



presents

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:

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Antitrust Litigation: Initial Strategies from a Plaintiffs' Perspective

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

February 10, 2010

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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

A Few Words About Class Actions

- 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



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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?
 - Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Plaintiff Must Allege Sufficient Facts that Violation is Plausible. Conclusory Allegations or Rote Recitation of the Elements of a Claim Are Insufficient. *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Initial Assessment of the Merits (Cont'd)

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

Discovery, Summary Judgment and Trial Preparation (Cont'd)

- 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?

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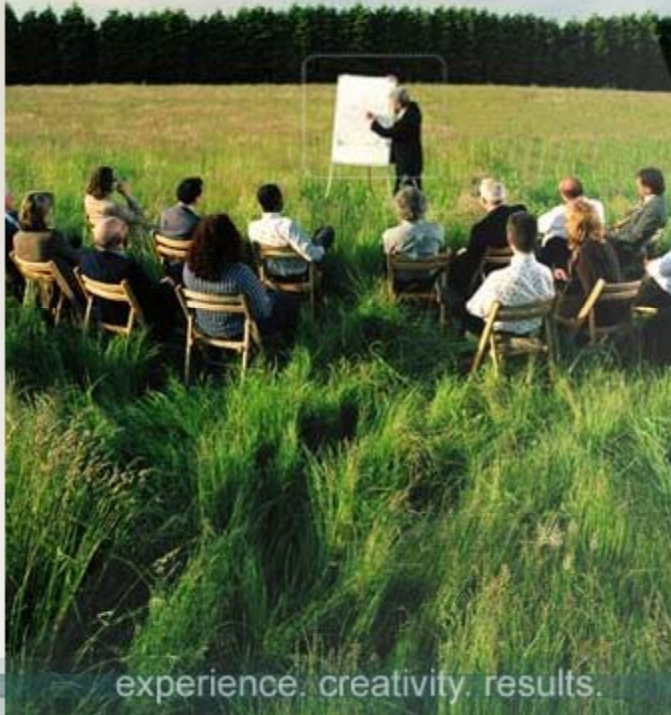
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Litigation, Trial, Settlement

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

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Jeffrey Blumenfeld
jblumenfeld@crowell.com

