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Emerging Trends

Antitrust Q&A: Kaye Scholer's Claudia Higgins

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Kaye Scholer Antitrust Partner and former Federal Trade Commission litigator Claudia Higgins speaks with *Global Competition Review* about current antitrust issues in the United States and abroad, cases to watch, and what advice she would give to the regulatory agencies.

Q. What do you think are the most interesting issues in antitrust right now?

Higgins: As an antitrust lawyer with more than three decades of merger experience, the seeming transformation now underway in the communications and media industries raises important and very difficult issues for antitrust enforcers.

In a seeming cascade of transactions, one proposed merger appears to spark another across and up and down the delivery chain, as each company seeks to protect its "seat at the table" in negotiations with other companies changing their competitive profiles. The antitrust agencies and the Federal Communications Commission must analyze each deal on its own merits, at the same time recognizing that the playing field will change with each successive transaction, which then may alter the competitive environment yet again.

Technological changes add another dimension to the agencies' merger reviews. While innovation in no way excuses anticompetitive conduct, it is important that the agencies' enforcement actions preserve incentives for innovation, because novel products and services are some of the most important drivers of our economy.

This is not the first time antitrust analysis has been conducted in the face of these types of challenges, but this is one of the more complex situations I have observed. The enforcers' task is complex and difficult, but certainly no more so than that of the companies themselves, as they work to position their firms for competitive survival and success in an ever-changing environment.

Q. Is there any antitrust litigation you are following closely besides the cases you are working on personally? Why is this case interesting?

Higgins: Along with other antitrust lawyers who represent pharmaceutical companies, I am closely watching the federal courts work through the difficulties of interpreting the Supreme Court's decision in *Federal Trade Commission v Actavis*. When that decision was first announced just over a year ago, some described it as a victory for the FTC; others saw it as a more Solomonic one. I subscribe to the latter view: The court adopted a rule-of-reason approach and declined both the FTC's proposed standard of presumptive illegality as well as the defendants' proposed standard for legality of settlements that remained within the 'scope of the patent.'

So, the Supreme Court's ruling really raises a conundrum, leaving the various district and circuit courts to sort through the questions the *Actavis* decision left for them to answer: What are the facts that show whether a settlement has "genuine adverse effects on competition"? What constitutes a "large, unjustified reverse payment"? What "traditional antitrust factors" in a rule-of-reason analysis will support a Hatch-Waxman settlement that provides some form of compensation to the generic company? To what extent will the innovator companies be allowed to prove the strength of their patents as they defend settlements against antitrust challenge?

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In the most recent example of this ongoing battle, the FTC this month has asked permission of the Third Circuit to participate in upcoming oral arguments (*In re Lamictal Direct Purchaser Antitrust Litigation*) to argue that the prohibitions of *Actavis* extend to non-monetary payments as well as cash payments.

We will have many decisions to watch in the upcoming months and years, I believe. I remain hopeful that the lower courts will provide further clarity.

Q. What issues are you keeping an eye on internationally? How will they affect the practice of antitrust law?

Higgins: For more than a decade, the International Competition Network has encouraged harmonization and "best practices" for competition authorities worldwide. While this effort has produced important results, many difficulties remain.

In the merger context, transactions between companies with worldwide operations struggle to identify where, when and whether merger review filings are required. These can significantly

delay a deal from moving forward, which is rarely in the best interests of the parties or the consumer. I look forward to continued efforts and results from the ICN as it works to smooth the international processes to reduce unnecessary burdens on businesses and harmonize standards and procedures.

Q. If you could give one piece of advice to the Department of Justice or FTC, what would it be and why?

Higgins: Any defense lawyer who faces a second request in a merger investigation knows that complying with the strict letter of the demand for documents and information will cost millions of dollars and require months of delay. This is true even when the agency has agreed to modify significantly the scope of its request. The DoJ and the FTC know they have only "one bite at the apple" to obtain information required to evaluate and possibly challenge the transaction, which is the rationale for their all-encompassing information requests.

Often, however, many unnecessary costs and delays inherent in the procedures could be avoided if fact-based discussions with the investigating staff and their superiors could be undertaken earlier in the process of the investigation. Under current practice, the attorneys for the merging parties have limited (if any) ability to discuss particular issues with decision-makers higher up in the agency until after they have complied with a second request.

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I would propose that defense counsel be given its own "one bite" to move the salient issues up the chain of command prior to completion of a full Second Request production and compliance. Defense counsel could be called upon to provide something in the manner of a proffer: "If the possible competitive issues are thus, and the facts related to those issues are thus, what would be the decision of the agency as to whether a challenge would be necessary?"

With this opportunity for one earlier discussion, defense counsel may be able to get an affirmative response, based on demonstrable facts. I know that I have been in situations where this advance procedure would have saved clients significant expenditures. And, when it proves successful, this procedure would also substantially reduce the burden on the antitrust agencies (and taxpayers).

Q. Whom do you most admire in the antitrust community right now, and why?

Higgins: Molly Boast is someone I really admire in the antitrust community. Molly is a seasoned litigator and a highly regarded antitrust defense counsel who has also held important senior positions in both the FTC and the DoJ. She is a wise, careful and effective lawyer–one of the best.

I worked closely with Molly when we were both at the FTC, and I saw first-hand the huge positive impact she had on public policy decisions for the agency as well as on the people with whom she worked. I know that Molly enjoys being a private attorney, but it was always clear when we were working together as civil servants that she truly appreciated the opportunity to serve in that capacity. Along with her many litigation and management responsibilities, she never failed to find time to develop the skills of others and was ever willing to serve in a mentoring capacity, particularly for younger women lawyers.

I know that clients appreciate Molly's skills, and I personally learned a great deal from her. The DoJ and FTC benefited greatly from her talents as well. I admire her expertise, her efforts and her service.

About Claudia

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Claudia Higgins is an Antitrust Partner in the Washington, DC office of Kaye Scholer. She represents Fortune 500 companies in significant antitrust matters, particularly high-profile mergers, acquisitions and joint ventures, as well as in private antitrust litigation and civil investigations by the Federal Trade Commission, the US Department of Justice, and numerous international regulatory agencies. Prior to joining the firm, she spent more than two decades as an antitrust litigator with the Federal Trade Commission.

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