Antitrust, Vol. 28, No. 2, Spring 2014.

Reverse Engineering Your Antitrust Case: Plan for Trial Even Before You File Your Case

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COMPLEX ANTITRUST LITIGATION often feels like a series of discrete, immediate, and all-important emergencies. In pursuit of trying to outdo your opponent at each turn, it is sometimes easy to lose sight of the fact that the results, both bad and good, of the decisions you make in those moments may dictate your trial strategy. So, in handling complex antitrust cases, you need to think about what your trial will look like even before you file a complaint. Each decision point in the case should be analyzed from the perspective of what it means for trial. You have to go to trial with the case you have litigated up to that point, so it is best if right out of the gate you are able to articulate clearly what your case is about and what kind of evidence you believe will prove it.

Below are some suggestions to assure that when you get to trial, you will have all the pieces in place and not have made any decisions that foreclose your best route to a successful verdict.

Tell a Simple a Story

In the post-*Twombly* and *Iqbal* world,[1] it is tempting for antitrust plaintiffs to throw every fact and theory they can muster into a complaint in the hope that it will push the allegations across the plausibility line. Plaintiffs should resist this urge and think carefully about what exactly it is that they have to prove. Counsel can hardly be blamed for wanting to use every means available to convince the judge that their claims have merit. Judges are sophisticated, and even if they are seeing an antitrust case for the first time, they have a team of capable clerks that can research the issues to assist the court in understanding the parties' arguments. However, jurors mostly have non-legal backgrounds and are affirmatively forbidden from conducting outside research. The story you tell to the jury must be clear and concise, the elements of the offense distilled down to the digestible essentials. Therefore, draft your complaint as if you were giving an opening statement, and make sure you do not unnecessarily complicate the matter.

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Start with the Very End

A trial is the culmination of years of strategy and work, and at the time you are drafting a complaint, trial can seem like a lifetime away. But jury instructions are one of the best sources of guidance when drafting a complaint. Model and sample jury instructions are, by their nature, all of the complexities of a case boiled down to the most basic elements. Although jury instructions are often modified to fit the particulars of a case, sample and model instructions are a good starting point. Unfortunately, there are no ABA Model Jury Instructions for several of the key antitrust issues of our day.

For example, there are no instructions for one of the most hotly litigated topics over the past few years—the Foreign Trade Antitrust Improvements Act, more commonly referred to by its acronym, FTAIA. The FTAIA was passed in 1982 and aimed at protecting American exporters doing business in foreign markets that might have more lenient antitrust laws than the United States. In enacting the FTAIA, Congress intended that an American exporter would not be held liable under the Sherman Act for entering into export agreements in foreign countries that, while illegal domestically, were legal abroad. But to protect the United States market from predatory foreign-based anticompetitive conduct, the FTAIA explicitly maintains Sherman Act liability for acts of "import trade or import commerce" and all foreign conduct that has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce.[2]

While antitrust lawyers will not find jury instructions relating to FTAIA issues in the ABA Model Instructions, with a little bit of extra leg work, enterprising attorneys can access the jury instructions from recent trials. The FTAIA has been litigated in many cases, but the issues were briefed and adjudicated primarily at the motion to dismiss and summary judgment stages. One of the few instances where FTAIA issues reached trial was the *TFT-LCD* case.[3] In *TFT-LCD*, the plaintiffs alleged that Asian TFT-LCD[4] panel manufacturers fixed the price of panels being imported to the United States. In the summer of 2012, after settling with all the other defendants, the direct purchaser class tried their claims against

Toshiba. In the *TFT-LCD* trial, the court interpreted the FTAIA to involve a merits issue that the plaintiffs had the burden of proving to the jury.[5] When it came time for the two sides to submit competing drafts of the jury instructions, it was no surprise that they had significantly different takes on the FTAIA issue.

The court ultimately decided to give two instructions that covered FTAIA issues. One was the "Elements of the Offense" instruction:

> To prevail against Toshiba on a price-fixing claim, plaintiffs must prove as to Toshiba each of the following elements by a preponderance of the evidence:
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> First, that an agreement to fix the prices of LCD panels existed;
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> Second, that Toshiba knowingly—that is, voluntarily and intentionally—became a party to that agreement;
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> Third, that such agreement occurred in or affected interstate, import or foreign commerce. Any such import commerce must have produced substantial intended effects in the United States; any such foreign commerce must have produced direct, substantial and reasonably foreseeable effects in the United States; and
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> Fourth, that the agreement caused plaintiffs to suffer an injury to its business or property.[6]

The second was the instruction on import commerce:

> U.S. antitrust law applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.
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> To show that foreign conduct was meant to produce some substantial effect, the plaintiffs must establish by a preponderance of the evidence that Toshiba knowingly and with the consent of at least one other co-conspirator, entered into an express or tacit agreement intending to produce a substantial effect in the United States.
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> The plaintiffs must also meet their burden of proving that the alleged agreement between Toshiba and the alleged co-conspirators in fact produced a "substantial" effect on the U.S. market. A substantial effect in the United States cannot simply be assumed. Nor can a substantial effect in the United States be assumed to continue because it once existed. The plaintiffs must prove that the substantial effect requirement is met at the relevant time.[7]

Reviewing the language courts use to instruct the jury on complicated antitrust issues is crucial to shaping the allegations in your complaint. If you have availed yourself of the existing resources from the beginning of your case, you will also be on better footing when it comes time to present your draft instructions to the court at trial. Now, you may be thinking, "Why would I worry myself about a jury instruction or something as technical as the FTAIA when I am drafting my complaint?" The simple answer is that you can determine the scope of the alleged antitrust violation, and the products included, only if you understand the answers to questions regarding which sales are domestic versus foreign. Having this nailed down at the pleading stage allows you to be as consistent as possible all the way to trial.

Hire a Guide Early On

One aspect of being an experienced antitrust attorney is that you have to become knowledgeable about multiple industries. Antitrust cases in our careers have involved such commodity products as citric acid and potash, beverages, complicated financial products, and just about every consumer electronic product you can imagine. Beyond being able to explain the legal issues to the judge and jury, advocates also must cogently introduce those audiences to the industry in which the antitrust violation occurred. Antitrust cases frequently arise in complex markets, and while it is rare these days to file an antitrust complaint without first hiring an economic expert to analyze the market and conduct a preliminary damages study, many attorneys will overlook the importance of hiring an industry expert during the nascent stages of a case. Even in the very beginning of a case, it is best to retain the services of a consultant or expert who knows the ins and outs of the particular industry at issue.

In the early stages, an industry expert can be a vital resource to help craft a narrative about the case that describes the industry in an easy-to-understand way. You might think it would be premature to retain such an expert before the complaint is filed, but telling the story of how the subject product fits into the overall market can be very challenging for non-experts. The more complex the industry, the more important it is to have someone who has a comprehensive understanding of that industry. The last thing you want is for the allegations you pled to later clash with what an industry expert tells you.

In the *TFT-LCD* case, for instance, the direct purchaser plaintiffs retained Dr. Adam Fontecchio, a professor of electrical and computer engineering at Drexel University and an expert in both the science and engineering behind TFT-LCD screens and the TFT-LCD industry. Dr. Fontecchio was an important resource for the plaintiffs throughout the litigation, but was especially crucial when it came time for trial. During his testimony at trial, Dr. Fontecchio helped guide the court and the jury through both the specifics of LCD technology and the intricacies of the industry. Crucial to the plaintiffs' case was explaining to the jury that the price-fixed panels were basically the same technology and were substitutable.

Dr. Fontecchio was well received by the jury, in part, because he came to trial with props: a bottle of the liquid crystal, the glass sandwich that constitutes the raw panel, and an easy-to-understand explanation of the physics of the technology. Without becoming immersed ourselves in the technology early in the case, eliciting this kind of testimony would not have been possible. Right at the beginning of the *TFT-LCD* case, the attorneys obtained raw panels and the modules surrounding the panels, and were taught how everything fit together. There is nothing like seeing how the technology works in real life; diagrams do not cut it. Seeing it in person strengthened the complaint and also gave us one of the best demonstratives in the case, a laptop computer that we took apart during opening statements.

Be Careful What You Wish For

If you are fortunate enough to survive motions to dismiss, the next major battle will be discovery. As your complaint should be reverse-engineered from what you will have to prove at trial, your discovery demands should be no different. Too many attorneys feel they need to ask for everything under the sun in discovery. But the problem with casting too wide a net is that you can end up with a massive amount of information. Without more insight about where the evidence you actually need is hiding, receiving an unwieldy amount of documents can create a host of problems that has the potential of unnecessarily complicating and derailing the narrative of your case. Even in the biggest antitrust cases, the trial likely will come down to no more than 100 documents, of which 10–20 are really critical. Finding these key documents as early as possible is vital.

Many federal courts are trending toward a discovery process that is more collaborative between the opposing sides. The goal of this process is more focused, allowing the plaintiffs to identify the key documents and eliminate some of the burden on defendants. Utilizing advances in technology, some courts are adopting iterative ESI search protocols that allow the parties to get a better understanding about kinds of documents being returned by the search terms before they have to be produced.

The court in *In re Potash Antitrust Litigation (II)*, a class action against an alleged cartel that sought to fix the price of a component of fertilizer, adopted such a procedure.[8] Some of the key points established by the adopted protocol included:

- A requesting party was entitled to full disclosure of the procedures by which the responding party gathered any target data set. These disclosures included, but were not limited to: the relevant time period; the data sets against which searches were run; and the format of the data gathered in to the target data set.
- The parties had to meet and confer to agree on search strings to be run against the target data set. Each party could add or delete terms and strings, but only for the purpose of better identifying responsive documents.
- Test searches were then run on the segregated data sets. The parties had to identify all the features of the program used to run the searches and disclose any vendors that assisted the search process. All of the target data sets had to be preserved for the entire case.
- "The searching of the target data sets was an iterative process, with search run, modified, and rerun for a reasonable number of iterations, until the target data set has been effectively search for relevant ESI."[9]
- The responding party had to disclose the number of "hits" and any other output regularly generated by running a search.
- The iterative search process had to be completed generally within two to five business days and no later than four weeks before any court-ordered production deadline.
- After a search identified a reasonable number of documents, the parties had to conduct a random sampling of those documents to further test responsiveness.
- Once the requesting party deemed the search to be adequately responsive, the documents had to be produced "promptly."

The *Potash* case settled before trial, but this kind of protocol, if adopted, could go a long way towards focusing your discovery so that the case is manageable by the time you reach trial.

Sweat the Small Stuff

During any fight over discovery, it is easy to get fixated on the evidence needed to support the merits of your case. Plaintiffs want to find the smoking guns. Unfortunately, in doing so, we can lose sight of the equally important evidence related to jurisdiction and standing.

In many antitrust cases, the issue of standing will arise before trial, in motions challenging standing under *Illinois Brick*[10] and *Associated General Contractors*.[11] The discovery that will help answer standing issues will most likely be documents and testimony related to corporate structure and where the products purchased by the plaintiffs fit into the flow of commerce. These issues need to be covered in the complaint so that you can show the judge a clear path from your allegations to the relevancy of the discovery you are asking for regarding jurisdiction or standing.

Rule 30(b)(6) depositions, if used effectively, can establish the relationship between and among corporate defendants and their affiliates. They can also elucidate the stream of commerce. Detailed written narrative responses, such as those used in the *Optical Disk Drive* litigation,[12] also can address these types of topics and avoid the need for a party to educate witnesses to testify on behalf of the corporation. Requests for admission and requests for judicial notice can also be used. Issues like jurisdiction or standing can be overlooked until it is too late, or alternatively, can become a side show that distracts from the merits of the case if not addressed early.

The Song Should Remain the Same

As the case progresses and you begin reviewing documents, you will hopefully find documents that support your allegations. However, the crunch of new information can also complicate matters. The more clearly you can continue to tell the story in your complaint, the more digestible it will be to the jury. You must look at what documents match up with the allegations in your complaint when you are preparing to respond to motions for summary judgment. These are the documents that will likely become your trial exhibits. If all goes right, you will hopefully have a wealth of documents to choose from in identifying evidence that supports the story you told in your complaint. However, it is vital that you do not lose the narrative that began with your carefully drafted complaint. When you walk into court for trial the judge

should recognize the story you are telling the jury as the one that you have consistently told throughout the litigation.

Don't Charge Up a Hill You're Not Willing to Die On

One of the most important benefits of reverse engineering your case from the trial is that you will be able to choose which battles are important and which are not. Attorneys sometimes get so involved in the combat aspect of litigation that they get mired in meaningless fights. Sometimes the choice to fight to death over an issue (even a minor one) results in terrible consequences. If you lose, it could affect your credibility with the court, adversely affect the court's view of the next issue you raise, and lead to many other unintended consequences. The same is true of jury trials.

So, if you reverse engineer your case from the trial backwards, then you will have a better handle on which battles are actually critical to your trial, and you can save time, energy, and resources by not fighting a battle that will never matter. In *TFT-LCD*, hundreds of hours were spent over disputes about translations of documents produced in foreign languages. Over 90 percent of those disputes were about documents that never saw the light of day at trial. There were a handful of critical documents for which the translations were material (e.g., where the parties disagreed on whether the foreign terms meant "agreement" or "understanding"). The challenge, of course, is predicting which issues are going to matter when presenting evidence to the jury, and which will fall by the wayside. If you have a trial plan when your draft your complaint, you will have a better sense of the critical issues and can concede on others. This creates efficiencies and saves resources.

Conclusion

There are always going to be bumps, detours, and setbacks as you march your way from filing a complaint to trial, and you can never predict how it will go years before it happens. But, if you start the journey by understanding exactly what it is you have to prove at trial, you will be much better prepared to know what is essential to your case and what you can do without. By reverse engineering your complaint and implementing a litigation strategy that always focuses on trial and not just the moment, you will walk into court with a minimal amount of uncertainty because your sights have been set there since the inception of the case. ■

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[1] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[2] 15 U.S.C. § 6a.

[3] *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 7-md-1827 (N.D. Cal. Apr. 20, 2007).

[4] TFT-LCD panels are thin film transistor liquid crystal display panels. They are the panels typically found in flat screen TVs, computer monitors, and laptops.

[5] There is an ongoing debate about whether satisfying the FTAIA presents a merits issue, and therefore relates to an element of the plaintiffs' antitrust claim, or a jurisdictional issue.

[6] *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 7-md-1827 at 9 (N.D. Cal.) (ECF No. 6028).

[7] *Id.* at 13–14.

[8] *In re* Potash Antitrust Litig. (II), No. 8-cv-6910 (N.D. Ill.) (ECF No. 503).

[9] *Id.* at 2.

[10] Ill. Brick Co. v. Ill., 431 U.S. 720 (1977).

[11] Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

[12] *In re* Optical Disk Drive Antitrust Litig., No. M:10-cv-2143 RS (N.D. Cal.).