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Why We Fight:

The Business Value of Antitrust Lawsuits

"Many view antitrust law as a shield—a defensive measure that prevents companies from competing unfairly.

However, companies should also view antitrust law as a powerful tool that market participants can use to combat interference in markets."

Before he won the Nobel Peace Prize, before he created the Marshall Plan and before he led the Allied forces to victory, George Marshall faced one vital task: winning support for U.S. involvement in World War II. Even after the attack on Pearl Harbor, the non-interventionist mindset of the era was so entrenched that General Marshall felt a need to move public opinion in favor of the war. To do so, he enlisted Hollywood director Frank Capra, maker of all-American classics like Mr. Smith Goes to Washington and It's a Wonderful Life. Marshall asked Capra to create a series of persuasive documentary films. "You have an opportunity to contribute enormously to your country and the cause of freedom," Marshall said, as Capra began work on a seven-film project that became known as *Why We Fight*.

At the time, the "cause of freedom" was widely understood to include eliminating cartels and other monopolistic forces that Axis countries wielded as a form of economic power. "Decartelization" became a central theme of both peace treaties and a major project undertaken by occupying Allies. A team of antitrust specialists followed behind the occupying forces, securing corporate records and questioning captured industrialists.

> Our present circumstances are not as dramatic, but the need to fight for the cause of free enterprise continues.

Since World War II, we have continued to constrain monopolies and economic aggressors at home, from the breakup of AT&T to the browser battle with Microsoft.

Antitrust law is a major asset in this ongoing fight. Many view it as a shield—a defensive measure that prevents companies from competing unfairly. Many believe this shield is an instrument the government can deploy, or not, at its discretion.

However, companies should also view antitrust law as a powerful tool that market participants can use to combat interference in markets. We understand this runs contrary to the more cautious, but popular, approach inside many law firms and corporate legal departments, a mindset as firmly in place as the instinct toward neutrality in the pre-war United States.

That hesitancy should be reassessed, and companies should, instead, consider antitrust litigation a valuable tactic to achieve the full degree of business success to which they are entitled in a free market. Of course, as with all business tactics, there are advantages and disadvantages, which must be weighed carefully. To assist in making that calculation, we provide insight into three critical questions: why we fight, how we fight and when we fight.

Why We Fight

Ask 100 business owners the following questions
and you'll get the same responses 100 times:

- *Does your company seize strategic opportunities?*
- *Would you like your legal department to generate revenue for your company?*
- *If a competitor has infringed your legal rights, should you take action in response?*

Yes, yes, and yes.

Of course companies perceive themselves as strategic actors. Of course they would like their legal departments, long lamented by the C-suite as cost centers, to become a source of revenue. And of course they believe in standing up for themselves against competitors that act illegally.

These beliefs are embodied in "affirmative recovery programs" that a number of forward-thinking companies have implemented over the last two decades. Companies like DuPont, The Home Depot, Tyco and Ford have established such programs with considerable success. DuPont's legal department alone recovered about $2.7 billion between 2004 and 2013.[1]

Even before hearing such figures, readers may know from personal experience that companies have become more aggressive in asserting their rights in commercial litigation. That's certainly true in the intellectual property arena. In 2000, Xerox's then-CEO, Richard Holman, shook the business world by focusing on maximizing the value of the company's IP, including, necessarily, protecting it in court. As the Harvard Business Review explained, it was a different way of thinking:

> Where others see mere legal instruments, he sees business tools. And where others see obscure pieces of paper gathering dust in the corporate legal office, he sees "Rembrandts in the attic" waiting to be exploited for profit and competitive advantage.[2]

Of course, this thinking is now commonplace not only for intellectual property claims, but for other commercial claims as well.

"As industries from airlines to telecommunications become more consolidated in part as a result of laissez-faire oversights by federal regulators,

private litigation is sometimes the only defense against corporations exercising market power to enrich themselves…."

– "Corporations Are Getting Bigger, Thank a Trial Lawyer for Keeping Them in Check," CNN Business (May 14, 2019)

Yet, while companies are quick to address cases of patent infringement or breach of contract—eagerly cashing in their "Rembrandts"—many have failed to adopt the same attitude toward antitrust claims. There are many potential reasons for this phenomenon, including misguided corporate machismo or undue faith in governmental antitrust enforcement. Regardless of why, the result is the same: they are leaving money on the table.

This phenomenon is causing companies to miss more opportunities now than any time in the last 50 years. That's because economic power has never been so concentrated, and competition never so threatened, as they are today. For example, the airline, banking and soybean industries have experienced rampant consolidation since 2000, leaving each with just four major players. Likewise, there have been 42 pharmaceutical mergers worth more than $10 billion each during the same period.[3] Over the past 20 years the average size of public companies has tripled.[4]

This concentration of economic power and its resulting unfairness has spurred political anger, particularly against technology firms, and ignited grassroots movements across many industries. But private litigation, too, is a way to fight back.

Properly understood, private litigation is its own kind of collective movement. Every company that asserts its rights against anti-competitive actors advances the cause of all companies in a similar position. Together, private litigants push the law in a direction that favors competition and inhibits monopolistic behavior. The accumulation of these incremental victories leads to landmark decisions that are the stuff of legal progress, whether in labor, civil rights or antitrust law. Without private litigation, no such progress can really happen.

Of course, companies will not pursue antitrust cases solely for the good that they do for others. For companies with injuries to redress, antitrust litigation may be the most effective avenue for securing a meaningful remedy. In fact, asserting an antitrust lawsuit can help companies answer each of the three critical questions above in the affirmative.

Antitrust Claims Have Strategic Value

The primary goal of antitrust litigation is to secure a remedy for economic injury resulting from anticompetitive conduct. To incentivize companies to seek relief for those injuries—and police the marketplace in the process—Congress authorized treble damages in antitrust cases.

The possibility of securing three-times actual damages is typically a sufficient reason to bring any valid antitrust action. But there are additional strategic reasons to pursue antitrust claims. A prominent business authority, Michael Porter, has spoken to this fact. Porter was among the first to take antitrust issues down from the shelf of macroeconomics and re-fashion them as a matter of business strategy for individual corporations. He found at least two strategic benefits other than a large monetary reward that the mere act of pursuing litigation can deliver.

First, for companies suing larger or more dominant firms, standing up for themselves has intrinsic value. Porter notes that lawsuits are a way of "sensitizing the stronger firm" to the fact that its aggressive behavior will not be tolerated. "If the stronger firm feels itself under legal scrutiny," he said, "its power may be effectively neutralized."[5]

Second, Porter noted that antitrust suits "punish" anticompetitive behavior by making anticompetitive actors endure litigation. They require parties to "bear extremely high legal costs over a long period of time and also divert [their] attention from competing in the market."[6]

As Bill Gates said recently, "There's no doubt that the antitrust lawsuit was bad for Microsoft, and we would have been more focused on creating the phone operating system and so instead of using Android today you would be using Windows Mobile. If it hadn't been for the antitrust case . . . we were so close, I was just too distracted. I screwed that up because of the distraction."[7]

Antitrust Claims Generate Significant Recoveries

Companies may think of antitrust litigation, particularly antitrust class actions, the way that many consumers think about consumer class actions: "not worth my time." But that is a mistake. The average recovery in antitrust class actions is large and growing. Between 2013 and 2018, antitrust classes recovered $19 billion, or more than $3 billion per year.[8]

Recoveries, moreover, are only getting larger. Over the six-year span, settlements of less than $100 million grew at more than 30% percent annually, while settlements between $100-$500 million grew at almost 120% each year.[9] Some of the largest beneficiaries are America's largest companies.

Government Protection Is Uncertain

In theory, the government works in parallel with private parties to enforce antitrust laws. For some entities, the feeling that the government is on the case may contribute to a reluctance to assert their own antitrust claims.

This is not the correct approach, particularly in today's enforcement climate. The government's commitment to antitrust enforcement has waned considerably since the New Deal, when some of the very industries that are consolidating today—telecom, banking, media and more—were opened to competition by trustbusting regulators.[10]

Following a shift in legal doctrine in the 1980s, the government became more friendly to large mergers and market behavior that previously would have been ruled anticompetitive.[11] The Justice Department filed 43 civil antitrust cases per year in the 1970s. Between 2008 and 2017, that number was down to 13.[12] Government "antitrust isn't working," Sen. Richard Blumenthal has said, referring to antitrust enforcement as "an empty suit."

The government has been particularly passive in preventing anti-competitive mergers. Since 2010, merger filings have increased nearly 80%, while the number of merger enforcement actions has remained flat.[14] The Federal Trade Commission, meanwhile, has grossly midjudged the competitive effects of numerous mergers. In greenlighting Facebook's acquisition of Instagram, for instance, the FTC relied on its belief that Google's failed social network, Google+, would be a "constraining influence" on Facebook.[15]

Non-merger enforcement has also declined to historically low levels. In both 2018 and 2019, the Federal Trade Commission and Antitrust Division of the Department of Justice filed fewer civil non-merger actions than all but one year since 1996.[16] Amazingly, the Justice Department's own statistics indicate that it has brought just one monopolization case since the year 2000.[17]

Even when the government does bring a case, it may not do so in the same way—or with the same effectiveness—as a private party. While government attorneys are certainly capable, the fact is that private parties are much closer to the facts than the government. Indeed, private actors are the source of the market facts that must be gathered by governmental enforcers to pursue a case and the executives of private companies best understand the competitive dynamics of their industry.

The question for private parties is this: in the rare event the government addresses anticompetitive behavior in their market, would they rather play the role of backseat driver or take the wheel themselves?

Misconception Addressed:

Antitrust class actions lead only to small recoveries.

In *In re Automotive Parts Antitrust Litigation*, private parties have recovered $1.7 billion to compensate dealerships, direct purchasers and end payors. The average dealer payment was $14,150 in the first round of settlements and $22,961 in the second round. More than 2,500 dealers received payments.

(AAI Report at 10.)

How We Fight

In drawing up the nation's antitrust laws, Congress wanted private parties to enforce their rights vigorously. As the Supreme Court has said, private enforcement of the antitrust laws "was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."[18]

The two statutes that form the backbone of antitrust law are:

- *The Sherman Antitrust Act of 1890, which prohibits monopolies as well as conspiracies "in restraint of trade," and*
- *The Clayton Antitrust Act of 1914, which elaborated on the Sherman Act's prohibitions and authorized treble damages.*

The Sherman Act and the Clayton Act are supplemented by additional federal laws (such as the Federal Trade Commission Act, which created the FTC) as well as state competition legislation.

Together, the antitrust laws enable victims of a wide range of anticompetitive conduct to obtain relief. The market behavior they address includes, but is not limited to:

Monopolization

"Monopoly" is a noun describing a particular status in business. The Sherman Act prohibits actual and attempted "monopolization," a verb that describes the unlawful acquisition or maintenance of a monopoly. The courts have built up decades of opinions determining the characteristics of monopolization. Antitrust statues and judicial opinions also prohibit behavior by monopolies or those with market power that goes beyond the mere act of being a monopolist, including the below.

Refusals to deal: Generally, companies can choose who they want to do business with. But firms with market power cannot refuse to deal with another firm just to maintain a monopoly (for instance, refusing to deal with customers that buy from a competitor) or to achieve monopoly status in another market.[19]

Private enforcement of the antitrust laws
“was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.”

– Justice John Paul Stevens,
California v. American Stores Co., 495 U.S. 271, 284 (1990)

Predatory pricing: When a large firm sets prices very low—below its own costs—in order to: (i) drive smaller competitors out of the market, and (ii) recoup its losses by raising prices after it has cleared the field of competition.[20]

Exclusive dealing and bundling: Not all of these arrangements are inherently anticompetitive. When monopolists use exclusive supply or purchase agreements to keep new competitors from entering a market, however, they are illegal. Likewise, when a monopolist uses the bundling of products to force sales in a market where it is not dominant, it can be illegal. For instance, if the only maker of a drug requires patients to buy blood-monitoring equipment (provided by many others) to get its medicine, it would violate antitrust law.

Restraints of trade

The Sherman Act prohibits agreements among competitors "in restraint of trade," which begs the question: what agreements restrain trade? The courts have divided agreements into two groups: those that are automatic, or "per se," violations of antitrust law, and those subjected to a "rule of reason" analysis.

Per se violations:
Price fixing: Agreements to set prices at certain levels or in a certain way.

Bid rigging: Coordination among bidders for contract awards.

Supply restraints: Agreements among horizontal competitors to restrict supply and therefore increase prices for their goods.

Market or customer allocation: Agreements to divide territories or customers.

Rule of reason analysis: Courts evaluate agreements that are not *per se* illegal according to the "rule of reason," which judges each agreement on its competitive effect. It is a fact-intensive inquiry that considers the competitive harm that can arise from the agreement and whether or not the agreement is necessary to achieve any legitimate business purpose.

Anticompetitive mergers: Mergers that create monopolies violate the Sherman Act, but the Clayton Act prohibits an even wider ranger of business combinations. Section 7 of the Clayton Act gives the FTC and the Department of Justice authority to regulate all mergers, and to prohibit mergers they deem anticompetitive.

Misconception Addressed:

Antitrust class actions lead only to small recoveries.

The Clayton Act gives private parties the right to sue for antitrust violations, including anticompetitive mergers. Although private litigants have not challenged many mergers, federal courts recently reaffirmed their ability to do so. In *Steve and Sons, Inc. v. JELD-WEN*, a San Antonio door manufacturer convinced a federal jury that a larger competitor's acquisition of a plant violated antitrust law by reducing competition in the market for interior "doorskins." The jury awarded the plaintiff $175 million, and the court ordered the divestiture of a large plant that the defendant had acquired in the merger.

In *Steve and Sons*, the government itself also clarified an important point: the fact that the government has not challenged a merger should have no bearing on a private party's attempt to block it. A Department of Justice brief in that case said: "The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive." "Contrary to JELD-WEN's suggestion," it went on to explain, "no inference should be drawn from the Division's closure of its investigations into JELD-WEN's proposed and consummated acquisition of CMI."

When We Fight

Parties that have experienced anticompetitive conduct don't walk straight to the courtroom to fix it. Instead, in consultation with their attorneys, they have to ask themselves a series of preliminary questions, including

- *whether they have suffered the kind of non-speculative injury that will give them standing to pursue their case in court, and*
- *whether they have a viable theory of recovery.*

Even with a sound case, companies must still consider whether pursuing a lawsuit is worth it. This is the point at which many law firms and legal departments balk, and sometimes that is a good decision. To avoid litigation for irrational reasons, however, is to lose a significant strategic advantage for your business. Professor G. Richard Shell, author of *Make the Rules or Your Rivals Will*, put it this way: "Many in business fear getting tangled up with lawyers, lobbyists and bureaucrats so they keep their distance from legal matters, but it is just this aversion that makes legal knowledge such a rich source of competitive advantage for those who take the time to understand how legal systems really work."

At companies that have made a serious effort to use the legal system to their advantage—DuPont, Ford and the others noted above—the legal department has become a critical player in the execution of business strategy, and thereby all the more indispensable. In those companies, "managers and attorneys work together to devise legal strategies that increase ROI in ways that can be tied directly to a profit-and-loss statement."[21] When an antitrust settlement adds millions to the bottom line, that makes it easy for any legal department to demonstrate its value.

But that's getting ahead of ourselves. Before a company initiates an antitrust lawsuit, a potential plaintiff should conduct a cost-benefit analysis to answer the question of whether or not the case is worth it. One major component of this analysis, of course, is the legal expense of bringing the litigation. The sidebar at the end of this section contains further discussion of this factor, which, given the availability of litigation finance, should not weigh against bringing valuable claims.

Professor Shell assembled a helpful list of additional factors that parties should consider in their analysis:

- Opportunity costs of litigation
- Potential damage to existing relationships and reputation
- The probability of winning on the issue of liability
- The strength of the case for damages
- The possibility of success on appeal
- The impact of suing (or not) on a firm's core profit model

There is no set formula by which these and other factors—like the amount of the alleged damages—should be evaluated. Some concerns, such as the potential for an antitrust lawsuit to damage business relationships, are chronically overstated. Evidence indicates that when buyers pursue antitrust actions against suppliers, the legal action does not disrupt their business relationship.[22]

Every company will have its own sensitivities with regard to each issue, and will weigh them accordingly. Not every cost-benefit analysis will call for a lawsuit. Ultimately, the goal is to arrive at a rational decision that serves the business's best interests.

In the end, however, those that institute litigation will have a strong understanding of the most important concern: why they are fighting.

"Not every antitrust cost-benefit analysis will call for a lawsuit.

Ultimately, the goal is to arrive at a rational decision that serves the business's best interests."

Misconception Addressed:

Bringing antitrust litigation involves the risk of losing a substantial amount of attorneys' fees.

According to 2018 research, seven in ten in-house counsel say their organization has chosen to forgo claims because of legal expenses associated with bringing them. But the advent of litigation finance has largely mitigated that concern. Providers of litigation finance give parties the funding necessary to bring a case (with the counsel of their choice) in exchange for a portion of any recovery received. This funding is expensive in the sense that, in the event of recovery, it will cost more than a commercial loan. However, in the event of a loss, litigation funders do not recover anything at all. That takes the out-of-pocket cost of bringing a suit down to nothing.

For those holding strong antitrust claims, finding willing litigation funders is not likely to prove an obstacle. Litigation funders find antitrust litigation to be an attractive investment, given the good credentials of most antitrust attorneys, the high monetary value of the claims, the usual good financial standing of the defendants, the likelihood that cases will settle, the fact that the high cost of litigation makes risk-sharing attractive and the fact that claims often follow findings by government authorities—an excellent indicator of misconduct.

(AAI Report at 10.)

About the Author

Dan Mogin is the Managing Partner of MoginRubin LLP, a national award-winning competition law boutique engaged in the full range of antitrust and related matters, including antitrust class actions, competitor cases, merger challenges, merger due diligence and opt-out cases. He has served as lead counsel in numerous large antitrust cases, chaired the Antitrust Section of the California Bar, taught antitrust law and was Editor-in-Chief of a leading competition law treatise. Mogin also represents private equity, hedge funds, M&A professionals and investors.

Endnotes

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