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Does Impeding Public Discourse Violate Antitrust Rules? Plaintiffs Say Yes in Big Tech Suits

"[T]he question is going to be: Have newspapers lost advertising revenue not simply because of Google and Facebook and any practices they have adopted, but because we now have different technologies that we like and use?" says one antitrust lawyer.

By Charles Toutant | May 12, 2021



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Suits by small-town newspapers accusing Google and Facebook of anti-competitive tactics come with a wild card: a claim that the tech giants are impeding public discourse and hampering the operation of the nation's democracy.

Owners of small newspapers around the country filed 13 suits between January and April claiming they face an existential crisis thanks to Google and Facebook's alleged anti-competitive and monopolistic practices.

Robbins Geller Rudman & Dowd leads a team of law firms that are behind the suits.

Google moved before the Judicial Panel on Multidistrict Litigation on May 6 to centralize more than two dozen antitrust suits, including the 13 filed by Robbins Geller, in the Northern District of California. The motion also includes a separate antitrust suit against Google by the U.K.-based Daily Mail.

The suits seek to connect a dramatic decline in newspaper ad revenue—and the loss of 60% of the jobs in the newspaper industry since 1990—to alleged violations of the Sherman Act by Google and Facebook. But what's unusual about the newspaper suits is that they focus not merely on the plaintiffs' financial losses but on the resulting impact on free speech and public discourse.

The complaints open with a line from Thomas Jefferson, who said, "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

The newspaper suits define their overarching purpose "not in the conventional economic terms of the plaintiffs' considerable financial losses or the impact of the challenged practices on the pocketbooks of consumers, but the reverberating implications for free speech and public and political discourse as we have come to know it in this country and beyond," said Robert Donaher, a former deputy attorney general who handled antitrust litigation in the state Division of Criminal Justice.

"The free-speech emphasis could be precedent-setting, adding the effect on public discourse to price control and consumer choice as a primary objective underlying antitrust enforcement," said Donaher, of Herold Law in Warren.

The newspaper suits come after the U.S. Department of Justice filed a separate antitrust case against Google in October 2020. They bring claims under Section 1 of the Sherman Act, alleging Google and Facebook reached an agreement not to compete, which is a per se violation.

The newspaper suits also bring claims under Section 2 of the act, alleging the tech giants have formed a duopoly.

In the Section 2 claims, the plaintiffs are asserting that Google and Facebook are not successful merely because of their innovation and investment, but because they used their resources "in such a way as to prevent others from being able to enter the market or compete," said Lionel Frank, who practices antitrust law at Szaferman Lakind Blumstein & Blader in Lawrenceville. The suits claim Google's acquisition of dozens of small companies over the last 20 years barred other companies from competing with it for ad sales, Frank said.

Ultimately the newspaper suits will come down to the root cause of the collapse of the newspaper advertising market, said Frank, a former deputy attorney general in the antitrust division of the state Division of Criminal Justice.

Frank noted that as a youngster, he would check the afternoon paper to get baseball scores, but now he gets much of his news from his smartphone.

"We get our news differently now," he said. "And because of that the question is going to be: Have newspapers lost advertising revenue not simply because of Google and Facebook and any practices they have adopted, but because we now have different technologies that we like and use?"

When deciding if there has been a Section 2 violation, the court hearing the newspaper suits will have to consider whether advertisers are spending less on newspapers because the tech giants have a monopoly or because the public is using the internet more, Frank said.

“That’s what the real interesting question is, and you’re going to have fierce debates about this. You’re going to have economists on both sides of the aisle, either saying this is a phenomenon that reflects changes in consumers’ habits and the way they access information, versus those who will say it is a misuse of resources by these two entities, Google and Facebook, and therefore they have unfairly competed against more traditional media,” Frank said.

Robbins Geller has filed suits on behalf of newspapers in Delaware, Indiana, Maryland, Mississippi, Missouri, New Jersey, Ohio, Pennsylvania, Texas, West Virginia and Wisconsin.

The plaintiffs include Gale Force Media, publisher of the Westfield Leader and the Scotch Plains-Fanwood Times in New Jersey; Coastal Point LLC, publisher of the Coastal Point in Delaware; and Eagle Printing Co., publisher of the Butler Eagle in Pennsylvania.

Another plaintiff, AIM Media Texas, publishes The Monitor in McAllen, Valley Morning Star in Harlingen, the Brownsville Herald and El Nuevo Herald in Brownsville, the Odessa American in Odessa, the Mid-Valley Town Crier in Weslaco and the Coastal Current in South Padre Island/Port Isabel.

In filing the newspaper antitrust suit, the plaintiffs face a long and daunting challenge, since antitrust cases often take many years to resolve, said James Laskey of Norris McLaughlin in Bridgewater, a former staff attorney in the Antitrust Division of the Department of Justice.

The newspaper case appears to be “an attempt to piggyback on the government’s case,” Laskey said, and the plaintiffs in the newspaper suit are likely hoping that some helpful material will emerge from the government’s case.

“I’m sure the people that made the decision to pursue it are very smart people with a lot of resources, but I’m sure they have no illusions as to what a challenge it will be,” Laskey said.

If the plaintiffs win their case, they can get trebled monetary damages as well as attorney fees and a chance to reshape the defendants, Laskey said. But if the government wins its case, that’s no guarantee that the newspaper plaintiffs will have a favorable outcome, he said. And if the government loses, it will be very hard for the newspapers to succeed, he said.

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