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Microsoft, Northern Securities cases paved way for Google antitrust showdown

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With high risk comes the potential for great reward. That's a pivotal part of the thought process for senior antitrust officials when they consider suing prominent companies.

The Department of Justice's Oct. 20 announcement that it and 11 states are suing Google for violations of the Sherman Act is the latest in a series of big antitrust cases resembling a high-wire act. Two cases that laid the foundation were the agency's litigation against Microsoft and Northern Securities Co.

Douglas Melamed, the deputy assistant attorney general when the DOJ filed its 1998 lawsuit against Microsoft, recalled in an *FTCWatch* interview that initially officials knew they had the law on their side. Still, they questioned whether the company crossed the antitrust line and whether the agency had enough witnesses and documents to support its case.

"There wasn't anybody who thought this was a lock. But the feeling was this was important and the right thing to do. In cases like this, you take your chances," he said.

The DOJ and 20 states sued the software giant for using the dominant position of its Windows operating system to force computer makers to exclude a browser made by Netscape on their PCs. The focus of the litigation eventually broadened to target Microsoft's alleged efforts to cripple programs that could act as a go-between specific applications and a computer operating system. As a result, the application could run on any computer and threaten the market share of Microsoft Windows. (See *FTCWatch*, No. 863, Dec. 1, 2014.)

The DOJ is making similar claims in its Google lawsuit, which alleges the company uses a network of exclusivity agreements to illegally extend a monopoly on search and digital advertising.

Although the Clinton administration often took a light touch when dealing with business, Melamed said there wasn't much pushback from senior DOJ officials or the White House.

Then-Attorney General Janet Reno was no antitrust expert but asked insightful questions about the Microsoft case. According to Melamed, her office wasn't involved in the case management. And DOJ officials only met with White House staffers during the remedy phase of the case. President Bill Clinton didn't participate in the meetings.

In the Google case, Melamed says it's unusual for Attorney General William Barr to be as hands-on as he's been, according to media reports.

"It's rare for an attorney general to appoint his shadow antitrust division. It reflects a lack of trust in the existing division," Melamed said.

But he added the Trump administration's views of a strong executive and its desire to stop the so-called excesses of Big Tech have guided its decision-making.

The rumblings of a case against Microsoft began with the Federal Trade Commission, which would conduct a three-year investigation. But the agency twice deadlocked, 2-2, on two different litigation approaches due to the recusal of Commissioner Roscoe Starek, and closed the probe.

Anne Bingaman, the first Assistant Attorney General for Antitrust in the Clinton administration, had been in office only a month in 1993 when she took the rare step of asking for the files to be transferred to her. Bingaman developed the case and achieved a settlement on the limited issue of "per-processor licensing," which had given computer makers a strong incentive to deal exclusively with Microsoft.

The DOJ filed its next case against Microsoft in 1998. By then, Bingaman had left the administration and Joel Klein had taken over her role.

US District Judge Thomas Penfield Jackson ruled in favor of the government, saying the company should be split up. But Jackson was removed from the case for speaking to reporters, and under supervision of a new judge, the parties settled in 2001 without breaking the company up. Microsoft was subject to a series of consent decrees until 2011.

An early 20th Century case helped the DOJ flex its antitrust muscles, so in later years it could battle the likes of Google and Microsoft.

— The railroad titans —

President Theodore Roosevelt's reputation as a trustbuster took root in 1902 when the DOJ sued Northern Securities, a railroad trust created through a combination of companies led by business titans JP Morgan, James J. Hill and EH Harriman. Morgan, who was to many the symbol of corporate bigness, was a ripe target for the government.

Although Roosevelt came from a wealthy family that made its money in the glass importing business and banking, he wanted to tame big business. The former New York governor was elected vice president in 1900 and became president in September 1901 following President William McKinley's assassination.

In a message to Congress three months after taking office, Roosevelt said large companies should be "supervised and within reasonable limits controlled."

Morgan formed the trust about two months after Roosevelt was sworn in. The trust was valued at \$400 million, which would be \$11.7 billion today. Railroads controlled transportation and communication at the time. By 1903, when the Supreme Court heard arguments in the case, the railroads' combined stock value represented one-eighth of the country's wealth.

Because Roosevelt and Morgan knew each other from New York City business and social circles, Morgan tried to persuade the president not to break up the trust. Before the lawsuit was filed, Roosevelt and his aides met with Morgan and his lawyers. "If we have done anything wrong, send your man to my man and they can fix it up," Morgan said.

Roosevelt never made it about Morgan the person but focused on Morgan's actions. In fact, while the case was moving through the courts, Morgan helped Roosevelt settle an anthracite coal strike that was crippling the nation's economy.

The Northern Securities case was designed to score legal and political points, said Susan Berfield, the author of *The Hour of Fate: Theodore Roosevelt, JP Morgan and the Battle to Transform American Capitalism*.

"Roosevelt wanted to take an early stand against big business and Attorney General Philander Knox wanted to bring a case he could win. But it took Knox some time to convince himself that this was a case they could win. He would suggest that it was concern that an increasing amount of wealth was concentrated in a few people's hands," she told *FTCWatch*. "Its greatest importance was symbolic."

Writing in 1906, University of Wisconsin political economy professor and Railroad Commission of Wisconsin member Balthasar Henry Meyer said the case had "an undoubted wholesome influence on all great corporations. It was a moral tonic."

The suit alleged Northern Securities was "not organized in good faith" and amounted to a conspiracy to restrain trade. It was the second major case brought by the government under the Sherman Act, which Congress passed in 1890.

During Senate debate over the bill, John Sherman, an Ohio Republican, described a trust as "a kingly prerogative, inconsistent with our form of government. If we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessities of life." The Sherman Act forbade "combinations in the form of a trust or otherwise in restraint of trade." (See *FTCWatch*, No. 853, June 17, 2014.)

In 1904, the Supreme Court ruled 5-4 in favor of the government.

"The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public," Justice John Marshall Harlan wrote for the court.

"Under the Articles of Confederation commerce among the original states was subject to vexatious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the states and with foreign nations," Harlan said.

Berfield says the government's argument in the Northern Securities case laid the groundwork for the balancing act that many subsequent administrations often struck when dealing with large and powerful companies.

"Roosevelt felt big business was inevitable and was needed to help America reach new heights. But he and his administration believed business shouldn't be unfettered and there should be a strong role for government to monitor and supervise it," she said.

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