FALL 2017

from the Section Chair

Tackling the Time and Cost of Antitrust Litigation

Dear Colleagues,

FOR LAWYERS, ECONOMISTS, and other professionals, antitrust litigation—the focus of this Fall issue of the Magazine—can be rewarding intellectually, professionally, and financially. It is not quite as much fun for our clients. In the long term, we will run into trouble unless we can find a way to make the process less time-consuming and less costly.[1]

Antitrust cases can take forever and cost a fortune. One of the first cases I worked on when starting out in 1976 was a private action follow-on to *United States v. Greater Buffalo Press*.[2] The events leading to that case started in 1954. A grand jury was convened in 1958. No bill was voted out, but Justice commenced a civil suit in 1960. A bench trial took place in 1967, with judgment for the defense. On direct appeal to the Supreme Court (ironically under the "Expediting Act"), the judgment was reversed 9-0 and the case sent back for divestiture of one of the printing plants involved. So much time had passed, however, that by 1973 the case terminated for lack of an interested buyer. The plant could not be sold.

The follow-on case was filed in 1974, taking advantage of the government case tolling of the statute of limitations under 15 U.S.C. § 16(i). The case was litigated for eight more years, after which it settled—long *before* expert reports, summary judgment, or trial. This was 28 years after the relevant events. By the time of settlement, all the principals involved were long gone. And, by then, case law developments in the late 1970s and early 1980s had made the plaintiff's task more challenging.

This is clearly an extreme set of circumstances, but we all have our war stories of similar *Jarndyce*-like events. And we have a true obligation as professionals to do what we can to minimize the time and expense involved. It is no mistake that, while 130 or so nations have followed the U.S. lead to create competition protection regimes, not one has sought to replicate our litigation methodology. And yet none of the newer regimes offers anything like the procedural fairness in outcomes that the U.S. system affords. Is there a way to achieve these same benefits with substantially reduced costs?

The high costs stem from a few different components of U.S. antitrust litigation, most notably from discovery, the use of experts, and motions practice. As antitrust continues to be a fact-intensive area of law, discovery is, of course, key. Likewise, expert analysis of the data, though expensive, is necessary if decisions are to be based on actual facts and economic analysis. The overwhelming time and expense associated with antitrust litigation, however, warrant some critical thinking as to how we can obtain and present the needed facts without miring our clients, agencies, and courts in years-long cases costing millions of dollars. For instance, there must be diminishing returns to the materials obtained during discovery. And perhaps better methods for resolving procedural issues can be implemented, as opposed to, say, convening a room full of lawyers to address more mundane issues such as schedules for briefing of protective orders.

Some strides have been taken already:

- Antitrust was essentially a trial practice until the 1980s, with *Poller* and other cases frowning on summary dispositions.
- *Matsushita* in 1986 made clear that summary judgment is not "disfavored" in antitrust cases, and since then summary judgment has ended a large percentage of the antitrust cases filed.
- Most recently, in 2007, *Twombly* launched a new day for motions to dismiss in antitrust cases. And, although relatively few cases today are resolved on that basis, Rule 12(b) now provides a credible means for ending a baseless case with relatively minor expense.[3]

These steps have helped mitigate the problems, but there is much more that can be done. Consider:

- Abolishing interrogatories for anything other than numeric or equivalent data.
- Imposing a 10 custodian limit on document production, absent good cause shown for more, if sufficiently detailed organization charts are provided at the start.
- Imposing a 10 witness limit on percipient witness depositions, absent good cause.
- Limiting expert reports to 10,000 words.
- Greater use of court-appointed experts.
- Requiring discovery to end within 12 months of when it begins.

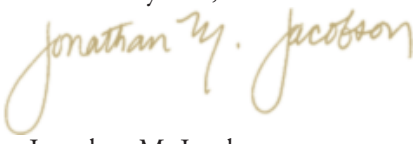
There are of course other measures too, including (through legislation) the imposition on the courts of timing requirements for the scheduling of hearings and trial, as well as the time to decide *Daubert* and dispositive motions. We may also want to consider how creative options like judicial education can contribute to lowering the time and cost associated with antitrust litigation. It is widely recognized that the economic issues underlying antitrust cases can be quite complex and difficult for the typical judge to understand.[4] An ABA Antitrust Section Task Force Report from 2006, for instance, found that only 24 percent of antitrust economists responding to the survey believe judges "usually" understand the economic issues in a case.[5] Some studies suggest that

judicial economic education programs contribute meaningfully to judicial decisions in antitrust cases—and that even additional exposure to antitrust cases is not necessarily a good substitute for such training.[6] Accordingly, continuing our economic education efforts could bolster not only outcomes but processes, as more educated judges likely have both a more accurate understanding of the facts and a better framework for understanding the materials and, accordingly, what does (and does not) need to be done in a given case.

Neither is the issue limited to the judicial branch. Complying with a Second Request or CID can likewise be incredibly expensive for companies. A 2014 survey found the median cost of second request compliance was $4.3 million, with a range of about $2 million to $9 million.[7] Custodian document collection, processing, review, and production is a significant contributor to this expense. While the Agencies typically rely upon the documents from just a handful of custodians in rendering their decisions, they nonetheless routinely require parties to provide materials from upwards of 20–30 custodians. The same 2014 survey found an average of 26 custodians, with a maximum of 171 custodians.[8] There is no reason why most second requests (or CIDs) cannot be handled with 10 or fewer custodians. Approval for more than that should have to come from a DAAG or a Bureau Director.

Antitrust litigation is important, indeed essential. Absent the unusual (and often ineffective) intervention by the Congress, antitrust remains a common law doctrine in the United States, and so litigation provides the main vehicle to establish, maintain, or change the law. But at some point, if things do not change, the companies that pay for all this will say "stop" and Congress will weigh in with solutions none of us will like. Let's make the process more manageable and avoid that outcome. ■

All the very best,



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[1] Many thanks to Elyse Dorsey for her assistance in preparing this letter.

[2] 402 U.S. 549 (1971).

[3] *See* Poller v. CBS, 368 U.S. 464 (1962); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[4] *See* Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. Econ. Persp., Spring 1999, at 91, 96 ("Econometrics is such a difficult subject that it is unrealistic to expect the average judge or juror to be able to understand all the criticisms of an econometric study, no matter how skillful the econometrician is in explaining a study to a lay audience"); Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & Econ. 1, 6 (2011) (finding "a large fraction of judges had little or no prior antitrust experience at the time the decision was made").

[5] Am. Bar Ass'n, Section of Antitrust Law, Final Report of Economic Evidence Task Force, App'x II, at 2 (Aug. 1, 2006), https://goo.gl/yyL1rY.

[6] Baye & Wright, *supra* note 2, at 10 ("Our second finding is that the decisions of judges who attended programs to learn basic economic skills are appealed at the same rate as those of their untrained counterparts in complex cases but about 10 percent less often in cases that do not involve the evaluation of sophisticated economic or econometric evidence. . . . Our results also suggest that repeated exposure to complex antitrust issues is not a close substitute for economic training.").

[7] Peter Boberg & Andrew Dick, *Findings from the Second Request Compliance Burden Survey*, The Threshold (ABA Section of Antitrust Law Newsl.), No. 14 Issue 3, at 26, 33 (2014).

[8] *Id.* at 30.