THE NATIONAL LAW JOURNAL
JUNE 28, 2010
Online Feature
An ALM Publication

LITIGATION MANAGEMENT

Coping with life as a plaintiffs' lawyer

In-house counsel may have to face up to the necessity of bringing an antitrust class action against another company.

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Let's face it: Large corporations are most often the defendants in class actions, and, not surprisingly, in-house counsel tend to dislike plaintiffs' lawyers. Few things are more painful for companies than having hordes of infamous plaintiffs' lawyers swooping in by private jet to make life miserable. Certainly, nobody envies the in-house lawyer's job of reporting to the board that the company is being sued, in a plaintiff-friendly court, by a well-known plaintiffs' lawyer. Even worse, perhaps, is the certain knowledge that, even if the case is baseless, defending it will cost millions of dollars and will occupy thousands of hours of company time.

But companies face different types of class actions. The consumer class action, though not a comfortable situation for any company, at least presents an overall experience well within an in-house counsel's comfort zone. Corporate in-house counsel know exactly how to react to these cases: despise them, despise the plaintiffs' lawyers and hire experienced lawyers from traditional defense firms.

In "business to business" (B2B) antitrust class actions, however, the plaintiffs are themselves corporations. A § 1 Sherman Act price-fixing case involving a commodity product, for example, may well pit large producers of the commodity against the equally large manufacturers that use the commodity as a raw material. See, e.g., *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100 (D.D.C. 2004). Corporate plaintiffs are arrayed against defendants with whom they often have long-standing and important supply relationships. Such cases can also be brought as individual actions. For example, antitrust cases under § 2 of the Sherman Act provide opportunities for corporations to go on the offensive against their competitors for using unfair tactics to compete. See, e.g., *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (affirming jury finding of monopolization and trebled damages award of $68.5 million).

Unfortunately, many corporations fail to distinguish between the obvious horror of defending a consumer class action and the more subtle issues, and perhaps major opportunities, associated with being a plaintiff in a B2B antitrust case. That is a big mistake.

This article analyzes corporate attitudes about antitrust plaintiffs' work through the lens of the familiar five stages of grief. Elisabeth Kübler-Ross, On *Death and Dying* (1969). Applying those principles to the corporate counsel can lead such counsel on a journey of self-improvement that can end in accepting the unique qualities of B2B plaintiffs' antitrust work.

- *Denial*. Large corporations, well accustomed to being defendants, often are in complete denial regarding their opportunities as antitrust plaintiffs. They do not even track the cases that have been filed. Worse yet, sometimes corporations know about cases that affect their interests but still do not take steps to participate in, or even monitor, the litigation.

The first step to overcoming this denial is admitting that legitimate plaintiffs' antitrust cases do exist. In-house counsel who schedule antitrust compliance seminars for their company's employees would do well to remember that there is a reason for those seminars. The lessons built into those presentations are drawn from a long history of cases in which buyers and sellers have subverted free competition, profited at their customers' and/or suppliers' expense and, in some cases, committed felonies.

Instead of denying the situation, corporations should educate themselves before they make critical decisions about plaintiffs' lawsuits, class participation or settlements. Corporations that are tardily made aware of class settlements or recoveries have very limited options — they can either opt out or accept whatever result is achieved on their behalf. In either case, they will not know if their interests have been fully protected. Even worse is the unthinkable prospect that free settlement money for the bottom-line-driven corporation might go entirely unclaimed. That result is not common, given the notice requirements of Rule 23 of the Federal

Rules of Civil Procedure, but the fact that it could happen should be of concern to companies.

- *Anger.* Denial does not last forever. Anger emerges as large corporations reflect on bad experiences as defendants in major litigation and experience cognitive dissonance at the very idea of being both defendant and plaintiff in simultaneous major litigation. The anger is valid. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and the U.S. Class Action Fairness Act of 2005, 28 U.S.C. 1332(d), 1453, 1711-1715, were responses to decades of practice in which the expense of discovery, lax pleading requirements, plaintiff-friendly class-certification standards and the terrible prospect of treble damages in hand-picked, plaintiff-friendly jurisdictions all combined to extort large settlements from corporations that genuinely believed themselves to be innocent of wrongdoing. Now, however, pleading standards are heightened and removal to federal court is easier — which should reduce the anger.
- *Depression*. In Kübler-Ross' book, depression comes after bargaining, but leave it to lawyers to reorder the stages to fit their thesis. At any rate, depression logically follows anger as the in-house lawyer contemplates plaintiffs' work and perhaps loses a carefully cultivated sense of self.

No longer can in-house lawyers chortle at a particularly restrictive circuit court ruling on class certification or pleading requirements. After all, the corporation may be on both sides of those issues now. All those years spent on joint defense conference calls are now touched with sad irony, as the in-house counsel finds formerly friendly defense lawyers are now adversaries. Even the term "plaintiffs' lawyer" now demands an asterisk and can never be said with the same disdain again. These are major life changes.

In the worst cases, instead of facing these uncomfortable realities head-on, the in-house lawyer slips into depression. Cocktail party and bar association conversations become more and more tense. With the corporation as a plaintiff in an antitrust class action, which topics are safe? Will the antitrust plaintiffs' bar accept her? Will old colleagues disown him? Will a wardrobe change be required? Only time will tell.

- *Bargaining.* Before accepting life as a plaintiffs' lawyer, the in-house lawyer bargains to ensure the paradigm shift is proper. What are the benefits to being a named plaintiff? Is it better to sit on the sidelines and monitor the litigation? If I simply monitor, will I still have the tactical strength to negotiate a settlement in excess of the class settlement? If we take the lead as a plaintiff, are there alternative fee structures I can negotiate with outside counsel? Will my existing law firm partners take my case on a contingent fee basis? Will they take the case at all, considering the possible backlash from their other clients? Does the case present issue conflicts with existing company litigation? Is there an opportunity to approach the defendant at the outset and negotiate my company out of the class in a manner that benefits both parties? How would settlement mesh with the company's larger business objectives? Answering these questions favorably will reveal the benefits of bargaining.
- *Acceptance*. Acceptance comes only when the corporation has an approach to potential plaintiffs' antitrust cases that is as sophisticated and thoughtful as its approach to defense work.

A mature corporate plaintiffs' practice will, first of all, make use of all of the smart people who are the eyes and ears of the corporation — the corporation's employees, particularly those involved in procurement and sales. When those employees are given defensive antitrust compliance training, they should also be given offensive antitrust awareness training. Corporate counsel should ask their business leaders questions designed to root out potential claims based on supplier or customer collusion. Even if no nefarious supply dealings are identified, and no plaintiffs' lawsuits filed, the corporation will only benefit from the process and will be better able to negotiate with its suppliers and customers in the future now that internal pressure points have been identified.

The savvy corporate plaintiff also will form partnerships with the right outside counsel — those who are experienced and creative enough to identify the issues, provide practical antitrust awareness training and help determine the proper course of action when antitrust exposure is identified. Of course, the outside counsel will likely need to go through the five stages of grief, as well — emerging with a Zen-like appreciation for the plaintiffs' side.

In the end, corporate counsel might not merely accept but actually embrace life as a plaintiffs' lawyer. Perhaps during the next report to the board, the in-house counsel will be basking in the glory of turning the company's corporate legal department into a profit center through plaintiffs' antitrust litigation.

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