burger King and Burger King franchisees

In 2018, a group of employees of Burger King franchises filed a class action lawsuit in the United States District Court for the Southern District of Florida against Burger King Corporation and its parent, Burger King Worldwide, Inc. (collectively, BKC). The complaint alleges that a non-solicitation and no-hiring clause contained in BKC's standard form franchise agreement constituted an unlawful contract, combination, and conspiracy in violation of Section 1 of the Sherman Act.[14] The plaintiffs argued that Burger King franchisees, "at the direction of and with the assistance of [BKC] itself, have together colluded to depress wages and employment opportunities of employees who work in Burger King branded restaurants through[out] the United States."[15] The franchise agreement clause at issue states:

Neither BKC nor Franchisee will attempt, directly or indirectly, to entire or induce, or attempt to entice or induce any employee of the other or of another Franchisee of BKC to leave such employment, or employ such employee within six (6) months after his or her termination of employment with such employer, except with the prior written consent of such employer.

BKC filed a motion to dismiss on several grounds. The district court granted the motion solely on the basis that the plaintiffs failed to

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allege that BKC and its franchisees were separate economic actors for antitrust purposes and that, generally, a franchisor and its franchisees are incapable of antitrust conspiracy in the context of a franchise agreement. In 2022, the Eleventh Circuit Court of Appeals, relying heavily on the U.S. Supreme Court's decision in *American Needle*,[16] reversed and held that the plaintiffs had adequately pled a Sherman Act restraint of trade.[17] Interestingly, while taking no position on the merits of the case, the DOJ and the America Antitrust Institute filed *amicus* briefs arguing that the district court's blanket holding that franchisors and franchisees are legally incapable of concerted action was not correct.

On remand, the district court considered the remaining grounds of BKC's motion to dismiss, namely that the plaintiffs failed to state a clam under the Sherman Act and that they failed to plausibly allege that the defendants engaged in wrongful conduct. In an order issued earlier this month, the district court denied the motion in its entirety.[18] Regarding the failure to state a claim argument, the district court held that by alleging that the plaintiffs conspired to restrict competition for Burger King restaurant labor, the plaintiffs had adequately pled an unreasonable restraint of trade. The court further held that the plaintiffs "sufficiently allege that each Defendant played a role in the purported conspiracy."[19] Of particular note is the district court's determination that the plaintiffs sufficiently alleged that the defendants' actions were either *per se* unlawful or, at most, subject to a quick-look analysis, seeming to disregard the defendants' argument that the rule of reason analysis should apply.[20] The district court ultimately concluded that "more factual development is necessary to determine which standard of review will apply."[21]

This case is interesting in that it seems to be a shift away from the long-held belief that franchisors and franchisees could not conspire absent extraordinary circumstances because franchisees of the same franchisor do not generally compete against each other due to territorial restrictions in franchise systems, and because franchisees do not generally compete with the franchisor unless the franchisor directly owns stores that compete geographically with franchisee-owned stores. The case tracks a recent shift in both

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antitrust jurisprudence and federal enforcement agencies' priorities by recognizing that labor, in and of itself, can be a cognizable product market for antitrust purposes. Thus, while franchisors and franchisees may not frequently compete with each other for customers and sales, they do compete for labor and thus may face antitrust liability for restraints of trade in the labor market.

Notable Increase in State Antitrust Legislation and Enforcement

Historically, compliance with antitrust laws has primarily been a concern under federal law. While many states have long had competition-related statutes on the books, they are not overly robust, and state enforcement generally has been lax. Further complicating state antitrust enforcement is the fact that few states have a developed body of state caselaw addressing antitrust issues. In light of the recent trend towards decentralization of federal enforcement, many state legislatures have increasingly turned their attention to their own, often underutilized, antitrust laws and regulations. This shift has led to a more proactive stance by state attorneys general, who are now more inclined to intervene in transactions that raise antitrust issues, reflecting a growing willingness to address these concerns at the state level.

A California Bill, SB 763, which increases the penalties for certain criminal antitrust violations, passed through the California Senate Judiciary Committee in early April and has advanced to the Committee on Public Safety for final review before progressing to the Senate floor.[22] Notably, California Governor Gavin Newsome vetoed the last antitrust bill to pass the California Legislature, which would have required private equity groups and related entities to seek the Attorney General of California's approval for transactions involving healthcare facilities and provider groups.[23]

In 2024, the Uniform Law Commission developed the Uniform Antitrust Pre-Merger Notification Act (the Uniform Act), under which covered entities would be required to provide their HSR Act premerger notifications and documentary materials to the state attorneys general in all states where an entity either has its principal place of business or where an entity, including any entity it controls

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directly or indirectly, has annual net sales of goods or services involved in the transaction of at least 20% of the HSR Act filing threshold. While there are no filing fees under the Uniform Act, failure to comply can lead to civil penalties of as much as $10,000 per day of noncompliance.

Washington has become the first state to enact the Uniform Act, [24] which has also been introduced in the state legislatures for California, Colorado, the District of Columbia, Nevada, Utah, and West Virginia. It is projected that many more states will enact the Uniform Act or some version of it. This very likely could lead to increased transactional costs, an uptick in enforcement action, and the risk of heightened scrutiny and delays in merger closings. Businesses may face additional compliance burdens and potential penalties for noncompliance, impacting their strategic planning and operations. Most importantly, antitrust counsel must confirm whether any state reporting is required for transactions that implicate the HSR Act or that possibly have even lower reporting thresholds than those contemplated by the Uniform Act.

Frost Brown Todd's Antitrust and Trade Regulation Team will continue to monitor the proliferation of new state antitrust laws and enforcement priorities. In the meantime, please reach out to the authors for more information or assistance achieving your business objectives within the bounds of antitrust and competition laws.

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[1] *Chamber of Commerce of the United States of America et al v. Federal Trade Commission et al.*, Civil Action No. 6:25-cv-00009-JDK (E.D. Tex.).

[2] FTC's Motion to Dismiss at 2.

[3] *Id.* at 3.

[4] *Id.* at 6.

[5] *Slaughter, et al. v. Trump, et al.*, Case No. 1:25-cv-00909-LLA (D. D.C.).

[6] *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).

[7] *United States v. KKR & Co. Inc., et. al.*, Civil Action No. 1:25-cv-00343 (S.D.N.Y.).

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[8] KKR's Motion to Dismiss at 1.

[9] *Id*. at 3.

[10] *Id*. at 22.

[11] *KKR & Co. Inc. v. Meeki, et. al.*, Civil Action No. 1:25-cv-00448 (S.D.N.Y.).

[12] Abigail Slater was confirmed as Assistant Attorney General for the Antitrust Division replacing Doha Mekki on March 12, 2025. Antitrust Division | Assistant Attorney General Abigail Slater | United States Department of Justice.

[13] *See* KKR's Statement of Relatedness at 2.

[14] *Arrington, et al. v. Burger King Corporation, et al.*, Case 1:18-cv-24128-JEM (S.D. Fla.).

[15] Plaintiffs' Complaint, ¶ 7, ECF 1.

[16] *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

[17] *Arrington, et al. v. Burger King Worldwide, et al.*, 47 F. 4th. 1247 (11th Cir. 2022).

[18] April 9, 2025 Order on Defendants' Motion to Dismiss, ECF 111.

[19] *Id*. at 6.

[20] *Id*. at 5-6.

[21] *Id*. at 6.

[22] Bill tracking in California – SB 763 (2025-2026 legislative session) – FastDemocracy

[23] Bill Text: CA AB3129 | 2023-2024 | Regular Session | Introduced | LegiScan

[24] SB 5122 Washington State Legislature

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