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No Reversal of Fortune for Google's Opponents

David Balto (Law Offices of David A. Balto) · Thursday, January 3rd, 2013

We all remember the movie “Reversal of Fortune” that retells the real life story of Claus von Bulow, accused of attempting to kill his super-wealthy wife. When the movie begins life looks extremely bleak for Claus – he has been convicted of murder, the factual evidence seems compelling and he seems like a wholly unsavory character. Yet Alan Dershowitz arrives on the scene, and although he believes Claus is guilty, he finds new legal avenues, undermines the key evidence, and reverses the conviction.

Google's opponents probably feel like Claus with the news that the decision in the ongoing Federal Trade Commission antitrust investigation has been delayed. The FTC seemed poised to close the investigation into search, perhaps with some enforceable voluntary commitments by Google. Then the announcement was delayed beyond the end of 2012, and we still remain in limbo awaiting the Commission's decision.

But they have no reason to believe that there is some reversal of fortune awaiting them.

First, the simple “hard facts.” The FTC has conducted an exhaustive 19-month investigation into both competition and consumer protection issues. Besides the dozens of attorneys and top-notch staff, they hired stellar outside counsel and an outside economist. There seems to be no dispute that at the end of one of the most extensive investigations in FTC history they were unable to secure evidence that consumers were harmed – the simple but essential first step to any antitrust case. (Even if they had, as I have written elsewhere, the legal burdens could not be overcome nor was there a reasonable way to regulate search).

In other words, there is simply no enforcement action to be brought.

Now the Google critics have unwisely attacked the FTC for not giving them the result they lobbied so hard for – their attacks clearly designed to give them a last minute reprieve. But none of their arguments will avail.

First, they traveled to the Antitrust Division of the Department of Justice (DOJ) and asked them to pick up the investigation. As I have explained, that effort will be fruitless. The DOJ can only bring a case under the Sherman Act which forbids “exclusionary conduct” by a monopolist while the FTC can challenge any “unfair method of competition,” a far lower legal standard.

If the FTC can't score a basket when it is 6 feet high, how can we expect the DOJ to score when it is 18 feet high?

Second, they have trotted out new theories. In a New York Times opinion, former FTC Commissioner Jones Harbour claimed the problem isn't search, but rather Google's collection and control of data. Of course that is a whole other set of issues that has not seemed to bother the FTC, the European Union or the state Attorneys General who have been investigating Google for years. Furthermore, Commissioner Jones Harbour confuses the focus of the FTC's investigation with separate policy discussions in relation to the use of consumer data. It should also be noted that in its 2007 review of Google's acquisition of DoubleClick, the FTC was urged by some to consider privacy as an antitrust issue and rejected that argument, finding that the Commission does not only "lack legal authority to require conditions to this merger that do not relate to antitrust, regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry."

One should also be reminded of the sage advice of the late Judge Bork – it's not size that antitrust condemns, but rather the conduct.

Then the anti-Google press machine suggested the FTC will appear lax because the EU settlement may differ from Google's settlement with the FTC. But they fail to recognize that different results may be entirely appropriate because the facts may be different in the EU and the legal standard in Europe permits greater intervention by enforcers. Having US and EU enforcers taking different approaches is not that unusual – in fact, in the recent EMI/Universal merger, the EU secured a divestiture, while the FTC took no action, observing that no remedy was necessary because there was simply no violation of law. That would seem even more the case when it comes to search.

So at the end of the day there is no reason to believe that some additional consideration by the FTC will lead to any different result. In the movie, Alan Dershowitz proclaims "If the rules don't work, you change them." Unfortunately for Google's opponents you can't change the rules. There is no antitrust case without harm to consumers. And that's why there will be no reversal of fortune.

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