

Q&A With Sheppard Mullin's Gary Halling

Law360, New York (March 14, 2013, 1:24 PM ET) -- Gary L. Halling is a partner with Sheppard Mullin Richter & Hampton LLP in San Francisco. He leads the firm's antitrust and trade regulation practice. He has experience in civil and criminal antitrust matters involving both federal and state enforcement agencies. He was a member of the trial team for the U.S. Department of Justice Antitrust Division in the first successful felony prosecution under the Sherman Act. He has represented Samsung entities in international cartel cases, in patent/antitrust civil and governmental standard essential technology cases, and also in the multibillion-dollar Rambus boycott antitrust litigation.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Representing the Hearst Corporation in its bitterly fought, and ultimately successful \$700 million acquisition of the San Francisco Chronicle. To satisfy federal, state and local antitrust regulators, it was necessary to transfer Hearst's San Francisco Examiner newspaper, the original Hearst newspaper, with an unprecedented \$50 million subsidy to entice a "buyer."

The case posed unique issues under the Newspaper Preservation Act antitrust exemption and its interplay with Section 7 of the Clayton Act. For the first time, two newspapers who had long ended commercial competition in return for maintaining editorial competition under the NPA, sought to dissolve their relationship, with one buying the other. The matter went to trial amid a media circus in San Francisco, with difficult legal questions raised daily by the judge, a respected jurist and antitrust lawyer, Chief Judge Vaughn Walker of the Northern District of California. Ultimately, with much difficulty, the transaction was approved.

Q: What aspects of your practice area are in need of reform and why?

A: A key feature of international cartel law is the DOJ Antitrust Division's leniency program. This program, more than anything else, has been responsible for the surge in the last two decades of successful prosecution of international criminal cartels. In addition to avoiding a criminal fine and prosecution of the firm's executives, a qualifying company who first reports a potential criminal antitrust violation, qualifies for reduced civil exposure under the Antitrust Criminal Penalty Enhancement Act. ACPERA provides for single, instead of treble, damages, and no joint and several liability. This statute should be a powerful additional inducement to cooperate with the government but it is seriously flawed in practice.

The ACPERA statute requires “cooperation” with the civil plaintiffs to qualify for the reduced civil exposure, but there are no meaningful standards for measuring such cooperation. Worse, the statute by its terms does not actually come into play until after an adverse judgment at trial. This poses the absurd notion of going to trial, all the while “cooperating” with one’s opponent. The amnesty applicant does an immense service to the civil plaintiffs by often making such cases possible at all, and assisting the government in achieving convictions. The standards for reduced civil exposure should be made clearer and easily verifiable.

Q: What is an important issue or case relevant to your practice area and why?

A: An important issue currently is the Foreign Trade Antitrust Improvements Act. The FTAIA proscribes the limits of U.S. commerce for purposes of the federal antitrust laws. As U.S. companies have become increasingly global, manufacturing and procurement operations have been commonly outsourced around the world. It is no longer clear what sales count for U.S. commerce and which sales are foreign, and thus properly the subject to the jurisdiction of other countries.

This is a critical question in international cartel cases where the determination of applicable commerce makes a huge difference in the amount of the ultimate criminal fine and civil damages. It is possible to significantly limit the U.S. exposure depending on which sales are counted and which excluded. In the LCD cartel case, for example, total U.S. criminal fines totaled in excess of \$1.0 billion dollars. In a case otherwise similar in many respects, CRT, the U.S. criminal fines due to commerce considerations totaled \$32 million. In virtually every antitrust case today with international scope application of the FTAIA is a pivotal issue.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: FTC Commissioner Tom Rosch. Tom is an antitrust lawyer from San Francisco who was a longtime partner at Latham & Watkins. I represented Hearst, and Tom represented the Chronicle in the Newspaper Preservation Act merger trial noted above before Judge Vaughn Walker. I have observed Tom’s work first-hand as a co-defense counsel in a number of major antitrust matters over the years, and we were on opposite sides long ago in a case involving an antitrust advertising dispute. At all times, I have been impressed by Tom as a gentleman and a first-class antitrust lawyer. Tom is widely respected by everyone who knows him. He was a zealous advocate in private practice but always with principle. Tom’s insightful work on antitrust cases at the Federal Trade Commission is also well recognized.

Q: What is a mistake you made early in your career and what did you learn from it?

A: The first cross-examination of an expert I did while at the Antitrust Division was quite a learning experience. The opposing witness was an economist from Stanford, and it did not go well. My questions were too open-ended, and the witness was highly skilled, as such experts generally are. At every opportunity, the expert in effect said, I am glad you asked, then proceeded to give a speech advocating his viewpoint. After that, I learned to do exhaustive preparation, ask only pointed leading questions, and then move on after making a point. The biggest lesson is not to be too ambitious. Score what points you can, no matter small or large, then sit down. You can always counter with your own expert.

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