



WINSTON & STRAWN
ANTITRUST/COMPETITION PRACTICE

Hipsters vs. Boomers

The Antitrust Revolution Is Here

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Agenda

A Look Back

Historical Context for Current Antitrust Debate

Two Schools of Thought

Boomer Antitrust – The Traditional School

Hipster Antitrust – The Modern Progressive School

The Current Landscape

The Current Antitrust Enforcement Landscape

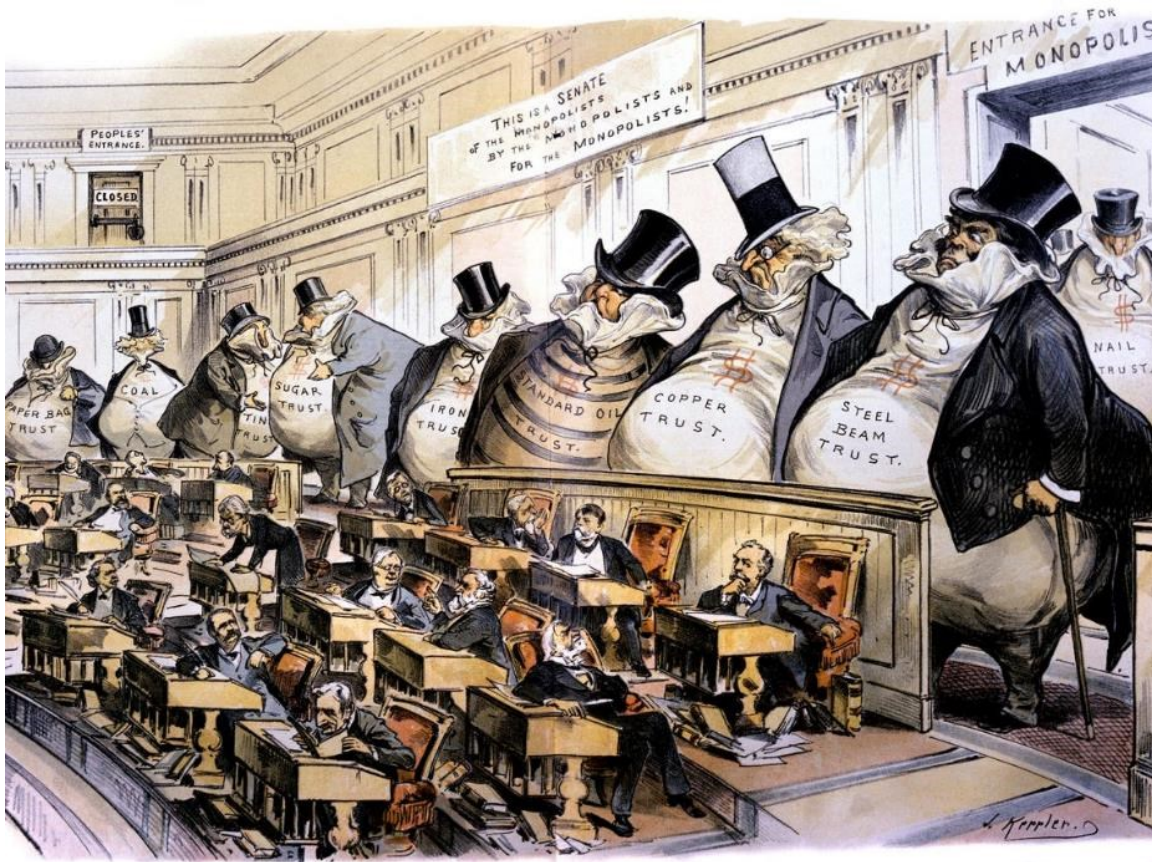
Things to Watch

Next Steps

Practical Steps to Take in Preparation for Increased Enforcement

A Look Back: Historical Context

A Brief History Lesson



- Technology boom
- Rise of trusts
- Progressive Era of Trust Busting
 - Sherman Act (1890)
 - Clayton Act (1914)
 - FTC Act (1914)

The Anti-Bigness Era

Northern Securities Co. v. United States, 193 U.S. 197 (1904)

- Broke up attempt to form railroad monopoly covering Western U.S.

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)

- Broke up Standard Oil Trust into 34 separate companies



United States v. Von's Grocery Co., 384 U.S. 270 (1966)

- Blocked two local grocery stores in Los Angeles from merging

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967)

- Blocked a national frozen pie company from selling pies in Utah at below-cost (making it harder on local pie company)



**Two Schools of Thought:
Boomer Antitrust
vs.
Hipster Antitrust**

Boomer Antitrust: The Traditional School



- The Chicago School: Robert Bork
- “Consumer welfare” standard
- Used by the FTC and DOJ currently
 - Focus: prices, output, product quality
 - Markets are perfectly efficient and will self-correct
 - Concern that more regulation means less innovation
- Dominant position of the Supreme Court



The only goal that should guide interpretation of the antitrust laws is the welfare of consumers In judging consumer welfare, productive efficiency, the single most important factor contributing to that welfare, must be given due weight along with allocative efficiency.

Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978)



Hipster Antitrust: The Modern Progressive School



Joshua Wright  @ProfWrightGMU · Jun 19, 2017

Call for return to Vons Grocery / Brown Shoe 1960s antitrust especially remarkable. And unwise.

Lina Khan  @linamkhan · Jun 19, 2017

In interview w/ @alexismadrigal, Congressman @RoKhanna urges antitrust officials to look beyond consumer prices
theatlantic.com/technology/arc...

2 2 12

Kostya Medvedovsky @kmedved · Jun 19, 2017

Antitrust hipsterism. Everything old is cool again.

2 3 9

- Modern progressive critics of the “traditional” consumer welfare standard
- Have used a range of names:
 - The “New Brandies” / Neo-Brandeis School
 - Antitrust Populism
 - Hipster Antitrust
- Represents a general return to some of the goals of progressive-era antitrust
- Critical of consumer welfare standard

“ The Chicago School focus on ‘consumer welfare’ . . . has warped America’s antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting ‘efficiency’ on the theory that this will result in low prices for consumers. The fixation on efficiency, in turn, has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs—all harms that Congress intended for the antitrust laws to prevent. ”

Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. Eur. Competition L. & Prac. 131, 132 (2018)

Two Hipster Antitrust Factions



Belief **that additional factors of harm should be considered** by judges and enforcement agencies, not just consumer harm

Like income inequality, unemployment

1

Others just want to recognize that harm to broader public interests is a **result of failure to enforce antitrust laws aggressively**

But ultimately want to continue using traditional benchmarks only, like pricing

2



Antitrust “Hipsters” in Prominent Positions

Lina Khan

- Recently named chair of the FTC
- Authored “Amazon’s Antitrust Paradox” in law school
- Served as counsel to House Antitrust Subcommittee leading congressional investigation into digital markets



Jonathan Kanter

- Nominee for Assistant Attorney General for DOJ’s Antitrust Division
- Decades of experience in antitrust, both at FTC and in private practice as plaintiff’s counsel “big tech”
- Critical of lax enforcement, especially lack of Section 2 monopoly cases



Tim Wu

- Appointed to National Economic Council as Special Assistant to the President for Technology and Competition Policy
- Columbia Law professor and author of 2018 book *The Curse of Bigness: Antitrust in the New Gilded Age*



Concerns About a “Return to Bigness”

- Companies become big through vertical integration and willingness to sustain losses and invest aggressively at the expense of profits
- Bigness, in turn, negatively affects democratic engagement
- Highly concentrated markets, creation of technocrats
 - From 1996 to 2006, the number of companies on the stock exchange fell by 50%
 - FTC has challenged fewer proposed mergers that would leave <5–6 firms in the industry



Lina Khan featured in the July/August 2019 issue of "The Atlantic."

The Current Antitrust Enforcement Landscape

Hipsters in Action: Executive Order on Promoting Competition in the American Economy

“Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition.”

We’re now 40 years into the experiment of letting giant corporations accumulate more and more power. . . . I believe the experiment failed.

- Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy, July 9, 2021

Executive Order on Promoting Competition: Whole-of-Government Approach

Together, the Order and accompanying Fact Sheet provide guidance on the Biden administration's view of antitrust challenges and enforcement, suggesting changes in antitrust policy and priorities at the agency level—but with limited immediate effect. The Order sets out enforcement priorities with recommendations and initiatives to further the Administration's goals in each industry of focus, including:



Agriculture



Labor Markets



Healthcare & Pharma



Internet Service



Banking



Technology



Transportation



Alcoholic Beverages



FEDERAL TRADE COMMISSION

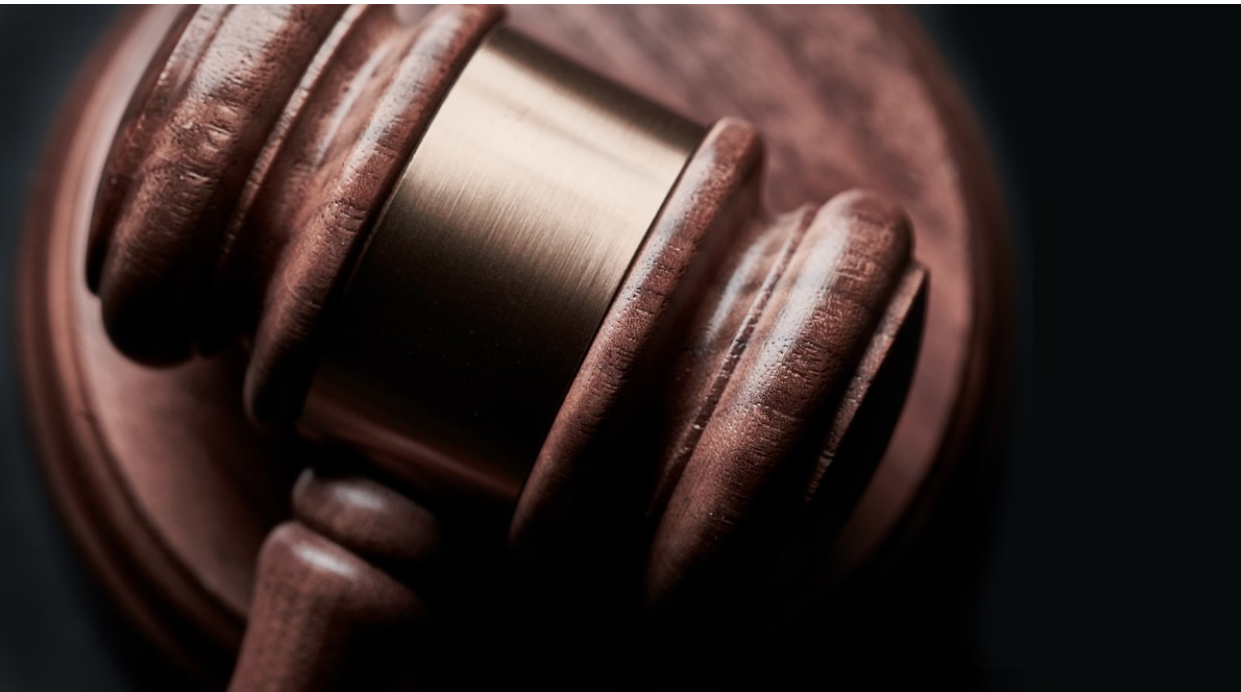
Merger Review Developments

- Lower HSR thresholds capture more deals
- Early termination of HSR waiting period “temporarily” suspended
- Multilateral Pharmaceutical Merger Task Force formed to share experience and ideas to update approaches to analyzing pharmaceutical mergers
- Letters sent to certain merging parties warning that they close at their “own risk” as investigations are not completed within statutory time periods
- FTC’s rescission of vertical merger guidelines
- FTC/DOJ review of horizontal merger guidelines

Enforcement Trends and Priorities

- Increased federal and state enforcement
 - Expect reinvigorated Section 2 enforcement
 - Focus on labor markets
 - May see more cases alleging theories of harm beyond price/output effects, e.g., impact on wages, impact on rate of new business creation/local ownership, data privacy
 - Monopsony power will be scrutinized
- Even small merchants or suppliers could be quickly impacted
- More merger challenges on novel theories of harm; including vertical and consummated deals
- New FTC rulemaking for “unfair methods of competition”
- Implications across industries from startups to established firms
 - Information access
 - Continued scrutiny: healthcare, big pharma, big agriculture, tech
- Company valuation under a shift toward hipster antitrust

Courts Are a Potential Check on Aggressive Enforcement



- Antitrust enforcers do not have the final say. Merger challenges and conduct cases can be litigated in federal court.
- With a significant portion of the federal judiciary appointed by Trump, expect skepticism of any new theories of harm.

Key Federal and State Legislative Proposals

Senate: Competition & Antitrust Law Enforcement Reform Act

Introduced in February 2021 by **Sen. Amy Klobuchar**, the Act proposes to:

- Increase resources for antitrust agencies
- Strengthen laws governing anticompetitive conduct and unlawful mergers
- Make reforms to improve enforcement
- Allow the FTC and the DOJ to seek additional civil penalties

House: Collection of Bipartisan “Big Tech” Bills

In June 2021, introduced four bills targeting **tech**:

- Two bills address **self-preferencing** by companies that compete against businesses that sell through their own platforms
- One bans platforms from **owning subsidiaries** that operate on their platform if those subsidiaries compete with other businesses – potentially forcing divestitures

NY: 21st Century Antitrust Act

In June 2021, the New York State senate passed new antitrust act that:

- If enacted, will make it unlawful for a company “with a dominant position in the conduct of any business . . . to abuse that dominant position”
 - E.g., leveraging a dominant position in one market to limit competition in a separate market or “unnecessarily” refusing to deal with a competitor
- Presumes dominance for sellers with **40% share** (or buyers with 30% share) without consideration of procompetitive effects

Next Steps: Preparing for Increased Enforcement

Areas to Watch

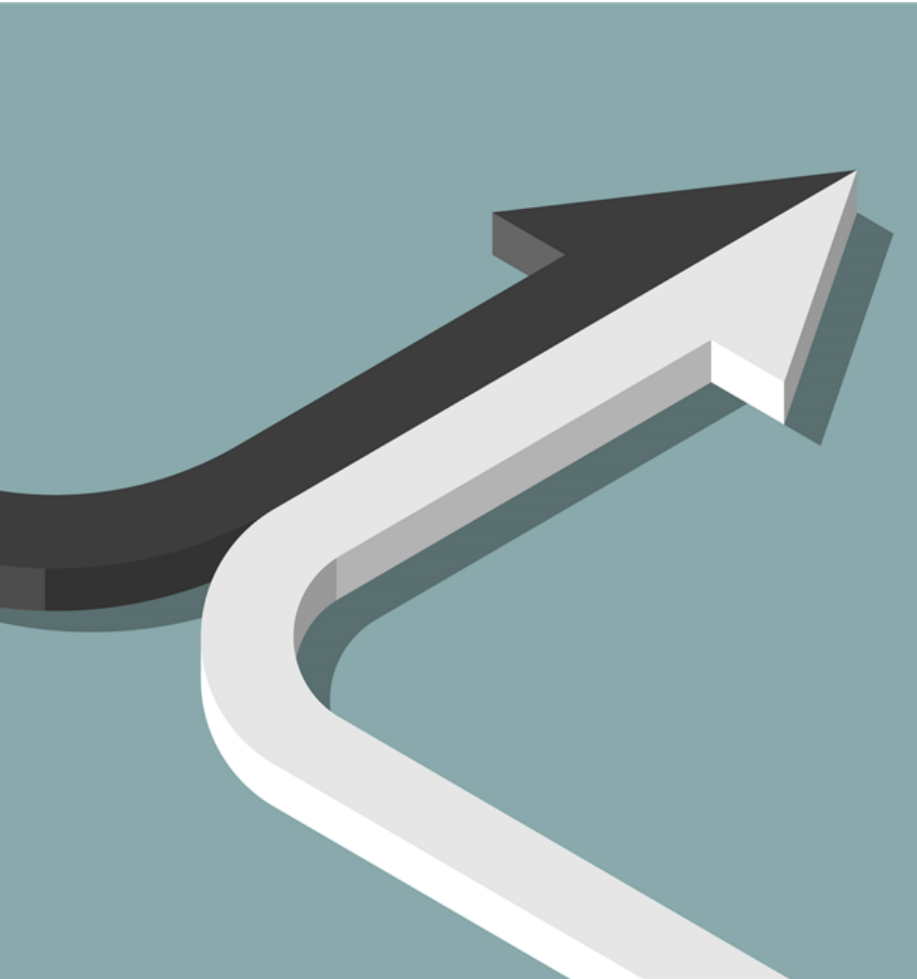


- Pay attention to political **appointments**.
 - Watch DOJ and FTC, but also other key positions with potential to influence policy.
- Monitor agency **rulemaking**.
 - Companies can submit comments during public comment phase, either directly or through industry associations.
- Monitor developments in **legislation**.
 - Key proposals continue to be introduced both in Congress and at the state level.
- Consider seeking **agency guidance** before collaborating with a competitor.
 - Take advantage of DOJ Antitrust Division Business Review Letter or FTC Advisory Opinion program.

Prepare for Coming Changes

- **Engage early** with regulators when negotiating deals.
 - Expect heightened scrutiny, potentially longer time period to close, and increased likelihood of Second Requests and litigation.
- Expect **greater deal scrutiny** focused particularly on ordinary course documents.
 - Be mindful of document creation and interactions with customers and competitors; consider the antitrust implications of how they may negatively affect the ability to enter into strategic transactions.
 - Adopt document creation guidelines and ensure businesspeople and outside advisers are aware of them, striving to conduct business and deal activities as if they were going to be reviewed by a government agency.
- **Monitor merger and acquisition activity** to assess whether they have a competitive impact on your company and whether it would be worthwhile to complain to the relevant antitrust regulators.

Practical Tips in Merger Planning & Review



- ✓ Don't assume the authorities will necessarily clear all vertical mergers.
- ✓ Engage antitrust counsel early to analyze potential claims of anticompetitive conduct or effects, and where appropriate, consider hiring an outside economist.
- ✓ If an efficiencies argument might be necessary, plan early. Don't wait to see whether an investigation will ensue.
- ✓ Be aware of any filing requirements and deadlines.
- ✓ Document the procompetitive justifications for the transaction. Develop consistent messaging in support of the transaction.
- ✓ Avoid inappropriate information sharing during due diligence/integration planning.
- ✓ Consider a written joint defense agreement with counterparty.
- ✓ Be prepared to litigate.

Antitrust Compliance Program Check-up

- Reduce risk with an **updated antitrust compliance program** that specifically tracks the DOJ's 2020 guidance and is tailored to company's risk
 - Deter and detect violations, reduce exposure, position company to seek leniency for criminal violations
 - Potential credit at charging stage (deferred prosecution agreement) or sentencing stage (reduced fine)
- Winston regularly conducts audits to help companies develop or strengthen antitrust compliance programs that follow best practices described by DOJ
 - Top-down commitment
 - Robust, interactive training
 - Regular monitoring and auditing
 - Anonymous reporting opportunities
 - Protection for whistleblowers
 - Incentives to comply, discipline for violations

Questions?



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Jeffrey is a partner in the global Antitrust/Competition and Complex Commercial Litigation Practices. He represents clients in a broad range of disputes with a particular focus on class actions. Jeffrey is skilled in the use of expert evidence and data analytics to devise innovative legal strategies in defense of claims, saving his clients billions in damages.

Jeffrey Amato handles complex multi-forum disputes, principally in the areas of international cartel litigation, class actions, arbitration, and government investigations. Jeffrey also has experience in white collar criminal defense, including representing defendants in federal and state courts at the trial, appellate, and post-conviction levels. His experience includes counseling clients with respect to navigating compliance with statutory, regulatory, and ethical obligations relating to government contracts. During his career in private and public practice, Jeffrey has been involved in legal disputes concerning a wide range of issues in federal, state, administrative, and arbitral forums, each contributing to his proficiency in new substantive areas of the law and diverse business sectors.

Prior to joining Winston, Jeffrey worked at another international law firm. Previous to that, he served as law clerk to the Honorable Arthur D. Spatt, U.S. district judge for the Eastern District of New York. Before his clerkship, Jeffrey was an attorney with the U.S. Department of Homeland Security, where he prosecuted numerous civil enforcement actions against individuals, air carriers, shippers, and other regulated entities. During his tenure at U.S. Department of Homeland Security, he received an interim appointment as special assistant to the chief counsel of the Transportation Security Administration. Immediately following his graduation from law school, Jeffrey was an Honors Attorney with the Office of the General Counsel of the U.S. Department of Transportation.

Services

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Education

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Bar Admissions

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An accomplished antitrust, sports, intellectual property, and commercial litigator, Jeanifer concentrates her practice on civil antitrust and unfair-competition litigation, with particular expertise in mixed issues of antitrust and intellectual property law, and class actions.

She regularly represents major U.S. and multinational corporations in complex commercial litigation and class actions and in connection with a wide array of federal and state antitrust and competition issues, including monopolization, price fixing, wage fixing, merger enforcement, group boycotts, exclusive dealing, tying, price discrimination, unfair competition, and mixed issues of antitrust and intellectual property law relating to Fair, Reasonable, and Non-Discriminatory (FRAND) obligations, standard setting, patent licensing, and patent misuse. She also has experience in alternative dispute resolution, including commercial arbitration and mediation. Jeanifer represents clients across multiple industries, including consumer electronics, finance, technology, food and beverage, sports and entertainment, and retail.

She has been recognized for obtaining critical wins for her clients, whether at trial or by obtaining complete dismissals. Recently, she successfully defended PetIQ in a private merger challenge, where she argued an appeal to the Ninth Circuit and successfully secured a dismissal of the complaint. Jeanifer also has a major role in Winston's renowned sports practice, successfully trying antitrust claims to a landmark win for college athletes against the NCAA, and in a high-stakes, high-profile gender discrimination lawsuit on behalf of the women's national soccer team in its pursuit of equal pay.

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Bar Admissions

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Brandon Duke is Houston-based litigator with extensive oral-argument and trial experience who focuses on complex commercial litigation, critical motions and appeals, antitrust litigation and counseling, and corporate and international governmental investigations.

Brandon Duke defends upstream and midstream oil and gas and oilfield services clients in a broad range of complex commercial disputes in state and federal courts and in arbitration proceedings. In 2020 alone, Brandon was part of two Winston trial teams that obtained successful judgments for our clients.

Brandon is also part of Winston's Texas Appellate Practice. He has served as counsel of record before the U.S. Supreme Court and has briefed and argued several cases in state and federal appellate courts, including the Fifth Circuit Court of Appeals and the Texas Supreme Court.

Brandon also represents clients in defending and prosecuting civil and criminal antitrust actions, including defending multidistrict class action litigations involving claims under Sections 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act and state antitrust and unfair-competition laws. He represents corporations and individual executives involved in international price-fixing and bid-rigging investigations. In addition, Brandon counsels clients on a variety of antitrust and competition compliance issues related to their businesses, with a focus on the convergence of antitrust, intellectual property, and new technology and platforms in the energy and chemical industries.

Brandon previously served as a special assistant corporation counsel with the New York City Law Department, Affirmative Litigation Division.

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Technology Antitrust
White Collar, Regulatory Defense
& Investigations

Education

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Bar Admissions

New York
Texas



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With experience representing and advising clients in antitrust, securities, and other complex commercial disputes and regulatory matters, Nasir has been described by clients as “detail-oriented” and a “willing and capable thought partner/advisor on key issues.” He also has an active and diverse pro bono practice.

Nasir Hussain (“Nas”) is an associate in Winston & Strawn’s internationally recognized litigation practice. Nas has experience representing clients at all stages of litigation, with an emphasis on antitrust matters (both litigation and merger reviews), securities-related matters (litigation and government investigations), and other complex commercial disputes. Nas has extensive experience in litigation matters before both state courts and federal courts throughout the United States and also represents clients in investigations by government agencies, including the U.S. Department of Justice, the U.S. Federal Trade Commission, and the U.S. Securities and Exchange Commission. He has also worked on merger control filings and reviews by several foreign antitrust authorities in multibillion-dollar global transactions.

Nas is a member of Winston & Strawn’s Health Care and Life Sciences Group and regularly serves health-care clients in litigation and with regulatory matters, including counseling clients on matters involving state and federal controlled-substances regulations. Nas also has considerable experience working with clients in a broad range of other industries, including manufacturing and financial services.

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Litigation
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Securities Litigation
Technology Antitrust
White Collar, Regulatory Defense
& Investigations

Education

Marquette University, BA
University of California, Berkeley,
JD

Bar Admission

Illinois

Winston's Antitrust/Competition Practice

Winston & Strawn's global antitrust/competition attorneys help clients resolve their most complex problems. Our team offers a full range of services, including advice and representation related to all aspects of global cartel defense, civil and criminal litigation, government investigations, mergers and acquisitions, and regulatory counseling and compliance.

We have decades of experience representing major corporations in both government and private antitrust litigation. We routinely represent clients in their most complex disputes, often coordinating defenses across jurisdictions with parallel government investigations. We have handled cases ranging from market-division and price- and wage-fixing to output-restriction conspiracies to antitrust claims stemming from Lanham Act and unfair-trade-practice issues. We represent plaintiffs and defendants in private antitrust litigation.

This team is “widely recognized for its expertise and success. In the specialized arena of antitrust law, companies must have a reliable partner that is adept at performing the critical fact-intensive analysis and communicating a strong position.”

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