Antitrust Risk Management – Effective Techniques for In House Counsel

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Joseph F. Winterscheid is a partner in the law firm of McDermott Will & Emery LLP and is based in the Washington, D.C., office. Joe is head of the Firm’s global Antitrust & Competition Practice Group and his practice focuses on U.S. and international antitrust law.

Joe regularly advises clients on competition issues in mergers, acquisitions and joint ventures, including U.S. and international premerger notification requirements. His experience also includes counseling on matters related to pricing and distribution practices, intellectual property licensing arrangements and e-commerce initiatives. Joe’s sectoral experience has encompassed a wide range of industries, including air transport, automotive products, chemicals, consumer goods, defense, health care, industrial products, pharmaceuticals, specialty metals and fabricated metal products. According to Chambers USA: America’s Leading Lawyers for Business, Joe “commands enduring client loyalty for his ability to transform legal theory into practical reality.”

In addition to being recognized as a leading antitrust lawyer in Chambers USA, he has also been listed in Euromoney Legal Media Group’s Guide to the World’s Leading Competition and Antitrust Lawyers; Global Competition Review’s International Who’s Who of Competition Lawyers; The Best Lawyers in America; as a leading lawyer in his field by The Legal 500 United States; as a Washington, D.C. “Super Lawyer” by Law and Politics; and as a recommended competition lawyer in Practical Law Company’s Cross-border Competition Law Handbook.

Joe’s extended bio can be found at: http://www.mwe.com/Joseph-F-Winterscheid/
Jon B. Dubrow is a partner in the law firm of McDermott Will & Emery LLP and is based in the Firm’s Washington, D.C. office. Jon is a member of the Firm’s Antitrust and Competition Practice Group. He focuses his practice on defending mergers, acquisitions and joint ventures before the Department of Justice, the Federal Trade Commission and foreign competition authorities, as well as antitrust and commercial litigation.

Jon regularly counsels clients on a broad range of antitrust issues including information exchanges, teaming agreements, joint venture ancillary restraints and distribution practices. Jon has also handled a wide variety of antitrust claims in litigation, including Sherman Act monopolization and conspiracy claims involving a variety of conduct such as alleged price fixing, market allocation, tying, "bundled discounts," "aftermarket" parts and services, theft of trade secrets, defamation, other business torts and other alleged anticompetitive conduct.

Jon has long term, ongoing representations in several highly regulated industries, such as medical products (biotech, medications and devices) and aerospace and defense products which allows him to monitor trends and efficiently provide advice informed by multiple prior matters.

Jon is AV rated by Martindale-Hubbell and is listed in Who’s Who in American Law. He was also ranked as a leading antitrust lawyer in The Legal 500 United States. Jon frequently publishes on issues of interest in competition law, including the antitrust chapter in the ABA’s “Best Practices in the Acquisition of a Government Contractor.”

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Carla A. R. Hine is a partner in the law firm of McDermott Will & Emery LLP and is based in the Firm’s Washington, D.C., office. She focuses her practice on antitrust and consumer protection regulatory matters.

In her antitrust practice, Carla has significant experience counseling clients on matters relating to mergers and acquisitions, competitor collaborations, information exchanges, trade associations, distribution practices, and compliance with the Hart-Scott-Rodino (HSR) Act and international merger notification regimes.

She defends mergers and acquisitions before the U.S. antitrust agencies and international competition authorities, and has experience with administrative, so-called Part III litigation before the Federal Trade Commission (FTC).

Carla regularly provides antitrust counseling on transactions – from helping clients identify transaction partners, trying to avoid potential government inquiry, advising on permissible pre-closing activities, defending transactions before the FTC or Department of Justice (DOJ), and responding to Second Requests and Civil Investigative Demands.

Carla has been selected for inclusion in the Washington, D.C. Super Lawyers—Rising Stars Edition 2013. Carla is a Fellow of the American Bar Foundation, and is actively involved in the American Bar Association’s Section of Antitrust Law, and serves as the Vice Chair to the Trade, Sports, and Professional Associations Committee.

Carla’s extended bio can be found at: http://www.mwe.com/Carla-A-R-Hine/
Clark Silcox is Secretary and General Counsel to the National Electrical Manufacturers Association (NEMA). He has overall legal responsibility for NEMA’s legal compliance program as well as internal compliance with NEMA policies and procedures, including compliance with NEMA’s Standardization Policies and Procedures. He also promotes industry and consumer awareness about counterfeit electrical products and law enforcement in protection of intellectual property rights.

From 1992-2002, he was a member of the management committee of the Capital Goods Standards Coalition, a coalition of equipment manufacturers and trade groups representing equipment manufacturers following the development of ISO and EU standards relating to the safety of machinery, and participated on the U.S. TAG reviewing the ISO machinery safety standards.

Mr. Silcox worked closely with U.S. machinery manufacturers in developing educational programs for members and other capital goods groups about the EU Machinery Safety Directive and the standards developed in connection with that Directive. Part of this education program focuses on the importance of risk assessment in a company safety and liability prevention program. Mr. Silcox has spoken before a number of organizations on the issue of Standard Development Organization tort liability. He currently serves as a member of the American National Standards Institute’s Intellectual Property Rights Policy Committee.

Mr. Silcox is also a member of the Board, American National Standards Institute (ANSI) and a member of the ANSI Intellectual Property Rights Policy Committee.
THE NEW ANTITRUST ENFORCEMENT CLIMATE: IMPLICATIONS FOR IN HOUSE COUNSEL

- Ever-increasing antitrust risk and enhanced potential rewards have resulted in heightened emphasis on antitrust compliance.
- In house counsel are therefore seeking ways to step up antitrust compliance efforts given tightening legal budgets and limited resources.
- Today’s program is directed at helping you to meet these challenges. . . How to get the biggest bang for your antitrust compliance buck.
- No “one-size-fits-all” solution, but there are many common elements for companies that already have formal antitrust compliance programs in place, those considering initiating such programs, or those simply trying to selectively focus on high-risk areas.
Specifically, we will try to help you identify potential antitrust “hot spots” and provide practical guidance on how you can manage your antitrust risk in these areas:

- Dealings with competitors, ranging from business combinations to collaboration arrangements and trade association involvement
- Antitrust “hot spots” in intellectual property matters
- Antitrust “hot spots” in distribution practices, including special challenges facing companies with high market shares

We will conclude with some practical pointers on antitrust compliance generally.
Sherman Act Section 1: Prohibits agreements in restraint of trade
Sherman Act Section 2: Prohibits exclusionary conduct by dominant firms
The Robinson-Patman Act: Depression-era small business protection statute that prohibits price discrimination and the granting of discriminatory promotional allowance and services
FTC Act Section 5: Prohibits unfair methods of competition and deceptive trade practices
Clayton Act Section 7: Prohibits anticompetitive mergers, acquisitions and joint ventures
ANTITRUST COMPLIANCE HOT SPOTS: INTERACTION WITH COMPETITORS

- Section 1 of the Sherman Act: Prohibits agreements in restraint of trade
  - Limited to “unreasonable” restraints
  - Covers agreements between competitors (“horizontal” agreements) and between suppliers and customers (“vertical” agreements)
  - The term “agreement” has a very broad meaning under Section 1
- Assessment of whether a restrictive agreement constitutes an “unreasonable” restraint of trade determined under one of two legal standards:
  - Per se rule: “Hard core” violations such as price fixing, bid rigging, market allocation between horizontal competitors are automatically illegal and potentially subject to criminal prosecution
  - Rule of reason analysis: Balancing test applied to efficiency-enhancing collaborations between competitors and vertical restraints; exposure confined to potential civil liability

Strict legal standard and potential criminal exposure dictate that interaction with competitors should be a prime focus of antitrust compliance efforts
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<tr>
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<th>Per Se</th>
<th>Rule of Reason</th>
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<tr>
<td>Horizontal</td>
<td>Hard core offenses:</td>
<td>M &amp; A</td>
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<td></td>
<td>- Price fixing</td>
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<td>- Market allocation</td>
<td>Teaming arrangements</td>
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<td>- Bid rigging</td>
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<td>Vertical</td>
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<td>Distribution practices</td>
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<td>- Caveat: RPM under state law</td>
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Per se treatment/criminal exposure limited to hard core conduct between competitors; but wide latitude for virtually all other business practices under rule of reason analysis
MERGERS & ACQUISITIONS

- Pre-merger notification requirements for transactions of a certain size
- Failing to notify can result in large fines - $16,000 per day
- Even transactions that are not reportable can be investigated and challenged
  - Enforcement priority at FTC/DOJ
- Acquisition of minority interest in a competitor
- Need to continue to operate as separate companies until closing or may run afoul of antitrust laws for “gun-jumping”

Government is aggressively challenging acquisitions – large and small
WHAT KINDS OF DEALS RAISE ISSUES?

- Transactions between significant horizontal competitors
  - Either or both of the companies have a dominant position in the market
    - E.g., combination of two leading suppliers
  - Reduction in the number of competitors to just a few
    - \(2 \gg 1\) = challenge
    - \(3 \gg 2\) = challenge
    - \(4 \gg 3\) = likely challenge
    - \(5 \gg 4\) = likely ok (as long as not two leaders)

- Vertical foreclosure
  - If company is acquiring a key input, agencies may be concerned about foreclosure of a step in the supply chain to other competitors

- Transactions with “hot documents” indicating post-acquisition pricing power

These merger review principles will guide antitrust evaluation of many non-merger antitrust matters – as we will see
PRACTICE POINTERS

- Identify whether transaction is likely to get a close look
  - Control documents being created
  - Advise on risk, timing, cost, etc.

- Prior to closing – control process to avoid gun-jumping
  - Should not exchange highly competitively sensitive information such as current and/or future pricing
  - But can do integration **planning**
JOINT VENTURES/COMPETITOR COLLABORATIONS

- Many potential valid purposes
  - Integration of productive resources to achieve efficiencies that benefit consumers
  - Creation of new or different product (see Broadcast Music v. CBS, 441 U.S. 1 (1979))
  - Increases the availability of a product (But see NCAA v. Board of Regents, 468 U.S. 85 (1984) (applying rule of reason in holding that the venture decreased output))

- Competitor collaborations that are not full mergers also raise many antitrust issues around their overall impact on competition and the necessity for any ancillary restraints
  - Marketing collaborations
  - Production collaborations
  - R&D collaborations
  - Formation of jointly owned business
JOINT VENTURES/COMPETITOR COLLABORATIONS (CONT’D)

- Most JVs, provided there is sufficient integration, evaluated under rule of reason – similar to the competitive assessment of mergers
  - Do the efficiency or innovation benefits outweigh the restraints on competition that result from two competitors acting together?
- Does it pass the “ancillary restraints” test?
  - Restraints on competition are typically upheld if they are ancillary to the purpose of the joint venture and narrowly tailored to achieve the venture’s objectives
  - “Naked” restraints can be *per se* unlawful – so you need integration
  - Avoid “spillover” issues

Legitimate ventures properly structured will generally survive rule of reason analysis as long as other strong competitors remain
PRACTICE POINTERS

- Do a merger-type review – Is there enough remaining competition?
- Make sure you have an integrated venture to get to a rule of reason analysis
- Evaluate whether restrictions are reasonably necessary to achieve procompetitive benefits
  - Limitations on JV competition with parents?
  - Access to competitively sensitive information?
- Ancillary restraints can be problematic even if the core purpose of the JV is lawful
TEAMING AGREEMENTS – A SPECIFIC TYPE OF COMPETITOR COLLABORATION ON A SINGLE CONTRACT

- Government contractors agreeing to work together to pursue a contract
- Permitted by the Federal Acquisition Regulation
  - May still violate antitrust laws
- Potential for criminal exposure if a naked agreement with no integrative efficiencies
- Rule of reason where there are potential increases in efficiency
  - Clearly procompetitive if neither firm would be able to compete independently
- Merger review principles generally govern the analysis
  - Horizontal: Is it a 3 ≫ 2 or a 10 ≫ 9 deal?
  - Vertical: Are there other suppliers of the input?

Even though teaming is commonplace, it may still create competitive issues
PRACTICE POINTERS

- Understand early what the business is contemplating
  - Why is team necessary?
  - What competition will remain for the procurement?

- Understand what the documents will show
  - Business people can become experts in telling the lawyers what they need to hear to bless the deal

- Customers’ views will be very important
  - Important to identify the relevant “customer”
BIDDING CONSORTIA – A COLLABORATION AMONG BUYERS

- Sometimes separate companies will join forces as a **buyer**, creating antitrust concerns (monopsony)
  - Two companies bid together to purchase another entity at auction
  - Frequently occurs in land rights acquisitions
- Often there are legitimate reasons, e.g.,
  - Don’t want entire asset (and therefore would not bid at all)
  - Can’t afford entire business
- Can’t be done simply to reduce price seller receives
- If structured for legitimate reasons to enable a bid, will usually pass muster
Counsel needs to understand

- Why is it being done?
- Are there other likely bidders?
- Will it be disclosed to seller in advance?
- Is it in compliance with bidding rules?
TRADE ASSOCIATIONS

- Because trade associations necessarily involve a group of competitors, they are subject to scrutiny.

- Wide range of trade association activities are permissible, e.g.,
  - Legislative efforts
  - Industry PR

- Nevertheless, trade association gatherings/meetings can raise serious issues
  - “Rump sessions”
  - Group boycott issues (see, e.g., Indiana Fed. of Dentists v. FTC, 476 U.S. 447 (1986))
  - Information exchange programs
SOFTWARE DEVELOPMENT

- Personnel attending trade association meetings should be sensitized to the issues.
- Review agendas prior to meeting if possible and ensure minutes are taken during the meeting.
- Have an understanding of what trade associations are relevant to your business:
  - What types of activities do they engage in?
  - How are they structured?
  - Where and how often do they meet?
  - Who is allowed to join and what are membership requirements?
  - Does association have antitrust counsel and antitrust guidelines?
- Avoid discussions before/after formal sessions.
- Counsel should review any proposed “benchmarking,” standard setting or statistical reporting activities.
JOINT PURCHASING ARRANGEMENTS

- Typically analyzed under rule of reason because of procompetitive benefits, such as achieving economies of scale and taking advantage of volume discounts (see *Northwest Wholesale Stationers v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985))

- Enforcement agencies recognize the procompetitive benefits of legitimate joint purchasing arrangements (see FTC/DOJ Antitrust Guidelines for Collaborations Among Competitors; FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care)

- To qualify for rule of reason, efficiency-enhancing integration must be present to avoid per se condemnation as “buyers cartel” (see *United States v. Alaska Brokerage Int’l*, No. CR-06-0011 (W.D. Wash., filed Jan. 17, 2006))
PRACTICE POINTERS

- Ensure that joint purchasing activities involve integration of joint purchasing function and can identify procompetitive benefits
- Know if you are in a “safety zone”
  - Less than 20% of costs:
    - If the participants are downstream competitors, the cost of the products and services purchased jointly accounts for less than 20% of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement
  - Less than 35% of purchases:
    - Purchases account for less than 35% of the total sales of the purchased product or service in the relevant market
- Have freedom to purchase some product outside of arrangement
- Have independent third party negotiate on behalf of members
EMPLOYMENT PRACTICES

- Agreements not to hire each other’s employees – can be per se illegal
- Agreements as to wages and benefits – can be per se illegal
- Agreements not to solicit each other’s employees – not clear if per se illegal, but DOJ believes per se rule applies
- Non-compete clauses and no-hire provisions are common in connection with mergers, acquisitions, and joint ventures
  - Because they are ancillary to legitimate business purposes, they are subject to the rule of reason
Participation in wage and/or benefit surveys should be reviewed in advance by counsel.

Non-solicitation agreements must be supported by legitimate business reasons and properly tailored to meet those objectives, e.g., limited in duration, territory, job description.
PRICE SIGNALING

- Can raise Section 1 issues and can be per se illegal if acted upon
- Includes affirmative statements in press releases and investor calls as well as answers to analysts’ questions.
- In re Delta/AirTran Baggage Fees, No. 1:09-md-2089-TCD (N.D. Ga., Aug. 2, 2010) (complaint sufficiently alleged defendants colluded to raise prices by signaling each other through earnings announcements and in response to analyst questions, motion to dismiss denied)
- Even absent an agreement, invitations to collude may be challenged under FTC Act (see Decision & Order, U-Haul Int’l., Inc., FTC File No. 081-0157 (July 14, 2010); In re Valassis Communications, Inc., F.T.C. No. C-4160 (April 19, 2006) (consent order))
PRACTICE POINTERS

- Examine the targeted audience and tailor the communication to reach that audience
- Avoid commenting on what competitors or industry “should” do
- Train employees that if competitors “signal,” consult with counsel before responding
- Document independent pricing and output plans contemporaneously
- Highly concentrated industries are at higher risk
Historical tension between antitrust policy and IP rights
  - Tension captured by the very notion of a “patent monopoly”

Enforcement agencies recognize legitimacy of IP, so long as IP holder’s conduct does not exceed the boundaries of its statutory “monopoly”
  - Ongoing scrutiny of IP practices that are arguably “out of bounds”

Challenging area for in house counsel since potential issues cut across entire antitrust spectrum and may impact ability to enforce IP rights
  - Licenses, patent pools, patent settlements, and other contractual arrangements may implicate Section 1 of Sherman Act
  - Transfer of IP rights, including sole and exclusive licenses, may implicate Section 7 of Clayton Act as asset acquisitions
  - Single-firm conduct by holder of “patent monopoly” may implicate Section 2 of the Sherman Act
  - Section 5 of the FTC Act has been used to attack practices that allegedly violate the “spirit” of the antitrust laws
  - Antitrust violations may be raised as affirmative defenses when company seeks to enforce IP rights
ANTITRUST HOT SPOTS IN INTELLECTUAL PROPERTY

- New pre-merger notification rules relating to transfer of exclusive rights to pharmaceutical patents
- Reverse Payment (aka “Pay-for-Delay”) Agreements
- Fraud related to standard-setting organizations (SSOs)
  - SSOs often require or encourage disclosure of patents held by members in the context of a pending standard
  - Members who violate disclosure obligations and later seek to assert patents on anticompetitive terms can violate the antitrust laws
- Patent Assertion Entities (“PAEs”)  
  - Also known as “patent trolls”
  - FTC seeking to gather information on PAEs “to develop a better understanding of how they impact innovation and competition”
ANTITRUST COMPLIANCE HOT SPOTS:
SALES/MARKETING PRACTICES BY DOMINANT
(OR NEAR DOMINANT) FIRMS

- Section 2 of the Sherman Act: Prohibits monopolization and attempt to monopolize
- Monopolization offense has two elements: (1) Possession of monopoly power (presumed at 70% market share); and (2) monopoly position has been achieved or maintained through exclusionary conduct
- Examples of exclusionary conduct:
  - Refusal to deal
  - Predatory (below-cost) pricing
  - Exclusive dealing
  - Tying
  - Bundled discounts
  - Patent misuse
- Key takeaway: conduct that is perfectly lawful for a small firm may be unlawful if undertaken by a dominant player
- Even short of dominance, market-share screen (+/- 30% share) also informs rule of reason analysis under Section 1

Sales and marketing practices of companies with high market shares are subject to heightened antitrust scrutiny; antitrust compliance efforts should likewise focus on sales/marketing practices in these areas

Caveat: No market share screen under the Robinson-Patman Act; prohibition against price discrimination applies regardless of seller’s market share
ANTITRUST HOT SPOTS IN DISTRIBUTION PRACTICES BY DOMINANT FIRMS

- Loyalty/market share discounts (compare Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000) and ZF Meritor)
- Bundled discounts (compare LePage’s Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) and Cascade Health Solutions v. PeaceHealth, 542 F.3d 668 (9th Cir. 2008))
Resale price restrictions
- Resale price maintenance: *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) established rule of reason standard under federal law, but still viewed as illegal per se in several states (including Maryland)
- Minimum advertised price (“MAP”) programs: special caution needed in e-commerce

Category Management: Heightened risks associated with “co-captaincy” initiatives
- Risk of collusion between “co-captain” competitors
- Risk of “boycott” claims by excluded competitors

Robinson-Patman Act: Heightened risks in the internet age
- Real-time price transparency producing more price discrimination inquiries/complaints by customers
- Website co-marketing between suppliers and major customers as a promotional allowance/service
PRACTICAL POINTERS FOR EFFECTIVE ANTITRUST COMPLIANCE

- **It starts at the top:** Visible and active support and involvement by senior management is essential

- **Consistent messaging:** Legal compliance is not a “legal” function; it is a core company value that will not be sacrificed for financial results

- **Effective educational tools:** Abstract policy statements alone are insufficient; employees must know precisely what is expected of them through training and guidelines (with focused guidelines on specific areas such as trade association involvement, Category Management, group purchasing, etc.)

- **Keep it simple . . . and personal:** Training and guidelines should focus on key risk areas and provide practical guidance; online training, while a useful supplement, is not a substitute for live interaction

- **Open lines of communication:** Employees must be encouraged to raise issues and concerns immediately and contact personnel must be clearly identified; enlist key “gatekeepers” to assist

- **Stay in the loop:** Establish clear direction on matters that require prior legal approval/review (e.g., new trade associations; meetings with competitors; resale price controls; business plans)

- **Law Department as business partner:** Position Law Department as a resource in facilitating legally compliant solutions to business issues