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7 Antitrust Concepts that Every Lawyer and Business Person Should Know

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Both in-house lawyers and outside counsel routinely face questions about legal risks that may arise when their clients interact with suppliers, customers and competitors. These questions are typically governed by antitrust laws and the legal analysis will always depend on the specific facts. Still, business people and lawyers can benefit from understanding the basics of antitrust laws. Here are seven essential antitrust concepts to train your team on.

1. The goal of antitrust law is to benefit consumers by protecting fair competition. Our economic system is based on faith in fair competition and the belief that fair competition benefits consumers. While legal academics have argued that U.S. antitrust laws are designed to maximize economic efficiency, the courts have focused on protecting consumers from paying higher prices to business that have unfairly gained or maintained market power.

The focus on benefiting consumers by protecting fair competition is the touchstone for distinguishing between lawful and unlawful conduct. As the U.S. Department of Justice recognized in a report entitled, Competition and Monopoly, "Competition produces injuries; an enterprising firm may negatively affect rivals' profits or drive them out of business. But competition also benefits consumers by spurring price reductions, better quality, and innovation. Accordingly, mere harm to competitors is not a basis for antitrust liability." But if the business people can't explain how their proposed conduct benefits consumers, there may be an antitrust problem.

2. Monopolies are not necessarily illegal. Despite what we learned about the "trustbusters" back in high school, U.S. antitrust laws do not aim to eradicate monopolies. This is because there is no legal prohibition if a company achieves a monopoly due to its superior product, business skill or even by historical accident. It's always possible to build a better widget than the next guy! But the law does prohibit a business from willfully acquiring or maintaining monopoly power through conduct that serves only to exclude competition. Think price fixing, where competitors agree to buy or sell products at a fixed price; price discrimination, where a business sells similar goods to buyers at different prices, or a so-called "tying contract," where a business sells a product on the condition that the buyer agrees to also buy a different product. Because these actions can hurt consumers by resulting in higher prices than competitive markets, they raise antitrust concerns.

3. The deliberate attempt to monopolize is illegal. Lowering prices well below market to put a competitor out of business; interrupting a competitor's supply source; refusing to deal with customers; refusing to deal with suppliers—any of this conduct could raise antitrust concerns. To determine whether a proposed course of conduct could cause legal problems, ask—what's the intent? The intent to compete vigorously and expand a business is not illegal. The intent to injure or destroy competitors or exclude competition is. In court, intent is usually proven by looking at the circumstances of the company's conduct. As a practical matter, business people need to understand that their internal email and corporate documents, as well as comments by officers of the firm, will be brought under the microscope to prove intent to a judge or jury.

4. Tread carefully when forging agreements with competitors. Antitrust laws are particularly skeptical about agreements between competitors. On the one hand, because it takes so much money to develop new products or penetrate new markets, collaborations among competitors can enhance consumer welfare in the form of lower prices or better products. On the other hand, agreements between competitors to engage in price fixing, boycott third-parties or divide up the market, are "per se" illegal. Business people must avoid agreements with competitors to take action against third parties by refusing to do business or insisting on unfavorable terms. Again, we revert to the guiding principle: is the competitors' agreement designed to increase consumer welfare by enhancing competition or will it destroy a competitor?

5. Tread carefully with trade associations. Trade associations to set industry standards can be good for consumers by lowering costs and improving quality. But as with any competitor collaboration, there are potential antitrust concerns because competitors have an opportunity to collude and pursue anticompetitive goals. Again, the key is the intent. If the trade association's work involves creating appropriate technical standards, informing each other of changes in industry regulations or serves as a platform for advocating on matters affecting the entire industries, there should be no problem. To mitigate risk, business people must make sure the trade association has a written mission statement and objective membership criteria. In addition, meetings should always follow a written agenda, detailed minutes should be kept and, whenever possible, a lawyer should attend.

6. Running afoul of antitrust law puts you and your company at serious risk. Companies and individuals can be sued by the government and private parties for violating antitrust laws and the penalties are severe. A company can face criminal indictment and hefty monetary penalties including treble damages. Employee status does not protect individuals. Officers, directors and employees who authorized or participate in violations can face felony conviction and imprisonment. In 2014, the DOJ filed 45 criminal cases, charging 44 individuals and 18 corporations, and initiated 100 preliminary inquiries. Meanwhile, the number of federal antitrust lawsuits filed in Texas surged in 2013. The cases typically result in lengthy, expensive litigation and damage to a company's reputation.

7. The company should have a written antitrust compliance policy, and everyone should be trained on it. A written antitrust compliance policy is essential both on offense and defense. Offensively, it requires a company's legal team to set out antitrust basics as well as relevant examples, and then to conduct regular training. Defensively, it will be helpful evidence of compliance in the face of a government investigation or litigation.

No lawyer can completely insulate their clients against antitrust litigation. But ensuring your team understands these basic antitrust concepts will go a long way to managing the risk.

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