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ARTICLE

Avoiding Antitrust Issues In Search Term Ad Agreements

JULY 12, 2021

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Search term advertising can be a vital marketing tool for brands, and companies spend billions of dollars a year bidding on search engine keywords.

However, executives should be cautious about entering into keyword search agreements with other market participants, as it could expose their companies to antitrust enforcement risk by government agencies as well as individual plaintiffs.

As evidenced by the recent decision from the U.S. Court of Appeals for the Second Circuit in an antitrust suit brought by the Federal Trade Commission against 1-800 Contacts Inc., U.S. antitrust law regarding keyword bidding agreements is an evolving area of jurisprudence.

The growing number of cases further suggests that keyword bidding agreements could become an area of increased interest for both government enforcement agencies and private plaintiffs. Companies can face triple damages, and even when legal claims do not ultimately prevail in court, they may incur multimillion-dollar litigation costs fighting claims that their agreements restricting keyword bidding are anti-competitive.

Background

Search engines, such as Google and Microsoft Corp.'s Bing, display organic searches in response to the user's query based on many factors, including the popularity of the website.[1]

Search engines also sell ads that typically appear before or alongside the organic search results. Companies can bid on keyword search terms, and the search engine then uses an algorithm to select which ad or ads will be displayed with organic search results based on the amount bid as well as the quality of the ad, which may include the relevance of the keyword to the search and the rate at which users typically click through to that bidder's ads when they are displayed.[2]

Some brands bid on keywords associated with their competitor as a marketing tactic. To minimize the risk of

keyword bidding wars, and to preserve brand image, companies have entered into agreements with other market participants to refrain from bidding on one another's key terms.

Suppliers and licensees have also included keyword bidding restrictions in their contracts with retailers and licensors for similar reasons. However, agreements that restrain search term advertising may constitute illegal bid-rigging or market allocation under Section 1 of the Sherman Act or Section 5 of the FTC Act.

Bid rigging occurs when competitors agree to fix a bidding process by, for example, agreeing not to submit bids. Market allocation occurs when competitors agree not to compete in specific areas or markets. Both practices are considered naked restraints on trade when agreements are among horizontal competitors.

Current Legal Landscape

Just last month, the Second Circuit issued a long-awaited opinion that seemed to suggest that keyword restriction agreements among competitors that arise as a result of trademark dispute settlements do not run afoul of the antitrust laws.

It has yet to be seen, however, if other circuits will follow this view, how the opinion will be interpreted by lower courts, and how narrowly the ruling will apply in the context of trademarks or settlements.[3] In 2016, the FTC issued an administrative complaint against 1-800 Contacts, an online contact lens retailer, alleging that 1-800 Contacts entered into unlawful agreements with direct, or horizontal, competitors to keep them from bidding on one another's keyword search terms.

Around 2004, 1-800 Contacts sent cease-and-desist letters to competitors that appeared in online searches for 1-800-Contacts accusing them of trademark infringement.

To avoid litigation, these competitors entered into settlements with 1-800 Contacts in which they agreed not to bid on keywords associated with 1-800 Contacts, as well as to employ negative keywords, which would direct a search engine not to display the competitor's advertisements in response to a specific search query for 1-800 Contacts' trademarked terms or variations thereof.

An initial decision issued by the FTC's chief administrative law judge in October 2017 found that the agreements between 1-800 Contacts and its competitors caused anticompetitive effects that harmed competition and consumers who had to pay higher prices to 1-800 Contacts than they would have to lower-priced competitors.

On appeal, the full Federal Trade Commission found that the agreements were inherently suspect and violated Section 1 of the Sherman Act.

Ultimately, the Second Circuit reversed the commission's decision, rejecting the FTC's conclusion that the settlement agreements were inherently suspect and finding that the trademark settlements at issue had cognizable pro-competitive justifications, namely reduced litigation costs and the protection of trademark rights, and did not violate antitrust law.[4]

The court further held that the FTC failed to prove anticompetitive effects in the relevant market because it did not proffer sufficient evidence to support the conclusion that the settlement agreements raised prices.

Notably, the court recognized that "sister circuits have occasionally considered advertising restraints ... to have anticompetitive effects, but stated that it need not decide if this theory of harm was viable because 1-800 Contacts was able to assert cognizable pro-competitive justifications.[5]

Similarly, in a footnote, the court "acknowledge[d] a concern" that 1-800 Contacts required its competitors to employ negative keywords but determined that the court did not need to reach a decision regarding negative keywords at this time.[6]

In addition to antitrust enforcement by the government, private individuals and companies have also brought civil

actions alleging violations of antitrust laws for restrictive keyword agreements.

In 2018, following the FTC's investigation, consumers of contact lenses online brought a private claim against 1-800 Contacts alleging that 1-800 Contacts, along with other online contact retailers, artificially inflated prices for contact lenses by entering anticompetitive agreements prohibiting one another from bidding on advertisement space on search engines. The District Court denied 1-800 Contacts' motion to dismiss, finding that the plaintiffs sufficiently alleged antitrust standing, and 1-800 Contacts ultimately agreed to a $15.1 million settlement with the plaintiffs.[7]

Similarly, in May 2019, the Utah Attorney General's Office filed a confidentiality agreement in a state court proceeding pursuant to a civil investigative demand, indicating that it, and a number of other state attorneys general, were "investigating certain allegations of anticompetitive behavior by certain hotel chains and online travel agencies."[8]

Specifically, the attorney general's office suggested that it was investigating an alleged conspiracy among hotel chains and online travel agencies to enter a group boycott to eliminate competition for keyword internet bidding.

Along with the investigation being pursued by the Utah attorney general, several hotel chains are facing both individual and class action lawsuits alleging agreements restricting keyword bidding.

Consumers who had booked hotel rooms online brought a class action suit against a group of hotel chains for allegedly conspiring with online travel agencies to refrain from certain branded keyword advertising on the internet, thereby increasing the costs of searching for and booking hotel rooms online.

The court found that plaintiffs sufficiently pled antitrust standing and denied defendants' motion to dismiss.[9] Similarly, in December 2018, TravelPass, an online travel agency, filed suit against hotel chain providers alleging that they had agreed with one another and with online travel agencies not to bid on one another's branded keywords, thus effectively dividing the market for branded keyword search results and eliminating competition with one another or with TravelPass and other internet travel agencies.

The district court found that plaintiffs made sufficient antitrust allegations to withstand a motion to dismiss.[10]

Notably, in the TravelPass case, defendants argued that there was no anti-competitive scheme between horizontal competitors because they were supplying rooms for the online travel agencies to sell, and thus the online travel agencies were neither consumers nor direct competitors of the defendant hotels.

Plaintiffs argued that they were direct competitors in the market for hotel rooms because they also distributed hotel inventory for other hotels not named in the action. The court, viewing the facts in the light most favorable to the plaintiff, held that TravelPass was a direct competitor to defendants and participated in the same keyword bidding process alleged to be manipulated by defendants.

The court, citing to the U.S. Court of Appeals for the Fifth Circuit, further noted that, "antitrust standing is [not] limited to competitors and consumers," but that "the Sherman Act is 'comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices.'"[11]

Both federal and state antitrust enforcers have also recently demonstrated an increased interest in enforcing the antitrust laws in the technology sector, specifically in relation to bid rigging and market allocation in tech advertising.

In October 2020, the U.S. Department of Justice filed suit against Google alleging that the search engine entered into exclusionary agreements that limited search distribution channels and "foreclosed competition for internet search[es]."[12]

Similarly, the Texas attorney general, joined by a number of other state attorneys general, filed a high-profile suit in December 2020 against Google alleging that the search engine entered into an unlawful market allocation agreement to rig advertising bids.[13]

The Biden administration's recent appointments of two ardent critics of big tech companies, Tim Wu to the White House Economic Council[14] and Lina Khan who was recently sworn in as commissioner of the FTC[15] indicate a continued interest in pursuing antitrust issues in the tech industry.

And just last month, over 40 U.S. state attorneys general called on Congress to provide additional funding to support their antitrust enforcement efforts, including their antitrust cases against big tech firms.[16] These recent developments suggest there may well be additional government action against anticompetitive search advertising agreements, making agreements restricting keyword bidding high risk.

Best Practices

Given this increased appetite in antitrust enforcement and litigation relating to search term advertising, and the ever-changing legal landscape in this area, companies should take proper precautions if considering entering into agreements regarding restrictions on keyword bidding, including the following:

Think twice before entering into any keyword agreement, especially with a direct (i.e., horizontal) competitor outside of the keyword bidding arrangement.

Ensure that any agreements do in fact protect legitimate trademark and intellectual property rights and do not exceed the scope of those rights.

Consider if there is a less restrictive alternative than a keyword agreement to protect trademark and intellectual property rights.

For example, be sure that you are bidding on your own company's branded keywords and consider other digital advertising strategies like target search page location bid strategies to ensure that your company's ads appear at the top of the page or on the first page of search results for a particular campaign.

You can, of course, also consider bidding on your competition's brand keywords. And, if your brand name is trademarked and is being used improperly in another company's ad copy, you can consider a cease-and-desist letter to cut off trademark abuse.

Refrain from entering negative search term agreements that ensure that your website will not appear in a search for a selected word or phrase.

If you do enter into a keyword bidding agreement, consider the competitive impact the agreement will have. For example, a brand should not enter into a keyword bidding agreement that may ultimately increase the prices paid by consumers for a product or service in a specific market, even if not with a downstream horizontal competitor.

Craft the language of any agreement carefully. Among other things, companies should enumerate the procompetitive justifications for such an agreement, such as the protection of legitimate trademark rights, the efficient resolution of legal disputes, or the preservation of brand image and reputation.

Without these precautions, companies increase the risk that they will face lengthy and costly litigation or investigation relating to keyword bidding agreements.

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[1] See Lorenzo Coviello, Uri Gneezy & Lorenz Goette, A Large-Scale Field Experiment to Evaluate the Effectiveness of Paid Search Advertising, MIT (Sept. 19, 2017), available at https://web.media.mit.edu/~lorenzoc/Edmunds%20paper%20v1.pdf; Quality Score: Definition, available at https://support.google.com/google-ads/answer/140351.

[2] What is paid search?, Google, available at https://ads.google.com/intl/en_id/home/resources/what-is-paid-search/; See also 1-800 Contacts, Inc., Docket No. 9372, Commission Opinion and Order Granting Motion for Partial Summary Decision (Feb. 1, 2017).

[3] 1-800 Contacts, Inc. v. Fed. Trade Comm'n, No. 18-3848, 2021 WL 2385274, at *11 (2d Cir. June 11, 2021).

[4] Id. at *7.

[5] Id. at *9.

[6] Id. at 11 n. 17.

[7] Thompson et al v. 1-800 Contacts, Inc., No. 2:16-cv-01183, 2018 WL 2271024 (D. Utah May 17, 2018).

[8] See State of Utah v. TravelPass Grp LLC, No. 190400696, Dkt. No. 21, Filed: Ex. 4 to Motion to Intervene.

[9] Tichy v. Hyatt Hotels Corp., 376 F. Supp. 3d 821, 842-849 (N.D. Ill. 2019).

[10] TravelPass Grp., LLC v. Caesars Entm't Corp., No. 5:18-CV-153-RWS-CMC, 2019 WL 5691996, at *1 (E.D. Tex. Aug. 29, 2019).

[11] Id. (quoting American Cent. E. Tex. Gas Co. v. Union Pac. Res. Grp., Inc., 93 F. App'x. 1, 7 (5th Cir.2004)).

[12] United States et al. v. Google LLC, No. 1:20-cv-03010, Dkt. No. 1, Filed: Compl.

[13] See State of Texas et al. v. Google, LLC, No. 4:20-cv-00957, Dkt. 1, Filed: Compl. (Redacted).

[14] White House Announces Additional Policy Staff, White House Briefing Room (Mar. 5, 2021), available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/05/white-house-announces-additional-policy-staff/.

[15] Lina Khan Sworn in as Chair of the FTC, Federal Trade Commission (Jun. 15, 2021), available at https://www.ftc.gov/news-events/press-releases/2021/06/lina-khan-sworn-chair-ftc.

[16] Attorney General James Leads Bipartisan Coalition Calling on Congress to Support Federal Funds for State Antitrust Enforcement (May 10, 2021), available at https://ag.ny.gov/press-release/2021/attorney-general-james-leads-bipartisan-coalition-calling-congress-support.

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