Bloomberg BNA

Antitrust & Trade Regulation Report™

LITIGATION

Accentuate the Positive: Defending Antitrust Litigation By Demonstrating the Procompetitive Character of the Challenged Conduct

BY DAVID L. MEYER AND ROBERT M. NICHOLS

For many defendants in antitrust litigation, the procompetitive nature of their alleged conduct is a topic near the bottom of the list of subjects they want to address.

They would prefer to first exhaust all of the available avenues for avoiding full-blown merits litigation—and all of the costs and burdens that discovery and trial can bring. There is the usual motion to dismiss raising the plaintiff's lack of standing; the incoherence of the plaintiff's legal theory; the failure to plead market definition or some other element; and (when available) the *Twombly* motion challenging the plausibility of the complaint's factual assertions. Then comes the challenge to class certification, the inevitable *Daubert* motions directed at the other side's experts, and the motion for summary judgment explaining why there is no cognizable evidence supporting a valid antitrust theory.

These sorts of defensive steps have their place and can be successful. But the real guts of any fully-formed defense ought to turn on the reason why the defendant's conduct does not violate the law—in other words, the procompetitive character of the challenged conduct, its consistency with the competitive process, and its benefits for consumers. Even in pretrial stages of litigation, defendants seldom win solely on the basis of purely defensive maneuvering, legal loopholes, or the plaintiff's own poor lawyering. Most successful defense strategies place at the center of their advocacy some credible affirmative explanation why the court or the jury should view the defendant's conduct as procompetitive. We call this the defendant's ''procompetitive showing.''

This central need to make a robust procompetitive showing may seem obvious in cases that will be judged under the rule of reason, where the ultimate question of liability will turn on whether defendant's conduct was on net anticompetitive. But it applies as well in cases alleging *per se* unlawful conduct: not only are the potential procompetitive benefits of the conduct a basis for eschewing *per se* treatment, but that rationale likely provides at the very least grounds for concluding that the supposed conspiratorial price fixing or other misconduct did not actually take place in the manner alleged.

We offer below our thoughts—as antitrust litigators with experience across an array of different kinds of cases and different stages of litigation—on the art of the procompetitive showing. We lay out ten principles of

David L. Meyer, a partner in the Washington, D.C., office of Morrison & Foerster LLP, represents clients in a wide range of industries in all aspects of antitrust law—including mergers and acquisitions, government investigations, litigation, and strategic counseling to manage antitrust risks. He formerly served as the Principal Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice.

Robert M. Nichols, an associate in the Washington, D.C., office of Morrison & Foerster LLP, focuses on antitrust matters and commercial litigation—including government contracts, intellectual property, and energy law. Recent representations included U.S. and international merger clearance, antitrust litigation and counseling, and government contracts litigation and investigations.

 ISSN 0003-6021

general applicability that we believe help inform when, where, and how to convey to the trier of fact (or the government investigator) that the defendant's conduct should be seen as comporting with antitrust standards. We begin by addressing how to think about framing a persuasive procompetitive showing and then turn to the equally important issue of presentation.

Framing the Showing

One — Take a Broad View of Your Procompetitive Showing

The procompetitive showing we are describing should not be confused with an ''efficiencies'' defense. Think more broadly than that. To be sure, if you have evidence quantifying the marginal cost savings realized from some transaction and can tally them as an offset to alleged price increases, don't hold back. But the procompetitive showing is more—and more nuanced—than this sort of math exercise. It is the fundamental narrative that explains how the conduct at issue comports with the process of competition exalted by the antitrust laws. It is how the conduct enables the defendant to compete more vigorously, to lower its price or increase its output, to improve its offering or offer some entirely new product or service, or even just to survive in a cutthroat ''rough and tumble'' world of rivalry.[1]

In cases where the challenged conduct has already had an effect in the marketplace, those effects will play a key role in the court's assessment of the conduct's legality, and they will inevitably bound the dimensions of the procompetitive story. But those effects are not necessarily the only lens through which to view the conduct's character. Did the effects arise because consumers—or competitors—reacted in ways that the defendant did not anticipate or intend? No matter what the law says, antitrust litigation is seldom resolved on the basis of ''strict liability'' for anticompetitive effects. If the defendant has a credible story that it *sought to* achieve procompetitive results, it should not shy away from the telling it just because things turned out differently.[2]

As a corollary, think dynamically and not just statically about the procompetitive showing. Are the anticompetitive effects being challenged just one consequence of a broader and overall procompetitive business strategy? A transaction or agreement might stimulate the parties to deemphasize competition in one narrow area of overlap today but may position them to be more effective in pursuing bigger opportunities in tomorrow's marketplace. Likewise, a restructuring of the company's distribution system or imposition of new restrictions on resellers might reduce intrabrand competition today, and might even appear to increase price and reduce output in the market at large, but may yield long-run improvements in positioning the company's brand and thus its value for the fast-growing or lucrative consumer segments the company desires to serve better.

These kinds of dynamic, inter-temporal stories can be the hardest to tell persuasively, in part because they will not fit the neat math of a simple ''net benefits'' or ''net pricing pressure'' calculation. They also often require laying a fair amount of foundation to allow the court or jury to appreciate the dynamics of the evolving markets in which the defendant operates or seeks to operate. The district court's decision in the Apple eBooks case provides one example of these difficulties. Apple was unable to persuade the court that its agreements with publishers that launched its iBook Store enabled a dynamic increase in competition against Amazon and others for the sale of electronic books.[3] Nonetheless, dynamic stories often reflect the compelling underlying truth needed to convey the procompetitive character of the conduct at issue.

Two — Remember What Is, and Is Not, Legally Cognizable

While thinking expansively about the procompetitive rationale, it remains prudent to bear in mind the limits on the *legal cognizability* of certain types of justifications.

We do not attempt to catalog all of those limits here but offer some examples. The law does not permit defendants to defend their alleged anticompetitive conduct by arguing, for example, that competition in a particular industry is itself undesirable, or that the prices, quality levels, and other outcomes yielded by the competitive process are inferior to those resulting from a private agreement or exclusionary conduct.[4] Likewise, saving costs by reducing promotional activity or slashing the level of discounting are less likely to be viewed as procompetitive than as reflecting a desire to be rid of the burdens of competition. And, as a general matter, arguments about why particular conduct increased the defendant's own profits are unlikely to be viewed as rel-

[1] *See, e.g.*, *Broadcast Music v. CBS*, 441 U.S. 1 (1979) (collaboration to offer blanket licensing enabled creation of new product); *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877 (2007) (minimum RPM agreements can ''enhance interbrand competition'' by supporting investment in pre-sale services that would otherwise be discouraged by ''discounting retailers [that] free ride on retailers who furnish services and then capture some of the increased demand those services generate''); *Texaco v. Dagher*, 547 U.S. 1, 8 (2006) (''What could be more integral to the running of a business than setting a price for its goods and services?''). *See, e.g.*,*Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 103 (1984) (''[A] joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive.'').

[2] *See, e.g.*, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997) (''[I]ntent is . . . important in judging the pro-competitive purposes, and thus the likely overall competitive effects, of an alleged restraint.'')

[3] In part, Apple's difficulty traced to the court's doubt ''that the only way [Apple] could have entered the e-book market was to agree with the Publisher Defendants to raise e-book prices,'' an issue we address under Principle Three below. *United States v. Apple*, Case No. 12-cv-2862 (S.D.N.Y. 2012), slip op. at 157.

[4] For example, antitrust defendants cannot defend their restraints by arguing that consumers would be better off without some of the choices that a competitive marketplace would make available. In *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 717 F.3d 359 (4th Cir. 2013), *cert. granted*, the court condemned practices whose ostensible purpose was to protect consumers from lower-quality teeth whitening services that might be unsafe. *See also, e.g.*, *National Society of Prof. Engineers v. United States*, 435 U.S. 679 (1978) (finding association of competitors acted unlawfully when it prohibited competitive bidding for engineering services based on concern that pressures to offer lower priced would yield shoddier engineering services and endanger public safety).

  ATRR ISSN 0003-6021

evant to the question whether that conduct was anticompetitive.[5]

Notwithstanding these limits on what is legally cognizable, bear in mind that antitrust litigation does not always turn solely on abstract legal tests. Decision makers are human and often reluctant to condemn economic actors for making reasonable economic judgments. When the time comes for a finder of fact to judge whether the defendant *violated the law* through its course of conduct, it will be far better to have some sincere, not-anticompetitive explanation than to rely solely on defensive tactics, even if that justification is not formally a valid offset to concrete anticompetitive impacts.

Also bear in mind that context matters. Whether the result of some conduct will be viewed as cognizably pro- or anticompetitive can depend on the circumstances under which it arises. Was it achieved unilaterally? In response to competitive threats? To better satisfy consumer preferences? For example, it may be ''efficient'' for a firm to move more rapidly to an equilibrium level of capacity and output that meets consumer demand without wasteful overinvestment and excess capacity, but if doing so was the product of coordination the conduct that led to that result likely will be seen as cartel-like rather than procompetitive.

Three — Link the Benefits to the Conduct Under Attack

In framing your procompetitive showing, link the procompetitive attributes as directly as possible to the conduct that the plaintiff has actually challenged. The defendant's broader procompetitive objectives will be of relatively little value if the court or jury believes that there were less restrictive ways to achieve them or if the alleged harms arose from a restraint that was not sufficiently related (*i.e.*, ''ancillary'') to the overall endeavor.

For example, when Microsoft sought to justify restrictive licensing terms for Windows as needed to prevent substantial alterations by OEMs, the court rejected that justification as to many of the restrictions (such as those preventing the removal of any icons from the desktop) on the ground they were not needed to prevent substitution.[6]

Similarly, in the Three Tenors case,[7] Warner and PolyGram formed a venture to record and jointly promote a new album by the Three Tenors. Each continued to sell its own earlier Three Tenors album. Realizing that success of the new album would be jeopardized if they could free-ride on the new release by promoting sales of their own Tenors albums, Warner and PolyGram subsequently agreed to an eight-week moratorium on advertising and discounting the older albums around new album's release. They sought to justify the moratorium as needed to support investment in the new album, but the court upheld the FTC's challenge on the ground that the parties had formed the venture without insisting on any such restriction. Some advance planning could have paid dividends for the parties here: had the moratorium been established upon the venture's original formation, or had the venture explicitly encompassed all three albums, the linkage between the moratorium and the obviously procompetitive (and output-expanding) release of a new album would have been clearer.[8]

Four — Credibility Is Everything, and, Like Charity, Begins at Home

The most valuable asset any litigant possesses is his or her credibility. When it comes to presenting a persuasive procompetitive showing in contested litigation, the key to building credibility will be evidence that the proffered rationale is the real explanation, not just a *post-hoc* justification invented for purposes of the litigation. And the best way to develop that evidence is to plan ahead before litigation materializes. Lay the groundwork when you plan and implement your conduct by first framing business decisions in terms that reflect a defensible procompetitive rationale and then taking care to ensure that the responsible businesspeople generate the kinds of non-privileged documents that one would expect to exist were this rationale the actual basis for the course of conduct.

Emails memorializing that rationale, and in appropriate cases studies documenting why the rationale makes business sense, will prove invaluable in helping to tell the story in court when the need arises. Though the absence of such documents can perhaps be overcome, a documentary record that consistently reflects a different view of the world likely will be fatal, as in the recent Bazaarvoice/PowerReviews merger litigation. There, the Antitrust Division was able to use company documents to prove that Bazaarvoice pursued its transaction to take out its leading rival, contradicting the defendant's claims in the litigation.[9]

Five — Don't Carry All the Water on Your Own

In framing and supporting the competitive showing, your adversary is an often overlooked resource. If you have identified a robust procompetitive explanation for the conduct at issue, it likely rests on undisputable realities of the business context in which the defendant

---

[5] *See, e.g.*, *LePages v. 3M*, 324 F.3d 141 (3d Cir. 2003), where the court observed that 3M's pursuit of higher profits did not justify certain discounts to retailers that the court regarded as exclusionary. On the other hand, at least some courts view the defendant's pursuit of business strategies that would be profitable without regard to their impact on rivals as indicating that the conduct should not be viewed as supporting a claim of unlawful monopolization or attempted monopolization. *See, e.g.*, *Novell v. Microsoft*, 731 F.3d 1064, 1076 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1947 (2014) (discontinuing a pattern of providing access to APIs not unlawful where evidence did not indicate that the decision was based on a ''willingness to sacrifice short-term profits'' but instead suggested that it ''came about as a result of a desire to maximize the company's immediate and overall profits'').

[6] *United States v. Microsoft*, 253 F.3d 34, 63 (D.C. Cir. 2001). By contrast, in *Northwest Wholesale Stationers v. Pacific Stationery & Printing*, 472 U.S. 284, 295 (1985), the Supreme Court rejected a challenge to a group purchasing cooperative's decision to expel the plaintiff for insufficient creditworthiness, because establishment and enforcement of ''reasonable rules'' was required for the cooperative to function effectively.

[7] *PolyGram Holding v. FTC*, 416 F.3d 29 (D.C. Cir. 2004).

[8] *See* David Meyer and Derek Ludwin, ''Three Tenors and the Section 1 Analytical Framework: A Continuum Drawn with Bright Lines,'' Antitrust Magazine (Fall 2005).

[9] *United States v. Bazaarvoice*, 2014 WL 203966, *11-15 (N.D. Cal. 2014).

operates.[10] And chances are good that the plaintiff, or at least the fact and expert witnesses it will ultimately rely upon, operate in the same environment. Though they may not be willing to concede the validity of your procompetitive rationale in response to direct questions, they probably will have little choice but to acknowledge many of the building blocks underlying it. Look for documents confirming some of them, and seek useful answers at deposition to support others. The fewer that are left for you to build, the more credible your showing.

Telling the Story

Six — Wrap Your Entire Narrative (Even Defensive Points) in Benefits Clothing Rather than Defensive Armor

Consistent with the notion that the procompetitive showing should be among the central themes of any defense rather than an ''efficiencies defense'' saved for the tail end, its presentation should be holistic. All of your arguments, and especially the ones that seem most ''defensive,'' should be cloaked with the core procompetitive thesis. The tactics for achieving this goal will vary and need to be tailored to your litigation context. In some settings, especially where the procompetitive story may not be immediately obvious or intuitive or where the case will be tried first in the press, an overt recitation of the procompetitive story as early as the first section of the answer may be the right choice.[11] In other settings, more discreet allusions to the procompetitive thesis will be preferable. Simply shifting the tone of a legal argument from one ''taking plaintiffs' allegations as true'' to one that begins with a sentence or two reminding the court what the defendant's conduct was really all about can work wonders.

Seven — Don't Get Cornered By Your Own Legal Arguments

In the same vein, defendants should avoid getting trapped by their own favorite legal arguments. Early sparring will often center on dispositive *legal* issues, since motions to dismiss must take the alleged facts as a given. Arguments such as the plaintiff's lack of standing, the application of some immunity or exemption, or the application of some threshold test for market power, market share, or below-cost pricing can be powerful grounds for dismissal and are the ostensible basis for most defense wins. But overemphasizing these legal points and debating the proper legal test under the plaintiff's characterization of the facts can backfire by creating an unhelpful lens through which the conduct at issue will ultimately be assessed if the legal points are not won.

Arguably this is what happened to 3M in the well-known *LePage's* case.[12] 3M consistently argued that the conduct at issue involved *pricing* that 3M was privileged to undertake so long at prices exceeded 3M's costs, an issue as to which there was no real debate. When the court ultimately rejected that framework for assessing the legality of 3M's conduct, the field was comparatively clear for it to conclude that 3M's conduct was illegally exclusionary.

Eight — Keep It Simple and Intuitive

Antitrust trials often involve many complex issues, from business decisions and their context to evidence of their economic consequences. Often the winning party is the one that simplifies its themes most effectively so that they can be grasped by the court early on and used as the organizational framework for the raft of detailed evidence that will inevitably be presented throughout summary judgment and trial. The need to simplify (without ''dumbing down'') is even more imperative if, as we have suggested, the defendant weaves its procompetitive thesis throughout its interactions with the court.

Strive to reduce the thesis to a few sentences, tapping into the phrases found in the company's internal documents and dialogue. Over the course of the litigation, burnish those sentences into buzzwords or ''bumper sticker'' slogans that capture the themes in shorthand. Take the initiative in framing the issues using your vocabulary rather than the plaintiff's. The phrases ''pay-for-delay'' and ''exclusion payment'' were not the only ways litigants could have described reverse payment patent settlements: ''entry-acceleration settlements'' or even just ''patent litigation settlements''[13] would be more favorable to defendants and equally accurate. (Relatedly, discourage business people from using phrases internally that might come back to haunt you; you would prefer not to be saddled with your adversary's repeated incantation during the litigation of your own phrases like ''monopoly in the market''[14] or ''crushing''[15] a competitor.)

Nine — Acknowledge and Embrace the Inconsistencies

Most business decisions that spawn antitrust litigation are somewhat complicated, as is the commercial environment in which they arise. Not every fact—and certainly not every email or other internal document—will neatly fit whatever story you choose to tell. Some small inconsistencies may not be worth fretting about, especially if easily explained on cross examination. But others could cast grave doubt on the credibility of your procompetitive showing.

---

[10] *See, e.g., Imaging Ctr., Inc. v. W. Maryland Health Sys., Inc.*, 158 F. App'x 413, 420 (4th Cir. 2005) (upholding exclusive contracts based in part on ''testimony that exclusive contracts for inpatient radiology services are the norm in the industry'' because needed for ''control of quality, control of cost, provision of services, ensuring the availability of services 24/7, 365 days a year, to ensure that the practitioners are highly qualified, and to minimize the disruption of services that can exist when a number of different providers are involved in that service'').

[11] *United States v. AMR*, Case No. 13-cv-1236 (D.D.C. 2013), Defendant US Airways Group's Answer to Amended Complaint at 1 (laying out defendants view as to how combination would allow merged firm to offer more and better travel options for passengers through an improved domestic and international network); *United States v. Apple*, Case No. 12-cv-2826 (S.D.N.Y. 2012), Apple's Answer at 2 (laying out defendant's view that its ''individually negotiated bilateral agreements with book publishers . . . allowed it to enter and compete in a new market segment – eBooks.'').

[12] *LePage's v. 3M*, 324 F.3d 141 (3d Cir. 2003).

[13] *FTC v. Actavis*, Case No. 12-416 (2013), Brief for Respondent Actavis at 3.

[14] *Bazaarvoice*, 2014 WL 203966 at *15.

[15] FTC v. Whole Foods, Case No. 07-cv-1021 (D.D.C. 2007), Proposed Findings of Fact at 1.

  ATRR ISSN 0003-6021

As a general matter, the best way to deal with these warts is to embrace them. Use them to show how the company struggled to make the right decision, considered other options, and maybe even sought to avoid antitrust risks. The court and jury will be more willing to believe that your business is complicated, or that different decision makers see things in different ways at different times, if they hear about it *from you*.

Ten — Repeat, Repeat, Repeat

Finally, at the risk of repetition, repeat the procompetitive showing. As one of the organizing principles of an antitrust defendant's case, the procompetitive showing and its core themes need to come across loud and clear over and over again. The court should hear them from counsel at every suitable opportunity. They should be presented not by a single witness, but by a mutually reinforcing array of different witnesses marshalling multiple perspectives and types of evidence. The available opportunities for repetition and reinforcement will of course vary depending on the facts and litigation setting. But if armed with suitable witnesses and ammunition and given the chance:

- have the businesspeople involved in the relevant decisions describe in their own words what the company's objectives were and why;
- have them sponsor and explain the contemporaneous documents demonstrating that the proffered rationale was the real motivation for the conduct;
- offer an industry expert to put the conduct in a context that allows the decisionmaker to understand how it made good objective sense in a competitive environment;
- provide testimony of other company fact witnesses to lay out how the actual marketplace impacts of the conduct were consistent with the company's objectives and with competition;
- offer the testimony of customers who view the conduct as beneficial; and
- offer the testimony of an expert economist to wrap all of the evidence together in a way that reinforces the themes and responds to any gaps in the judge or jury's grasp of them.

Like the New Testament, a cohesive story told from numerous different perspectives is likely to more convincing and more enduring than a point passed over quickly once or twice, especially since it is often hard to predict which aspect of the supporting case will resonate best with the judge or jury.

* * *

Antitrust defendants need not, and should not, be defensive. Defending against antitrust challenges may require demolishing the credibility, legal theories, and factual assertions made by the plaintiff. But in most cases, having a straightforward and credible procompetitive thesis for the defendant's conduct will improve the defendant's chances of avoiding prolonged litigation and achieving success if the battle must be joined.