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Q&A With Kaye Scholer's Claudia Higgins

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

A: When I was a senior litigator at the Federal Trade Commission in 1996, the agency received a Hart-Scott-Rodino filing for the merger of Ciba-Geigy Ltd. and Sandoz Ltd — at the time, the largest transaction ever filed before the FTC. This presented some of the most complex issues I have experienced in my career. It raised unique policy judgments for the FTC, both on the law and on the facts. The agency resolved its competitive concerns with a novel settlement remedy that has since served as a template for other transactions.

During our investigation, the FTC staff realized that although large portions of the transaction did not raise competitive issues, there were serious concerns in the area of gene therapy research and development. At the time, scientists were excited about early promising results in gene therapy research and development, and they worried that the combined Ciba-Geigy/Sandoz would have little incentive to offer licenses to intellectual property necessary for continued research. However, since no product was on the market and there were no guarantees that R&D would ever produce one, the competitive questions were quite novel. These issues involved what antitrust lawyers were beginning to term "innovation markets."

The FTC and the parties resolved their concerns by crafting a settlement that required the parties to license certain IP assets that scientists believed would be critical for their research efforts. Today, this type of a nondivestiture antitrust remedy is relatively commonplace. At the time, it was anything but normal.

The Ciba-Geigy/Sandoz merger ended up creating the prominent pharmaceutical giant Novartis, which I have been privileged to represent since I joined Kaye Scholer in 2001 after leaving the FTC.

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

A: As an antitrust lawyer whose primary focus is mergers, one of the most troubling aspects of this practice to me is the massive volume of documents that is required when a merger is being investigated and may be subject to a challenge. I know both sides to this dilemma — having practiced for more than

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20 years with the FTC and now for more than a decade with Kaye Scholer — and there are no easy answers. The government has valid needs for information and too little time to prepare a court case, and the parties have strong incentives not to help the investigators find information that might hurt their chances for the deal.

Nonetheless, companies under serious scrutiny will produce terabytes of information that does not meaningfully address the issues presented. The useful documents and information are usually those identified in early stages of the investigation or located in the files of company employees whose responsibilities are readily named in those early stages as well. The government does not want to receive the extraneous information any more than the parties want to spend time and money producing it. However, the government does need time to analyze relevant information and, when necessary, to prepare a case to challenge the transaction.

One proposal would be for government agencies to allow earlier access by the parties to decision-makers above the investigating staff, perhaps within 30-45 days of issuance of a Second Request, in order to present and discuss case theories. The costs of putting parties through a full Second Request production before being able to discuss issues and legal theories with superiors in the agencies (the deputy assistant attorneys general at the DOJ; the Bureau Directors at the FTC) is significant. The details of proof on both sides would be half-completed, but with that recognition, both sides could benefit from an exchange of theories and arguments sooner rather than later. This would require time commitment from agency superiors earlier in the investigation process, but it would have the benefit of allowing them to hear arguments on both sides of the investigation. In some instances, this process could truncate an investigation and allow a merger to be consummated with less cost and more quickly without causing harm to the government's ability to prepare to litigate against truly problematic transactions.

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

A: Like many others in the antitrust bar, I am anxious to see what the US Supreme Court decides in *FTC v. Watson Pharmaceuticals*. After several efforts, the FTC has finally succeeded in getting a so-called "reverse payments" Hatch-Waxman settlement case on the court's docket. In addition to many court cases and the split in the circuits, various parties have supported legislation to resolve the murky standards that have been present in this area for years. With the intersection of antitrust and intellectual property rights, along with the Hatch-Waxman Act and other health policy matters in play, the issues are difficult and multifaceted, and there are many different positions and opinions.

I believe all would agree that for too long now, antitrust practitioners have been advising clients, without clear legal precedent, about whether and in what circumstances a pharmaceutical company with a patented branded product can or should compensate a generic company in the context of settling

patent litigation between the companies. The case will be argued in late March, and I am hopeful that we receive a decision that provides good guidance.

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

A: Bill Baer, who recently assumed the role of assistant attorney general for antitrust at the Department of Justice and has now left behind a very successful practice with Arnold & Porter. Bill was the director of the FTC's Bureau of Competition during the Clinton Administration, during which I worked closely with him as one of his assistant directors. Those of us in the antitrust bar appreciate his expertise at balancing solid legal theories and careful economic analysis with well-reasoned public policy principles, practical litigation strategies and effective management skills. Now it is DOJ's turn to benefit from his well-regarded capabilities. I know that the Antitrust Division will be in good hands for the upcoming years.

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

A: As a young woman joining what was a man's world in 1977, during my early years I was overly deferential to those around me who had more experience, even if I thought them wrong about a particular issue. Growing up in Oklahoma, I was taught to always respect one's elders and to "go along to get along." Over time, I realized that my development as an attorney would be stunted unless I learned to be more assertive and to offer my opinions to those with whom I worked. I made conscious efforts in various settings and sought out advisors who could provide honest feedback.

We all come with different skills and attributes, and I believe that anyone who wants to be a better attorney can learn to do so. People invested in me along the way — whether they did so consciously or not — and, as a partner at Kaye Scholer, I believe in providing the same to those coming up the ranks.