

Q&A With Robins Kaplan's K. Craig Wildfang

Friday, Nov 02, 2007 --- U.S. enforcement agencies should rely more heavily on private litigation to complement their efforts, says Robins Kaplan's K. Craig Wildfang 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. What initially attracted me to antitrust law, and what keeps me fascinated by it, is the opportunity to be creative. The principal antitrust statutes are only a few sentences, so the law is mainly judge-made law. This leaves a lot of room for creative approaches involving new and different factual settings. Add to that mix the need for constant revision of application of the law to facts as economic science has expanded our understanding of how markets work, and you have a very intellectually challenging subject.

Q. What's the most challenging antitrust case you've worked on, and why?

A. Actually, two cases come to mind. The first is one I am currently working on as co-lead counsel for a class of merchants in the U.S. who are challenging the fixing of prices charged by Visa and MasterCard and their member banks to merchants for processing credit- and debit-card transactions. The case is MDL 1720 In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation.

The case involves the application of joint venture law, as both Visa and MasterCard are joint ventures of banks, to one of the fastest growing sectors of the economy. The case has every conceivable issue in it, and the stakes are huge.

The second case is one I tried almost 10 years ago, *Concord Boat Corp. v. Brunswick Corp.* I represented about 20 boat builders in a case involving a challenge to marketing tactics and acquisitions by a monopolist that had the effect of raising prices and excluding competition in the market for stern-drive marine engines. The 10-week trial in Little Rock, Ark., resulted in a trebled jury verdict of \$133.2 million. In a departure from established precedent, the court of appeals reversed the judgment. The joy of victory and the agony of defeat in the same case.

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

A. The case that stands out in my memory was an antitrust counterclaim in a

patent infringement suit my firm brought against an infringer. The antitrust counterclaim was brought by a lawyer probably very well versed in patent law but who apparently knew little about antitrust law. We got the party's expert report excluded under Daubert and obtained summary judgment on the merits.

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

A. I actually don't think that the antitrust laws are in need of much reform. Although the Antitrust Modernization Commission considered many proposals and proposed a few, I don't think that anyone has really made a persuasive case that the U.S. antitrust laws are not working well to achieve their goals of enhancing and preserving competitive markets.

In fact, if you look around the world, other countries have taken steps to adopt and pattern their competition laws after those in the U.S. I think that many people believe, and I certainly do, that one of the reasons that the U.S. economy outperformed the other economies during much of the 20th century is that we had a vigorous competition policy embodied in the Sherman and Clayton Acts that spurred competition and innovation.

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

A. Having served in the Antitrust Division as special counsel to Anne Bingaman in the mid-'90s, my perspective is that one of the areas where the enforcement agencies could do a better job is in cooperating with private enforcement efforts. The agencies cannot possibly discover and challenge every antitrust violation; they simply don't have the resources to do it.

That is one reason Congress provided for the private treble-damage remedy, to encourage the concept of "private attorneys general." And I think private enforcement has produced a lot of good for the country. The agencies, however, are unduly suspicious, in my view, of the role of the private bar in antitrust enforcement, and this makes them reluctant to cooperate even in cases where such cooperation would further the government's interest in effective enforcement.

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

A. Take as many economics courses as you can and find a good mentor with antitrust experience.

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

A. My firm was recently named by the American Lawyer to its "A" list of the top 20 law firms in America. My firm tries more big cases than almost any

other firm in America. Our antitrust expertise is second to none, and we know how to get the result the client wants. We have represented Fortune 100 companies, such as Best Buy and Unocal, in very complex antitrust matters.

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