# Google And The Next Frontier Of Divestiture Antitrust Remedy

By **Lauren Weinstein and Nathaniel Rubin** (September 23, 2024, 4:26 PM EDT)


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On Aug. 5, U.S. District Judge Amit P. Mehta of the U.S. District Court for the District of Columbia issued a landmark decision in U.S. v. Google LLC, holding that Google engaged in anticompetitive conduct to maintain its monopolies in the markets for general search services and search text ads.[1]

On the heels of Judge Mehta's headline-making order, it has been reported that the U.S. Department of Justice and multiple state attorneys general are considering asking the court to order Google to divest — i.e., sell or spin off — key parts of its business.[2]

The prospect of a large-scale divestiture in the Google search case comes on the heels of recent requests by the government and private litigants to seek, and courts to impose, business breakups as remedies for anticompetitive conduct.

In this article, we provide a brief history of divestiture as a remedy for anticompetitive conduct. Then, we turn to recent court decisions ordering, and enforcer requests seeking, divestiture.

As we will discuss, court decisions and antitrust agencies' requests reflect an increasing confidence that courts can determine when divestitures would be appropriate and effective, and an increasing boldness on the part of both government and private plaintiffs who feel that less coercive measures would fall short. Finally, we turn to lessons for Big Tech from the trend in favor of divestiture.

**History of Divestiture**

In 1911, about 20 years after the Sherman Act's passage, the U.S. Supreme Court made waves by ordering the breakup of Standard Oil Co.

It found "dissolv[ing] the combination" necessary to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."[3]

Divestiture did not gain much traction as a remedy for antitrust-law violations in the intervening years. Seven decades later, amid the trial regarding the Bell System monopoly, the U.S. Department of Justice and AT&T entered into a 1982 consent decree that would break up AT&T's local business into seven so-called Baby Bells.[4] And then, in the early 2000s, the government sought, unsuccessfully, to break up Microsoft Co.[5]

As the history reflects, courts have been reluctant to impose divestiture as a remedy. Government enforcers also have been hesitant to seek such a remedy, which can be seen as strong medicine.

A divestiture order requires businesses found to have engaged in anticompetitive conduct to sell or spin

off certain assets, operations, or lines of business.

Both the government and private plaintiffs can seek divestitures from antitrust defendants as a remedy for a wide range of anticompetitive behavior. Section 15 of the Clayton Act empowers the federal courts to grant the DOJ equitable relief to "prevent and restrain violations of this Act,"[6] while Section 16 of the Act permits courts to order similar equitable relief in suits brought by private plaintiffs.[7]

Under those provisions, courts can tailor the remedy to the anticompetitive conduct by, for example, imposing broad injunctions that break apart monopolistic enterprises.

Both the DOJ and Federal Trade Commission frequently reach consensual agreements with businesses to divest some assets as a condition of receiving approval for a merger.[8]

In such instances, the divestiture can be less coercive than an ongoing injunction, and it can allow the merging parties input into how best to run their combined business moving forward. And, of course, if the merging parties decide they do not want to divest any assets — and the government will not relent on the request — they can always decide against merging.

Divestitures in backward-looking suits for past or ongoing anticompetitive behavior have historically been rarer. That is understandable. Courts, and to some degree, enforcers, generally display reluctance to meddle in markets rather than simply open them up to competition.

It is hard to imagine a greater interference than an order requiring an entity to give up part of its operations. Moreover, an order requiring a business to sell assets to a third party can be difficult to administer: It requires a willing, commercially sophisticated buyer who has the ability and economic incentive to compete in the relevant market.

Spinning off assets or operations into their own company also requires identifying elements of a monopolist's business that can viably operate independently. And in either case, a court must be confident that the structural remedy will actually have procompetitive effects — increasing output, lowering prices, or preserving certain economies of scale possessed by the larger, prebreakup company.

**The Growing Trend in Favor of Divestiture Remedies**

Despite the difficulties in administrating divestiture remedies, the past decade has seen a growing number of courts willing to impose such remedies and more requests from the government for such remedies. This section analyzes some of the leading cases on the subject.

***Steves & Sons. v. Jeld-Wen***

Steves & Sons v. Jeld-Wen Inc.[9] marks the first time that a federal court approved an antitrust divestiture as the remedy in a suit brought by a private litigant.[10] The case arose out one of Jeld-Wen's customers' 2016 challenge to Jeld-Wen's 2012 acquisition of a competitor.[11]

Steves & Sons, the customer, alleged that Jeld-Wen had begun to overcharge it for door parts — called doorskins — claiming that the 2012 acquisition gave Jeld-Wen too much market power, which allowed it to charge higher prices, offer inferior products and attempt to run Steves out of business in the markets where the two companies competed.[12]

Steves asked that the U.S. District Court for the Eastern District of Virginia unwind the 2012 acquisition, including requiring that Jeld-Wen divest the plant it had purchased in that deal.[13]

A jury agreed with Steves that Jeld-Wen's acquisition had anticompetitively consolidated the market for doorskins in a way that would substantially lessen competition in violation of Section 7 of the Clayton Act.[14] The district court ultimately concluded that divestiture would serve the public interest and appointed a special master to run the sale following any appeals.[15]

In 2021 The U.S. Court of Appeals for the Fourth Circuit affirmed the divestiture order, determining that the district court had appropriately concluded that divestiture would serve the public interest and create a viable and profitable competitor to Jeld-Wen that would restore competition to the marketplace.[16]

The Jeld-Wen case remains ongoing in the U.S. District Court for the Eastern District of Virginia pending approval of a bid for the sale of the plant by the special master and district court.[17]

That the process is still incomplete speaks to the considerable effort required to actually impose a divestiture remedy in an adversarial context.

***Bio-Rad Labs v. 10X Genomics***

As part of the multidistrict litigation in Bio-Rad Laboratories Inc. v. 10X Genomics Inc.,[18] Bio-Rad sued 10X for patent infringement, and 10X counterclaimed under the Clayton and Sherman Acts alleging that Bio-Rad had engaged in anticompetitive behavior in certain markets for PCR testing.[19]

10X alleged that Bio-Rad's acquisition of one of its competitors — and the competitor's patent portfolio — had substantially reduced competition and consolidated the market for various types of tests.[20] It sought to require Bio-Rad to divest all of the patents, licenses and products Bio-Rad had acquired.[21]

The district court allowed substantial portions of 10X's counterclaims to proceed.[22] It also rejected Bio-Rad's attempt to dismiss the divestiture remedy 10X sought.[23] The court noted that 10X had "made a prima facie case for divestiture," noting that the divestiture of specific patents was far less burdensome a form of relief than the unwinding of an entire merger.[24]

The Bio-Rad litigation settled in 2021 with an agreement allowing the parties to cross-license each other's patents.[25]

***Google Digital Advertising Antitrust Litigation***

In re: Google Digital Advertising Antitrust Litigation[26] involves over a dozen states' parens patriae challenges to Google's practices in online advertising markets.[27]

The states had sought structural relief, which Google argued was barred by the doctrine of laches.[28] Reasoning that Google's conduct was alleged to have taken place outside the public eye, the court concluded that the states could continue to maintain their request for equitable relief for the time being.[29] The case is currently in discovery.

Google and BioRad suggest that the prospect of structural relief for private litigants goes beyond just Jeld-Wen and can survive a motion to dismiss to become part of a wide range of antitrust cases.

The next case we explore suggests that divestiture may expand into the criminal antitrust context as well.

***United States v. Teva Pharmaceuticals and Glenmark Pharmaceuticals***

The DOJ's prosecution in U.S. v. Teva Pharmaceuticals USA Inc. and Glenmark Pharmaceuticals Inc.[30] is notable for resulting in a novel use of divestiture in a criminal antitrust case, this time via a pair of deferred prosecution agreements.

The government alleged that Teva and Glenmark had engaged in a bid-rigging conspiracy to supply generic drugs and had conspired to maintain the price of a drug named pravastatin.[31] The proceedings ultimately culminated in a pair of deferred prosecution agreements that, among other things, required both companies to divest their pravastatin businesses.[32] The agreements included detailed compliance requirements for Teva, including the duty to locate a divestment monitor to effectively sell the relevant assets involved in Teva's pravastatin enterprise.

These deferred prosecution agreements reflect a policy judgment by the DOJ that a structural remedy may be the best way to restore competition to the generic drug market. They also reflect a confidence on the part of the DOJ that a suitable buyer can be found who will viably compete in the market for generic pravastatin.

**Lessons for Big Tech**

Big Tech companies are increasingly facing antitrust scrutiny and demands for divestiture. For example, in December 2020 the FTC sued Meta alleging that the company monopolized the market for personal social networking services, seeking to unwind its WhatsApp and Instagram acquisitions.[33]

The DOJ began a trial against Google in September alleging monopolization of the online web display advertising market and seeking to divest Google's ad management and exchange products.[34] And the FTC raised the possibility of structural relief in its November 2023 lawsuit against Amazon for anticompetitive pricing and advertising practices.[35]

As this trend demonstrates, Big Tech should be attuned to the possibility of courts ordering divestiture remedies in such cases. The fact that the government feels the confidence to pursue such remedies suggests that the DOJ and FTC believe courts will find unpersuasive arguments about the difficulty in implementing structural relief. Decisions like Jeld-Wen would confirm such a belief.

If the government succeeds in obtaining divestiture — as the plaintiffs did in Jeld-Wen — that likely would embolden more private antitrust plaintiffs to seek equitable remedies like divestment. And the more orders come down the pike, the more models exist for other district courts to follow.

While paying damages or a fine in an antitrust action can often be seen as the cost of doing business, a divestiture remedy can seriously disrupt operations. Companies facing enhanced antitrust scrutiny — like the Big Tech companies — should seriously consider, and start planning for, the likelihood that courts may impose divestiture remedies in the event of a liability finding.

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[1] Doc. 1033, United States v. Google, No. 20-cv-3010 (D.D.C. Aug. 5, 2024).

[2] See, e.g., David McCabe & Nico Grant, U.S. Said To Consider a Breakup of Google To Address Search Monopoly, N.Y. Times (Aug. 13, 2024), https://www.nytimes.com/2024/08/13/technology/google-monopoly-antitrust-justice-department.html.

[3] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 78 (1911).

[4] See United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 141 (D.D.C. 1982).

[5] See United States v. Microsoft Corp., 253 F.3d 34, 47-51 (D.C. Cir. 2001).

[6] 15 U.S.C. §25.

[7] 15 U.S.C. §26.

[8] See Richard Feinstein, Fed. Trade Comm'n, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies 4 (Jan. 2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf ("Anticompetitive horizontal mergers are most often remedied by a divestiture; a proposal to divest one party's demonstrably autonomous, on-going business unit will usually expedite settlement."); Antitrust Division, U.S. Dep't of Justice, Merger Remedies Manual 6-20 (Sept. 2020) (withdrawn Apr. 2022), https://www.justice.gov/atr/page/file/1312416/dl (prioritizing focus on divestiture remedies); see also, e.g., Press Release, Justice Department Reaches Settlement in Suit To Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division, U.S. Dep't of Justice (May 5, 2023), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum; Press Release, Justice Department Requires Substantial Divestitures and Waiver of a Non-compete for S&P To Proceed with its Merger with HIS Markit, U.S. Dep't of Justice (Nov. 12, 2021), https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-and-waiver-non-compete-sp-proceed-its.

[9] 988 F.3d 690 (4th Cir. 2021).

[10] Erin L. Fischer, Private Merger Challenges Under Section 16 of the Clayton Act: Caution Post-Jeld-Wen, 170 U. Pa. L. Rev 241, 242 (2021).

[11] 988 F.3d at 698.

[12] Id. at 702-03.

[13] Id. at 703.

[14] Id. at 705.

[15] Id. at 704-07.

[16] Id. at 710-11, 717-20, 722-24.

[17] Steves & Sons, Inc. v. Jeld-Wen, Inc., No. 3:16-cv-00545-REP (E.D. Va. filed Jun. 29, 2016).

[18] 483 F. Supp. 3d 38 (D. Mas. 2020).

[19] Id. at 49-50.

[20] Id. at 51.

[21] Id.

[22] Id. at 67-68.

[23] Id. at 55-56.

[24] Id. at 56.

[25] Joint Stip. & Order of Dismissal, Doc. 410, Bio-Rad Labs., Inc. v. 10X Genomics, Inc., No. 1:19-cv-12533-WGY (D. Mass. Jul. 29, 2021); Press Release, Bio-Rad and 10x Genomics Announce Settlement To Resolve Multiple Litigations, Bio-Rad Investor Relations (Jul. 27, 2021), https://investors.bio-rad.com/press-releases/news-details/2021/Bio-Rad-and-10x-Genomics-Announce-Settlement-to-Resolve-Multiple-Litigations-07-27-2021/default.aspx.

[26] In re Google Digital Advertising Antitrust Litigation, 627 F. Supp. 3d 346 (S.D.N.Y. 2022).

[27] 627 F. Supp. 3d at 359, 404.

[28] Id. at 402, 404-07.

[29] Id. at 407-08.

[30] No. 20-cr-200 (E.D. Pa.).

[31] Doc. 186 at 22-23, Teva; Doc. 188 at 19, Glenmark.

[32] Doc. 186 at 31-44, Teva; Doc. 188 at 27, Glenmark.

[33] Doc. 82, FTC v. Facebook, Inc., No. 20-cv-3590 (D.D.C.).

[34] Doc. 1 at 144, United States v. Google LLC, No. 23-cv-08 (E.D. Va.).

[35] See Doc. 114, FTC v. Amazon.com, Inc., No. 23-cv-1495 (W.D. Wash.).