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The Rise of Monopoly Maintenance Cases and What It Means Beyond Big Tech

BY RONALD F. WICK, COHEN & GRESSER WASHINGTON D.C. OFFICE

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For most of the past several decades, major government monopolization cases were a rarity. The Microsoft litigation in the late 1990s stood alone as a landmark Section 2 case, referenced by antitrust practitioners for nearly two decades as a likely unicorn in government monopolization enforcement. Then, in fairly rapid succession beginning in 2020, the government brought major monopolization cases against Google (twice), Apple, Amazon, Meta Platforms (Facebook), and Live Nation. Whatever one thinks of the merits of those cases individually, together they represent a wave of government Section 2 enforcement not seen in this country in more than fifty years.

Most of the commentary around these cases has understandably been focused on the technology industry. But there is an element of this enforcement wave that has received far less attention, and that deserves careful consideration by GCs outside the tech sector.

The Distinction That GCs Should Note

These cases are not, for the most part, about companies illegally acquiring monopoly power. They are about companies that allegedly maintained it.

That is a meaningful legal distinction. Achieving monopoly power through superior products, innovation, or business acumen is not illegal under the antitrust laws; and the government is not claiming that any of these companies achieved their monopolies otherwise. What becomes legally problematic is when a company that already holds monopoly power, even lawfully, uses that position to exclude competition in ways that go beyond legitimate competitive conduct. The legal theory in the current wave of cases is not that these companies did something wrong on the way up. It is that they did something wrong to stay there.

The Microsoft case established this framework decades ago. The company was found to have engaged in exclusionary conduct designed to protect its Windows operating system monopoly from the competitive threat posed by Netscape and Java. What is notable about the current generation of cases is how consistently the government has returned to that same theory: not that these companies dominated illegally, but that they acted illegally to preserve a dominance they had already achieved.

Why the Distinction Matters Beyond The Tech Space

Thus far, the focus of the government's Section 2 enforcement has been on major technology companies (or at least tech-adjacent industries like live event ticketing, in the case of Live Nation/Ticketmaster). Here, however, is where GCs outside the technology sector should be paying attention.

A monopoly maintenance claim does not require that a company be a household name or operate a two-sided platform with billions of users. It requires monopoly power and conduct designed to preserve it. Those conditions can exist in industries that are not accustomed to thinking of themselves as antitrust targets, particularly where the leading players are vertically integrated.

Consider healthcare. Hospital systems that have consolidated primary care practices, specialist practices, and ancillary services in a given region may have accumulated market positions that look, from an antitrust perspective, more like the defendants in these tech cases than hospital administrators might expect. When a dominant health system uses exclusive contracting, steering arrangements, or other mechanisms to keep patients away from competing providers, the conduct begins to resemble exactly what the government has been targeting in its recent Section 2 litigation.

Media and entertainment present a similar dynamic. A company that controls both the supply of content and a key distribution channel has the ability to favor its own content or channel access in ways that disadvantage competitors. The pending government litigation against Live Nation, which encompasses several different levels of the live entertainment industry, offers a case study in how that dynamic plays out in the live events sector. A company with dominant positions at multiple points in a vertical supply chain can use those positions to limit competition in ways that a less powerful, or non-vertically integrated, company simply could not.

The Early Warning Signs Worth Taking Seriously

The pattern across these cases points to a few things.

01 First, complaints about a company's competitive practices, particularly if frequent, should not be disregarded. Companies that develop reputations as unyielding dominant players, or hear themselves described as "throwing their weight around," sometimes dismiss these comments as the grumblings of a disappointed competitor or a necessary byproduct of the company's success. But every Section 2 enforcement claim is rooted in such perceptions.

02 Second, vertical integration deserves antitrust counsel on an ongoing basis beginning at the planning stage, not after the fact. Conduct that may be unremarkable for most companies, such as exclusive supply arrangements, preferential pricing for bundled customers, or platform policies that favor proprietary products, can take on a different legal persona once a company has market power. The question is not merely whether the conduct is efficient. The question is whether it harms competition in ways that a monopolist cannot justify.

03 Third, the enforcement environment can be uncertain. State attorneys general have become significantly more active, particularly as the federal antitrust agencies are signaling a diminished appetite for litigation and are losing experienced trial lawyers as a result. This means that the source of scrutiny may be closer to home than a federal investigation in Washington. A well-designed compliance program can account for both.

The companies that have faced the most significant antitrust exposure in recent years were not, for the most part, surprised by the conduct that drew scrutiny. They were more surprised that an enforcement agency—state or federal—would pursue it seriously. In the wake of the recent wave of monopoly maintenance cases, vigorous Section 2 enforcement should surprise no one.

Why This Matters, and How Cohen & Gresser Can Help

Antitrust risk is no longer confined to the merger review process or the technology sector. The current wave of Section 2 monopolization cases is establishing a legal framework that applies to any company with significant market power, and the enforcement community is looking beyond Big Tech for the next generation of cases.

Cohen & Gresser's antitrust practice is built around exactly this kind of complex, high-stakes competition work. Our team brings decades of Section 2 litigation experience, close familiarity with the enforcement agencies, and the trial capability that produces credible outcomes. This applies whether a client is evaluating its own compliance posture, responding to a government investigation, or considering whether to pursue a competitive concern of its own.

If your company holds a significant position in its market, or is moving toward one, we would welcome the conversation.

Ronald F. Wick is a Partner in Cohen & Gresser's Washington D.C. office, where his practice focuses on antitrust and competition matters, including government investigations, Section 2 monopolization cases, and complex civil antitrust litigation.