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THE DOJ'S SECTION 2 ENFORCEMENT AGENDA

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Senior officials of the DOJ Antitrust Division have spent much of the year touting an impending wave of enforcement action driven by their view that the "digital economy has enabled monopoly power of a nature and degree not seen in a century." *See Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Keynote at Fordham* (Sept. 16, 2022). In the combative words of the DOJ's top antitrust cop, Assistant Attorney General Jonathan Kanter, "enforcers need to unplug the monopolization machine in digital platform industries." *Id.* In recent days, another senior DOJ official has suggested that "plenty of activity in that vein" will soon be unleashed under Section 2 of the Sherman Act, the century-old antitrust law that makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire … to monopolize." *mLEX*, Expect Section 2 antitrust enforcement once Kanter settles into top antitrust role, DOJ's Mekki says, (Oct. 21, 2022).

It is virtually a rite of passage for a new Antitrust Division AAG, especially in a Democratic Administration, to pledge "[v]igorous antitrust enforcement action under Section 2 of the Sherman Act." *See Vigorous Antitrust Enforcement In This Challenging Era* (May 12, 2009). But AAG Kanter – while renewing the obligatory vow to "vigorously enforce Section 2" – appears to doubt the robustness of past enforcement, finding Section 2 "very near death" with "no significant cases in nearly twenty years." *See Assistant Attorney General Jonathan Kanter Delivers Keynote at the University of Chicago Stigler Center* (April 21, 2022). What are some of the strategies that the DOJ believes will turn things around this time? And what reception might those strategies receive in litigation?

Duty to deal. One strategy the DOJ has been telegraphing is an effort to revitalize the so-called "duty to deal" doctrine, which holds that a monopolist may violate Section 2 by failing to assist a competitor (or would-be rival) in a manner deemed anticompetitive. The doctrine reached its zenith in a 1985 Supreme Court decision imposing Section 2 liability on a multi-mountain ski resort operator for pulling out of a joint marketing venture (an all-mountain ski pass) and leaving a single-mountain rival out in the cold. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). *Aspen Skiing* left a generation of antitrust lawyers puzzling over when a monopolist might face such a duty to deal. In later cases,

the Supreme Court banished *Aspen Skiing* to the far margins of the law – "at or near the outer boundary of § 2 liability." *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). As Justice Gorsuch has observed, "today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid." *Novell, Inc. v. Microsoft Corp.*, 731 F. 3d 1064, 1072 (10th Cir. 2013).

AAG Kanter considers this to be an outmoded viewpoint, contrasting the hardware-based infrastructure implicated in cases like *Trinko* with "[m]odern online platforms" that "are

fundamentally participatory" and operate under differing "investment incentives." *See* Stigler Center Keynote, *supra*; Fordham Keynote (Sept. 16, 2022). But "[m]any antitrust values lie be-hind the boundary line" that the DOJ would like to shift. *Novell*, 731 F.3d at 1073. Courts worry about acting as central planners when imposing duties to cooperate and fear inadvertently catalyzing anti-competitive collusion rather than procompetitive collaboration. And it is far from clear that imposing a right to piggyback on large digital rivals would not harm incentives for "investing, innovating, or expanding (or even entering a market in the first place)." *Id.* If anything, courts may be less prone, not more, to impose duties to deal in technology markets. *See FTC v. Qualcomm Inc.*, 969 F.3d 974, 990-91, 993-95 (9th Cir. 2020).

Monopoly Broth. Another arrow in the DOJ's strategy quiver is the "monopoly broth" doctrine articulated in *City of Mishawaka v. American Elec. Power Co., Inc.*, 616 F.2d 976, 986 (7th Cir. 1980), which holds that Section 2 liability may be based on the overall unsavory "mix of the various ingredients of [the defendant's] behavior in a monopoly broth" even though "no one aspect [of its conduct] standing alone is illegal." As AAG Kanter puts it, "we need to examine a monopolist's course of conduct" to assess the "combined effects" of the "full range" of the activity, instead of judging the legality of each challenged action. *See* Fordham Keynote, *supra*.

This approach is very much in tension with the bedrock principle that "[t]wo wrong claims do not make one that is right." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 449-52, 457 (2009). At a minimum, we-know-it-when-we-see-it standards that trade in generalities and metaphors ("moat building," "digital castles," "flywheel effects," "whac-a-mole") do little to promote legal transparency and predictability. Regardless of the flavor of the broth, most courts find separate evaluation of the ingredients to be necessary "[f]or the sake of accuracy, precision, and analytical clarity." *In re Epipen Antitrust Litigation*, 44 F.4th 959, 982 (10th Cir. 2022). In fact, in the landmark *Microsoft* case, the district court's conclusion that *Microsoft's* overall "course of conduct separately violate[d] § 2" was reversed. *See United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

Lock 'em up. The DOJ has also advertised its intention to charge some violations of Section 2 criminally – imposing fines and imprisonment – and just announced the first such case (albeit arising in the "old" economy) in almost 50 years. *See Executive Pleads Guilty to Criminal Attempted Monopolization* (Oct. 31, 2022). Only time will tell if criminal Section 2 charges become anything other than an occasional novelty given the many impediments to their employment. *See* Daniel G. Swanson and Mckenzie Robinson, *Criminal Prosecution Under Section 2 of the Sherman Act: Reading the Cases*, 2 Antitrust Trends, at 6-9 (Fed. Bar. Assoc. Antitrust and Trade Reg. Section 2022).

There is every reason to take the DOJ at its word that it "will not be afraid" to bring Section 2 cases. But even the fearless must recognize that Section 2 is not a license "to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." *Trinko*, 540 U.S. at 415-16.

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