Amazon’s Latest and Greatest Antitrust Lawsuit: A Big Tech Reckoning

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 This past Tuesday, September 26th, the Federal Trade Commission (“FTC”) and 17 state attorney generals filed suit against Amazon.com, Inc. (“Amazon”) in the United States District Court for the Western District of Washington.[[1]](#footnote-1) Crucially, this suit marks one of the largest antitrust lawsuits against Big Tech in the twenty-first century.[[2]](#footnote-2) The complaint alleges that Amazon has unlawfully obtained a monopoly in two key markets—the online superstore market and the market for online marketplace services—and has maintained its monopoly in these markets via exclusionary conduct contravening Section 2 of the Sherman Antitrust Act.[[3]](#footnote-3) The FTC seeks a permanent injunction, and commentators anticipate the case spanning years before reaching a resolution.[[4]](#footnote-4) While the behemoth online retailer is hardly unacquainted with antitrust scrutiny,[[5]](#footnote-5) this most recent suit elucidates the extent to which Amazon is coming to a head with U.S. regulatory bodies, which could potentially shift the present online retailer model.[[6]](#footnote-6)

Some of Amazon’s purported exclusionary acts the complaint highlights include myriad anti-discounting tactics that prevent potential competitors from undercutting Amazon’s price.[[7]](#footnote-7) These include using an anti-discounting algorithm to deter potential competitors from lowering their prices.[[8]](#footnote-8) The complaint also argues Amazon employs coercive tactics in order fulfillment services that prevent potential rivals from gaining the necessary scale to complete in the marketplace.[[9]](#footnote-9) Moreover, the FTC and state attorney generals argue these practices harm consumers via forcing them to pay higher prices and manipulating their search experience by replacing otherwise organic search results with paid promotions.[[10]](#footnote-10) This line of argumentation further asserts Amazon equally harms independent sellers who rely on Amazon as a platform enabling them to sell products; Amazon charges these sellers fees that can amount to nearly 50% of the revenue those seller earn on the conglomerate’s platform.[[11]](#footnote-11)

FTC Chairperson Lina Khan issued a statement, expressing that the “lawsuit seeks to hold Amazon to account for these monopolistic practices and restore the lost promise of free and fair competition.”[[12]](#footnote-12) By contrast, Amazon Senior Vice President and General Counsel David Zapolsky characterized the lawsuit as “misguided.”[[13]](#footnote-13) Zapolsky points to the benefits the company’s Prime delivery service bestows on consumers and that sellers have discretion in participating in the services for which it charges.[[14]](#footnote-14)

As the litigation progresses, the FTC will need to contend with existing antitrust precedent, including *Ohio v. American Express Co.*, where the Supreme Court applied a rule of reason analysis to American Express’ vertical restraints on trade and deemed them permissible.[[15]](#footnote-15) However, recent antitrust literature has taken the increasingly popular stance that antitrust law need address the anticompetitive effects Amazon furthers.[[16]](#footnote-16) Regardless of outcome, this case will have major implications for the 2020s antitrust arena—implicating the future of Big Tech at large—as well as online retailing practices.

1. Complaint at 16–22, Federal Trade Commission v. Amazon.com, Inc., (No. 2:23-cv-01495). The seventeen states and commonwealths are the following: Connecticut, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Hampshire, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Wisconsin. [↑](#footnote-ref-1)
2. Dan Papscun, *Amazon Antitrust Case Must Clear Amex Bar Set by Supreme Court*, Bloomberg Law, Sept. 29, 2023, https://news.bloomberglaw.com/antitrust/amazon-antitrust-case-must-clear-amex-bar-set-by-supreme-court. [↑](#footnote-ref-2)
3. Sherman Antitrust Act (1890); Complaint, *supra* note 1, at 43. [↑](#footnote-ref-3)
4. Complaint, *supra* note 1, at 5; Alina Selyukh, *U.S. sues Amazon in a monopoly case that could be existential for the retail giant*, NPR, Sept. 26, 2023, https://www.npr.org/2023/09/26/1191099421/amazon-ftc-lawsuit-antitrust-monopoly. [↑](#footnote-ref-4)
5. Mike Scarcella, *Amazon.com faces an array of US consumer, state antitrust lawsuits*, Reuters, Sept. 26, 2023, https://www.reuters.com/technology/amazoncom-faces-an-array-us-consumer-state-antitrust-lawsuits-2023-09-26/. [↑](#footnote-ref-5)
6. Selyukh, *supra* note 4; Complaint, *supra* note 1, at 43. [↑](#footnote-ref-6)
7. Complaint, *supra* note 1, at 6. [↑](#footnote-ref-7)
8. *Id.* at 6, 123. Notably, the released complaint seems to redact a significant portion of the details regarding this algorithm. The complaint also talks about a classified “Project Nessie” algorithm that has extracted a redacted amount of excess profits for Amazon. [↑](#footnote-ref-8)
9. *Id.* at 6. [↑](#footnote-ref-9)
10. *Id.* at 32–33. [↑](#footnote-ref-10)
11. *Id.* at 24; *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, Federal Trade Commission, Sept. 26, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power. [↑](#footnote-ref-11)
12. *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, supra note 9. Notably, Lina Khan’s Yale Law Review Note, *Amazon’s Antitrust Paradox*, was subject to much acclaim and argued that, despite Amazon’s ability to offer consumers lower prices on items, Amazon ultimately harmed competition. Lina Khan, *Amazon’s Antitrust Paradox*, 126 Yale L. J. 3, 710–805. [↑](#footnote-ref-12)
13. David Zapolsky, *The FTC’s lawsuit against Amazon would lead to higher prices and slower deliveries for consumers—and hurt businesses*, Amazon, Sept. 26, 2023, https://www.aboutamazon.com/news/company-news/amazon-ftc-antitrust-lawsuit-full-response#:~:text=We%20fundamentally%20disagree%20with%20the,standing%20and%20well%2Dconsidered%20doctrines. [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. Papscun, *supra* note 2; *see* Lina Khan, *The Supreme Court just quietly gutted antitrust law*, Vox, July 3, 2018, <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>.To provide a brief antitrust doctrine explanation, a rule of reason analysis consists of a court looking at specific facts to determine whether a practice unreasonably restrains trade. This contrasts other modes of analysis courts conduct, per se and quick look, which do not involve as exacting an analysis but seek to answer the same question. In *American Express*, the Court conducted a three-step inquiry to find the antisteering provisions not inherently anticompetitive. *But see* Ohio v. American Express Co., 138 S. Ct. 2274, 2301 (2018) (Breyer, J., dissenting). [↑](#footnote-ref-15)
16. Rebecca Haw Allensworth, *Antitrust’s High-Tech Exceptionalism*, Forum, Yale L. J., Jan. 18, 2021, https://www.yalelawjournal.org/forum/antitrusts-high-tech-exceptionalism. [↑](#footnote-ref-16)