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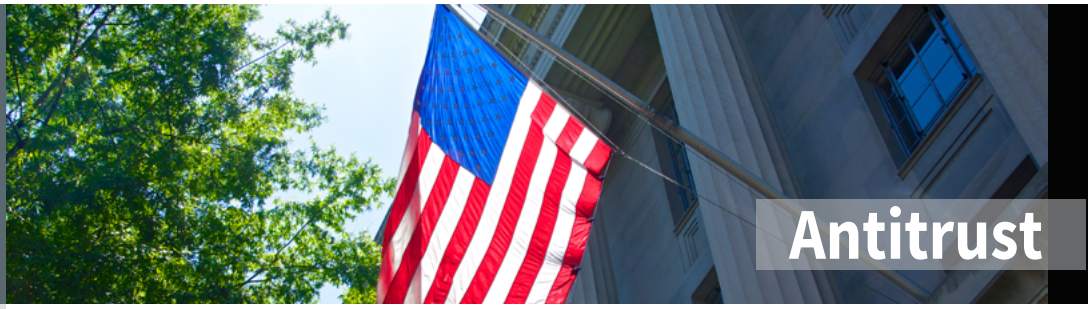

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Becoming the Target of an Antitrust Lawsuit: Essential Considerations

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Becoming the target of an antitrust lawsuit is a daunting prospect for any business. Antitrust lawsuits are often time-consuming and expensive to defend, and the consequences of losing a case can be severe. Under the Sherman Act (the primary federal antitrust statute), a prevailing plaintiff is entitled to treble damages, injunctive relief, and compensation for the costs of bringing the case, including attorneys' fees. In all but the smallest cases, awards can skyrocket into the many millions of dollars. Antitrust cases can also involve significant reputational harm. In the case of certain conduct deemed per se illegal, like price fixing or bid rigging, there may even be criminal liability.

Although all antitrust cases are different and require individualized strategy and analysis, there are some high-level considerations that apply in virtually all cases. This alert provides an overview of these considerations.

1. Engage Qualified Litigation Counsel and Plan Litigation Budget

The first step in responding to an antitrust lawsuit should be to engage counsel with experience defending antitrust lawsuits. Where possible, defendants should consider engaging counsel with experience in the industry in which their business operates. Antitrust law is a broad field with many industry-specific legal nuances. Healthcare antitrust law, for example, has evolved to allow doctors and hospitals to work together to improve patient care in ways that may be problematic in other industries. Heavily regulated industries like pharmaceuticals can be especially complex, since they implicate conflicting and overlapping regulatory frameworks. Engaging counsel with prior experience with these issues can be critical.

Budgeting and cost considerations are an important part of choosing the right firm and developing litigation strategy. Firms often provide cost estimates for each phase of the case based on rates of the attorneys who will staff your case. Flat-fee or contingency arrangements may be an option depending on the case. Once a case moves into discovery, cost considerations may be particularly important, given the very broad discovery that courts permit in many antitrust cases on issues like market power and causation.

Depending on the allegations in the lawsuit, the defendant may have insurance that covers part of the expense of defending the lawsuit. The availability of insurance can play an important role in budgeting and planning. Although "pure" antitrust claims are often not covered under typical commercial general liability policies, many cases involve mixed claims that will fall under some provision of the policy, such as a provision providing coverage for claims arising from "personal and advertising injury."

2. Issue Written Litigation Hold Notices

Both plaintiffs and defendants have a duty to preserve documents and other information that may be relevant to a dispute once they reasonably anticipate litigation. To comply with this duty, parties should issue written litigation hold letters to key employees and document custodians to ensure that relevant materials are retained and not destroyed as part of routine document deletion. Where a party fails to preserve relevant materials, courts can impose a range of penalties based on the severity of the conduct, from a monetary sanction up to the issuance of an adverse inference instruction to the jury, or even the entry of an adverse judgment. Outside counsel can help ensure a defendant complies with this obligation.

3. Consider a Motion for Change of Venue or Motion to Consolidate

If a case is pending in federal court, there are several mechanisms through which a defendant can seek to have the case moved to a different court or consolidated with related cases. A motion for a change of venue can be brought under 28 U.S.C. § 1404 to transfer the case for "the convenience of parties and witnesses" to a different judicial district where the case could have originally been brought. A motion to consolidate may be appropriate if the lawsuit relates to one or more cases already pending in a different judicial district or before a different judge. Federal Rule of Civil Procedure 42 allows for consolidation of lawsuits that involve common questions of law or fact. Meanwhile, the federal multidistrict litigation (MDL) statute, 28 U.S.C. § 1407, allows for pretrial consolidation of certain complex class actions and mass tort cases. Under the MDL statute, cases are transferred for pretrial proceedings and discovery, but remanded back to the original court for trial.

4. Assess the Legal and Factual Sufficiency of the Complaint

Antitrust complaints can have both legal and factual flaws. Legal problems arise when the facts alleged in the complaint, even when taken as true, do not establish a violation of the laws. In other words, it may be that what the plaintiff says is illegal is not actually illegal. For example, a complaint that alleges harm to a competitor without alleging harm to competition would fail as a matter of law. Allegations based on a refusal to deal may similarly fail as a matter of law in many circumstances.

Factual problems occur when the complaint fails to allege facts that provide a "plausible" basis for each element of the antitrust claim. For example, if the plaintiff alleges a violation of Section 1 of the Sherman

Act, which requires the existence of an agreement in restraint of trade, the plaintiff must allege "plausible grounds to infer an agreement." Simply stating in the complaint that there was agreement is not enough. Similarly, for antitrust claims that require proof of market power, the plaintiff must allege facts about the market that provide plausible basis for believing that the defendant indeed had market power, or the power to charge supra-competitive prices. Failure to plead these facts for any essential element provides strong grounds for a motion to dismiss the lawsuit.

5. Begin the Initial Fact Investigation

If the complaint has any merit, the company should direct outside counsel to conduct a privileged, intensive internal investigation to learn the facts, find and preserve evidence, and identify witnesses before the plaintiffs do. This investigation should include review of key correspondence and agreements, and interviews with key employees.

To best preserve the attorney-client and work product privileges, the investigation should be conducted by counsel and remain confidential. Employees should not attempt to investigate the lawsuit on their own, or through communications with individuals outside of the company, since such communications are almost always not privileged unless a lawyer is present. In interviews with employees, counsel for the company should warn employees that the company's lawyers are acting as counsel for the company, not individual employees.

Business people should take great care in creating documents or communications relating to the case that might be discoverable by the other side. And employees should not attempt to create evidence for the purpose of helping the case: Self-serving file memos, backdated documents, and attempts to rewrite history usually do more harm than good.

6. Consider Engaging an Economist

Testimony from economic experts often plays a key role in antitrust litigation. Experts in antitrust litigation testify not just on questions of damages, but also on liability: Has the challenged conduct in fact caused harm to competition in the form of reduced choice or quality, or increased prices? Can other market factors explain the alleged harms? Are there procompetitive benefits associated with the defendant's actions that outweigh any harms and make the challenged conduct lawful? Moreover, a good economist will work with counsel to develop strategy and themes for each phase of the case from the motion to dismiss through discovery to summary judgment and trial.

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