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DOJ And Google Set For Trial, Again, This Time Over Ad Tech

By **Bryan Koenig**

Law360 (September 5, 2024, 4:18 PM EDT) -- The U.S. Department of Justice is up Monday for its second high-stakes trial against Google in a year, going after the alleged monopolization of key digital advertising technology in Virginia federal court.

When the bench trial kicks off Sept. 9, just a month after winning a landmark victory over the company's search business, DOJ Antitrust Division attorneys will be trying to convince U.S. District Judge Leonie M. Brinkema of the Eastern District of Virginia that Google has multilayered monopolistic control over the technology used to connect website publishers, advertisers and consumers through split-second auctions that place display ads on webpages each time they are loaded.

The DOJ traces that power through a series of acquisitions, beginning with the 2008 purchase of DoubleClick and its ad exchange, now dubbed AdX, that Google allegedly has used to force website publishers to employ its own products and avoid offerings from rivals. By controlling the tools through which publishers sell ads and advertisers buy ad space, as well as the ad exchange, the DOJ contends Google has been able to manipulate the auctions to harm rivals and charge far more than it otherwise could.

Law360 spoke to antitrust observers on what to watch and where the case fits in with a broader array of litigation against Google itself and against its Big Tech peers.

Defining the Market

Like most antitrust cases, observers say the ad tech trial, and the inevitable appeal, whoever loses, will hinge heavily on the court's definition of the market's contours, which Google wants to water down by arguing it competes with the likes of Amazon.com and Meta Platforms for advertising dollars.

"In an antitrust case, market definition is everything," said Christine P. Bartholomew, a professor at the State University of New York at Buffalo Law School.

The DOJ and its state attorneys general partners have sought to exclude Amazon and Meta from the market definition, and from diluting Google's market share, by arguing that the shopping and social media giants function as "walled gardens" where ads are only sold on those companies' sites. Google's ad servers, and the proffered market, are in contrast a place to broadly distribute ads on third-party sites, according to the DOJ.

One fight has been over exactly how much market share Google has and whether the DOJ even needs to show it in order to label the company a "monopolist." Google maintains that there's a 70% minimum threshold that the DOJ hasn't shown. But the department says no such threshold exists in the Fourth Circuit and that it doesn't even need to show one to demonstrate monopolization.

"It's going to be a hot issue," said Jeffery M. Cross, a counsel in Smith Gambrell & Russell LLP's litigation practice.

After market share, Cross said, comes whether Google has truly acted anticompetitively, and whether the company has procompetitive justifications for that conduct, an issue he predicted will see the

search giant put many witnesses on the stand to argue.

Navigating those markets will require extensive testimony from experts diving into complex business and technology.

"They're very complicated markets," Cross said.

Judge Brinkema has herself recognized that complexity, telling the parties in a June hearing that she expected them to walk her through the technology.

"Do not assume that I'm an expert on this case," she said at the time.

For all the case's complexity, however, Judge Brinkema has continually demonstrated why the Eastern District of Virginia is known as a rocket docket, including by holding the parties to 30-minute opening statements per side, a length she described as generous during a late-August hearing when counsel for Google asked for 45 minutes.

Google has also tried to treat the case as one where enforcers are contending the company has a duty to deal with its advertising competitors.

While refusal-to-deal cases are difficult to make under U.S. antitrust law that generally assumes companies can choose with whom they do business, the DOJ argues this is not such a case. Instead, it argues the case rests principally on Google's manipulation of the advertising exchanges to coerce customers to use its own offerings. And Judge Brinkema **refused to nix the suit** based on Google's **duty-to-deal arguments**.

One Trial of Many

The case is not alone, either in enforcer litigation targeting Google's ad tech directly or a broader pantheon of enforcement actions contesting multiple aspects of the search giant's business. Also in the wings against Google's ad tech business is a lawsuit from **a separate coalition** of state enforcers, led by the Texas attorney general, and a **multidistrict litigation** from advertisers, publishers and others in New York federal court.

Perhaps most importantly, the trial comes on the heels of **a landmark early August ruling** from Judge Amit P. Mehta of the U.S. District Court for the District of Columbia, finding after a trial last year that Google illegally monopolized online search by paying Apple, Mozilla, Samsung and others billions of dollars to be made the default search engine on their devices and browsers. Google has already vowed to appeal that loss, the first major monopoly order against a technology giant since the DOJ's landmark case against Microsoft.

Despite its general importance, Bartholomew said there are limits to how much influence the search ruling will have on Judge Brinkema.

"It's neither binding, nor persuasive, in the legal sense to this case," she said.

Diana Moss, vice president and director of competition policy at the Progressive Policy Institute, said that while both DOJ cases against Google target the same defendant, there are important differences.

"It's a more complicated case than search," Moss said of the instant suit. "There is more technical detail that will have to be unpacked."

In some ways, according to Moss, the search trial was relatively "cabined," dealing only with default placement on browsers and devices, and the contracts and payments that made that placement possible.

Ad tech, however, deals with things like the auctions process, whether that process itself was designed to give Google's offerings a leg up over the competition and allow the company to hike prices, whether publishers were forced to use Google's tools to get access to its exchange, and the series of acquisitions that created Google's juggernaut in the industry, according to Moss.

"It gets very technical, very detailed, very quickly," she said.

Unlike search, ad tech also deals not with the maintenance of monopoly, but its construction, Moss said.

The cases against Google also fit in with a broad crusade, by the DOJ and the Federal Trade Commission tracing back to the Trump administration, to rein in online platform giants broadly. Apple, Amazon and Meta also are battling government monopolization cases.

"Tech is under significant antitrust pressure," said Neil Chilson, a former chief technologist at the FTC who is now head of artificial intelligence policy with the Abundance Institute.

Private litigation **also has struck a major blow** against Google, in Epic Games' successful jury trial last year against the search giant's control over the Android Play Store.

The government cases, while all alleging monopolization, still present "quite a smorgasbord of major elements" of what makes such cases, according to Moss. She also noted that resolution in many of the cases remains years away — even in the search case, assuming Google is refused an appeal on Judge Mehta's liability finding, the court would still need to have a phase determining an appropriate punishment to remedy Google's conduct, a dynamic that would also have to play out in the ad tech case.

"We're looking at the better part of a decade for some of these cases to run their course," Moss said.

In ad tech, the DOJ has explicitly sought to break up Google's advertising business, including the mandated divestiture of its ad manager suite and its AdX ad exchange. But Bartholomew said that courts are often hesitant to break up companies to resolve antitrust cases, having had difficulty achieving "the surgical precision."

From Jury to Bench Trial

The ad tech case has come a long way since the DOJ and its attorneys general partners **filed suit in January 2023**.

Gone are claims that Google's auctions rigging overcharged federal agencies like the U.S. Department of Defense paying for online advertising, spending the DOJ had said topped $100 million since 2019.

Those claims instead fell apart when Google said that discovery showed that any potential overcharge from direct federal spending — U.S. antitrust law precludes damages claims for indirect buyers — at most was less than $1 million. Google was able to entirely **short-circuit the DOJ damages claim**, and with it the bid for a jury trial, by cutting a $2.3 million cashier's check, even as it maintained there was no liability at all.

"It is very different to have a jury case than it is to have a bench trial," said Bartholomew, who asserted that antitrust cases can sometimes be appealing to juries, but that jury trials introduce **extra complications** and potential extra grounds for appeal.

Abiel Garcia, a Los Angeles-based partner at Kesselman Brantly Stockinger LLP and a former antitrust attorney in the California attorney general's office, agreed that juries can be much more unpredictable, and much harder to shape messaging for than a judge.

"Taking a jury out of the equation — you know exactly the audience that you're speaking to," Garcia said.

The search and Play Store cases show that Google can lose in front of both a judge or jury. But Bartholomew noted that ad tech is a particularly complex case that the parties would have needed to explain to the jurors.

"You have to have an understanding of the tech, not just the industry," she said.

Without a jury, Chilson said the DOJ here will have to "much more closely connect the facts to the law," and cannot rely on things that simply "look bad" for Google.

John Briody of McKool Smith said that the lack of the damages claim doesn't impact the main thrust of a complaint that has always been focused on breaking up Google's ad tech business, "which is where you'd be anyway."

Chat Deletion Haunts Google

One issue that could make it that much harder for Google to defend its ad tech practices are the policies that have plagued the company in every major U.S. antitrust battle: the policy kept in place until **February 2023** that automatically deleted most internal company chats after 24 hours, unless staffers affirmatively switched from the "history off" default to "history on," and a "communicate with care" training that taught employees not to discuss certain topics through email or other formats that would be preserved, and to copy lawyers in an attempt to assert privilege.

Judge Brinkema opted in late August to take **a wait-and-see approach** to whether she should sanction Google as sought by the DOJ, via an adverse inference assuming that deleted chats hid key evidence detrimental to Google's arguments.

While declining for the moment to adopt an adverse inference, Judge Brinkema said that the prospect of missing chats could weigh on witness credibility, lambasting the deletion policy as "a foolish decision."

The two other judges to handle the discovery preservation issue, Judge Mehta in the search case and U.S. District Judge James Donato of the Northern District of California in the Play Store suit, both excoriated Google. Judge Mehta ultimately opted not to let the matter influence his decision because he said **he didn't need it** to rule against Google, while Judge Donato agreed to instruct jurors that missing documents could be damaging to the company's case.

"Judges are not pleased," Bartholomew said.

The case is U.S. et al. v. Google LLC, case number 1:23-cv-00108, in the U.S. District Court for the Eastern District of Virginia.

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