

## FTC Must 'Scale A Slick Wall' To Revive Meta Suit

By **Bryan Koenig**

*Law360 (January 21, 2026, 7:42 PM EST)* -- The Federal Trade Commission set itself up for a tough fight to overturn a D.C. federal judge's rejection of its lawsuit accusing Meta of monopolizing personal social media through its purchases of WhatsApp and Instagram.

Agency officials on Tuesday announced a D.C. Circuit appeal that targeted both the facts and the law of U.S. District Judge James E. Boasberg's November decision, a ruling observers said will be difficult to challenge.

While the FTC won't file its opening brief for a number of months, agency officials said Judge Boasberg botched the market analysis by watering down Meta Platforms Inc.'s social media dominance, wiping away its alleged monopoly by finding competition beyond connecting with friends and family. They also took issue with his decision to anchor his market analysis in the present day, ignoring past conduct and past power that Judge Boasberg concluded has been eroded in particular by the rise of TikTok.

They even nodded to the broader Republican invective targeting Judge Boasberg's handling of deportation cases and Jan. 6 probes into lawmakers.

"The deck was always stacked against us," a senior FTC official told reporters Tuesday, echoing the politically tinged rebuke raised at the time of the ruling by FTC Public Affairs Director Joe Simonson.

The deck, most observers said, remains stacked against the FTC because it is appealing findings of fact that engender great deference on appeal, and findings of law that many said stand on firm footing.

"For the FTC to succeed in an appeal, it will have to convince the circuit not only that the commission's narrow market definition is right, but that Judge Boasberg had no basis whatsoever to conclude that Meta competes with TikTok and YouTube," said Paul Swanson, head of Holland & Hart LLP's competition practice. "If the FTC's market definition faced an uphill battle in the district court, the commission basically has to scale a slick wall to prevail on appeal."

The ruling came just two months after a different judge two floors below Judge Boasberg's D.C. federal courtroom rejected the U.S. Department of Justice's most sweeping proposals to address Google LLC's search monopoly, based heavily on the rise of artificial intelligence technology. Google said last week it would appeal its search liability loss.

Antitrust observers say the twin blows to enforcers reflect the challenges of competition enforcement

in **rapidly evolving technology spaces.**

It can be difficult, according to Syracuse University law professor Shubha Ghosh, to "nail down something that's constantly moving."

Judge Boasberg didn't let the FTC get past the threshold question of whether Meta, Facebook's owner, has a monopoly. Stopping at that question means the judge never got to allegations that Meta acquired WhatsApp and Instagram as part of a monopolistic strategy to buy or bury the competition.

"To win, the FTC would need to show that Boasberg made a 'clear error,' like that he applied the wrong framework for defining markets, demanded a type of proof that antitrust law doesn't require, or dismissed relevant evidence for legally improper reasons," said Brian Albrecht, chief economist at the International Center for Law and Economics, a think tank that was critical of the case. "The difficulty is that Boasberg's opinion, by most accounts, engaged seriously with the standard antitrust tools, legal and economic. He found the FTC's market definition unconvincing after weighing the evidence, not on a technicality. Convincing the D.C. Circuit that this was a clear error, that's the standard, rather than a reasonable judgment call, is a heavy lift."

While some expressed surprise that the FTC would continue to pursue Meta after its stinging loss, a former antitrust enforcer said the appeal is par for the course.

"When an agency looks at bringing a conduct case, the understanding is generally a trial and then an appeal. Because if you win, you're definitely going to have to defend it on appeal," said Kenneth Dintzer, a Crowell & Moring LLP partner who joined the firm in 2024 after more than 30 years with the DOJ's Antitrust Division. "The assumption is typically for conduct cases that either side will appeal anything they don't like."

The appeal means the case is likely to stretch years longer. Dintzer estimated the initial appeal will take about a year to reach an opinion. From there, there would likely be a bid for full court reconsideration and perhaps a petition to the U.S. Supreme Court.

And the best case scenario for the FTC would likely be a remand of Judge Boasberg's dismissal, sending the case back to the district court for further litigation, all while the industry continues to evolve.

"It'll be even more altered from that original time the claim was made," said Jessica Melugin, director of the Center for Technology and Innovation at the conservative-leaning Competitive Enterprise Institute and a critic of the FTC case.

In rejecting the case, Judge Boasberg concluded Meta doesn't have a monopoly and "the rapids of social media rush along so fast" that it does not matter what the market looked like when the commission first sued nearly five years earlier.

"The FTC is continuing to fight yesterday's battles in today's world. Judge Boasberg is right that the social media and technology landscapes are rapidly and constantly changing, and Facebook acquired Instagram 14 years ago, before some of today's most active social media users were born," said Yetter Coleman LLP partner Tyler Young.

Observers said the FTC is likely focused in particular on the standards by which it must define the market in antitrust cases and the point in time to which monopolization findings are pegged, especially based

on its authority to combat violations under Section 13(b) of the FTC Act. Judge Boasberg had said 13(b) is forward-looking and cannot be used against conduct that occurred purely in the past with no chance of recurrence in the future.

McCarter & English LLP's Robin Crauthers, an alumna of the DOJ's Antitrust Division, said the FTC may be particularly focused on trying to preserve an expansive view of its 13(b) authority to pursue injunctions against anticompetitive conduct.

"Letting the Meta loss go unchallenged is like letting go of a roadmap for the next Big Tech case. I think the FTC is thinking long-term we need to challenge this decision because some parts of this decision could be difficult for some of our other issues," Crauthers said, pointing to the ongoing case against Amazon.com Inc. and the prospect for other technology cases.

Laurel Kilgour, research manager at the American Economic Liberties Project and a supporter of pursuing Meta, also suggested the FTC wants to push back on Judge Boasberg's treatment of the market, in which he rejected a focus on a specific subset of users who still turn to Facebook specifically to connect with friends and family. She argued that rejecting that focus runs counter to the 2008 D.C. Circuit decision in the FTC challenge to the purchase of Wild Oats by Whole Foods.

"On appeal, this is going to depend on how the appeals panel views the Whole Foods decision," Kilgour said.

Lawrence White, an economics professor at NYU's Stern School of Business who headed up the Antitrust Division's Economic Policy Office in the early 1980s, also said the FTC may try to poke holes in how Judge Boasberg handled the so-called cellophane fallacy, which warns against an overly expansive product market when a monopolist has already forced out nearer competition and is able to charge anticompetitively high rates within its more specific sphere.

In Meta's case, Judge Boasberg concluded that because the company had recently rolled out a friends-and-family-only tab on the Facebook app where there were no ads, it belied FTC assertions that Meta was able to impose a higher cost, via greater ad load, on users turning to it specifically to connect with friends and family. But White said companies often reduce the costs for new products when trying to draw in customers.

"He doesn't really deal with that," White said.

Challenging Judge Boasberg's findings is not without risk of further rolling back FTC authority.

"You run the risk of the Court of Appeals affirming," Melugin said.

Crauthers noted that the FTC has already seen a dramatic constriction of its powers from an appeal, in the Supreme Court's 2021 ruling in *AMG Capital Management v. FTC*, where the justices found the commission lacks the power to seek monetary relief directly in federal court under its 13(b) authority.

"We could see that happen here," Crauthers said.

Filed in December 2020 at the tail end of the first Trump administration, two months after the DOJ sued Google over its search function — the department would later target Google's advertising placement technology — the Meta complaint came at the start of a wave of government monopolization cases

picked up and pushed further by Biden enforcers, who piled on with new lawsuits against Amazon, Live Nation, Visa, RealPage, Agri Stats, John Deere, Southern Glazer's Wine and Spirits LLC, and pesticide giants Syngenta and Corteva.

The case went to trial in April 2025 with FTC accusing Meta of buying Instagram in 2012 and WhatsApp in 2014 to head off direct competition with Facebook. According to the FTC's court filings, Meta feared the juggernauts the companies would become. The commission described concerns that WhatsApp would have expanded from its messaging app roots into a direct rival to Facebook, and alleged the social media giant deliberately stifled the growth of both companies to keep them from cannibalizing Facebook. However, because his decision came down entirely to market definition, in a market where both sides agree WhatsApp does not currently compete, Judge Boasberg said "WhatsApp is not relevant to what follows and will now disappear from the case."

The FTC had tried to push Meta into a narrow corner for personal social networking connecting friends and family, a field where it says Meta's only competitors are Snap and MeWe, while excluding TikTok and other social platforms. Judge Boasberg instead credited changing habits, such as users posting less publicly, sharing more via direct messages and spending far less time generally interacting with content from their friends and family. He said noted that users, as well as Meta and TikTok, shifted to short-form videos, with features that today look virtually identical.

"The FTC rightly lost in court because it failed to prove that Meta had monopoly power in a contrived market definition that ignored intense competition from TikTok and YouTube. There is virtually no chance that those robust factual findings will be found clearly erroneous on appeal," Joseph V. Coniglio, director of antitrust and innovation policy at the Information Technology and Innovation Foundation, a think tank funded by the tech industry that has been sharply critical of the case, said in a statement.

The FTC is pursuing the appeal even as Meta CEO Mark Zuckerberg cozies up to President Donald Trump. But several observers note that the Trump administration continues to focus on technology platforms.

"The administration still has a very negative view of Big Tech," said Young.

At least one person expressed surprise that the FTC would try to frame Judge Boasberg's rejection in a partisan lens.

"It is surprising to see the anonymous quote regarding Judge Boasberg and the insinuation of political bias. The Biden administration fully endorsed these cases," Young said. "Antitrust litigation against big tech companies seemed to be one of the few issues both parties could agree on. Suggesting the FTC lost because of a respected judge's purported political agenda is simply not credible."

The case is Federal Trade Commission v. Meta Platforms Inc., case number 1:20-cv-03590, in the U.S. District Court for the District of Columbia.

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