

Wrestling Suit May Be Round 1 Of Antitrust Scrutiny For WWE

By **Jordan Passmore**

In the opening-bell words of World Wrestling Entertainment Inc.'s Paul "Triple H" Levesque, it's time to play the game.

In a Jan. 11 complaint, Major League Wrestling Media LLC **alleges** violations of Section 2 of the Sherman Act and Section 4 of the Clayton Act,[1] accusing WWE of leveraging its market power to interfere with broadcasting opportunities that MLW had with VICE TV and Fox Corp.'s Tubi streaming service.



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Filed in the U.S. District Court for the Northern District of California, the MLW Media LLC v. World Wrestling Entertainment Inc. complaint further alleges that WWE sought to obtain confidential and proprietary information about MLW's business from professional wrestlers that WWE tried to poach, even though these professional wrestlers were under exclusive contracts with MLW.

While WWE has faced other lawsuits, from head injuries to misleading shareholders, it has not been the subject of significant antitrust scrutiny, despite criticism of the contract terms WWE uses for its professional wrestlers.

Former WWE wrestler and Minnesota governor Jesse "The Body" Ventura, during an interview in 2016, noted the issues with WWE's contract terms, "Vince [McMahon] is lucky I didn't go for the Senate because ... I would have started a senatorial investigation as to why pro wrestlers are called 'independent contractors' when they're not. You work for one company. They order you around, control your whole life. . . we can't work for another promotion on Wednesday and work for you on Friday." [2]

As attempts to unionize or litigate state law contract claims have failed, professional wrestlers could attempt to effectuate change through state and/or federal antitrust laws. At the federal level, the Biden administration has made labor markets an area of focus for the U.S. Department of Justice and the Federal Trade Commission, and if either agency decides to investigate WWE's contracting practices further, MLW's lawsuit may be just the beginning of antitrust scrutiny for WWE.

The Undisputed Champion of the U.S. Industry: WWE

Today, when most people think of professional wrestling, WWE — formerly WWF — is the first, and maybe only, company that comes to mind. According to the complaint, alongside WWE there are three other major competitors in the U.S. professional wrestling industry:

- All Elite Wrestling;
- Impact Wrestling; and
- MLW.

There are also several smaller promotions in the U.S., such as National Wrestling Alliance and Ring of Honor, along with promotions outside of the U.S, such as New Japan Pro-Wrestling and Antonio Peña Promotions, S.A de CV. There are limited opportunities to watch NWA, ROH, NJPW, and AAA in the United States, either live or by replay.[3]

According to the complaint, WWE holds 85% of the market share for "the national market for the sale of broadcasting rights for professional wrestling programs to networks, cable and streaming services." [4]

Broadcast rights for professional wrestling make up a substantial portion of the revenue that these promotions receive. In 2019, the year before the emergence of COVID-19, WWE amassed \$960.4 million in net revenue, which was comprised of \$743.1 from media contracts, \$125.6 million from live events, and \$91.7 million in consumer products. [5]

In 2020, WWE increased its overall net revenue by \$13.8 million despite the pandemic. [6]

Even with its revenues from live events dropping substantially, from \$125.6 million in 2019 to \$19.9 million in 2020, and slightly for consumer products from \$91.7 million in 2019 to \$86.1 million in 2020), there was a substantial increase in media revenue, from \$743.1 million in 2019 to \$868.2 million in 2020. [7]

The complaint cites that for 2020, WWE's total revenue in North America was over \$764 million. [8] By comparison, AEW had an estimated revenue of \$64 million, less than 10% of WWE. [9]

MLW alleges that because of this market power, WWE "has the ability to raise prices for consumers of professional wrestling entertainment for a significant period of time and lower the quality of goods in this market available to consumers." [10]

There are high barriers to entry in this industry, as production costs, exclusive contracts, and the importance of brand recognition make entering the market difficult. [11]

Outside Interference in MLW's Opportunities

Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." [12] For Section 2 claims, the plaintiff must establish possession of monopoly power — also called market power — by the defendant, and that the defendant willfully acquired or maintained that monopoly power through exclusionary conduct.

Generally, to establish monopoly power, the plaintiff must define both the product market and geographic market. As described above, MLW alleges WWE has an 85% market share nationally in "the sale of broadcasting rights for professional wrestling programs to networks, cable and streaming services."

If MLW's market share calculation is accepted, the court will almost certainly find that WWE has monopoly power, as courts have held market shares in excess of 70% is enough to establish monopoly power absent no or low barriers to entry. For exclusionary conduct, there is no exact definition, but courts look to anticompetitive behaviors of the monopolist. In the coming sections, MLW accuses WWE of anti-competitive behavior in MLW's relationships with VICE, FITE, Tubi, and its own professional wrestlers.

VICE

In the Spring 2021, MLW entered into a television deal with VICE, where VICE would air MLW's archival footage. [13] Concurrently, there were negotiations to begin airing new MLW

programs across VICE platforms. Upon learning of MLW's agreement with VICE, WWE intervened.

In June 2021, WWE Senior Vice President Susan Levison phoned a VICE executive, informing him that WWE owner, Vince McMahon, was angry that VICE was airing MLW content.

The VICE executive responded, "I think this is illegal what you're doing" and was probably a violation of antitrust law. Ms. Levison responded that she does not control Vince McMahon.

VICE has several professional wrestling programs, and WWE's participation in these programs is vital to their success. For example, Dark Side of the Ring, a series that documents storylines and behind-the-scenes footage of different events and controversies, often focused on WWE content and included interviews with WWE personalities.

After receiving WWE's threat, VICE stopped engaging with MLW about an expanded media deal and only aired one MLW program.

FITE

Around the same time as the VICE interference, FITE, a streaming service dedicated to combat sports, offered MLW a media rights deal in which MLW would provide professional wrestling programs to FITE.[14]

While the two sides were discussing the deal, FITE suddenly halted negotiations and abandoned the potential deal. MLW learned that FITE's executive adviser of corporate development, Gregg Bernard, was simultaneously working as a Senior Vice President of Strategy and Opportunities for WWE. FITE had previously used WWE content on their platform.

Tubi

Roughly a month after the VICE and FITE opportunities vanished, MLW entered into a deal with Tubi to air MLW programming.[15] Tubi is an ad-supported streaming service, owned by Fox, with its headquarters in California.

This lucrative agreement between Tubi and MLW was important for MLW as it increased the company's valuation, enhanced its brand recognition, and became a more attractive destination for professional wrestling talents. After executing the deal, MLW began to prepare two live events, hired staff, editors, a public relations agency, marketing consultants; signed new professional wrestlers; increased salaries; and ceased conversations with other potential partners following the Tubi deal.

With the first event scheduled, Tubi and MLW agreed to issue a joint press release. Upon learning of the MLW-Tubi deal, WWE executive Stephanie McMahon spoke with a Tubi executive seeking to ensure that MLW would not compete head-to-head with WWE's Tuesday night program, WWE NXT. As alleged by MLW,

McMahon ultimately pressured Tubi executives and other executives at Fox to terminate the deal with MLW in its entirety, as Fox feared it may lose WWE business or content if it did not act.

A Headlock to MLW

MLW alleges that WWE's conduct has caused irreparable harm to both MLW and consumers.[16] Ticket sales dropped 40% in the weeks following WWE's interference in the Tubi deal, along with lost future profits and marketing opportunities.

Having ceased discussions with potential partners after the Tubi deal, MLW was unable to resume conversations as potential partners moved on to other deals. MLW believes it could take months, or even years, to find a critical platform to air its new programs.[17]

MLW also alleges consumers were harmed as consumers could have had increased access to a greater variety of professional wrestling entertainment at lower prices.[18]

In addition to the antitrust claims, MLW also alleges three state law claims for:

- Intentional interference with contractual relations;
- Intentional interference with prospective economic advantage; and
- WWE's history of attempting to unfairly compete against MLW, including its:
 - Attempts to poach MLW's talent and air footage without authorization or consent,
 - Attempted inducement of MLW's wrestlers to breach their contracts and reveal confidential and proprietary information about MLW's business, and
 - Efforts to prevent MLW from broadcasting its licensed programs on VICE and Tubi.[19]

In its prayer for relief, MLW is seeking damages for tortious conduct, treble damages for violations of antitrust law, injunctive relief and attorney fees.

In a statement last month WWE said it "believes these claims have no merit and intends to vigorously defend itself against them." [20]

Other Lawsuits Over the Past Year

The MLW lawsuit is not the only controversy WWE has faced in the past year. In a separate matter, WWE agreed to pay \$39 million to investors who claimed the company made materially false and misleading statements regarding WWE's business dealings in Saudi Arabia.[21]

The settlement was preliminarily approved by the Southern District of New York in March 2021, and a final judgment was approved in July 2021.[22]

Additionally, earlier in 2021, the U.S. Supreme Court declined to hear an appeal made by several former professional wrestlers that WWE failed to protect them from repeated head injuries that resulted in long-term brain damage.[23]

Lower courts had dismissed claims by the former professional wrestlers,[24] saying the lawsuits were filed too late. The original claims were filed in 2014.[25]

Exclusive Contracts/Independent Contractors

One area where WWE has constantly garnered scrutiny is its classification of professional wrestlers, along with the contract terms it uses. Although the details of WWE contracts are rarely publicly available, in an article written in 2015, a comparison of nearly a dozen contracts that were available through lawsuits or U.S. Securities and Exchange Commission filings showed that the contract structure and language of WWE contracts had remained largely unchanged since 1990.[26]

MLW's complaint makes reference to exclusive contracts, with MLW stating that it signs professional wrestlers to exclusive contracts like WWE. An exclusive contract means professional wrestlers are not able to work for other promotions during the duration of their contract.

In the absence of exclusive contracts, professional wrestlers can work for multiple promotions, even if they have a long-term contract with one company. For example, a Maryland Championship Wrestling event, which took place Feb. 5, had AEW's Adam Cole make an appearance.[27]

MCW, a tiny promotion compared to AEW, generated more ticket sales and revenue as it was able to feature a wrestler who can be seen on AEW broadcasting every week and has name recognition. WWE does not allow its professional wrestlers to appear for other promotions under normal circumstances.

Additionally, WWE does not classify its professional wrestlers as employees, but rather as independent contractors. According to one contract:

Nothing contained in this agreement shall be construed to constitute wrestler as an employee, partner or joint venturer of promoter, nor shall wrestler have any authority to bind promoter in any respect. Wrestler is an independent contractor and wrestler shall execute and hereby irrevocably appoints promoter attorney-in-fact to execute, if wrestler refuses to do so, any instruments necessary and consistent herewith to accomplish or confirm the foregoing or any and all of the rights granted to promoter herein. Promoter shall provide wrestler copies of all documents so executed.[28]

In August 2008, three wrestlers filed a lawsuit, arguing that they should be classified as employees and not independent contractors.[29] These claims were not made under federal or state antitrust statutes, but rather were made using state law contract and unjust enrichment claims. In February 2009, the judge granted WWE's Motion to Dismiss.[30]

Even though that lawsuit was dismissed 13 years ago, the conversation about WWE professional wrestlers being labeled as independent contractors is still in the news. Former U.S. residential candidate Andrew Yang has sought to have WWE professional wrestlers labeled as employees. In a tweet in September 2021, Yang said:

Had a call with the Department of Labor. If you are a current or former @WWE performer who feels you were misclassified as an independent contractor contact @lkmiddleb and let's get you what Vince owes you. Been a long time coming but this storyline is real.[31]

One possible avenue to change the status from independent contractors to employees is through antitrust law. In the executive order on promoting competition in the American economy, President Joe Biden signaled the policy of his administration would be:

To enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets [32]

The order also said:

Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions.

In an industry dominated by one company, a hard look by the Federal Trade Commission or the Antitrust Division of the U.S. Department of Justice Antitrust could be one avenue for change.

Conclusion

As the MLW case is still in its infancy, it remains to be seen where this suit will go. While WWE has yet to file anything in the case, it will likely file a motion to dismiss as opposed to answering the complaint and moving on to discovery. If the case makes it to discovery, WWE will likely file a motion for summary judgment. If both the motion to dismiss and motion for summary judgment are denied, WWE may look to settle as opposed to protracted litigation.

Even if WWE can avoid a trial in the MLW controversy, there could be additional antitrust claims that WWE could face in the coming months and years, either from private litigants or antitrust enforcers.

During a December 2021 two-day joint workshop of the Federal Trade Commission and the U.S. Department of Justice to discuss labor markets, FTC Chair Lina Khan said:

While labor markets have long been characterized by inequalities in bargaining power between workers and employers, over the last few decades these asymmetries have tended to become more acute. Research suggests that heightened market power, fissuring of the workplace, and weakened legal protections have all contributed to a decline in labor's share of national income and to an increase in work arrangements that are precarious and that deprive workers of what they are owed. These asymmetric relationships can enable firms to impose take-it-or-leave-it contract terms.[33]

By all accounts, professional wrestlers do not have much leverage when negotiating with WWE. By controlling 85% of the professional wrestling market in the United States, WWE can impose take-it-or-leave-it terms to prospective professional wrestlers, knowing the second largest promotion brings in less than 10% of WWE's revenue.

For athletes who spend their entire lives trying to make it to the grandest stage in professional wrestling, they may not want to argue contract terms with a powerhouse like WWE. But antitrust enforcers, either at the state or federal level, may be willing to step into the ring with WWE.

At the federal level, a major labor monopsony antitrust case against WWE could signal the Biden administration's intentions to aggressively enforce antitrust laws with respect to labor markets.

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[1] 15 U.S.C. § 2; 15 U.S.C. § 15.

[2] William Windsor, Jesse Ventura Disputes Pro Wrestlers Being Independent Contractors, Talks Hulk Hogan Selling Him Out, Wrestling Inc. (Nov. 13, 2016), available at <https://www.wrestlinginc.com/news/2016/11/jesse-ventura-disputes-pro-wrestlers-being-independent-619292/>.

[3] Some options to view these promotions are YouTube (all); their websites (ROH, NJPW, AAA); monthly or annual subscription through FITE (NWA); PPV (NWA); The Roku Channel (NJPW); and cable, based on which market you reside (ROH, NJPW).

[4] Compl. ¶ 17, MLW Media LLC v. World Wrestling Entm't, Inc., 5:22-cv-00179-EJD (N.D. Cal Jan. 11, 2022), ECF No. 1.

[5] WWE® Reports Record 2020 Results and 2021 Business Outlook, WWE (Feb. 4, 2021), available at <https://corporate.wwe.com/investors/news/press-releases/2021/02-04-2021-211020204>.

[6] Id.

[7] Id.

[8] Compl. ¶ 21.

[9] Compl. ¶ 21.

[10] Compl. ¶ 25.

[11] Compl. ¶ 27.

[12] 15 U.S.C. § 2 (2022).

[13] Compl. ¶¶ 34-36.

[14] Compl. ¶ 37.

[15] Compl. ¶¶ 38-45.

[16] Compl. ¶¶ 48-52.

[17] Compl. ¶ 51.

[18] Compl. ¶ 52.

[19] Compl. ¶¶ 79-80.

[20] <https://www.law360.com/articles/1454652/wwe-rival-picks-fight-with-wrestling-giant-in-antitrust-suit>.

[21] World Wrestling Entm't, Inc., Form 10-Q (Nov. 4, 2021), available at <https://otp.tools.investis.com/clients/us/wwe/SEC/sec-show.aspx?Type=html&FilingId=15329419&CIK=0001091907&Index=10000>.

[22] Id.

[23] Dave Collins, Supreme Court declines to hear wrestlers' brain damage cases, Associated Press (Apr. 26, 2021), available at <https://apnews.com/article/connecticut-head-injuries-lawsuits-wrestling-injuries-a5d36523a5435dce920cb263155ee122>.

[24] Former professional wrestlers include William "Billy Jack" Haynes; Russ "Big Russ" McCullough; Ryan Sakoda; Matthew "Luther Reigns" Wiese; and the wife of the late Nelson "Viscera" Frazier, also known as Big Daddy V, who died in 2014.

[25] World Wrestling Entm't, Inc., Form 10-Q (Nov. 4, 2021), available at <https://otp.tools.investis.com/clients/us/wwe/SEC/sec-show.aspx?Type=html&FilingId=15329419&CIK=0001091907&Index=10000>.

[26] Chris Smith, Breaking Down How WWE Contracts Work, Forbes (Mar. 28, 2015), available at <https://www.forbes.com/sites/chris-smith/2015/03/28/breaking-down-how-wwe-contracts-work/?sh=34d3879a6713> ("Over the years a handful of such contracts have become public information, either through lawsuits involving WWE or through the company's SEC filings . . . We've pored over about a dozen booking contracts, ranging from Ultimate Warrior's 1987 deal through Stephanie McMahon's 2013 contract. Others include Owen Hart (1996), Raven (2000), Brock Lesnar (2003) and Triple H (2012). A review of these documents show that the contract structure and language has remained remarkably consistent over the last 25 years or so, though there are some key differences in place.").

[27] MCW Pro Wrestling, available at <https://www.mcwprorestling.com/>.

[28] Chris Smith, Breaking Down How WWE Contracts Work, Forbes (Mar. 28, 2015), available at <https://www.forbes.com/sites/chris-smith/2015/03/28/breaking-down-how-wwe-contracts-work/?sh=34d3879a6713>.

[29] Chris Smith, Breaking Down How WWE Contracts Work, Forbes (Mar. 28, 2015), available at <https://www.forbes.com/sites/chris-smith/2015/03/28/breaking-down-how-wwe-contracts-work/?sh=34d3879a6713>. The wrestlers who filed suit were Steve Levy (better known as Raven), Chris Klucsarits (better known as Canyon) and Michael Sanders.

[30] Memorandum of Decision on Motion to Dismiss, Levy v. World Wrestling Entm't, Inc., 3:08-cv-01289 (D. Conn. Feb. 23, 2009), ECF No. 36. The Motion to Dismiss was granted for two reasons. First, the court did not find persuasive that the contract language where the plaintiffs would be paid "in full without withholding, except where required by law" was sufficient to constitute that the plaintiffs were employees and WWE was in breach of its contract with the plaintiffs for not withholding taxes. The language was also "consistent with

the Booking Contract's provision that plaintiffs were to be 'responsible for payment of all [their] own Federal, state or local income taxes.'" The unjust enrichment claims were also quickly disposed of as the parties had an express contract. Second, the Connecticut Statute of Limitations for breach of contract and unjust enrichment claims is six years. The contracts signed by the three plaintiffs occurred more than six years prior to the filing of the complaint, and the court found unpersuasive arguments that their de facto status as employees evolved within six years of the complaint being filed.

[31] Andrew Yang (@AndrewYang), Twitter (Sept. 16, 2021, 9:35 AM), <https://twitter.com/andrewyang/status/1438496646313222145?s=10>.

[32] Executive Order on Promoting Competition in the American Economy (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

[33] Remarks of Chair Lina M. Khan at the Joint Workshop of the Federal Trade Commission and the Department of Justice: Making Competition Work: Promoting Competition in Labor Markets, Fed. Trade Comm'n (Dec. 6, 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1598791/remarks_of_chair_lina_m_khan_at_the_joint_labor_workshop_final_139pm.pdf.