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Compliance and Awareness

Moving Legal Departments from "Red to Black" on Corporate Balance Sheets

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Generating cash flow has not traditionally been the domain of traditional corporate legal departments or the in-house lawyers who handle a company's litigation. Rather, the goals usually set by corporate leadership for in-house litigators are: manage risk, defend against attack, and do both effectively and efficiently. Implicit in those goals is a corporate expectation that preventing and defending against litigation is a necessary resource drain.

Likewise, investors rarely focus on a company's in-house litigators. At best, investors only think about company litigators when skimming through annual reports warning that unfavorable results of legal proceedings could materially adversely affect the company, or when seeing those potentially "unfavorable results" appear as "extraordinary items" in company 10-Qs.

Why must these litigation "extraordinary items" always be extraordinarily *bad*? Why do companies only expect corporate litigation groups to spend and not make money? Wouldn't it be nice for companies to realize income from their company litigators and report extraordinarily *good* items for a change? This article explores a timely and unique way of transforming corporate legal departments into profit centers by using antitrust laws, not merely as a set of rules to follow, but also as a set of tools to level corporate playing fields.

At their core, antitrust laws are designed to protect free-market competition. Companies that understand and use these laws are better able to protect themselves against anticompetitive tactics by industry participants. Exploring antitrust laws from the point of view of an antitrust plaintiff raises organizational IQs - and has the potential to raise the bottom line of company 10-Qs - by removing anticompetitive headwinds from the business arena.

Admittedly, the idea of transforming old-line, defensive-minded corporate legal departments into offensive-minded, income-producing profit centers is a paradigm shift. Thinking offensively is, too often, simply outside the corporate counsel comfort zone. For example, corporations are defendants, or non-parties, in approximately 82% of the lawsuits they encounter.[1]

With that said, this is the perfect time to explore new ways of boosting corporate income through the legal department. Companies pulled themselves out of the recent recession with efficiency gains, largely the result of cost-cutting measures. Today, companies are producing more goods and services despite having seven million fewer employees.[2] Now, with costs cut, efficiencies gained, and the world economy facing what is at best an aftershock of the most recent recession that might soon qualify as its own recession, companies must be open to new and creative cash-flow-generating solutions. Fighting a rival's anticompetitive practices is one way; realizing a few "extraordinarily good" litigation results - stemming from a workforce more aware of the company's competitive environment - is another.

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Antitrust Awareness and Antitrust Compliance: A Complementary Relationship

One of the traditional roles of the corporate legal departments in sophisticated companies is to create antitrust compliance programs to prevent and defend against antitrust lawsuits and government investigations. These programs focus on counseling company employees on antitrust laws, the dangers of running afoul of those laws, and ways to limit corporate liability.

At the same time, most corporations fall short of adopting antitrust *awareness* programs. These often overlooked, yet innovative, programs combine traditional defensive compliance education with programming designed to increase awareness of the offensive uses of the antitrust laws to combat illegal practices in the marketplace.

Although such an offensive-oriented antitrust agenda is a dramatic shift in thinking, it is only a slight shift in action. Companies can seamlessly supplement their already-established corporate antitrust compliance programs with complementary antitrust awareness concepts. The same antitrust laws and legal principles taught in defensive-minded compliance programs are equally relevant to the offensive-minded awareness programs. For example, where antitrust compliance emphasizes the dangers a company might face when high-level executive contact with a competitor is coupled with perceived parallel pricing with that competitor, antitrust awareness emphasizes that the occurrence of those same actions among a company's competing suppliers or vendors is a red flag that the company could be exposed to anticompetitive harm.

From Learning to Earning: The Nuts and Bolts of Antitrust Awareness

The purpose of antitrust awareness programs is to empower companies to harness the antitrust laws for their own benefit and to protect themselves from competition-killing actions by industry participants. A robust antitrust awareness program includes two major prongs: employee training and litigation management.

Employee training supplements traditional defensive antitrust compliance training seminars by adding themes from the point of view of an antitrust plaintiff. In addition to teaching employees basic antitrust law, awareness training includes brainstorming with employees to better understand the company's competitive landscape and identify company exposure to anticompetitive practices by industry participants. For example, if the company's products use an essential raw material that is only sold by a few suppliers (i.e., a highly concentrated industry), employee training might include a statistical analysis of those suppliers' pricing and further analysis of those competitors' non-price actions, to determine whether anticompetitive practices might exist. Further, antitrust awareness trainers explore with employees their company's bargaining power in supply relationships in an effort to identify potential problem areas under antitrust laws. Analysis of the competitive landscape can be highly productive even if it accomplishes nothing more than encouraging the workforce to identify potential company exposure to harmful marketplace actions.

The second major prong of an antitrust awareness program is litigation management. This first involves cataloging already-filed antitrust class actions to determine whether the company has any interest in claims being pursued by others. This is not a quick endeavor. From 2006 to 2008, more than 1,000 antitrust cases, and an average of almost 680 antitrust class actions, were filed each year.[3] If the awareness program discovers relevant litigation, the company then must explore whether to get involved, opt out of the litigation, or monitor and decide later. At any rate, not exploring these cases is not an option - especially if the company wants to maximize their income-generating potential.

Once employees are trained and the full scope of existing litigation is understood, the next focus should be on exploring new situations in which the company faces collusive or anticompetitive behavior by industry participants. Identifying problem areas does not necessarily lead to new litigation. More likely, the knowledge will simply provide the company with the necessary leverage to work out forward-looking business solutions with the right supply chain partners. Whether these changes are attributed on corporate balance sheets to the legal department is not as important as the outcome - principally, a more educated and vigilant workforce and a more profitable business.

Misconceptions Addressed

Any evaluation of supply chains to identify anticompetitive conduct by vendors and suppliers will naturally generate some concerns about the impact the exercise will have on the company and its industry relationships. Though these concerns should factor into the cost-benefit analysis, companies cannot allow myths to cloud their judgment. The five most common myths are:

– Myth #1: All plaintiffs' lawyers are despicable ambulance chasers

Implementing an antitrust awareness program does not transform you into - or require that you hire - one of those ambulance-chasing plaintiffs' lawyers you have learned to despise. In fact, corporate hatred for certain types of plaintiffs' lawyers can be kept intact even after implementing a plaintiff-oriented antitrust awareness program. A company's own lawyers, exploring litigation against large corporations in the types of antitrust class actions contemplated here, should and will be viewed as distinct from plaintiffs' lawyers who target a company with often frivolous consumer class actions designed only to enrich the plaintiffs' lawyers.

The business-to-business antitrust cases contemplated here are generated not out of opportunism but rather from a sober and searching assessment of market conditions. For example, a business-to-business Sherman Act price-fixing class action might pit large producers of a commodity product against equally large

manufacturers that use the commodity as an input product.[4] Likewise, a Sherman Act monopolization case might provide opportunities for growing corporations to sue their larger, more established, competitors for using unfair competitive tactics to maintain their dominant industry positions.[5] Further, unlike the "quick hit" goal of most traditional antitrust class actions, the main strategic objective in these business-to-business antitrust class actions is to find workable resolutions between plaintiffs and defendants that could benefit all businesses going forward, as opposed to scorched-earth litigation strategies.

– Myth #2: Corporate legal departments lack capacity for offensive legal programs

Offensive programs of the type described here are not - nor should they be - the highest priority of corporate legal departments' litigation budgets. Companies allocate large portions of their litigation resources towards defending multi-million dollar, and often frivolous, lawsuits. These resources are rightfully used to defeat these attacks as quickly and as efficiently as possible. Legal department resources are also effectively used to maintain company compliance with increasing regulation and oversight. However, for the portion of the budget set aside for antitrust compliance, a company would be better-served to supplement with antitrust awareness programs.

– Myth #3: Antitrust awareness programs are expensive

As stated above, antitrust awareness programs are seamlessly implemented to supplement existing antitrust compliance programs. The concepts should be fairly intuitive for the company's business-minded employees - especially those who have already had antitrust compliance training.

Likewise, even if the company reaches the point where litigation is contemplated, costs can be controlled. The company can explore creative billing arrangements with its outside law firms, some of whom may well take these types of cases on contingency. A recent study showed that almost 75% of plaintiffs' lawyers charge on a contingency basis, compared to the 98% of defense attorneys who bill by the hour.[6] On top of that, and perhaps not surprisingly to in-house lawyers, contingency-based lawyers on average report lower costs.[7] If a company engages in plaintiffs' litigation, the additional out-of-pocket costs are not likely to be a significant portion of the legal budget; Fortune 500 companies already spend on average $20 to $200 million in legal expenses every year.[8]

A cost-benefit analysis weighs in favor of implementing antitrust awareness programs. Vigilant pursuit of claims likely will cause suppliers and vendors to end anticompetitive practices. Moreover, successful antitrust plaintiffs stand to receive substantial sums of money from settlements and jury awards.[9] Civil antitrust litigation allows for treble damages, which means that for every $100 million in damages awarded by a jury for a federal antitrust law violation, $300 million goes to the plaintiffs. Nine figure settlements also are possible in antitrust class actions, such as *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation* in 2008 where defendants paid over $300 million to plaintiff corporate purchasers and *In re Linerboard Antitrust Litigation* in 2004 where corrugated sheets manufacturers paid over $200 million to cardboard box makers. In addition to treble damages, successful plaintiffs can sue for attorney's fees.

– Myth #4: This is a call to recklessly damage relationships with supply chain partners

No one is suggesting that companies ruin healthy relationships with supply chain partners and other industry participants in favor of speculative payouts. The goal is simply awareness. At the foundation of this awareness is educating procurement and sales employees on antitrust laws and the specific situations in which they are often violated by vendors. More specifically, detailed analyses of a company's suppliers and customers, their industries, their competitors, their trade associations, and their prices, provide key insight into whether there is the potential for collusion. In fact, even if a company identifies potential collusive behavior by supply chain partners, the awareness program usually will favor seeking workable business solutions with those existing supply chain partners over litigation - while being mindful, of course, of not condoning or participating in any collusive activity.

– Myth #5: Being a plaintiff is optional or preventable

Even if a company's DNA renders it genetically incapable of viewing itself as a plaintiff, it will still end up as a putative plaintiff in antitrust class actions. As anyone who has received a class settlement notice - i.e., nearly all of us - realizes, class litigation affecting one's rights is a fact of everyday life. Despite (or perhaps because of) recent volatile market fluctuations, almost two antitrust cases are filed every day,[10] and aggregate corporate litigation spending has remained relatively constant, oscillating between $13.2 and $14.7 billion per year.[11] With antitrust class actions filed at this rate, getting a handle on existing litigation is imperative. By monitoring cases, in-house counsel strengthen their ability to ensure their clients' rights and legal positions are properly represented. The alternative is a situation where corporate counsel must decide whether to accept or reject a class settlement on little or no information.

Companies also should not forget the power of the right to "opt out" of class litigation, and to change the very nature of being a plaintiff. If a given company's claims make up a large portion of a class's claims and, therefore, a large portion of the damages, a company might opt out of class litigation, pursue a workable business resolution with the defendants, and simultaneously maximize its own income while frustrating plaintiffs' lawyers (whose fees are affected by the size of their recovery).

The Imperative for Antitrust Awareness Training

In today's economy, corporate legal department employees are just like other corporate employees - i.e., they can ill afford to let profitable opportunities slip away. Indeed, an appropriate antitrust awareness program can be beneficial to the company in the ways described above, while simultaneously renewing management's interest in the continued vitality of its corporate legal department. This is not the time for any corporate department to be seen solely as a cost center. Being proactive about contributing to income growth is one way a corporate legal department could protect its viability. And reporting to the board of directors that there has been an "extraordinarily good" litigation result - one that has shifted the legal department to a company profit center - will go a long way in keeping that viability intact.

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[1] The Inst. for the Advancement of the Am. Legal Sys., *Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association of Corporate Counsel* 1 (2009) *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Toc/FF5840218337 41D98525771300496509/?OpenDocument.

[2] Lila Shapiro, *Layoffs Return, Along With Fears of Deepening Economic Stagnation*, The Huffington Post (July 14, 2011), http://www.huffingtonpost.com/2011/07/14/layoffs-recession-economic-stagnation-_n_899261.html.

[3] Timothy S Longman & Joseph Ostoyich, *US Private Enforcement*, Global Competition Review: The Antitrust Review of the Americas (2011) *available at* http://www.globalcompetitionreview.com/reviews/29/sections/102/chapters/1137/us-private-enforcement/#ftr_1

[4] *See, e.g., In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100 (D.D.C. 2004).

[5] *See, e.g., LePage's Inc. v. 3M,* 324 F.3d 141 (3d Cir. 2003) (affirming jury finding of monopolization and trebled damages award of $68.5 million).

[6] ABA Sec. of Litig., *Member Survey on Civil Practice: Detailed Report* 10 (December 11, 2009) *available at* http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf

[7] *See* Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis* 6 (March 2010) *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf.

[8] Wendy Bradley, *In-House Counsel And Innovation: The Benefits To Outsourcing Routine Work At "Reverse Auctions,"* L. Practice Mgmt. Advisor (Aug. 3, 2011, 3:31 PM), http://lawfirmsuccess.wordpress.com/2011/08/03/in-house-counsel-and-innovation-the-benefits-to-outsourcing-routine-work-at-reverse-auctions/.

[9] *See, e.g., Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (upholding a jury award of over $1 billion to the defendant's competitor).

[10] *See supra* text accompanying note 2.

[11] Richard Vanderford, *Litigation Spending To Keep Ticking Upward In 2011*, Law360.com (Oct. 25, 2011), http://www.law360.com/articles/204084.