Antitrust Laws

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The Role of Counsel in Antitrust Law

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The Four General Areas of Antitrust Practice

The typical full-service law firm antitrust practice covers four general areas: (1) criminal defense; (2) civil litigation; (3) pre-merger notification and clearance; and (4) compliance and counseling.

Criminal Defense: Although it is a form of white-collar defense, antitrust criminal defense is a distinct sub-specialty. Antitrust crimes are investigated by the Antitrust Division, a separate division within the Department of Justice ("DOJ"). The Antitrust Division operates under different ground rules, as well as different substantive laws, from those used by U.S. Attorneys and other divisions of the DOJ. The Antitrust Division confines criminal actions to hard-core, intentional cartel behavior like horizontal price fixing and bid-rigging, and has made prosecution of international price fixing cartels (e.g., vitamins, shipping, DRAM chips) the centerpiece of its criminal enforcement program. Antitrust criminal defense work involves assisting clients in responding to grand jury subpoenas, negotiating plea and leniency agreements, and handling criminal trials and appeals.

Civil Litigation: Antitrust civil litigation involves representing plaintiffs as well as defendants in a wide variety of cases: Sherman Act section one price fixing and other conspiracy cases, including consumer class actions, resale price maintenance (also known as “vertical price fixing”), tying, and distribution and dealer terminations; Sherman Act section 2 monopolization, attempts to monopolize, and predatory practice cases; Clayton Act section 7 litigation over mergers, acquisitions, and joint ventures; and Robinson-Patman Act litigation (price-discrimination, commercial bribery). Antitrust issues also often arise in litigation involving other substantive fields including: patent and other intellectual property issues (monopolization and attempted monopolization, patent misuse, cross-licensing); labor and employment (non-compete and non-poach agreements); construction and contracting litigation (bid-rigging); state unfair competition litigation; franchising; bankruptcy; arbitration; and international trade/anti-dumping.

Pre-Merger Notification and Clearance: This area involves helping clients determine whether they must file Hart-Scott-Rodino ("HSR") Act
The Role of Counsel in Antitrust Law

pre-merger notification for a proposed transaction (merger, acquisition, or joint venture); preparing HSR filings; analyzing transactions to determine whether they're likely to provoke antitrust scrutiny or challenge from the DOJ or the Federal Trade Commission (the two agencies share responsibility for merger enforcement); assisting the client if the DOJ or FTC requests additional information about a transaction ("second requests"); negotiating divestitures or other structural or conduct remedies with the DOJ or FTC if one or the other threatens to block a transaction as anti-competitive; and litigating against the DOJ or FTC if the negotiations fail. The area requires specialized expertise in understanding the HSR Act and accompanying regulations, in analyzing and defending a transaction under the antitrust laws (primarily Section 7 of the Clayton Act, which outlaws acquisitions that “may” harm competition), and in dealing with the agencies.

Compliance and Counseling: This area involves helping clients minimize their exposure to antitrust liability in all of the areas described above. It encompasses counseling clients on antitrust issues that arise in their businesses, providing antitrust compliance instruction, and conducting audits of client records to spot and deal with actual and potential antitrust problems. Companies that are particularly sensitive to antitrust issues, such as those with very high market shares, often require annual or semi-annual audits. Others, such as trade associations, require the presence of antitrust counsel at meetings to protect against accusations that the attendees engaged in illegal collusive activity.

This chapter will focus on issues relating to price fixing and Hart-Scott-Rodino filings and the steps involved in counseling clients in these matters.

Evaluating a Client's Situation and Price fixing Risk

The first thing a law firm typically does when working with a new corporate antitrust client is develop an in-depth understanding of the client: its structure, its products, the markets (both geographic and product) in which it competes, who its suppliers, customers and competitors are, what its methods of doing business are (particularly its methods of pricing and distribution), and whether it has a history of antitrust problems or litigation.
The single biggest risk that any company faces, and the single most devastating antitrust violation that a company can commit, is price fixing with one or more competitors, also known as “horizontal price fixing.” Companies and individuals involved in horizontal price fixing risk huge criminal fines—even jail time—as well as massive civil suits in the form of class or individual actions. In such civil suits, the company faces the prospect of paying triple damages—usually three times the profits earned on the price-fixed products. Accordingly, with any client our first priority is to help them avoid even the appearance that they may be involved in price fixing (or other collusive horizontal activity that affects prices such as market or customer allocations or output restrictions) with competitors. So during a client evaluation we want to find out whether the client is involved in industry meetings or other situations where company officials with pricing authority have the opportunity to get together with their counterparts at the company’s competitors.

Vertical pricing issues do not carry as great a risk of catastrophic liability as price fixing or other collusive horizontal activity. Nevertheless, vertical price and non-price restraints do carry risk as well. So company lawyers will also examine a company’s distribution scheme to determine, for example, whether a company actually sells goods to the wholesalers, uses agents, or sells on consignment. As a general rule under the antitrust laws, when a supplier sells its goods and passes the title to the goods down the chain of distribution, the supplier may not set the resale price of the product, i.e., it cannot require the distributor to charge a specific price for the product. This law can prove troublesome for suppliers who sometimes have a good reason to want to control the resale prices of their products. Companies such as luxury goods makers may feel that if their products are too deeply discounted it will undermine much of their marketing. Antitrust counsel can help these clients determine legal methods to maintain the upscale, high-end image that they are seeking to foster for their products.

**Helping Clients Understand Price fixing**

Clients usually know that price fixing is illegal. But they often don’t understand that simply discussing present or future prices with competitors or even just talking about past pricing can be dangerous. Attorneys must
educate clients on this pitfall. To establish a horizontal violation, a prosecutor or plaintiff must prove that two or more competitors reached an agreement to stabilize or raise prices, divide markets, or restrict production. But they need not have proof of a written or other formal agreement. Evidence that competitors discussed prices or the market followed by what appears to be coordinated activity can serve as circumstantial evidence and form the basis for an indictment and conviction or a civil suit. Any sort of competitor collaboration that affects prices can be considered price fixing. Even agreements not to raise prices or not to offer promotions can be a violation.

On the vertical side, at times, a company will observe that other companies seem to control the prices at which their goods are sold in the marketplace, so they will assume that they should be able to do the same. But, as noted above, once a product is sold, a company may not control the price at which it is resold. There are, however, legitimate ways around that law that allow a manufacturer to have some component of control over resale pricing.

For example, if a company sells to a distributor, the company can suggest a sticker price (e.g., the manufacturer’s suggested retail price or “msrp”) to the distributor. This retail price is just a suggestion; the company cannot actually force the item to be sold at that price. If a company seeks greater control over retail pricing, it can, rather than sell its goods to the distributor, have the distributor act as its agent and pay the distributor a commission on the sale. Under such circumstances it is perfectly legal for the company to tell the distributor what to charge. Consignment sales can be used to achieve the same purpose.

**Price Fixing and Financial Risk**

There are severe financial and reputational implications associated with antitrust violations, especially with price fixing and other collusive horizontal activity. A company convicted of price fixing under Section One of the Sherman Act faces corporate fines for each criminal violation of up to $100 million—possibly even more if the amount of commerce affected is large. Individuals convicted of antitrust violations face fines of one million
dollars, plus up to ten years in jail, per count. And that is not the end of a company’s exposure. Criminal convictions are typically followed by civil suits in which parties injured by the price fixing conspiracy sue for three times their actual losses. Civil plaintiffs are entitled to recover their attorney’s fees and costs of suit as well. In major price fixing conspiracies the total damages can reach into the hundreds of millions or billions of dollars. Moreover, because of a quirk in the antitrust laws, any one or combination of guilty companies can be forced to pay the entire damage award without the right to sue its co-conspirators for contribution.

There’s more. If a company in the business of government contracting is convicted of violating the antitrust laws, it could be debarred, i.e., temporarily or permanently denied the ability to bid on government contracts. This can result in the company being put completely out of business. Antitrust violations destroy businesses and ruin reputations; they must be taken very seriously by all companies.

**Working with Individuals in the Company**

The first person with whom an attorney works on these issues is usually either the general counsel or another individual from the client’s legal department. Where the company does not have in-house lawyers, the outside firm must communicate with employees from the CEO on down about the dangers of antitrust violations. Everyone in the company who’s in a position to commit the company to an action that could violate the antitrust laws must be educated about the potential catastrophic losses that can result if a company is found guilty of criminal price fixing and other potential antitrust liabilities.

This includes the CEO and other high-level decision-makers. CEOs sometimes think it is no big deal to talk about business with other CEOs, but some significant cases have been made based on CEO-to-CEO communications. CEOs therefore must be the first to be educated about price fixing and antitrust risks. On the next level are many employees with pricing authority.
We, and most law firms with substantial antitrust practice groups, offer compliance seminars to their clients to help educate them to antitrust risks and how to avoid them. We also offer antitrust audits—periodic review of company records to help spot and prevent trouble. One reason for such audits is that the DOJ has a generous leniency policy for companies that uncover and report illegal collusive activity.

In sum, the single most important advice antitrust lawyers can give their clients is how to avoid even the appearance that they may be engaged in collusive activity—and particularly price fixing—with their competitors. The advice should also include tips on how to extricate oneself from a situation where a competitor raises a subject that you think verges on dangerous territory and instructions to report any such situations to company antitrust counsel.

**Hart-Scott-Rodino Filings**

Congress passed the Hart-Scott-Rodino (“HSR”) Act in 1976 to bring order to the then-chaotic process of merger review, i.e., the process whereby the government antitrust enforcement agencies decide whether a merger would violate the antitrust laws. The act requires companies or individuals planning mergers, acquisitions, or joint ventures of a minimum size to notify the DOJ and Federal Trade Commission (“FTC”) of their plans and wait thirty days while the agencies conduct a preliminary antitrust review based on the parties' initial Premerger Notification Reports. The parties may not close until after the expiration of this waiting period, which the government can extend if its initial review suggests the presence of antitrust problems.

HSR compliance is important—parties that fail to timely file HSR premerger notification are subject to fines of $11,000 per day running from the date they close through the running of the waiting period once they do file.
Evaluating a Deal for Filing Requirements

Anytime a company is considering a transaction, it should contact its antitrust attorney—preferably early in the process—explain the elements of the deal, and inquire as to whether the company must file HSR pre-merger notification. The attorney then informs the company of the cost, whether it must file, who pays for it, how long it will take, and whether there are likely to be any antitrust problems associated with the transaction.

When determining whether a filing is required, the first question asked is the value of the transaction. If it will exceed $53.1 million, then the next level of analysis involves the size of the companies. If the companies are below certain size thresholds, then even though the transaction might be large enough, the companies may not be required to do a filing. Basically, if a party on one side has $10.7 million in total assets or annual sales and the other party has $106.2 million in total assets or annual sales, then both thresholds are satisfied and HSR reporting will probably be necessary. If the transaction is valued at more than $212.3 million it is reportable without regard to the size of the parties.

There are, however, several exemptions that may allow the parties to avoid reporting even if the transaction and the parties exceed the size thresholds. For example, certain acquisitions of real property or carbon-based reserves are exempt as are certain acquisitions made solely for the purposes of investment and many foreign transactions. Whether a transaction is exempt is often a highly technical question that requires careful reading of the extensive regulations that accompany the HSR Act.

Filing a Pre-Merger Report and Gaining Approval

Depending on the size of the company and the transaction, the preparation of a pre-merger notification and report can take anywhere from a day or two to a few weeks. The acquiring company must list all of its sales of products in the U.S. broken down into a series of categories called the North American Industry Classification System Codes (NAICS). If the client has not maintained its sales data on that basis, then the antitrust attorney must work with the company to help reclassify their sales into
these new categories. This process can be time consuming because it entails the categorizing of every sale. Some companies have thousands of products, and each one must be assigned to one of these categories. Companies must also provide financial information and lists of subsidiaries and of major shareholders.

Probably the single most important part of a company’s pre-merger report is what are known as its “4C documents,” i.e., documents submitted by the filer in response to item 4C of the pre-merger report form. These are documents created by or for an officer or director of the company that analyze the proposed transaction from a competitive standpoint. The DOJ and FTC take very seriously a company’s obligation to provide these documents, which are often quite helpful to the agency in analyzing the likely competitive outcome of the transaction. Consequences for failure to comply can be severe. If the agencies finds out after the fact that a company improperly withheld 4C documents, they can in effect rule that the report and the clearance that was received as a result of the report are void. In such a situation, the company will be found in violation of the Hart-Scott-Rodino Act and will be subject to paying a fine of $11,000 a day dating back to the time the deal was closed until the report is re-filed and clearance obtained.

Antitrust attorneys therefore must emphasize the importance of properly searching for and producing 4C documents. Moreover, because of the delicate nature of 4C documents, antitrust attorneys should, if possible, be consulted before they are created. 4C documents are often created by marketing staff or investment bankers working for the company who want to make the transaction sound great. Unfortunately, they sometimes over-hype the likely competitive consequences of the transaction. Such documents can act as red flags to regulators and even be used as evidence if litigation occurs. One of the functions of antitrust lawyers is to become involved early and ensure that the client is careful about what they write about the transaction both in formal documents and in e-mails.

Another danger to be wary of throughout the reporting process is the practice known as “gun-jumping.” The DOJ and FTC do not appreciate it when companies begin to act as if the transaction has already been
completed while the agencies are still reviewing it for antitrust compliance. What constitutes legitimate due diligence or planning for post-closing integration and what constitutes gun-jumping raises some fuzzy issues on which antitrust counsel should be consulted. This is no laughing matter—in 2003 the DOJ obtained a $5.67 fine from Gemstar and TV Guide for gun-jumping in connection with the merger of their interactive program guides.

Once all parties to the transaction have filed their reports with the government and the acquiring party has paid the requisite filing fee ($45,000; $125,000; or $280,000 depending upon the size of the transaction), there is a thirty-day waiting period during which the DOJ and FTC take a first look at the proposed transaction to determine whether they think it might harm competition and hence violate the antitrust laws. If they quickly decide it won’t, which is very often the case, they can opt for early termination of the thirty-day waiting period. That termination can occur as quickly as seven to ten days after the filing.

Conversely, if the investigating agency sees a potential problem, it might come back to the companies during the thirty days and ask for more information on an informal, voluntary basis. This information might include a list of the parties’ ten biggest customers, their annual purchases for the last three years, and the contact information for individuals at the customers who can answer questions regarding their opinions on the transaction.

Probably the single most important factor in the government’s review is finding out what the parties’ customers think about the proposed deal. If the customers say they think the transaction will increase efficiency, improve the quality of the products, and not result in higher prices, the government will be much more likely to view the transaction favorably. Companies can benefit from preparing their customers before they file, encouraging them to understand why and how the transaction will affect them positively.

If the investigating agency is still not satisfied after these steps are taken, it can, at the end of the thirty-day period, serve a request for additional information, known informally as a “second request.” This second request
is usually a very extensive request for documents, answers to written questions, and possibly interviews. The issuance of a second request extends the running of the waiting period until thirty days after the company recipients of the request have fully complied with it. A second request typically calls for the production of hundreds of thousands, or even millions, of documents. Compliance can postpone a closing an additional several months.

Sometimes the information provided in response to the second request satisfies the government that the transaction will not harm competition and they simply allow the parties to close. If not, the investigating agency will negotiate with the parties in an attempt to find ways to change the transaction that will eliminate the agency’s antitrust concerns. Settlements can take the form of structural remedies, such as divestitures, or conduct remedies, such as licensing. If the parties and the agency cannot agree, the government can sue in federal court to enjoin the transaction as in violation of the antitrust laws. While such litigation is rare, it often generates major headlines, witness, most recently, the DOJ’s unsuccessful attempt to block Oracle’s takeover of PeopleSoft.

**Keys to Success**

It is important that companies planning a transaction get their antitrust attorneys involved early. Antitrust attorneys can sometimes help structure a transaction so that HSR reporting is unnecessary. The attorneys can also get an early start on preparing the HSR report so that preparing the report itself does not hold up the transaction. Counsel can help position the transaction so that it is more likely to receive easy clearance by helping prevent the creation of embarrassing 4C documents and by helping prepare company officials and customers to answer government inquiries. Throughout the process, counsel can advise the client on how to avoid gun-jumping. Finally, the more familiar the company’s attorney is with the company, the transaction, and the markets, the more effective an advocate he can be when seeking to persuade the agencies to clear the transaction, or, if necessary, when litigating against them.
Douglas F. Broder has practiced for more than twenty-seven years in federal and state courts throughout the United States and abroad. His practice includes providing antitrust counsel to national and international clients in a wide variety of industries, as well as assisting clients in obtaining antitrust clearance for mergers, acquisitions, and joint ventures. Mr. Broder litigates all manner of antitrust matter, including criminal matters, as well as insurance coverage, securities, and other commercial cases. Mr. Broder also has an extensive appellate practice.

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