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# The Major Antitrust Conduct Cases Of 2021

By **Bryan Koenig**

*Law360 (December 20, 2021, 2:01 PM EST)* -- Competition probes of major online platforms drew the most attention, but they were far from the only antitrust targets in 2021, a year that saw dramatic developments in labor-side enforcement, class action litigation, the business model for major college sports and more.

Below, Law360 takes a look at some of the U.S. conduct cases from government enforcers and private plaintiffs that shook up the antitrust world.

**Big Tech, Big Litigation**

U.S. antitrust enforcers finally broke their 20-year dry spell without a "big case" against allegedly anti-competitive conduct in 2020 and built further momentum throughout the last year. In 2021, they added new claims against new targets, particularly major online platforms, amid a widespread worry about the market power Google, Facebook, Amazon and others have acquired and concerns that current antitrust enforcement policies are inadequate to keep them in check.

Google has borne the largest share of enforcement pressure, especially in Europe, where many of the allegations targeting its conduct mirror those now being pursued by U.S. enforcers. The European Commission has fined Google billions of dollars for allegedly using restrictive contracts for the Android operating system, using restrictive terms in contracts to provide search ads on third-party websites, and steering users toward its own comparison-shopping service. The commission also launched a fourth probe in 2021 into Google's online display advertising technology services, a probe that hews closely to a suit led by the Texas attorney general.

In the U.S., state attorneys general and the U.S. Department of Justice have targeted Google's Search, advertising technology and Android Play Store business practices. State enforcers led by the Utah attorney general filed the fourth and most recent suit in July, alleging that the search giant effectively forces Android users and application developers to use its app store while collecting "extravagant" commissions on app purchases.

In conjunction with these and other anti-competitive practices, Google allegedly forces its app store users to go through Google Play billing to make all in-app purchases for game credits, subscriptions and other add-ons, keeping up to 30% of the cash from those buys. A variety of closed digital ecosystems charge a similar commission and many of them have also faced claims in court.

After Google, no other technology company has come under more antitrust fire than Facebook. But Facebook scored important wins in 2021 against the parallel enforcement actions against it from the Federal Trade Commission and state attorneys general, which are centered around its past acquisitions of WhatsApp and Instagram.

The social media giant was able to duck the state enforcer suit in its entirety, while the FTC was allowed to amend its complaint. The state enforcers are appealing.

U.S. District Judge James E. Boasberg held in June that the FTC's initial complaint failed to go beyond "the naked allegation" that Facebook has a dominant share of the market, with no explanation of how the agency concluded that Facebook dominated a nontraditional market like personal social networking.

The judge's conclusion that the FTC fell short when defining the market, according to David Reichenberg of Cozen O'Connor PC, dovetails with much of the debate about the adequacy of modern antitrust law, which lawmakers from across the political spectrum are currently trying to change to make it easier to go after Big Tech.

Judge Boasberg was even more forceful against the complaint from the attorneys general, including on allegations based on restrictions Facebook placed on third-party developers that access its network. Companies generally have no duty to deal with their competitors, according to the ruling, and while it is possible that those policies could be part of an ongoing effort to maintain a monopoly, he did not reach that question because Facebook stopped blocking developer access more than five years ago.

Phil Bartz of Bryan Cave Leighton Paisner LLP sees in Facebook's legal momentum the need, and challenges, in establishing that tech giant power translates to actual harms.

"That's where these cases need to go," he said. "That's where they're struggling. To come up with 'what's the bad conduct.'"

**Apple's Epic Win**

The 30% commission for app store purchases is at the heart of a raft of private litigation launched recently against Google and others. That litigation came to a head in 2021 in video game company Epic Games' lawsuit against Apple, which went to trial in May and resulted in a near total win for Apple in September. Another Epic case against Google is still moving forward, and both Apple and Epic have appealed parts of the September ruling.

U.S. District Judge Yvonne Gonzalez Rogers concluded that Apple is not a "monopolist," finding that based on current federal antitrust law, the case as Epic alleged didn't make the leap from Apple's success to a violation of competition law.

Epic's only win against Apple was importantly under state law, California's Unfair Competition Law, which Judge Gonzalez Rogers said was violated by "anti-steering provisions" prohibiting app developers from trying to get users to make payments outside the App Store. Epic is fighting the now-paused mandate to scrub those provisions.

Despite some signals of sympathy for Epic's case, the judge found that federal law "wasn't flexible enough," Reichenberg said. Those findings fit into a much larger debate about the current state of antitrust law.

"The biggest question is, 'does the law need to change?' And if it will, how are we going to come out with the law in a way that is predictable?" Reichenberg said.

The iPhone has an even more restricted app distribution market than Android phones, with Apple barring the installation of any apps from outside its store and explicitly blocking other stores on iOS. But of the four Big Tech companies targeted in 2020 by a landmark House report that's helped guide the backlash against online platforms more generally, only Apple has not yet faced a government enforcement action, although it is battling private litigation, including from consumers. Some predict enforcers will eventually step in.

"I strongly suspect in light of the congressional report and other commentary that there is going to be a move at some point," said Reichenberg.

Other lawsuits have followed in Epic's wake, including private suits against other closed and allegedly monopolized digital ecosystems like Sony's Playstation and Valve's Steam online gaming platform.

Other cases against the major technology giants are also moving forward, including a state court bid by Ohio's attorney general to have Google declared a common carrier, which could render it unable to discriminate between content.

D.C.'s attorney general also sued Amazon in D.C. Superior Court in May.

**Labor Front and Center in DOJ Criminal Prosecutions**

The last year also saw important developments in long-promised cases targeting agreements between competing employers to suppress wages or refusing to recruit each other's workers, which prosecutors say deny employees important leverage to try and improve their compensation. Enforcers had previously targeted labor-side conduct only with civil cases.

Years after 2016 guidance telegraphed that the DOJ would pursue criminal charges against such "no-poach" deals between direct competitors, the department finally declared the first such indictment in late 2020, with most charges so far brought in the health care space.

That made 2021 the year in which the cases moved through important discovery and motions practice as judges for the first time weighed whether employee-side, instead of consumer-side, agreements can be per se, or automatically, anti-competitive. The DOJ only pursues criminal cases under the per se standard, so court precedent subjecting no-poach cases to the harder-to-prove rule of reason standard, in which the harm to consumers must be weighed against any potential benefits, could effectively stop such prosecutions in their tracks.

"It would be a lot harder to prove and you couldn't criminally prosecute those," said Samer Musallam of Ropes & Gray LLP.

So far, the only court to weigh the governing standard has sided with prosecutors.

At the end of November, a Texas federal court refused to toss the DOJ's first criminal charges, targeting an alleged wage-fixing agreement over physical therapists and therapist assistants in the Dallas-Fort Worth area. The judge rejected contentions that there's not enough precedent to criminally prosecute

that type of activity, asserting that the definition for "horizontal price-fixing agreements cuts broadly," thus encompassing "any naked agreement among competitors" either as sellers of goods or buyers of inputs, including labor.

The DOJ has already begun citing those findings as it fights to preserve other labor-side criminal charges.

Lisl Dunlop of Axinn Veltrop & Harkrider LLP will be particularly watching for how a judge ultimately decides UnitedHealth Group unit Surgical Care Affiliates should be treated in the DOJ's first criminal case targeting employee nonsolicitation agreements.

When considering wage-fixing, Dunlop said "you can see readily how it fits in the existing mold." But agreements not to employ workers may be trickier.

More cases are likely on the horizon, backed by a White House heavily focused on protecting workers, including through antitrust policy and enforcement. As recently as Dec. 9, the DOJ announced a major expansion of its criminal prosecutions beyond the health care space by accusing an apparent former Pratt & Whitney global engineering services director of participating in a conspiracy to restrict the hiring of engineers and other skilled laborers working for engineering services suppliers.

The FTC also voted in November to expand its program for referring conduct of all stripes discovered in its investigations to the DOJ for potential criminal prosecution. The FTC announced regular public reporting on referrals, guidelines for referrals, and regular meetings with federal, state and local criminal authorities.

The prosecutions may be having their intended effect. According to Jeny Maier of Axinn, many companies hadn't been paying much attention to labor-side enforcement when navigating mergers and acquisitions, even in the wake of the guidance signaling criminal prosecution. But when you tell them people are being prosecuted and such conduct often turns up in enforcer reviews of transactions, "they start to sit up and take notice," Maier said.

**Qualcomm's Victories**

Qualcomm scored two crucial wins in 2021, starting with the FTC's final decision in March to give up on its enforcement case against the chipmaker and followed by a potentially far-reaching Ninth Circuit ruling striking down class certification in follow-on private litigation.

The FTC and consumers had accused Qualcomm of violating antitrust law through its licensing practices, including its "no license, no chips" policy that requires phone manufacturers to license its standard essential patents, or SEPs, regardless of where they purchase modem chips. They also attacked Qualcomm's refusal to license rival chipmakers and exclusive supply agreements the company had in the past with Apple.

U.S. District Judge Lucy Koh, who handled both cases, sided with the FTC and certified a nationwide consumer class estimated to encompass some 250 million Americans. But on appeal, the Ninth Circuit upended the FTC's win in August 2020 and then tossed out certification in September 2021.

Reichenberg says the FTC case sends strong signals about attempts to push the bounds of antitrust law to cover new technologies.

"That is a harbinger for what I'll call 'innovative theories that seem to break traditional antitrust notions being applied to these tech markets,'" Reichenberg said.

Despite the judge's "extensive factual findings of alleged pretextual justifications," Reichenberg said the Ninth Circuit "didn't hesitate" to knock it down.

Observers at the intersection of intellectual property and antitrust now look to the FTC and especially the DOJ and new chief Jonathan Kanter to see if he'll pivot away from his predecessor's novel policy of generally treating most exercises of IP rights as beyond the reach of competition law.

Qualcomm's private litigation win also poses far-reaching implications for would-be class actions, according to Michael Murray of Paul Hastings LLP, who said the Ninth Circuit decision serves as a "roadmap or guidance" for how companies facing proposed class actions might try to defend themselves.

The appellate court found in September that Judge Koh wrongly applied California law to a nationwide class. Consumers had only been able to sue under state law because they are "indirect" purchasers unable to pursue damages under federal antitrust statute.

**NCAA Loss Sets Stage for More than Athletes**

In June, the NCAA suffered a major loss when the Supreme Court affirmed that the organization cannot limit education-related benefits for college athletes. The ruling not only fueled continuing litigation seeking to allow athletes to be compensated for the use of their name, image and likeness but also is likely to usher in dramatic changes to the business model for big time college sports.

"It's really started to change the paradigm for college athletes and college athlete labor rights," Musallam said.

The justices held that the NCAA and its restrictions on education-related benefits are not entitled to special treatment under antitrust law, unanimously affirming a Ninth Circuit decision that opened the door for schools to provide athletes more benefits, such as reimbursements for computers and musical instruments, free tutoring, internship stipends and cash academic achievement awards. Such benefits have been closely monitored and limited under NCAA amateurism rules.

A variety of cases outside of college sports, including in labor-side enforcement, have seen references to the ruling. Carl Hittinger of BakerHostetler says a lot can be gleaned from the justices themselves and their 9-0 opinion.

"It gives us a really good flavor for how this court … is going to look at antitrust issues going forward," Hittinger said. "They don't always agree on everything. But they agreed on everything [here.]"

Among the lessons learned, Hittinger said, is a high court skepticism of the "quick look" analysis that's supposed to be a truncated use of the rule of reason, allowing for justifications and arguments that consumers weren't actually harmed.

The court, according to Hittinger, also signaled that Congress, not courts, should decide if whole industries are exempt from antitrust litigation.

**FTC's Loss of Restitution Power Rewrites the Playbook**

In effectively stripping the Federal Trade Commission of its ability to recoup money from lawbreakers in federal court, the Supreme Court's April ruling in AMG Capital v. FTC left both the agency and lawmakers scrambling to fill the gap.

In a unanimous opinion, the high court said Congress never intended for the FTC to wield the authority to collect restitution or disgorgement of ill-gotten gains as an equitable relief power under the Federal Trade Commission Act's Section 13(b), which was added to the statute in the 1970s and gave the agency authority to ask district courts for injunctions against illegal conduct.

Without the power to seek restitution through injunctions, a tool the FTC has traditionally used mostly for consumer protection cases but has also employed in competition enforcement, the FTC can pursue financial penalties in most cases only through a much more onerous in-house process.

The vacuum takes away a significant bargaining chip that the FTC may otherwise hold, according to David Shaw of Morrison & Foerster LLP, who said the high court ruling "dramatically changes the bargaining leverage when you're negotiating a settlement with 13(b)."

Lawmakers have proposed legislation to restore the FTC's fining authority, but it remains pending.

That has left the FTC to try to find alternative means of imposing financial penalties and remedying harm, including by partnering with state enforcers with their own authorities. Critics have also accused the FTC of trying to set up warnings against certain contact under which it can lob fines without first imposing an order against that conduct and then fining infringers.

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