INSIDE THE MINDS

THE ART & SCIENCE OF ANTITRUST LAW

LEADING LAWYERS ON COMPETITION, LITIGATION AND GLOBALIZATION

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The Soul of a Modern Antitrust Lawyer

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Wanted: Renaissance Lawyer, Committed to a Long-Term Antitrust Career

Antitrust law is cross disciplinary, which is both its challenge and its joy. It involves mergers, joint ventures, licensing and other corporate transactions; litigation, in both courts and regulatory agencies here and abroad; and counseling on the entire range of marketing, pricing and distribution activities a modern corporation encounters. The skilled practitioner must understand reverse triangular mergers, be facile in negotiating the corridors of the Federal Trade Commission, and seamlessly shift from writing compelling "white papers" on the markets for finite element analysis software to a federal court motion for summary judgment based upon lack of antitrust standing. He or she must walk with equal ease among bankers and bureaucrats, Boards of Directors and judges, salesmen and CEOs. The foundation for all this is a life-long commitment to learning the law, policy and economics of antitrust—even as it changes in the face of global and dynamic economic forces.

The successful antitrust lawyer is a trusted counselor with deep understanding of the client's business, products, strategies and market dynamics. He or she is a facilitator, not an obstacle; an educator, not an adversary; creative, rather than rule-centric; and dedicated to the constant learning required to stay abreast of global antitrust law and policy. Antitrust is a jealous mistress, demanding full and long-term attention to a breathtakingly wide range of issues. The American Bar Association's Antitrust Section, for example, has fully 26 separate committees, focusing on topics as diverse as Intellectual Property, Health Care, Consumer Protection, Economics and State Antitrust Enforcement. Issues for the antitrust lawyer may arise from any of these arenas at any time; merely spotting those issues can be a daunting task in itself. But for those bitten by the bug, that rich diversity in substance, process, forum and skill sets is the joy of an antitrust practice.

Litigation

The litigation pillar in an antitrust practice includes regulatory litigation, such as cases brought by the Department of Justice (DOJ) or the Federal Trade Commission (FTC) to challenge mergers viewed as anticompetitive. The FTC's successful challenge to the merger of Staples and Office Depot is a recent example. Typically these cases are determined in well under a year, or the mergers are simply abandoned. Government non-merger enforcement actions are another active field, such as the celebrated and long-running DOJ case against Microsoft. There has also been a steady stream of grand jury investigations and criminal charges brought by the DOJ against Archer-Daniel-Midlands and various international cartels in recent years. Antitrust litigators also engage in private litigation, instigated by individuals or companies seeking injunctive relief and trebled damages. Antitrust class actions, in particular, carry the risk of enormous potential monetary verdicts against losing defendants. Private actions often ride shotgun to government investigations or enforcement actions for such offenses as price fixing or allocations of customers by erstwhile competitors. It is not uncommon for antitrust litigation to rumble on for years, costing millions of dollars, before resolution.

Regulatory Antitrust

A second antitrust pillar is mergers, acquisitions and joint ventures that are reviewed by the antitrust agencies of the United States and the European Commission. Practicing in this arena essentially revolves around defending mergers—*i.e.*, convincing the Department of Justice, the Federal Trade Commission or foreign competition agencies that the newly combined company or strategic alliance will not substantially lessen competition in any relevant market, and so should be permitted to close without further government intervention. The regulatory antitrust lawyer is also increasing asked to seek the antitrust agency's help in resisting mergers the client may feel are anticompetitive (and, of course, harmful to it and to consumers). When the government nevertheless decides to challenge a merger, and no consent decree can be negotiated, the matter heads to federal court on an expedited track to a preliminary injunction hearing. The regulatory antitrust lawyer is often thus instantly transformed into a federal court litigator.

Counseling

The third pillar of antitrust is counseling, which can cover the entire gamut of corporate conduct involving competition. Generally, this entails advising companies on compliance with antitrust laws in their marketing, pricing, distribution, and sales activities, as well as in their collaborative conduct such as licensing intellectual property, joint R&D or marketing agreements, strategic alliances, participation in trade association or standard setting bodies, and a host of other activities that risk running afoul of the antitrust laws here and abroad. The task here is minimizing risk—helping to structure programs or agreements so as to accomplish the corporate purposes with minimal risk of later antitrust litigation or government enforcement.

Purpose of the Antitrust Laws

The foundational antitrust statutes have been around for many generations. The granddaddy of them all is the Sherman Antitrust Act, enacted in 1890 to counter the enormous concentrations of economic power gathered by John Rockefeller's Standard Oil and hundreds of other trusts—giant corporate enterprises that were seen as threatening the very core of democratic processes and free markets. The Supreme Court has called the Sherman Act "a comprehensive charter of economic liberty" *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). The purpose of the Sherman Act, and other antitrust laws that followed, was to protect not competitors, but the competitive process, ultimately bringing the benefits of the free market to consumers. Adam Smith eloquently stated the core principle of our antitrust laws in his 1776 classic, *Wealth of Nations:*

"Freely operating competitive markets will result in the most efficient allocation of a nation's scarce resources and will bring consumers the widest variety of choices and the lowest possible prices."

The Sherman Act's Section One declares illegal "contracts, combinations and conspiracies" that unreasonably restrain trade—i.e., which may cause harm to competition. In its Section two, the Act bars the predatory use of monopoly power and attempts to create an unlawful monopoly. It was – and still is – viewed that a company with monopoly power or market power is capable of raising prices or engaging in predatory conduct unrestrained by the competitive environment. This result is a profound risk to the competitive process and, ultimately, harmful to consumers in a free market economy.

Beyond the Sherman Act lies a panoply of other trade regulation statutes that are both playing field and rule book for the antitrust lawyer: The Robinson-Patman Act, for example, prohibits forms of price discrimination in the contemporaneous sales of commodities for resale.

The Clayton Act bars, among other things, mergers that may lessen competition. The FTC Act bars a range of anticompetitive behaviors, as do multiple state antitrust and unfair competition laws.

The Antitrust Lawyer's Commitment

The first purpose of the corporate antitrust lawyer is to give strategic business advice that enables the client to conduct business as it must, without running afoul of the antitrust laws and with the lowest possible risk of entanglement in government enforcement or private litigation. Failing that, the job becomes defending the client: mitigating any damages or delays and quickly restoring the company to its proper pursuit of building shareholder wealth.

It follows from my comments above that an enormous commitment to learning, leavened by experience, is a prerequisite to practicing antitrust law at the highest levels. Even so, the vast tundra of antitrust increasingly demands specializing on more limited geographies.

For myself, after fifteen years of complex litigation, I began focusing on two of the three pillars – antitrust counseling and merger and acquisition work before U.S. and international antitrust agencies. The nature of my firm's client base – we represent many technology companies, large and small – has led me to focus on corporate representation, particularly at the intersection of antitrust and intellectual property issues. With apologies to those with far different and perhaps broader antitrust experience, the discussion that follows will necessarily revolve around the technology mergers and counseling with which I am most familiar. I am confident, however, that the fundamental points apply equally to other and disparate parts of the antitrust landscape.

The most effective antitrust lawyers today, however specialized they may be, will have somehow gathered knowledge and experience in all three of the pillars I have described: litigation, counseling, and transactional/regulatory. The starting point, however, is a firm commitment to conquering, over and over again, the substance of antitrust law and policy. That is a moveable and never-ending feast, deterring all but those truly interested in the history, economics and confluence of antitrust and American business. Required is continuous study not only of cases, but also of governmental enforcement policies as revealed by speeches, conferences, business review letters and formal guidelines emanating from the antitrust agencies of this country and elsewhere.

Challenges and Myths Facing the Modern Antitrust Lawyer

Perhaps the three most important client challenges for an antitrust lawyer are: 1). Becoming deeply knowledgeable about the client and its business; 2). Convincing the client that you are there to help, not hound; and 3). Getting in on a potential problem or transaction early enough to minimize client risk. Those challenges are heightened by a number of antitrust "myths" in the business community.

Know your client

You must commit to study and fully understand the companies you represent – their products, markets, industries and trends. A good antitrust lawyer simply cannot provide effective strategic advice in a vacuum. Antitrust has few hard-edged, black-and-white rules that may equally be applied to different situations and different clients. You have to understand the particular client and the markets in which that client operates. You have to understand their business and their distribution and marketing strategies. You have to understand their competition, now and going forward. Only then should you apply the antitrust laws, with a heavy dose of both good judgment and creativity that ideally will enable the client to do what they want with minimal antitrust risk. The most knowledgeable lawyer, unfortunately, can be blocked by the myth and mysticism of antitrust among businesspeople.

One of the most common and fractious myths with clients is that antitrust is an obstacle to good business – a roadblock to go around or, when necessary, to crash right through. A stake needs to be put through the heart of that perceived wisdom. One of my fundamental precepts as an antitrust lawyer is this: If a decision makes good business sense, it is unlikely to raise an antitrust problem. Conversely, if a transaction or distribution channel or license or competitor collaboration will ultimately lead to conflict, is internally inconsistent, or has contradictory purposes, the antitrust risks are higher. Simply put, the antitrust laws and good business are neither inconsistent nor mutually exclusive. That simple truth is, for me, the heart of good counseling.

To illustrate: The client wishes to create a new channel of distribution: on-line resellers, who may expand overall sales of our products. Our existing brick and mortar distributors, however, see new competition, so the client intends to bar the online folks from advertising their prices (or discounts) on the web. This raises an antitrust issue: resale price maintenance. The issue arises only because the client is creating a competing channel of distribution, and then trying to put band aids on the conflict by restricting that competition—perhaps illegally. This problem can be resolved in various ways—all involving lessening the business conflict between distributors or channels in their resale of the product. For example, the online sellers can be a commission sales force, leaving our client as the actual seller and price-setter to the consumer. Or the channels can be legitimately restricted to certain geographic or customer markets that structurally limit opportunities of different channels to come into competitive conflict. The result: both a business benefit and, when done properly, a lessened antirust risk.

When I have a client that wants to do something that raises antitrust problems, if I drill down far enough, the client and I will often discover that the particular conduct or the transaction they are considering really does not make very good long-term business sense. It may be inherently contradictory, or trying to solve one problem by creating a worse one. Typically, these situations are revealed as invariably raising business problems down the road, even if generating some short-term benefit. Talking the client through what will actually happen in the field after the decision is taken, and considering the longer term, can illuminate both the business and antitrust risks. This is one reason why it is so important to understand the clients' business. An informed counselor can usually get to a solution that enables the client to make a smart business decision without raising serious antitrust problems.

Another example: My client sells three different products: computer servers, software applications, and related services. We have a joint marketing agreement with another company that sells competing computers and software, but has no service capability. Their software is better than ours, but we have the necessary service capability and can sell the full line that many large customers want. So we have agreed to collaborate: our client's service capabilities may be packaged with their computers and software, so that we get at least some piece of sales we otherwise might lose.

Thinking through the business relationship, invariably the competitor will be selling these bundles that include our services to at least some of the same customers to whom we have traditionally sold all three products. Conflict is inevitable between the sales forces, whose commissions depend on selling as many of all three products as possible. It is perfectly acceptable under antitrust law to have a joint marketing agreement on the services, where the companies don't compete. But when the salespeople are trying to sell all three products at the same time to the same customers, the inevitable incentive will be for those sales forces, left to their own devices, to resolve the conflicts by agreeing on how to share customers, or on what the pricing should be to avoid undercutting one another.

Obviously, for two competitors to set prices, apportion customers or divide markets in order to eliminate competition between them is a hard-core violation of the Sherman Act. This is a good example of a business relationship in which serious business tensions will inevitably develop in the field. These issues are likely to lead the companies into an antitrust problem when sales forces react to that tension by dividing markets or competitors. The solution has to be a collaboration that will minimize business conflicts, thereby as well lessening any antitrust risk.

Similar issues arise with proposed mergers that, carefully considered, make little long-term business sense. Such deals typically have antitrust problems with them as well, which can prove disastrous for one or both of the companies.

If two companies, for example, do the exact same thing, are primary competitors, and have little in the way of complementary assets, products or technologies, their merger may very well be problematic for the antitrust agencies. The business reality, correspondingly, is that such a merger may also prove to be a serious financial mistake, despite the short-term attraction of eliminating a pesky competitor. The first arbiter will be the stock market, if public companies are involved. Analysts and arbitrageurs will weigh in with opinions about both whether the merger benefits customers and shareholders, and also how likely it is that the antitrust agencies will permit the deal. Billions of dollars in capital can flow from the companies in the days after announcement of an unwise deal.

Next, customers will vote with their purchase decisions. The greater the "fear, uncertainty and doubt" engendered by the transaction, the greater the loss of business. Especially for targets in announced mergers with antitrust risks, the lost sales during the months before close can be dramatic and debilitating. Finally, employees make their judgment. Rather than awaiting the uncertain axe that will fall months later, many valuable personnel—often heavily recruited by competitors during these periods—depart.

Typically, mergers having no rationale beyond eliminating a competitor imply significant employee losses, the scrapping of duplicating brand names and product lines, major customer disruption (and dissatisfaction) and huge write-offs of goodwill down the line.

Among all mergers in over the last decade, more fail than are successful; the fatality rate among those having few synergies (and antitrust issues) is much higher. For those, more often than not, the end result of the millions or billions of dollars paid is a company that is essentially worthless a year or two later, with little net gain in customers or competitive position. Mergers that do not bring any real value or efficiency to the acquiring party tend to be the very ones that raise antitrust problems for the DOJ, FTC or EC. Eliminating a competitor as the sole reason for a merger is simply not a very effective business strategy in the long run. This may be one of the antitrust lawyer's most important messages and contributions—*before* the deal is signed.

Get in Early

Early antitrust counseling benefits the client in almost all circumstances, but can have particularly dramatic value in high-stakes mergers and acquisitions. As an antitrust lawyer, you want to be involved early in the consideration of any merger with a competitor. You should be analyzing, with the client, whether this deal will get reviewed by the government, how burdensome that review will be, and how likely it is that the transaction will be challenged by the U.S. or European antitrust agencies. Those antitrust judgments need to be made before the client signs a transaction document or announces publicly the agreement to merge.

Hewlett Packard's acquisition of Compaq a couple of years ago is a vivid example of a best case. In one of the largest technology mergers in history at about $18 billion, the antitrust lawyers did a great deal of work before any agreement was signed or announced. Working with the companies, bankers and economic consultants, antitrust counsel analyzed where the two companies' products overlapped, in which geographies they competed, who the other competitors were in those markets, what the market shares and barriers to entry were, and how the markets should be properly defined—or would likely be defined by the FTC and EC when they looked at the merger. Pre-merger analysis also included:

- How concentrated the markets were;
- How current market shares would change if the companies merged;
- Whether the combined company would have the power to raise prices to supra- competitive levels; and
- The likelihood that the combined company would be able to reduce the R&D or innovation competition that had existed between them before the merger.

After rigorous antitrust review and due diligence, HP and Compaq went forward with their agreement to merge, announcing it publicly and sparking intense interest by both the U. S. Federal Trade Commission and the EC, among others. Antitrust review consumed less than six months—relatively short for a transaction of this scope—and ultimately all agencies cleared the merger with no required changes. The ability of antitrust counsel to get in early and to prepare thoroughly enabled the parties to make the strategic decision with antitrust comfort; early study also greatly enhanced the odds of approval, and expedited the antitrust clearances worldwide.

HP/Compaq and other technology mergers have highlighted an increasing focus by the government in recent years on whether or not certain mergers remove the incentive for companies to do research, to innovate and develop new products. When technology companies have three or four vigorous competitors, each of those competitors pushes the others to invest heavily in R&D to improve or develop new products. A merger with a primary or only competitor that has been forcing innovation may pose a danger that the combined company will start resting on its laurels, cutting back on its R&D, and slowing the pace of innovation—to the detriment of consumers. That harm is just as destructive to an efficiently operating free market as raising prices or cutting back on production. Lessened innovation is the other side of the coin, with particular relevance for technology company mergers. No review by counsel is complete without carefully assessing the merger's impact on innovation, as well as product, competition.

Advising the Board

Mergers between significant competitors require a very fact-intensive antitrust analysis before the merger is agreed to or announced. The business risks can be so great, if a merger is delayed or threatened by antitrust investigations, that the Board of Directors has a fiduciary duty to assess those risks in making its decision about the transaction. The Board should expect antitrust counsel to give them a solid opinion about what is likely to happen on the antitrust front, and recommendations about whether to go forward and, if so, how to minimize the antitrust risks.

The crucial antitrust opinion in mergers covers two issues. The first is whether there is likely to be enough of a competitive concern that the government, after its one-month initial review, will launch a formal investigation by issuing a "Second Request" for information. The second is whether, after a Second Request, the merger is likely to be challenged, leading either to a Consent Decree or abandonment of the deal altogether.

In many respects, the first issue—whether a Second Request is likely—is the more important one for the antitrust lawyer and client. Second Requests cause a delay of at least several months in closing the merger, even if the deal is ultimately cleared. The client and the other party must also expect each to pay millions of dollars in additional costs in attempting to "substantially comply" with the demands of the formal investigation. As described below, a Second Request is an extraordinarily burdensome process. Equally importantly, almost two-thirds of all transactions receiving Second Requests lead to antitrust challenges by the FTC or DOJ. Consequently, it is important for the Board and company management to know whether a Second Request is likely in their deal.

If antitrust counsel are given the opportunity and have the time to make the right kind of thorough analysis beforehand, they can usually make very good judgments for the Board of Directors about what is likely to happen on the antitrust front, and prepare for it. Indeed, proper antitrust preparation before announcement can substantially lessen the likelihood that the antitrust agencies will need a formal, Second Request investigation.

Keeping the Client "On Message"

Another responsibility of the antitrust lawyer is keeping the client on message. That starts even before a merger is announced. Inevitably, there will be flurries of e-mail and documents flying around the company. If the writers are not careful, some of these documents can be inflammatory, hurting the antitrust review of the deal when they come to light. You have to make it clear to your client, early in the deal, to be aware that what will be written may be reviewed by the agency; it may be reviewed in Europe; and it may be reviewed by the state attorney general if he or she gets involved. You must warn your client not to get carried away with overheated statements that will come back to haunt them later:

- If you analyze the deal in an e-mail, don't talk about how you'll dominate the market.
- Don't talk about how you'll wipe out the competition.

These are silly things to say in the best of circumstances, and they certainly will hurt you if they are viewed later by the agencies.

You have to do some sensitivity training about these kinds of issues with a client before the deal is announced. You have a serious role to play in public statements that are made, extending all the way from the press release announcing the merger to the script for the analyst conference call that typically happens on the morning of a merger announcement, and including employee briefings, customer briefings, and follow-on discussions with analysts. All of these occasions need to have a consistent, positive story to tell that is not only real but is also not self-contradictory and does not overlook the importance of how the merger will help consumers.

In many companies doing a deal, the board's primary fiduciary duty is to the shareholders. Often the starting point for any announcements, press releases, discussions, and rationale for the deal is the focus on how great the deal is for shareholders. The antitrust focus is different. The antitrust focus is how the deal will affect customers, and the antitrust lawyer must convey that lesson so that all public statements include that point with whatever else is being said.

The Challenges of a Second Request

For mergers between competitors, the goal of antitrust counsel is usually to have ready to give to the antitrust agency the necessary facts and documents in the first 30-day waiting period, in hopes of avoiding a Second Request. Unfortunately, the period just before reaching and announcing a merger agreement is one of frantic final negotiations, due diligence, planning and preparation for disclosure of the deal to the markets, customers, partners and employees. It can be a serious challenge for the antitrust team to get sufficient client attention during this period. Failing that, the lawyers may be unable to stave off the enormous consequences of a Second Request, and will be less prepared than they should be even to avoid a challenge to the deal.

By getting in early, antitrust counsel can have the key themes and antitrust story worked out, will have gathered the key research and documents required to convince the agency that the deal does not threaten competition, and will have coordinated fully with the other side to enable the presentation of complementary, rather than conflicting stories. One cannot overstate the importance of adequate preparatory work by the antitrust lawyer before announcement if the merger involves competitors and raises antitrust issues.

Most clients never understand how burdensome and costly a Second Request is until they go through one. That is one of the biggest challenges I encounter as a merger antitrust counsel. You can try to explain it ahead of time, but the reality is so difficult for clients that if they have not previously been exposed to a Second Request, the experience is invariably a shock to the system, and sometimes threatening to the transaction itself.

A Second Request takes a huge amount of the client's time at the management level. It typically involves producing hundreds (sometimes thousands) of boxes of documents, including searches of e-mail and all of the company's electronic data, reaching back as much as three years, even into digital archives. The paper and electronic files of 40, 60 or sometimes over 100 different officers and management personnel have to be compiled, searched, reviewed by lawyers for substance and applicable legal privilege, categorized, copied and finally produced to the government. The document production itself—the "easiest" part of a Second Request intellectually—is a huge logistical challenge in these days of electronic digital documents and vast quantities of stored company e-mail. It takes an enormous amount of time and is done at a very high cost. And that is just the document production.

The other part of the Second Request is answering some very complex and difficult interrogatory questions covering all of the company's products, all of its markets, and all of the competition a company faces, as well as the company's plans for research and development. Examples:

- What are the costs of developing and manufacturing each of the competing products?
- What facilities, IP, channels of distribution and other relevant assets do you have?
- What does it cost to enter the affected markets, in terms of time, necessary assets, production facilities, capital, reputation, etc.?
- How difficult is it for other companies to enter your markets, either on a "greenfield' basis or by extension from related product lines?
- What does history show about entry and exit in these markets?
- What barriers to entry exist?
- Who might enter in the future, and under what circumstances?

- What technologies compete, or may be alternatives in the future?
- What have your sales and costs been for each product over the past few years?

Each of these queries call for comprehensive analyses of the entire business and history of a company, not to mention essays on the future. Responded to fully, Second Request answers can run into hundreds of pages of text, tables and data that can take months to prepare. More than one client has told me that they learned a great deal new about their business in responding to a Second Request, and would have done some things differently.

The parties cannot close the merger until 30 days after both companies have "substantially complied" with the Second Request. That is incentive enough to devote enormous resources to completing it as quickly as possible. Apart from the need to "substantially comply" with the questions posed, moreover, antitrust counsel must use the Second Request responses as a platform to tell, and to document, the story on competition that will get the merger cleared.

In its literal terms, a Second Request is physically impossible to comply within all respects. No company can strictly comply with every single demand and instruction—for example, translating into English every foreign language e-mail from the sixteen international subsidiaries using twelve different languages. There is a process of negotiation with the government in which you try to get some narrowing of the request to reduce the job. If the DOJ or FTC is expecting to challenge the merger in court, and so intent on preparing its case for trial—implicit in any Second Request—the disclosures and discovery involved is just enormously difficult to accomplish in less than some months. A Second

Request is the government's only opportunity to do discovery and gather the evidence it may need to launch a court challenge against a merger. By its nature, therefore, a Second Request is very broad. Antitrust counsel engages in an important process of negotiation in the first days or weeks of a Second Request to try to limit its scope. If successful, those negotiations can cut the cost and time for compliance in half. But client assistance is essential—for example, in detailing the jobs and functions up and down the organization chart, and in fully explicating the IT and archived storage systems to demonstrate the burden of certain document searches.

Telling the Client's Story

One perception many clients have is that the government antitrust regulators do not (or cannot possibly) understand their markets and the competitive pressures they face. They feel they may be dealing with people who "just don't get it," who are young, inexperienced, technologically illiterate or who somehow just cannot appreciate how truly competitive their market environment is, and how essential it is for them to consummate this merger, *quickly*. This reaction can mask an unwillingness of the client to dig down and commit to the staggering preparation and work required to navigate the antitrust merger investigation—as in, "Why do you need to know my averages sales price on dual-port timing semiconductors in February of 1999? Don't they see how ridiculous it is to imagine my raising prices in this market?" Antitrust counsel has to break through that resistance, convincing the client that facts, not feelings, will dictate the end result of the government's review; and that the story must be told from the bottom up, fully supported by detailed evidence. If the job of the antitrust lawyer is to convince the agencies about the reality of the marketplace pressures and why, when this deal is done, the combined companies won't be able to engage in any exercise of market power; it is the client's job to help gather the detailed evidence.

Apart from responding to the Second Request demands, the antitrust lawyer has only limited opportunity in the time allowed to educate and persuade the U.S. or European antitrust enforcers about the client's story. In white papers, presentations and letter submissions of evidence tailored to address specific concerns, the antitrust case must be made quickly and clearly. Only if the agencies' questions are dealt with directly and in a compelling fashion can the client expect to escape challenge. Economic analyses by prominent consultants are often helpful as well, though they may come at additional significant expense. Interviews or sworn depositions of client officers are also a key part of many investigations.

Through it all, the client must understand that the agency will be out talking to other competitors and customers, testing everything we tell them against the views of more "objective" participants in the market. For that reason the client must stay close to its key customers right from the beginning, upon announcement of the merger, responding to their questions, encouraging their support and convincing them that this merger will be a net positive for them, even if it raises some competitive issues. If customers are generally not terribly concerned about the effects of a merger, it is unlikely that the government will decide to challenge the deal in court. Part of antitrust counsel's contribution can be counseling the client on how to respond to customer inquiries and curry their support. In fact, a compelling part of the client's affirmative case to the antitrust agencies can be signed declarations by customers willing to support the merger, or customer surveys conducted by third-party consultants.

The goal of the antitrust lawyer is to convince the FTC or DOJ, during the Second Request investigation, that this is not a merger likely to cause anti-competitive effects in the market if allowed. Where the decision is a close call, counsel's job is to demonstrate that a challenge to the deal is not worth the effort, because competitive harm is uncertain, or modest, or outweighed by the benefits to consumers—or because the agency is likely to lose in court, which they are loath to do. Making your case includes all of those things—legal arguments, factual arguments, economic analyses and litigation risk analyses.

Another important requirement for the antitrust lawyer through the whole process is maintaining credibility with the agencies. In fact, personal credibility and integrity is a long-term requirement for the successful merger antitrust practitioner, which cannot be overstated. Most antitrust agencies deal with lawyers who have been practicing in this field for a while. If you develop a reputation for sharp practice, for speaking in a fast and loose manner, being casual about the facts, overstating your case, being too clever by half or misleading the agency in some respect, you will make it more difficult for that client and for all future clients you may have. The agencies will simply follow a practice of testing everything you say, accepting nothing at face value, and not giving you the benefit of the doubt.

If you are an antitrust lawyer who hopes to practice before the agencies long term, you must build and maintain your credibility, and your reputation for honest and straight-forward dealing. You must be known as someone who can be relied on to do what you say you will do and not to overstate your case. It is critical that when you express views or represent facts about the client, competitors or the marketplace, you will be able to support those views and facts with hard evidence.

For the same reason, I have seldom agreed with the "litigation" or adversary style of responding to a merger antitrust investigation. Unless you know at the outset that the merger will be challenged, and your client intends to litigate to a conclusion—which is rare indeed—taking an uncooperative or hostile approach to the agency can only prolong the agony and greatly enhance the risk of an adverse decision. The fact is the DOJ and FTC hold all the cards in a merger investigation; they are the enforcers, with the statutory tools to stop the merger and make the process far more lengthy and costly than it might be. They are also professionals who believe in what they are doing, and who will give due respect to probative factual and legal argument, properly asserted by a practitioner who has earned their respect and trust.

When Mergers are Challenged

As both clients near completing their responses to the Second Request, the process will have been ongoing for some months. You will have produced to the government almost all of the important documents in the company. You as the antitrust lawyer will have learned—perhaps for the first time but hopefully not to your shock—what those documents say. You will have done your economic, legal, and factual analyses, and you will have developed and presented to the DOJ or FTC the arguments for why this transaction is pro-competitive—or at least why it doesn't substantially reduce competition in the relevant markets. That preparation is going on the whole time and is ultimately the preparation needed for trial, as well.

If you get down to a challenge, the reality is that very few of these cases go to trial. The parties abandon more than 90 percent of the transactions that are challenged. In most others, a consent decree settlement is worked out with the government. If the antitrust lawyer has come in to the transaction early, has done the required preparation, and has persuaded the client fully to support the needed antitrust analysis, the government's decision to challenge the deal should come as no great surprise.

Ideally, client and counsel will have anticipated the possibility of a challenge and thought through the possible remedies that could go into a consent decree that would permit the merger to go forward. Remedies may include divesting, or selling off to another competitor, a particular division or product line that will restore the competitive conditions threatened by the merger. Another remedy may be licensing some technology to a competitor if that technology is viewed as critical to enable their competition in the marketplace. Counsel should have thought through the possibilities with the client at the outset. Proposing a remedial settlement is your first line of defense if you think a deal is likely to be challenged.

For those fewer than 10 percent of challenged deals that go to trial, you do go into a new phase at that point, and it all happens very quickly. The case will be litigated. Merger litigation almost always starts and ends with the preliminary injunction hearing. First, the agency files a complaint in federal court. The complaint must be filed within 30 days after "substantial compliance" by both companies with the Second Request, absent mutually agreed extensions of time. The agency in its complaint seeks a temporary restraining order that will stop the parties from closing the deal until a preliminary injunction hearing, which is usually two to three months into the future.

In those two to three months, the government and the companies frantically prepare for the hearing. They get witnesses ready and go back through all the documents they have been working with for months. They look for third-party testimony from customers and perform additional economic analyses. They prepare expert witnesses to testify about the markets, technologies, ease of entry and economic evidence. They conduct depositions of each other's witnesses. All of the classic litigation activity is going on, but it is concentrated in those two or three months before the preliminary injunction hearing, which all view as dispositive of the issues and the merger.

The hearing itself is often just a few days long, with the court issuing its decision days or, at most, a few weeks thereafter. If the court grants a preliminary injunction stopping the merger, that is almost always the end of the game for the merger. If the court denies the preliminary injunction, that is almost always the end of the game for the government, and the parties are free to close the transaction—even if the litigation continues on to trial. Although the judgment is just a preliminary ruling and not the final trial on the merits, very few of these cases ever go beyond the preliminary injunction because a merger can't sit in limbo for a couple of years waiting for a trial. For the government's part, it will seek to unwind a closed merger after losing a preliminary injunction hearing only in the rarest of circumstances.

Change as a Constant

For me, the most interesting antitrust problems in mergers (and in more generalized counseling) are those that involve complex or new technologies in rapidly changing markets. Often enough with technology or life science companies, new products in effect create new markets that have never existed before. Apple's introduction of the PC is a classic example. In antitrust terms, the company that comes out with a wholly new product will by definition have 100 percent of that "market;" perhaps a year or two later, they'll want to acquire one of the new competitors that have sprung up. The antitrust agencies, starting by just looking at market shares and concentration, might well look askance at such an acquisition. Only deeper review and appreciation for the broader technology trends demonstrate why that merger may be pro-competitive despite high current market shares.

For mergers in changing or new markets, the antitrust lawyer has an educational job to do. First, of course, he or she has to learn the new technologies, products and markets. Only then is it possible to do the educational job with the antitrust agencies. This involves enabling them to look out a year or two from now to try to understand what this competitive environment will look like, and helping the agencies realize how rapidly things are changing and how little they should be relying on the static picture of today's market shares.

Those deals can be very challenging for an antitrust lawyer to get through, but they are also very satisfying when you accomplish what you've tried to do. They're interesting because you learn about industry trends and new technology that will change the market as it now exists. That process is often not just informative, but plain fun.

Past and Present: "The More Things Change ..."

Antitrust law, though anchored by the century-old Sherman Act, is in a constant process of change as the science of economics and political policy evolve. The "Chicago School" of economics, which gained ascendancy in the 1970s and 1980s, altered fundamentally many of the views about antitrust – not just in mergers, but antitrust in the broader sense of what companies could and could not do consistent with healthy competition.

For example, if you were a manufacturer, could you legally put restrictions on your distributors about to whom they could sell, or in which geographic territories? Was termination of a distributor, following complaints about its low pricing by competitor distributors, presumptively an illegal concerted action under Section One of the Sherman Act? The Chicago School became a profoundly liberalizing influence on courts and regulators alike, largely replacing rigid rules of *per se* (presumptive) antitrust liability for such conduct with assessment under the far more flexible "rule of reason." Traditional notions of what might be anticompetitive were challenged, to the point where the most evangelical proponents almost seemed to be preaching that antitrust law had very little role to play in free markets. One way or another, they argued, the market would work its way through a short-term competitive restraint and make necessary adjustments far better than courts or government agencies could impose.

The pendulum has swung back in the last decade to a more modest position between traditional, very restrictive antitrust views and the Chicago School "hands-off" extremes. In general, I think antitrust is in a very healthy place right now. Antitrust theology is in a more middleground position, and few would dispute that policy-makers and enforcers are armed with a much better understanding of economics and market forces than existed 30 years ago. As the Chairman of the FTC recently observed after the 1980s: "Antitrust finally regarded enhancing consumer welfare as the *single* unifying goal of competition policy, and it used a policy framework that was based on sound economics, both theoretical and empirical." "Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy," Remarks of Timothy J. Muris in New York, N.Y., Dec. 10, 2002, available at http://www.ftc.gov/speeches/muris/handler.htm. In mergers, progress has been similarly dramatic. The Joint DOJ-FTC Horizontal Merger Guidelines announced in 1982, while perhaps strained by the breakneck pace of change in technology industries, have provided much needed rigor to the agencies' competitive analysis—at the same time giving business and its lawyers more predictability about the outcome of troublesome mergers.

On a more granular level, antitrust trends may appear with new political administrations every four or eight years, leading to subtle policy shifts by government enforcers. Recently, for example, the DOJ and FTC have focused heavily on consolidation in software markets, competitive issues in health care, standard-setting abuses and international cartel activity, to mention just a few initiatives.

Here must be laid to rest is another common myth: That political pressure is a useful tool when the antitrust agencies may not be going your way. The fact is that the antitrust agencies are mature, professional organizations with clear mandates to enforce the antitrust laws. They regularly deal with momentous global transactions involving billions of dollars, thousand of employees, and hundreds of plants, offices and subsidiaries. DOJ and FTC decisions can profoundly alter entire industries. Any taint of political influence would not only be politically explosive, but would threaten the agency's reputation for integrity; that in turn would severely undermine the agency's effectiveness long run.

Calls from a Congressman in the midst of a large merger investigation are therefore far more likely to be counter-productive than helpful to one's position. The agency attorneys and economists reviewing a transaction must make complete and carefully considered, written recommendations to their superiors. At the slightest hint of political pressure, it would be only human for those responsible to be all the more thorough in finding and detailing the bases for their recommendations, so as to be above criticism later. That instinct would normally extend, rather than shorten an investigation, and strengthen what might have been a weaker case. With very few exceptions, my advice to clients is to argue and win your case on the merits. Trying to introduce jack-booted politics into a highly visible, delicate and difficult antitrust investigation is far more likely to backfire than help.

The courts, in any event, continue to be the ultimate definers of U.S. antitrust law. The foundational Sherman Act, like the U.S. Constitution, simply does not, as a practical matter, change. The courts interpret it, and those interpretations of what an "unreasonable" restraint of trade is may change. But the statute is constant, and rulings by the U.S. Supreme Court stand sentry over its integrity. Similarly, Congress seldom tinkers with the substantive provisions of the Clayton Act, which controls mergers. At bottom, therefore, judicial precedent controls antitrust, and the pace of change there, with changes in economic thinking, is relatively slow—providing a stable base for antitrust in a fast-changing business world.

Reliance upon the stable but slowly changed law of antitrust as announced by the Supreme Court carries with it a cost and challenge—well illustrated by current foment at the intersection between intellectual property and antitrust. A whole series of antitrust issues raised at that intersection are the focus of an enormous amount of litigation, government enforcement action, academic research, writing and speaking these days.

Antitrust and Intellectual Property Tensions in the "New Economy"

In recent years the fastest-growing aspects of our economy have been products and services based upon innovation and intellectual property. Despite collapse of the "internet bubble" (primarily a stock market phenomenon), industries based on software, the life sciences, internet services, e-commerce and data storage—to name but a few—have proliferated and increasingly become essential engines of the global economy. At the core of these developments is intellectual property ("IP"). As the former Chairman of the FTC, Robert Pitofsky noted in a celebrated speech: "A major challenge of the next decade is to identify the policies that will allow a market economy to thrive in the context of the intellectual property revolution." "Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy," Remarks at the Berkeley Center for Law and Technology, Mar. 2, 2001, available at http://www.ftc.gov/speeches/pitofsky/ipf301.htm. (hereinafter "Pitofsky Remarks").

There is a natural tension between antitrust and IP, exacerbated by the rising role of IP in the "new economy." Patents, for example, grant exclusive ownership of certain IP for many years—by statute precluding competition within the scope of the patent grant. Patent and copyright laws nobly seek to encourage and reward innovation through such grants of exclusivity. As set forth in Article 1, section 8 of the Constitution, their purpose is to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries."

Protecting innovation is no less a goal of antitrust law. Both IP and antitrust "are aimed at encouraging innovation, industry and competition." *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed Cir 1990). Nevertheless, a host of specific issues have arisen at the intersection of antitrust and IP policy, which have inspired debate and judicial conflict, and which require reconciliation based upon sound economics and public policy in coming years.

FTC Chairman Pitofsky and many others have argued, for example, that our current patent system is flawed: too many patents are being granted too easily by patent examiners who cannot possibly keep up, either with the technologies involved or the flood of new applications (*See* Pitofsky Remarks at note 9). With the pace of change in the new economy, and the risks of harm to competition, perhaps patent protection for business methods and software should be reduced to five years, or even less.

Keeping abreast of changing technologies—indeed, even fully understanding them—is a major challenge not just for patent examiners, but also for the courts and regulatory agencies facing antitrust issues as they intersect with IP rights. A vivid example has been the Microsoft case, which the Department of Justice and numerous states have been fighting for some years now. Though finally settled by the federal government, several states battle on. And the European Commission is just beginning to weigh in with its own challenge to Microsoft's alleged monopolistic and exclusionary conduct. On August 6, 2003, the EC announced that it was on the verge of enforcement action directed at Microsoft's server software and its bundling of applications such as Media Player with the Windows operating system.

By traditional standards, the DOJ's case against Microsoft moved very quickly—certainly at light speed relative to a similar case against IBM in the 1970s. But the litigation has still dragged on for six or seven years. During that time, the operating system market, the browser market, and other markets affected by the Microsoft litigation changed dramatically. Netscape essentially is gone as a competitor at this stage, though exclusionary conduct in the browser market was the original crux of the DOJ's lawsuit.

Microsoft has also demonstrated the difficulties courts have in dealing with complex technologies. The Appellate Court in the District of Columbia, faced with a claim that Microsoft illegally tied its browser technology to the Windows operating system, famously commented on how unsuited courts were to second-guess the company's technical design decisions.

Grasping complex technology and responding quickly will continue to pose serious challenges to antitrust agencies faced with possible anticompetitive conduct. "[L]aw enforcement can rarely equal the speed of change in high-tech sectors." Id. Applying the broad, Constitution-like proscriptions of the Sherman Act to interdict exclusionary conduct—before the technology, the economy, and the companies involved have radically changed—may often be all but impossible. That is the biggest challenge for antitrust today. It remains to be seen whether the courts and the antitrust agencies, using "fast track" procedures, outside experts and other creative solutions, will prove able to act quickly enough to preserve competition in IP-intensive markets.

The FTC, DOJ and other antitrust agencies, by contrast to the courts, are certainly better armed to deal quickly with antitrust issues in the new economy. As a consequence, they have assumed a much more important role in recent years, relative to the courts. Their issuance in the past few years of Joint Guidelines on Intellectual Property Licensing and Competitor Collaborations reflect acceptance of that role. The agencies, unlike the courts, can at least initiate an investigation quickly; they can block a merger within a few months if they decide it will reduce competition. They can seek criminal indictments or civil injunctions quickly if they see a serious competitive problem. Private litigation, by contrast, though bringing to bear the much-touted "millions of private attorneys general"—will invariably will take years to reach resolution. I expect, therefore, that the antitrust agencies will continue to play an ever-larger role in antitrust enforcement.

International antitrust agencies, particularly the European Commission, will also play an ever more significant role in antitrust enforcement. National economies are increasing interlinked and interdependent. We are truly moving to a "global economy." At the same time, antitrust has gone global. With collapse of the Berlin Wall and communist governments has come a movement into democracy-based free market economies by the older Soviet satellite states in Eastern Europe, as well as other countries. Most of those countries are adopting Western-style antitrust laws of one form or another to preserve the competition and free markets they are trying to develop. In many cases they are grafting Sherman Act clones onto cultures and histories far different than our own—not always with coherent or effective results. This transition to free markets presents short-term dislocations as a potpourri of differing national competition authorities assert jurisdiction over U.S. companies doing business across the world.

An example of this problem is the more than 60 countries now that have their own unique merger control laws. Each requires notification by companies when they are going to merge, and each is intended to afford the national competition agencies the opportunity to investigate those mergers—and potentially to stop or impose conditions on them. The sixty-odd national laws have similarities, but each country has its own specific filing requirements and fees, notification form, substantive tests for harm to competition, and regulatory enforcement system. The potential for conflicts is enormous.

These many unique merger control laws have placed a growing burden and cost on multinational companies engaged in mergers or joint ventures. Often merging companies must report to, educate and convince dozens of different antitrust regimes in different countries—some of which have requirements or substantive tests for legality that are contradictory if not mutually exclusive. This tax on international business, often perceived as a sign of economic progress (and source of revenue) by the countries imposing it, is finally receiving some attention. The International Competition Network ("ICN") was recently formed and in September 2002 issued suggested "best practices" for merger notification.

The U.S. agencies have been active participants in the ICN, as have many national merger authorities from both developed and developing countries. In an ideal world, merging companies would be able to file a single notification acceptable in all the different countries asserting jurisdiction. Some sort of coordinated review of the deal by those countries, with a common set of deadlines, would follow. In the perfect world, the result of that coordinated merger review would lead to consistent outcomes in the reviewing countries. That world is years away, and may never arrive. Even less likely is serious substantive convergence in national merger antitrust laws. I remain an optimist. At least there is now hope for more procedural harmony in international merger reviews, even if it may take some years to really mitigate this tax on and deterrent to mergers by multinational companies.

Within the European Union, the European Commission is the operative agency for merger review and enforcement actions against cartels and other restraint on competition. The EC has exclusive jurisdiction within the European Union for very large mergers that meet certain sales or market-share thresholds within Europe, whether the companies involved are European or not. To the extent the EC has jurisdiction, it preempts the reviewing authority of the national agencies, lessening the procedural cost and complexity for mergers.

The EC's one-stop shop has a well established set of rules and substantive antitrust principles quite similar to those in the U.S. Conflicts can still develop, as illustrated by the GE/ Honeywell merger a few years ago. There the U.S. approved, but the EC rejected, the merger after antitrust review, causing great controversy and no small amount of political tension between the countries' enforcement agencies. A central antitrust agency in Europe is still hugely helpful for business certainly, however. And U.S.-EC cooperation in antitrust investigations has been dramatic in the last several years, making far less likely repeats of the GE/Honeywell scenario.

There are a number of specific "hot topics" at this intersection between antitrust and intellectual property, which will fill news reports and occupy the attention of antitrust lawyers for years to come. Even assuming that legitimate patents are properly asserted, various prickly antitrust issues can arise. A patent, for example, can block entry by a potential competitor, making a proposed merger far more problematic in concentrated markets. A portfolio of patents, legally acquired, can put a wall around a market, blocking all entry and leading to higher prices by the protected monopolist. Companies may settle patent litigation by agreeing to cross-license each other and not to license other competitors. A dominant player may withhold IP that is essential for competitors, either in retaliation for a legitimate lawsuit or to remove competition that has become too successful. All of these situations have occurred, and all raise antitrust issues. So too can the misuse of patents, such as asserting patents beyond their legitimate scope, or asserting patents that were fraudulently obtained, or which the holder knows to be invalid, in order to obstruct competition.

The pharmaceutical companies now are getting concentrated attention and review by the Federal Trade Commission in this country, as well as by the European Commission. The FTC, for example, has brought several cases challenging patent settlement agreements between branded and generic drug manufacturers that allegedly delayed the entry of (much cheaper) generic drugs into the marketplace. *See, e.g., Abbott Labs*, FTC Dkt. No. C-3945 (May 22, 2000) (consent order), available at http://www.ftc.gov/os/2000/03/abbot.do.htm.

Other FTC cases have alleged that certain pharmaceutical companies sought to delay generic competition by fraudulent "Orange Book" listings under the Hatch-Waxman Act. These cases involve serious money. When generic drug competitors finally enter the market, the cost of the drugs that have been under patent all those years drops precipitously, sometimes saving consumers billions of dollars a year. In response to these abuses, the FTC last year issued a report, "Generic Drug Entry Prior to Patent Expiration," suggesting some changes in the balance between IP and competition law (*See* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.).

Another hot topic at the antitrust/IP interface is in standard setting. In technology industries, the establishment of standards by formal standard-setting organizations ("SSOs") may be critical to the introduction of new technologies. DVDs, for example, were introduced to the consumer market only after a broad consortium of suppliers had settled on critical technology standards involving both the players and the disks. For DVDs, for cell phones, and semiconductors and hundreds of other technologies, there are formal standard-setting organizations, of which many potential competitors are members. It is important that they be encouraged to come up with standards that will enable the introduction of new products and technologies.

Because standard setting and the integrity of that process are so important, abuses can be correspondingly destructive to innovation and consumer welfare. One abuse can be manipulation of the process by a dominant company seeking to ensure that its technology is adopted, regardless of merit and in violation of SSO rules or fundamental due process. Recent cases have also been brought against SSO participants who have asserted "submarine" patents, seeking windfall royalties, only after an SSO standard has been implemented by participating companies unaware that there was patented IP essential to the standard. The FTC has sued Dell, Rambus and most recently Unocal for alleged abuses of this sort. *See*, *e.g.*, Joseph J. Simons, "Report from the Bureau of Competition," *The Antitrust Counselor* (July 15, 2003).

Conclusion

This essay has focused primarily on the relatively few antitrust venues in which I happen to practice, which should demonstrate the vast reach of this topic, as well as its centrality to a properly functioning free market system. I have discussed many of the challenges for antitrust lawyers. Let me close with some of the joys of this practice.

First, the wide range of antitrust topics stands in sharp relief to the relatively small number of career antitrust lawyers. The antitrust legal community worldwide numbers perhaps a few thousand lawyers who are fully engaged, as a career, in this discipline. Over time, most meet and get to know one another at some level. Professional civility and respect is the typical by-product—by pleasant contrast to the ad hominum attacks that can arise in battles with anonymous adversaries whom one never meets again. The need to maintain credibility with antitrust agencies and adversaries reinforces the tendency to civility and professionalism.

Second, the antitrust community understandably and necessarily is constantly studying its craft. Most practitioners devote a great deal of their time researching, writing, speaking and meeting at conferences and seminars. No less is necessary to keep current, to advance the learning and to educate one another. This intellectual interchange is, for me, one of the paramount joys of an antitrust practice.

Finally, those who practice antitrust most effectively have committed to it for the long term. You don't dabble in antitrust. You don't step in and step out and remain a truly effective counselor. Experience and extended learning are requisites. Those who have made that commitment tend also to be those with a true and enthusiastic devotion to the field. I constantly marvel at the bright, diligent, interesting lawyers I meet who work on the sorts of issues and challenges described above. Most come to be friends with ease. They inspire optimism in even the most challenging antitrust issues.

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In addition to a wide range of intellectual property litigation, including Lotus v. Borland, Mr. Compton has handled numerous private antitrust suits and grand jury investigations involving price fixing, refusals to deal, distributor terminations, price discrimination, group boycotts, and monopolization. He is a frequent speaker, has authored numerous articles in US and international publications, and is regularly called upon to address the issues raised by the intersection of the antitrust laws *and intellectual property. He is an adjunct lecturer in Santa Clara University's IP & Technology LLM program and guest lectures at the University of California Berkeley's Boalt Hall. Mr. Compton is included in Chambers "America's Leading Business Lawyers," 2003-04, and named among "Top Ranking Competition Lawyers in Europe and North America" by Practical Law Institute's Global Competition Handbook.*