

Rising Star: Jenner & Block's Douglas Litvack

By **Matthew Perlman**

Law360 (June 1, 2022, 2:02 PM EDT) -- Douglas Litvack of Jenner & Block LLP's competition team has helped clients like ProMedica and Dartmouth University defend against high-stakes antitrust claims, after several years of litigating hospital mergers and working on other matters at the Federal Trade Commission, earning him a spot among the antitrust practitioners under age 40 honored by Law360 as Rising Stars.

HIS BIGGEST CASE:

Litvack, who is co-chair of Jenner & Block's competition practice group, said the biggest case of his career so far has been leading ProMedica Health System in its defense against an antitrust suit brought by St. Luke's Hospital in Ohio over the termination of contracts the hospital had with ProMedica's insurance unit.

The contracts were a result of the Federal Trade Commission's successful unwinding of a merger between ProMedica and St. Luke's several years ago and included a termination provision Litvack said kicked in when McLaren Health Care Corp. purchased St. Luke's.

But when ProMedica moved to terminate the contracts in 2020, St. Luke's accused it of violating antitrust law and sought a preliminary injunction to keep the contracts in place.

"It was high-stakes, fast-moving litigation," Litvack said.

St. Luke's filed the case in November 2020, and the district court issued an injunction the next month after finding that terminating the pacts could be considered exclusionary conduct under the antitrust laws. ProMedica appealed to the Sixth Circuit, which vacated the injunction in August last year, saying the company had legitimate business reasons for terminating the contracts. The case is now back in Ohio district court.

"We didn't get the result we wanted originally, but we knew we

2022



Douglas Litvack
Jenner & Block

Age: 37

Home base: Washington, D.C.

Position: Partner and competition practice group co-chair

Law school: Georgetown University Law Center

First job after law school: Federal Trade Commission staff attorney

were right, told the client we felt strongly about our position and got it overturned on appeal," Litvack said. "It's now one of the strongest opinions out there on 'duty to deal' with competitors, which is a hot issue given all the interest in the tech industry about whether they have any obligation to help potential competitors compete."

HIS PROUDEST MOMENT:

Getting the ProMedica injunction vacated, Litvack said, is his proudest moment as an attorney. He said it meant a lot that the client trusted him to lead the case and argue the appeal and that he felt a sense of vindication when the circuit court agreed with his position. He also said the ruling not only left him and his client happy, but it also clarified the law in a necessary way.

"It shows that just because you lose a battle, you can't think you've lost the war," he said. "You need to keep fighting for what you believe in."

HIS MOST INTERESTING CASES LATELY:

Among his current matters, Litvack is defending Dartmouth University from antitrust claims in a proposed class action lodged in January alleging that top private U.S. universities conspired to limit financial aid. The schools filed a joint dismissal bid in April contending they have an exemption from antitrust law to work together on the process for offering aid.

Litvack is also working for real estate listing service PLS.com on an antitrust suit against the National Association of Realtors challenging a policy that prohibits members from privately marketing properties without using the association's listing services. The Ninth Circuit revived the case in April after finding the lower court had focused too much on the impact for home buyers and sellers and not enough on how the rules affect brokers.

The case is one of several currently pending accusing the NAR of antitrust violations based on its rules, and the group is also being investigated by the U.S. Department of Justice's antitrust division.

"Trade associations need to be really careful with the types of rules they pass because they're all subject to antitrust scrutiny," Litvack said.

OTHER NOTABLE MATTERS HE'S WORKED ON:

Litvack started his career as a staff attorney at the FTC, where he worked on investigations of hospital and consumer product mergers and hospital merger litigation. The agency had conducted a study analyzing a string of losses in hospital merger challenges, Litvack said, and when he arrived the commission was starting to tailor its enforcement agenda based on the findings from that study.

"I was part of the group that basically created the current model for how the FTC thinks about hospital mergers and litigates them in court, and it's proven to be quite successful," Litvack said, noting the commission had a long winning streak in hospital merger cases that was only broken recently.

His work at the commission included the agency's successful bid to block St. Luke's Health System from acquiring the largest physicians group in Idaho, Saltzer Medical Group PA. The Ninth Circuit upheld the win in February 2015, and Litvack said the case was unique for a number of reasons, including that it originated as a private case that the FTC later joined and because the agency had a particularly small trial team.

"It was like David versus Goliath," he said. "And that case has been precedent-setting. If you look at the

recent hospital cases ... they all cite the St. Luke's case."

Litvack also worked on the FTC's challenge of a Georgia hospital purchase by Phoebe Putney Health System that resulted in a 9-0 Supreme Court decision in the agency's favor in 2013. The district court dismissed the case on state action immunity grounds, and the Eleventh Circuit affirmed that dismissal before the justices took it up.

State action immunity shields certain state activity from antitrust scrutiny, and Litvack said the decision narrowing the scope of that immunity has proven to be important.

"The Solicitor General's Office argued it, but we supplied and edited their briefs — it was really a collaborative effort," Litvack said, noting the novelty of a merger case landing at the high court. "It was really neat to be a part of that."

WHAT MOTIVATES HIM:

Litvack said it feels like he's never worked a day in his life because the job feeds his competitive spirit, something he said he also felt while playing soccer in college. And like team sports, he said, antitrust law involves working collaboratively to try to get the best result possible.

"I always want the ball and always want to win — that's really what drives me at every level," Litvack said. "This is really the perfect profession for that, being an antitrust litigator."

— *As told to Matthew Perlman*

Law360's Rising Stars are attorneys under 40 whose legal accomplishments belie their age. A team of Law360 editors selected the 2022 Rising Stars winners after reviewing more than 1,350 submissions. Attorneys had to be under 40 as of April 30, 2022, to be eligible for this year's award. This interview has been edited and condensed.