

## DOJ Has A Long Set To Play Against Live Nation-Ticketmaster

By **Bryan Koenig**

*Law360 (May 23, 2024, 9:30 PM EDT)* -- The U.S. Department of Justice antitrust lawsuit announced Thursday against Live Nation and Ticketmaster's dominance over performing artists, venues and tickets may have been 14 years in the making, but it still has a long road ahead in New York federal court.

The monopolization lawsuit from the DOJ alongside 29 states and the District of Columbia targets the "flywheel" business model that they say locks artists into exclusive promotion deals and venues into exclusive long-term ticketing agreements, while buying up, punishing or coercing any venues or performers who consider alternative options or pit promoters against one another for better terms. The complaint's main goal: the breakup of Ticketmaster and Live Nation.

Here, Law360 looks at some of the major implications, and arguments, over breaking up what the DOJ says is the combination of Live Nation's control over 60% of major concert venue promotions and Ticketmaster's 80% market share for primary ticketing, a combination the government itself authorized in an oft-maligned 2010 deal.

"The DOJ is breaking out a really big gun here — seeking to blow up a company that was created with its approval. That looms large even though the DOJ has and will continue to try to frame Live Nation's conduct as going well beyond the scope of the merger," said Craig Waldman, the head of Jones Day's antitrust practice and a critic of the initiative.

### The Road Ahead

As much as advocacy groups hailed the lawsuit, which comes after years of political pressure applied in the wake of high-profile ticketing snafus like the one that snarled sales of Taylor Swift's Eras tour, any resolution is likely years away.

Filing suit in the Southern District of New York means the case will be working its way through one of the country's busiest and slowest dockets, where federal judiciary statistics from last year indicated a median time to disposition at trial of civil litigation of nearly four years.

"I don't see this case getting to trial until late 2026," said Jeffery M. Cross, a counsel in Smith Gambrell & Russell LLP's litigation practice.

Antitrust enforcers have shown some willingness in recent years to be highly selective about where they file suit. That includes the DOJ's monopoly case over Google's ad tech. That suit is expected to go to trial

in September, less than two years after it was filed in the "rocket docket " Eastern District of Virginia. One thing the cases have in common is the request by enforcers for a jury trial.

"It is somewhat rare when DOJ is seeking structural remedies like this" to seek a jury trial, said Crowell & Moring LLP antitrust partner Eric P. Enson.

Enson said the DOJ probably believes everyday people who buy concert tickets "will be more incensed than a judge." But even if the jury finds liability and assesses damages based on the state law claims from the DOJ's state partners, Enson noted that whether there is any breakup of the company or another remedy will be decided by the judge.

A senior DOJ official, speaking on condition of anonymity, declined Thursday to go into detail on the choice of forum for the lawsuit against Beverly Hills, California-based Live Nation. Speaking with reporters, the official instead cited the multiple connections the case and Live Nation have to New York and its thriving live music industry.

### **Not So Settled**

Live Nation has so far been on a messaging blitz against a lawsuit it says is going after the wrong player, preferring to blame the secondary ticketing market and arguing it can't have a monopoly because it earns slim profit margins. That full court press may indicate little willingness to settle a suit seeking its breakup.

"You would think that if Live Nation was willing to divest Ticketmaster they would have done so before the filing of this lawsuit. I think we are in for a lengthy fight," said Bill Morrison, a partner at Haynes and Boone LLP.

"Some monopolies are just so entrenched, and some problems so difficult to address, that they require decisive and effective solutions," Antitrust Division head Jonathan Kanter said Thursday on the decision to pursue a breakup.

Nor is the DOJ's highly aggressive antitrust leadership likely willing to cut a deal. In the merger context in particular, and enforcement more broadly, Kanter has expressed a strong preference to challenge monopolies and anticompetitive tie-ups directly rather than risk cutting deals that may not adequately safeguard competition.

"We're unlikely to see him settle for anything less than a total breakup of Live Nation and Ticketmaster, and additional remedies that prevent that monopoly from reemerging in a different form," said Lee Hepner, senior legal counsel at the American Economic Liberties Project, a major backer of the Biden administration's aggressive enforcement streak and a strong proponent of the current lawsuit.

### **The Road to Here**

The Obama-era DOJ had cleared the \$2.5 billion merger under a consent decree requiring the merged company to sell off assets and to license certain software to a competitor. The agreement has come under heavy criticism in the years since.

"The Live Nation-Ticketmaster merger was allowed to proceed in 2010, but the decision was an abject failure of antitrust enforcement. Instead of blocking the merger, the DOJ required the company, then

with an 80% share of the ticketing market, to comply with ineffective conditions," said Diana Moss, vice president and director of competition policy at the Progressive Policy Institute. "Live Nation-Ticketmaster violated these anti-discrimination and anti-retaliation requirements, entrenching its dominance and keeping smaller competitors in live events in fear and in check."

The original deal also included conduct commitments prohibiting Live Nation from retaliating against or threatening concert venues for using another ticketing provider for 10 years, commitments the DOJ said in December 2019 that Live Nation had violated, forcing the company the following month to extend the agreement for an additional 5½ years.

The DOJ had called the deal extension, and tweaks, the "most significant enforcement action" the agency had taken on an existing antitrust consent decree in 20 years. The modifications were meant to clarify what Live Nation is prohibited from doing regarding concert venues, and to allow for easier detection and enforcement if violations do occur.

The changes included adding language that expressly prohibits Live Nation from withholding concerts from a venue if the venue chooses a different ticketing provider, and from threatening to withhold concerts.

Economic Liberties argued that the behavior described in the complaint "clearly violated the court-ordered consent decree." And yet, according to the group, "the Obama and Trump administrations punted on opportunities to implement stronger remedies, allowing Live Nation's anti-competitive and illegal behavior to continue into the present."

The 2020 tweaks were not enough to assuage lawmakers and advocacy groups, especially in the wake of high-profile ticket sales debacles.

"Since its merger in 2010, Live Nation-Ticketmaster has engaged in boldly anti-competitive practices at the expense of consumers, entertainers, venues, and vendors," the House Judiciary Committee's top Democrat, Jerrold Nadler of New York, said in a statement. "Instead of cooperating with the terms of its consent decree with the Department of Justice, the company has only grown more brazen in its tactics to corner the primary and secondary ticketing markets."

Despite the transaction's history, Smith Gambrell's Cross said it doesn't matter that the DOJ had previously cut a deal allowing the tie-up.

"In the U.S., the fact that one of the agencies allowed a merger to proceed under the Hart-Scott-Rodino Act does not prevent the agency from later on suing for an antitrust violation," Cross said.

Kanter similarly said Thursday that the merger case was limited to concerns with single transactions under Section 7 of the Clayton Act. The new complaint, he told reporters, targets "a systemic and systematic pattern of anticompetitive conduct that addresses nearly every aspect of the live music supply chain," and it does so under the Sherman Act.

### **The (Efficiency) Defense**

Live Nation has responded to the lawsuit by arguing it and Ticketmaster pull in only 1.4% annual net profits, a margin it called "the opposite of monopoly power," while also asserting that Ticketmaster's market share has gone down since the DOJ consent decree, in a sign of what it contends is healthy

competition for ticketing.

"The defining feature of a monopolist is monopoly profits derived from monopoly pricing. Live Nation in no way fits the profile. Service charges on Ticketmaster are no higher than other ticket marketplaces, and frequently lower," it said. "And even accounting for the sponsorship division, an advertising business that helps keep ticket prices down, the company's overall net profit margin is at the low end of profitable S&P 500 companies."

The company argues that the lawsuit won't drive down ticketing prices or the array of fees the DOJ refers to as the "Ticketmaster tax."

Instead, Live Nation blames ticketing prices on artists, asserting that it's the venues that set and keep most fees rather than Ticketmaster and contending the lawsuit "ignores everything that is actually responsible for higher ticket prices, from increasing production costs to artist popularity, to 24/7 online ticket scalping that reveals the public's willingness to pay far more than primary tickets cost."

The real enemy of low ticket prices, Live Nation insists, is the secondary ticket market, contending that the best way to safeguard fans would be to let artists cap resale prices. The complaint, however, contends that Ticketmaster also participates in, and controls, "a growing share of ticket resales in the secondary market."

The company appears in particular to be gearing up for an argument that any anticompetitive harm from its conduct is outweighed by the benefits, or efficiencies, and that the deal has been a net positive because of its vertical structure pairing companies on different points on the supply chain.

"Live Nation can offer and has offered fans, artists, venues and the rest of the live entertainment ecosystem better prices and better services than they would receive if these complementary businesses were separated," Live Nation's executive vice president for corporate and regulatory affairs, Dan Wall, said in a blog post. "Ticketmaster in particular is a far better, more artist- and fan-focused business under Live Nation's ownership than it ever was as a standalone company. The complaint is entirely devoid of any response to that inescapable fact — because DOJ has no answer for it."

"That is the same efficiency-based argument that we have seen rolled out by monopolists in other markets. It is very typical messaging," Economic Liberties' Hepner said.

Cross says the arguments can carry some weight.

"It is likely that the court will apply the stepwise, burden-shifting approach set forth by the D.C. Court of Appeals in the Microsoft Section 2 case brought by the DOJ to determine if the conduct is anti-competitive," Cross said. "Under this approach, the plaintiff has the burden of establishing a prima facie case of anticompetitive effect. Once it does, the burden shifts to the defendant to establish plausible and cognizable procompetitive justifications."

Jones Day's Waldman suggested that the efficiencies defense may back arguments against a breakup.

"Breaking up the company seems like a draconian move especially given the efficiencies that typically come from a merger of complementary companies, and the availability of other tools in the DOJ's arsenal. As a lifelong fan of live music, I'm all for competition in the industry, but wouldn't want to do any harm either," Waldman said.

Crowell & Moring's Enson also said that while the 2010 deal may not be a direct defense against liability, it could be used against efforts to break up the company, "because it has been blessed by the government in the past."

--Editing by Brian Baresch.

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