Private Antitrust Litigation on the Rise
Strategies for Addressing Parallel Proceedings, Defending Claims, and Minimizing Damages

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
C. Fairley Spillman, Partner, Akin Gump Strauss Hauer & Feld, Washington, D.C.
William L. Monts, Partner, Hogan & Hartson, Washington, D.C.
Jeffrey Blumenfeld, Partner, Crowell & Moring, Washington, D.C.

Wednesday, February 10, 2010
The conference begins at:
1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers. Please refer to the dial in/ log in instructions emailed to registrations.

CLICK ON EACH FILE IN THE LEFT HAND COLUMN TO SEE INDIVIDUAL PRESENTATIONS.

If no column is present: click Bookmarks or Pages on the left side of the window.
If no icons are present: Click View, select Navigational Panels, and chose either Bookmarks or Pages.

If you need assistance or to register for the audio portion, please call Strafford customer service at 800-926-7926 ext. 10
For CLE purposes, please let us know how many people are listening at your location by

• closing the notification box
• and typing in the chat box your company name and the number of attendees.
• Then click the blue icon beside the box to send.
Antitrust Litigation: Initial Strategies from a Plaintiffs’ Perspective

C. Fairley Spillman
Akin Gump Strauss Hauer & Feld LLP
fspillman@akingump.com

February 10, 2010
Defining Objectives

What is the Business Problem You are Trying to Solve?
- Market access?
- Unfair business practice?
- Pricing issues?
Defining Objectives (cont’d)

What do you want?
- Change in behavior
- Money
- A piece of the action
- Some combination
Defining Objectives (cont’d)

- Consideration of Non-Litigation Options
  - Negotiation
  - Threaten litigation
  - Engage antitrust agencies
Defining Objectives (cont’d)

- Consider the Costs
  - Litigation expenses (that’s the easy one)
  - Business disruption
  - Impact on business relationships
  - Disclosure of your confidential business information
    - Can you rely on protective orders?
Defining Objectives (cont’d)

- Any skeletons in your closet?
- Tendency of litigation to take on a life of its own
  - Creation of expectations
- What is your exit strategy?
Stating An Antitrust Claim

- Impact of Twombly/Iqbal
  - Current state of the law – confused
  - Practical considerations
Stating An Antitrust Claim (cont’d)

- Can you state a *per se* claim?
- Can you articulate antitrust injury?
- Defining the relevant market(s)
Stating An Antitrust Claim (cont’d)

- Potential Claims in Addition to Antitrust Claims?
  - Contract claims
  - Tort claims
  - State competition law claims

- Pros and Cons of Pursuing Multiple Theories
Venue

Know your Options
- Consider state court options

Key Considerations
- Precedent
- Attitude toward MTD
- Attitude toward stay on discovery while MTD is pending
- Docket conditions
Discovery Plan

- Sufficient Information to Prove Key Elements of Claim
- Useful Information vs. Settlement Pressure
- Comprehensiveness vs. Quick Resolution
- Disruptions to Plaintiff’s Business
Experts

- Key at all Stages
- Assistance in Developing
  - Theory of harm to competition/antitrust injury to plaintiff
  - Definition of relevant markets
  - Market power analysis
  - Anticompetitive impact vs. pro-competitive effects
  - Discovery
  - Damages
Choosing Experts

Core Consulting Expert(s)
- Prior work in industry
- Prior work on similar issues
- Good working relationship

Testifying Expert
- Prior relationship with consulting expert
- Industry/issue expertise
- Scholarship consistent with theories of case
Should be considered where offending practice affects significant numbers of customers

- But consider consistency with business objectives
Class Actions (cont’d)

Additional Considerations for Class Action Plaintiffs

- Surviving MTD may be more challenging, but more rewarding
- New developments in class certification standards – practical implications
- Does CAFA effectively rule out proceeding in state court?
PRIVATE ANTITRUST LITIGATION

Strategies from the Defendant’s Perspective

William L. Monts III
Hogan & Hartson LLP
555 Thirteenth Street, N.W.
Washington, D.C.  20004

February 10, 2010
Defendant’s Initial Considerations

• Early Settlement or Litigation
  ➢ Business Practice at Issue Important to the Defendant?
  ➢ Reasonable Prospect of Success?
  ➢ Will Settlement Lead to Multiple Actions?
  ➢ What Does Plaintiff Want?
    ▪ Money
    ▪ Conduct Remedy/Business Solution
    ▪ Both
    ▪ What is the “Real” Amount in Controversy?
Defendant’s Initial Considerations (Cont’d)

- Putative Class Action
  - Named Plaintiff Have Reasonable Chance of Obtaining Class Certification?

- Prospect that Overall Cost of Early Settlement is Less Than Cost of Litigation or Litigation Plus Later Settlement?
Initial Assessment of the Merits

- Nature of Case Will Shape the Defense
  - Per Se Claim/Quick Look ("Near Per Se")
  - Claim/Rule of Reason Claim
  - Does the Complaint State a Claim for Relief?
Initial Assessment of the Merits (Cont’d)

- Agreement – Necessary for Section 1 Claims and Section 2 Conspiracy to Monopolyize Claims

- Proper Relevant Market – Not Necessary for Per Se Claims

- Market Power, Monopoly Power, or Dangerous Probability of Monopoly Power

- Output Restriction or Some Other Anticompetitive Effect That Outweighs Any Procompetitive Benefits – Not Necessary for Per Se Claims

- Predatory Conduct for Monopolization or Attempted Monopolization Claims
Initial Assessment of the Merits (Cont’d)

• Is the Plaintiff a Proper Plaintiff, i.e. Does Plaintiff Have Antitrust Standing?

➤ In Private Cases, Plaintiff Must Allege and Prove Antitrust Injury

▪ Injury that the Antitrust Laws Are Designed to Prevent

▪ Injury that Flows from an Anticompetitive Aspect of the Practice at Issue
Initial Assessment of the Merits (Cont’d)

- Other Elements of Standing Inquiry
  - Is Plaintiff Directly or Indirectly Injured?
  - Is Plaintiff’s Injury Remote from the Alleged Violation?
  - Is the Chain of Causation from Alleged Violation to Alleged Injury Speculative?
  - Are There Other Parties Better Situated to Challenge the Alleged Violation?

- Did the Plaintiff Bring the Claim Within the Four-Year Statute of Limitations?
Other Early Considerations

• What Are the Business Rationales for the Challenged Conduct?

- Identify and Interview the Relevant Decisionmakers and Persons Implementing the Practice and Get Relevant Documents

- Do Not Be Surprised if the Business Personnel do not Explain the Rationale for the Challenged Practice in “Antitrust” Terms
Other Early Considerations

- Personnel Often Know that a Practice “Works” but May Not Be Able to Explain Why That Is So
- Lawyers and Expert Economist Should Be Able to Take Facts and Fit Them Into Relevant Antitrust Analysis

- Filing of Motion to Dismiss
  - Prospect for Success
  - Setting Up a Motion for Summary Judgment
Shaping the Defense

• Retention and Use of Experts
  ➢ Testifying Experts vs. Consulting Experts
  ➢ Expert Economist
    ▪ Necessary for Rule of Reason Cases
    ▪ Many Conspiracy Cases, Especially Those Turning on Circumstantial Evidence of Conspiracy, Often Have Substantial Economic Analysis
  ➢ Industry Experts/Other Experts
  ➢ Keep an Eye on Daubert Issues
Shaping the Defense (Cont’d)

• Experts Are Useful in the Shaping of the Defense Story
  
  ➢ Development of Discovery Requests/Assistance with Deposition Preparation
  
  ➢ Putting the Business Rationales for the Challenged Conduct into “Antitrust” Terms
  
  ➢ Offering Compelling Economic Justifications for the Challenged Practice
Discovery, Summary Judgment and Trial Preparation

• Discovery and Summary Judgment
  ➢ Prospects for Summary Judgment
  ➢ What Element or Elements of the Claim?
    ▶ Defendant Should Know Where Plaintiff Will Have Trouble Proving its Case
    ▶ What Facts Must Plaintiff Admit? What Facts Can Plaintiff Not Controvert?
    ▶ Are Those Sufficient for a Grant of Summary Judgment?
    ▶ What Else Is Needed?
• Simplifying the Story
  
  ➢ Major Challenge is Simplifying the Story and Making It Interesting
  
  ➢ Even with Experienced Judges, Economic Reasoning May Be Difficult
    
    ▪ Why Does Conduct Makes Sense for the Defendant’s Business?
    
    ▪ Why Do Consumers Benefit/Not Harmed?
    
    ▪ Why is Plaintiff Not Injured/Lack Damages?
Litigation, Trial, Settlement

February 10, 2010

Jeffrey Blumenfeld
jblumenfeld@crowell.com
Business decision

» Don’t allow litigation to take on life of its own
  – Keep business objectives in mind
  – Constantly weigh continuing vs settling
  – Be sure law firm understands/shares perspective

» Cost/Benefit analysis
  – Out of pocket costs
  – Management time and attention costs
  – Does settlement number get bigger or smaller as result of continuing to litigate?
Distraction costs to business

» True for both plaintiff and defendant
» Effect throughout company
  – Direct effect on management
    • Running litigation vs running the business
  – Effect on everyone
    • Direct effect of supporting management of litigation
    • Indirect effect on morale
» Difficult to estimate
» Difficult to over-estimate
» Often greater than out-of-pocket costs
Discovery

» Whoever knows the most and knows it first, wins

» But
  – Very expensive
  – Very burdensome
  – eDiscovery has increased cost and burden
  – Cost in management time and attention
Discovery

» Determine own strategy
  – Know the facts
    • “everything” vs “enough”
  – Effect on opponent
  – Courts increasingly active in supervising

» Control own strategy
  – Resist being drawn into opponent’s
  – Frequent cost/benefit analysis
Getting Ready for Trial

» Willingness and ability to go to trial is crucial
  – Key issue in choosing law firm
  – Key factor in driving settlement
  – Key factor in ability to resist settlement

» Developing trial theme(s)
  – What happened
  – Need to tell a story
  – Have to convince trier of fact
    • Judge vs jury
  – Has to account for all significant facts
  – Must align with expert testimony
Getting Ready for Trial

» If pretrial is art of knowing everything, trial is art of leaving most of it out
  – “Where’s Waldo” effect
» Need to climb out of the weeds
» Different set of skills from pretrial litigation
Getting Ready for Trial

» Think visually: Important role of trial graphics
  - Planning throughout preparation
  - Help trier understand your issues
  - Help trier see issues your way
  - Trials are boring

» Testifying expert(s)
  - Good ones speak English
  - Not an academic exercise
  - What issues need an expert?
  - How many are enough?
  - Avoid duplication, risk of contradiction
  - Know their histories
Settlement

» Plaintiff: what best serves business objective(s)

» Defense: value of preserving business practice at issue
Settlement - Plaintiff

» Business objectives drive settlement strategy
  – Why did you file?
    • Market access
    • Unfair business practice
    • Pricing issues
  – What do you want?
    • Change in behavior
    • Money
    • Better/unique business terms for future
  – What is your relationship to defendant(s)?
    • Key/strategic to ongoing business
    • No future business relationship
Settlement - Defense

» Class action: “just money”
  – Earlier-in get better deals
  – Straight business decision
    • costs of settling vs costs of litigating
  – Civil cartel cases usually some % of class period revenues

» Individual plaintiff(s): possibility of more creative settlement
  – Business deal going forward
    • with or without cash component
  – Preserving strategic business relationships
Litigation, Trial, Settlement
February 10, 2010

Jeffrey Blumenfeld
jblumenfeld@crowell.com