

## The Top Merger Challenges To Watch In 2021

By **Bryan Koenig**

*Law360 (January 3, 2021, 12:02 PM EST)* -- Blockbuster monopolization lawsuits against Facebook and Google won't be the only antitrust cases to watch in 2021. Merger challenges will also draw a lot of attention, including the Justice Department's suit contesting a massive alleged "killer acquisition" and the Federal Trade Commission's attempt to find renewed success in blocking hospital transactions.

Here are some of the top U.S. merger challenges that antitrust professionals say they'll be watching this year.

### **DOJ Takes Another Crack at a Nascent Competitor Deal**

The most high-profile merger challenge as the year begins is the U.S. Department of Justice's lawsuit seeking to block Visa Inc.'s planned \$5.3 billion tie-up with fintech company Plaid Inc. The DOJ challenged the deal in early November, alleging that Visa is trying to scoop up Plaid because it represents a rare potential rival to Visa's 70% market share of the United States' online debit transactions market.

According to Visa, the suit is only the second so-called nascent competitor or killer acquisition case to go to court in roughly 40 years. It's also the first chance for the DOJ to win a favorable ruling after its other recent nascent competitor case, a challenge of Sabre's planned \$360 million acquisition of its "disruptive" airline booking technology competitor Farelogix, was rejected in April.

Nascent competitor cases are especially challenging because they're based on what a small company, often purchased relatively cheaply, might eventually grow into. While Freshfields Bruckhaus Deringer LLP partner Andrew Ewalt, a DOJ alum, noted that all merger challenges "are inherently predictive," the department normally has the benefit of direct competition and current market shares.

High market shares allow antitrust challengers to win without having to show the impacts on competition in the future, Ewalt said. But in nascent competitor cases, the acquired company has little or no market presence. "And so then DOJ can't get this presumption of anti-competitive effects," Ewalt said.

The DOJ does, however, have one advantage in the case, thanks to what appears to be a trove of internal Visa communications, including a missive from Visa CEO Alfred F. Kelly Jr. describing the deal as

an "insurance policy to protect our debit biz in the US."

"That really helps the DOJ along in making that case," said Sara Y. Razi, global co-chair for Simpson Thacher & Bartlett LLP's antitrust and trade regulation practice and an FTC alum.

Without those documents, Razi said, the DOJ would have to rely a lot more on marketplace evidence, which would make the case "more speculative" than one targeting established market positions. Because the DOJ has those documents, "that makes it a lot harder for the parties to come in and say, 'DOJ is making a very speculative case here,'" Razi said.

The agency's bid for other documents, generated by Bain & Co. when it did consulting work for Visa, is also an important subplot to the merger challenge. The DOJ had gone to court nine days before filing the merger lawsuit to try to force the material's release, arguing the companies were improperly asserting privilege as part of a pattern of resistance among "consulting firms, accounting firms, and investment banks" that aren't entitled to attorney-client protections.

The DOJ dropped the Bain petition days after challenging the merger, stating that it would seek the material as part of the transaction case. As a result, the fight over the material continues, with Visa and Plaid accusing the department of improperly offering to hand over the merger's investigative file early in the process only if Visa agreed to waive claims of privilege over the Bain materials. The sideshow over the documents is being closely watched because the outcome could shed light on antitrust enforcers' ability to demand third parties' information.

On the fight's main stage are the DOJ's two claims, made under both the Clayton Act's Section 7 prohibition on anti-competitive mergers, which is the normal route for tie-up challenges, and the Sherman Act's Section 2 prohibition on monopolistic practices, a more novel approach.

Antitrust enforcers have in fact been criticized for not bringing Section 2 cases in the last two decades, but enforcers may increasingly turn to that aspect of the law as they seek to check the vast power held by technology platforms. One feature of the backlash against technology companies has focused on their own alleged killer acquisitions, with Facebook's purchases of WhatsApp and Instagram serving as key pieces of the cases against the social media giant.

Visa has speculated that the DOJ is using the Sherman Act in a way it hasn't been employed since Section 7 was added to the Clayton Act in 1950, because enforcers know how hard nascent competitor merger challenges are to win. But Paul Cuomo, a partner with Baker Botts LLP, said the Sherman Act monopolization claim, however novel, fits the DOJ's arguments that the Plaid deal represents part of a pattern of Visa trying to stifle the competition.

"It's a new approach. It's a new theory," Cuomo said.

The DOJ won't be alone in pursuing a nascent competitor case in 2021. The FTC is also contesting Procter & Gamble's proposed purchase of direct-to-consumer startup Billie Inc., which sells women's razors. The FTC is pursuing a challenge both in-house and in D.C. federal court, arguing that P&G is trying to "snuff out Billie's rapid competitive growth," including by preventing it from expanding into physical stores.

Razi noted that where other nascent competitor cases have been technology-focused, this one, launched in early December, is focused on consumer goods.

"Same theory, different application," she said.

### **FTC Tries To Revive Its Hospital Merger Winning Streak**

Hospital mergers are a frequent target of FTC challenges. But the case challenging a proposed tie-up between Philadelphia-area health care systems Jefferson Health and Albert Einstein Healthcare Network didn't go according to plan.

U.S. District Judge Gerald J. Pappert refused in December to temporarily block the deal while an FTC in-house challenge moves forward. The Pennsylvania federal judge held that the government's alleged markets wrongly "focus more on patients" than the insurers that will feel the immediate impact of any price increase.

With the merger likely to close before the in-house administrative process can begin, the FTC is asking the Third Circuit to upend those findings in order to avoid its first loss of a hospital merger challenge since a federal judge rejected its opposition to the merger of Chicago-area Advocate Health Care and NorthShore University HealthSystem in 2016. And even that loss was reversed by the Seventh Circuit.

Alexis J. Gilman, a partner at Crowell & Moring LLP and former FTC official, cautioned, however, that the Philadelphia case does not necessarily show the FTC has lost its mojo contesting hospital deals.

"This one was very much about the facts on the ground," Gilman said. He noted that in the Philadelphia deal, the FTC faced the difficult task of demonstrating that a specific type of hospital faces only limited competition in a large urban market. To prevail, he said, the FTC needed to convince the judge that the geographic market should be defined so narrowly that many of the area's health care providers should be excluded from the merger's relevant market.

### **No Thank You for Merging**

The FTC's administrative complaint alleging Altria Group Inc.'s \$12.8 billion purchase of a stake in private equity-backed e-cigarette startup Juul Labs Inc. will represent the rare instance where the FTC goes to trial to contest competition concerns over a partial acquisition or partial ownership stake.

"There's really been few litigated areas in this area," Gilman said.

The FTC contends that Altria agreed not to compete with the startup in exchange for a substantial ownership interest in Juul. The companies had been close competitors until Altria left the e-cigarettes market in late 2018, weeks before announcing the investment that made Altria Juul's largest shareholder, according to the commission's case, filed in April.

Gilman also pointed to the somewhat unique nature of the FTC complaint itself, adding a Sherman Act Section 1 claim for an illegal agreement restraining competition, on top of a Clayton Act Section 7 claim for a merger harming competition.

The case will garner added interest because of the massive array of public pressure and private litigation that's descended upon e-cigarettes.

--Additional reporting by Christopher Cole, Matthew Perlman, Eric Kroh, Dave Simpson, Kevin Stawicki, Jeff Montgomery, Nadia Dreid and Vince Sullivan. Editing by Aaron Pelc.

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