

Q&A With Foley Hoag's Lisa Wood

Friday, Oct 05, 2007 --- The Noerr Pennington doctrine provides important protection of a competitor's use of litigation, even when the litigation has anti-competitive consequences, says Lisa Wood of Foley Hoag in our series of chats with high-profile antitrust lawyers.

Q. What attracted you to antitrust as a practice area? And what keeps you interested?

A. The opportunity to help clients solve complex business problems initially attracted me to the antitrust field. Counseling clients on antitrust matters has been an excellent way to learn about and stay abreast of a client's key business drivers, because in my view, every antitrust problem must be evaluated by first understanding the business objectives that justify the proposed conduct.

My litigation experience also helps me be a better antitrust counselor, because I have considerable experience seeing how legitimate business decisions can be challenged effectively after the fact, and what a difference good advice at the outset can make in managing litigation risk.

I also enjoy the opportunity to help shape antitrust policy by working on litigation matters addressing cutting edge antitrust issues. The opportunity to instill that policy with practical litigation insights and basic business common sense keeps me active in the field.

Q. What's the most ridiculous antitrust lawsuit you've defended a client against?

A. Recently, a professional service client of mine was named as an antitrust and RICO conspirator in what was essentially a hotly contested patent litigation between two competitors with allegations of sham patent litigation and the like.

My client had served as a patent agent of the defendant competitor, and the plaintiff competitor argued that that consulting work alone made the client a conspirator.

Less than 24 hours after we filed a motion to dismiss and sent a Rule 11 letter, the plaintiff voluntarily dismissed the suit against our client. It should never have been filed in the first place, but I was glad to see that the litigation process worked, and we were able to resolve the case quickly and before the expensive prospect of discovery.

Q. Which aspects of antitrust law do you think are in need of reform?

A. I think the Robinson Patman Act, which prohibits price discrimination, should be repealed. Clients struggle to comply with the Act, often in industries in which the Act is honored in the breach. It is rarely enforced, and seems to protect competitors rather than competition, making it inconsistent with the rest of our antitrust regime. The current rules on tying also need to be modernized and clarified.

Q. If you were in charge of the DoJ's and the FTC's antitrust divisions, what changes would you make?

A. I would not attempt to narrow the Noerr Pennington doctrine, which protects a competitor's use of litigation, even when the litigation has anticompetitive consequences. Access to the courts is an important business advantage to U.S. businesses, and private litigation is an important way to maintain and enhance the rule of law in our country.

Q. Outside your own firm, can you name one antitrust lawyer who's impressed you?

A. Alan Silberman, of Sonnenschein Nath & Rosenthal in Chicago. Alan and I worked together on an interesting litigation matter involving a public bid dispute between competitors. He did a masterful job taking the plaintiff's Rule 30(b)(6) deposition, and to this day I employ strategies I saw in that deposition. Essentially, he was able to develop in the deposition that plaintiff's conduct was motivated by the same drivers as the defendant, and that both behaved rationally in competing forcefully with one another. This greatly enhanced the business story we developed about why our client did what it did, and we were able to obtain summary judgment.

Q. What advice would you give to a young lawyer who's interested in getting into antitrust law?

A. Try to work on a broad range of antitrust matters so that you can learn antitrust law in the context of solving actual client problems. Even if you want to focus on litigation, assist more senior lawyers in counseling assignments as much as possible.

Talk to clients about their business, and keep up with the business press. Practice explaining complex antitrust and economic concepts to business people to sharpen your litigation skills.

If you do want to do litigation work, make sure you handle a broad range of matters, not just antitrust matters. This will make you more effective at developing trial themes in antitrust cases that resonate with the jury and the court, neither of whom is likely to have been steeped in antitrust doctrine.

Q. I'm a General Counsel with a Fortune 500 company facing a major antitrust lawsuit. Why should I hire your firm?

A. Foley Hoag's roots in dispute resolution are deep; we have a strong litigation team comprising nearly half of our lawyers. We argue in courts across the country and before various arbitral bodies and panels and many of us have worked on significant, bet-the-company matters.

We have an excellent reputation with corporate clients and judges alike. Because we handle many different kinds of business disputes, we know how to boil down any complex dispute into themes that resonate with the jury and motivate the court to rule in our client's favor.

While we regularly take cases to trial, we are also proud of our ability to find creative ways to resolve cases early. We are committed to understanding our client's business and are immersed in their industries. We understand what clients face on a daily basis and are living their challenges.

Because of this we can respond quickly and efficiently to their needs, and often proactively shape our clients' strategies ahead of the curve and help them meet issues head-on.

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