

Antitrust's Role In Overbuilder/Franchise Dealings

BY MATTHEW L. CANTOR

Hard-nosed competition is the engine of our capitalistic society. Virtually all businesses set out to achieve the goal of limiting or wholly eliminating competition. This goal, however, has serious legal pitfalls when one competitor has already reached monopoly status.

According to the antitrust laws, it is illegal for a monopolist to abuse its market dominance to maintain its monopoly. For example, a federal appeals court recently affirmed that the Microsoft Corp. had violated the law by improperly maintaining its monopoly in the computer operating systems market. The court noted that legitimate business practices engaged in by non-monopolies could serve as the ba-

sis for antitrust liability when an entity wields monopoly power.

This prohibition against improper monopoly maintenance poses a problem for incumbent monopoly cable franchises who "compete" with overbuilders. These franchises may set out to "kill" overbuilder competitive threats in their infancy. However, in light of the antitrust laws' proscription of illegal monopoly maintenance, should these franchises refrain from engaging in competitive advertising, pricing or other competitively-driven behavior?

Unfortunately, the vague answer is that the monopolist cable franchise can aggressively compete so long as it does not unfairly use its monopoly power to maintain its position. For example, if the cable franchise prices its services for a sustained period be-

low "cost" in order to destroy competition and then raises the price for its services in the absence of competition, it will likely incur antitrust liability. Similarly, if the franchise utilizes its dominant infrastructure to disseminate false information about its competitors' services, it may be liable for antitrust violations. Further, vertically integrated cable entities that also supply programming may incur antitrust liability if they deny their cable competitors access to their programming.

Cable franchises should be especially concerned about engaging in potentially anti-competitive conduct because the plaintiff in an overbuilder/franchise antitrust case will not face the traditional hurdles generally placed before antitrust plaintiffs. For example, in order to establish liability in a

monopoly maintenance case, a plaintiff must first prove that the defendant has achieved a monopoly in a particular product and geographic market.

In an overbuilder/franchise suit, a court will likely find that cable services constitute the product dimension of an antitrust market, especially when one considers that Congress has determined through legislation that these franchises do not face "effective competition".

Also, because the Cable Act refers to a cable franchise area as the proper dimension of a geographic market, one would not expect that the franchise defendant will be able to make credible arguments that favor a finding of a geographic market that is broader than its franchise area. In such a lawsuit, the only real liability issues that will be faced is

whether the franchise improperly utilized its economic power and whether the franchise caused harm to competition and the overbuilder.

Because it is generally easy for a cable challenger to prove the existence of monopoly power in an antitrust suit against an incumbent franchise, the franchise must rigorously scrutinize its actions to ensure that its behavior does not violate the antitrust laws. If litigation is pursued by an overbuilder, however, the franchise should thoroughly analyze whether it can reasonably argue that its actions were merely nothing more than hard-nosed competition on the merits.

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