ABA Antitrust Fall Forum Special Report

*PaRR journalists report from the front lines at the American Bar Association (ABA) Antitrust Fall Forum on November 8, 2012.*

**Judicial decisions will continue to alter antitrust legal landscape**

Two federal appeals court judges today agreed that the judicial branch in the United States is likely to continue to fine-tune American antitrust legal standards. The two spoke as part of an American Bar Association panel in Washington, DC.

US Circuit Court Judges Doug Ginsburg and Diane Wood, both of whom earned antitrust chops at the Department of Justice, agreed that the role of the judiciary is to use the goals of competition to issue rulings that clarify the vague language of the Sherman Act.

“The role of the courts is greater in the US than perhaps any other jurisdiction,” Ginsburg said. For example, he noted that, as more courts find fewer obvious, or ‘per se’ violations of antitrust law, judges are forced to determine whether behavior is sometimes unlawful, or always completely legal.

That is because most antitrust laws are concerned with ideas of competition; but, as the judges noted, the devil is in the details. Each case’s specific facts are subject to scrutiny within the notions of antitrust concepts.

And, Ginsburg noted, that issue has some antitrust scholars – and businesses – in a quandary, trying to assess if there is any violation of law arising from potentially anti-competitive behavior.

Additionally, Ginsburg said, sometimes Supreme Court rulings can declare that some activities can be legal, even though state laws continue to maintain a prohibition on that specific behavior.

Wood said it is also a challenge to adopt modern economic theories that can inform jurists, without issuing opinions that are too rigid to adapt to evolving theories.

Courts “need to leave room for future development” of theories, but “are wary of adopting theories they don’t understand,” Wood said.

But she noted, while Section 2 of the Sherman Act forbids “monopolizing,” the law also “says you should not maintain your monopoly through illegal means,” a notion she said that is “not clear at all.”

Antitrust law is not unique in this regard, Wood added. There has been increasing scrutiny as to how plaintiffs make their cases in their initial filings, something that has been in a state of evolution for several years as the Supreme Court has issued more rulings demanding greater specificity in pleadings. She said both pleading standards and antitrust case are “moving pieces” for judges.

And with two antitrust cases before the Supreme Court this term, antitrust law is still being written by the courts.

By Cecile Kohrs Lindell in Washington DC
An official from Brazil’s newly invigorated Council for Economic Defense (CADE) has warned companies against contacting the competition agency for pre-filing negotiations if they have applied for a fast-track merger review. Pre-filing negotiations are a common tactic in the US.

“If it’s a fast-track case, don’t come in. We don’t allow for this kind of conversation,” CADE Superintendent Carlos Ragazzo said in a speech at the American Bar Association’s 2012 Fall Antitrust Forum.

Ragazzo explained that the decision to not allow pre-filing meetings in such cases was taken because the agency currently has limited human resources.

New legislation that created the “super CADE” also introduced a prescreening system similar to that in the US and has sparked intense interest about how the new agency will operate.

The statement on human resources highlighted a concern that the new agency could take a considerably longer amount of time to make decisions compared to agencies in the US and the EU due to staffing levels.

Another factor making the length of the review process of particular interest is that, previously, mergers were reviewed post-consummation; thus the pace of the review process was not a major concern for companies filing in Brazil or the regulators themselves.

However, Ragazzo made a point of emphasizing that CADE was addressing reviews in a timely manner.

Since the new law came into force on 29 May, the average time to process a fast-track merger application was 19 days, he said.

He added that fast-track cases generally do not involve coordination with international competition agencies.

When asked whether parties might file “non-complex” applications seeking a fast-track review when not appropriate, Ragazzo responded by saying such practices was more common under the old law as there were strong incentives to do so in the previous post-merger review regime.

“They tend not to do it anymore,” he said. “It has happened once or twice since the beginning of the law.”

Looking to the future, Ragazzo said that coordinating remedies with other competition agencies is going to be the hardest challenge for Brazil’s new competition agency but this situation had yet to occur.

by Raymond Barrett in Washington DC
ABA to urge international enforcement cooperation and comity

The American Bar Association (ABA) will advocate for increased cooperation and diplomatic deference in a new report outlining challenges to domestic and international regulators, according to the co-chair of the report.

Donald Klawiter, a partner at Sheppard Mullin and co-chair of the ABA report, said the report will focus on convergence cooperation through the International Competition Network (ICN) and comity between the Federal Trade Commission (FTC), Department of Justice (DoJ) and international regulatory bodies.

Theodore Voorhees, a partner at Covington & Burling and chair of the ABA Section of Antitrust Law, told PaRR in an interview that greater involvement from the ICN is noncontroversial.

“The ICN has been a tremendous development both in terms of international cooperation and capacity building in the emerging competition regimes,” Voorhees said. “Both the FTC and the DoJ have been squarely behind it.”

In terms of comity, Voorhees explained that if two sovereign entities are looking into the same matter, but the matter has “greater urgency or a greater collection of sensitivities or issues” in one sovereign relative to the other, then deferring to that sovereign helps “get through what would otherwise be an obstacle”.

Klawiter said that an increase in comity would represent “a dynamic change from what we’ve seen recently”.

The co-chair of the ABA report noted that the timing of investigations also plays a role.

“Everybody works at their own pace, and in the cartel area especially we found the US tends to move first, and maybe a year or two later we hear from the Europeans, and the Brazilians, or the Koreans,” Klawiter said.

“It takes time for everybody to get their investigations going, and there is a great deal in the report that talks about timing coordination and comity as ways that we can kind of move ahead, share resources to some extent, and do things better than we have done them thus far.”

Klawiter explained that this year’s report will focus on international issues as a result of recent developments.

“In the last four years, so much has happened internationally that we’re worried about things like individuals going to jail in more than one country, merger investigations that involve 20 or 30 jurisdictions in the process, and just a variety of things that kind of show the growth and development of antitrust practice around the world.”

by Ryan Lynch in Washington DC
An upcoming report from the American Bar Association (ABA) will likely ask the Federal Trade Commission (FTC) and the Department of Justice (DoJ) to look more closely at acquisitions involving non-standard essential patents (non-SEPs) in addition to SEPs, according to a member of the ABA task force involved in formulating the report.

SEPs are patents deemed necessary to practice a specific industry standard. Standard-setting organizations (SSOs) generally require patent owners of SEPs to license the patents in a reasonable and non-discriminatory (RAND) manner.

“There is an argument that agencies should be more concerned about transactions regarding non-SEPs, rather than SEPs,” said Gail Levine, assistant general counsel at Verizon (NYSE: VZ) and a member of the ABA task force. “SEPs are often burdened by RAND commitments, and the report notes that non-SEPs are RAND-free.”

Levine explained that she did not necessarily concur with individual recommendations set to be issued by the task force’s patent section group, which she chaired.

“Some of it I agree with, some of it I don’t agree with; and that’s one of the joys and pleasures of committee work,” Levine said.

In addition to patent acquisition, Levine’s part of the report is expected to address patent quality and patent remedies.

Theodore Voorhees, a partner at Covington & Burling who is also chair of the ABA Section of Antitrust Law, told PaRR that the task force’s views on the prioritization of SEP versus non-SEP transactions have not been finalized. “They are still jelling,” he said.

Voorhees is an ex-officio member of the task force who has participated in some of the discussions and has worked “to generate some of the consensus” he said the task force hopes to achieve.

Donald Klawiter, a partner at Sheppard Mullin and co-chair of the ABA report, commented that the agencies’ aggressive enforcement of antitrust and consumer protection laws means that this year’s report will not have a dramatic impact.

However, the report “will hopefully give the agencies a great deal of material to work from and to work with in formulating policy going forward”, Klawiter added.
Patent infringement and antitrust roles analyzed by enforcement officials

The US International Trade Commission (ITC), facing criticism from certain US companies for being “trigger happy” in issuing exclusion orders, got a vote of confidence from a senior Department of Justice (DoJ) official during the American Bar Association’s 2012 Antitrust Fall Forum on 8 November.

As this news service previously reported, companies such as Cisco Systems (NASDAQ: CSCO) and Ford (NYSE:F) have argued before Congress that these exclusions orders granted to so-called “patent trolls” are injurious to US consumers.

“We feel like the ITC has the flexibility within its public interest standard to take those competition issues into account,” said Renata Hesse, senior counsel at the Antitrust Division of the DoJ. “The threat of an injunction should not be used by a patent holder that has committed to a license with FRAND [fair, reasonable, and non-discriminatory] terms to obtain greater compensation for the licensing of its patents than they would have been able to obtain had the patent not been incorporated under that standard,” Hesse said.

Hesse made the remarks during a panel examining the roles and jurisdictions of judicial bodies and regulatory agencies. The panel included Federal Trade Commission (FTC) Commissioner Thomas Rosch and Zachary Katz, chief of staff to Federal Communications Commission (FCC) Chairman Julius Genachowski.

Contrasting the history and mandates of their respective agencies, Hesse noted that agencies such as the International Trade Commission (ITC) and the World Trade Organization (WTO) also play an important role in communication antitrust law.

“When you have a transaction where two agencies like the DoJ and FCC have jurisdiction, it is beneficial to understand how the processes at both places work, because the processes will help you understand better what will be the likely outcome at both agencies,” Hesse said.

Recognizing patent infringement as an important issue, Rosch highlighted the importance of the FCC’s technical staff when regulating technology and telecommunications transactions.

“The DoJ and FTC are truly, much more law enforcement agencies, not regulatory agencies,” Rosch said.

Noting the increasing importance of spectrum purchases and how the FCC is moving toward a more market-focused free competition model as it seeks to improve wireless networks, Katz addressed the standard by which the FCC reviews public interest concerns in transaction reviews.

“The potential public interest benefits must outweigh the harms,” Katz said. “They cannot be less, nor can they be equal, for the transaction to move forward.”

None of the participants would give projections on how the enforcement and regulatory roles of their agencies would change during the second Obama administration.

“I expect us to continue vigorously enforcing the antitrust laws,” Hesse said.

by Tom Risen in Washington DC
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