GCR NEWS
GLOBAL COMPETITION REVIEW

Q&A with Joe Miller of Crowell & Moring

Charles McConnell
18 April 2016

Credit: Photo provided by Crowell & Moring

Joe Miller is a partner in Crowell & Moring's antitrust and health-care groups. He has worked at the Federal Trade Commission as a trial attorney and the Department of Justice as assistant chief of the antitrust department, and focuses on antitrust issues in the health-care world.

What are the most important or interesting issues in antitrust law today?

For me, it's health care. That's the area I'm focused on right now, and I do think it's important because of the volume of commerce as well as the doctrinal issues. It's a huge amount of money – 17 or 18 per cent of our gross domestic product – so there's a lot at stake. There are broad policy issues of which antitrust is only a piece. The Affordable Care Act is forcing or encouraging so much rapid change in the industry that players in all segments are trying to drive lower costs while increasing quality – through a lot of experimentation and delivery system reform. So, industry transformation on that scale will touch on every interesting civil antitrust issue.

There are vertical collaborations between health plans and providers. Sometimes those come with market power on one or both sides of the transaction. There's entry and repositioning happening in a very real way across the industry. One example that you see a lot is providers taking on and trying to manage the financial risk of patient care, and so they're bleeding over into traditional insurance functions. Some providers are acquiring insurers; some of them taking on risk through accountable care organisation mechanisms, and so there are a lot of interesting issues because nobody's staying in their lanes. There are obvious implications for product market definition, as well as entry, repositioning, and competitive effects. There's well-documented and well-known horizontal mergers across the industry – hospitals, health plans, doctors, other providers. And there's also – and these don't get reported under the HSR Act – a lot of activity for competitor joint ventures. The joint ventures could prompt the agencies to revisit how they approach a quick look or truncated rule of reason analysis. That's interesting as well.

First published on the *Global Competition Review* website, 18 April 2016
www.globalcompetitionreview.com

Health care was a big focus of the Senate antitrust subcommittee hearing a few weeks ago. How much do consumer complaints about prices of drugs play into everything?

It certainly generates a lot of policy discussion. This was a big area of focus for America's Health Insurance Plans when I was there. Consumer complaints can generate Hill hearings and think-tank discussions and conferences. In terms of actual antitrust enforcement, the price of drugs, absent anticompetitive conduct, will not have much influence on antitrust legal issues. The issues that the FTC has focused on with pharmaceuticals have been the same for well over a decade now. There's more focus on it, and Hill interest will get the FTC's attention, but I don't know that it changes much about what they're going to do.

Are there any international issues that you're paying particular attention to, and how might they affect antitrust enforcement in the US?

I've got a small window into international issues. This is going back over 10 years, but I was the US representative when the Europeans were looking at *Oracle/PeopleSoft*. I was working on that case when I was at Justice. I also did some merger training in Vietnam for the Southeast Asian enforcement authorities, so I have a little flavour of it.

Out of those experiences I have a continuing interest in whether the emerging enforcement regimes will look at antitrust enforcement through the lens of politics. In the United States, we have over a century of experience and tradition that has evolved into a law enforcement model. And the agencies take a less aggressive enforcement posture than they could under the case law. The merger guidelines are intended to fill in between current economic thinking and what is a violation if you just look at Supreme Court cases. The last substantive merger case on the Supreme Court is over 30 years ago. People still cite *Brown Shoe* even though analytically it's well behind where we are today. That's because enforcement is, here, informed by good economics and that drives the US's credibility, because they approach enforcement from a law enforcement perspective the approach to case selection tends to be relatively consistent over time and across political administrations.

I think that self-restraint is a good model for newer enforcement regimes, because there's a constant temptation to further non-economic – maybe political – goals through antitrust enforcement. So that's – on a broad level – what I'm looking toward or find interesting about international enforcement.

Many say working for the government is one of – or the most – rewarding experience of their careers. How do you look back on your time at the agencies, and how does that experience manifest itself in your work today?

I feel the same way. It's an exceptionally rewarding experience. The agencies are full of smart, dedicated people. One aspect of agency work that's hard to replicate outside of that setting is day-to-day contact with PhD economists. They have a different perspective than lawyers that's very valuable for informing enforcement decisions, as well as developing legal and economic theory. I really agree with the others that it's a very rewarding experience.

Is there any advice you would give the antitrust agencies today?

One area that I've become refocused on – I did some second request productions when I was an associate in the mid 1990s, but the world has changed since then. It was challenging enough then when clients kept their records in paper format but now the volume of responsive material has grown exponentially. The second request discovery process fails the risk/reward test.

The amount of information collected is beyond any reasonable measure that the government gets out of what they're demanding. If they were to ask my advice, I'd suggest thinking about ways to cut that back – to something that is both useful to them but also more reasonable to those having to produce the information. I did try to address this issue when I was in the government with some middling success – not as much as I would have liked. Both as a staff attorney and then when I was assistant chief, I would talk to parties about their appetite for cutting way back on second request production by number of custodians or subject area to get a truncated staff review and an accelerated front office briefing schedule.

The parties would agree that if we had to challenge it, we'd do it in federal court on what would be a traditional preliminary injunction standard, as opposed to what the agencies do today, which is called a preliminary injunction but in reality is a full trial on the merits. That kind of agreement takes a lot of work and it's hard to do on both sides. The

default path that we have today is well worn and known to everybody and cuts down on a lot of risk, but there's opportunity there for folks to think creatively and try to do some things that would make it a more streamlined process.

What advice would you give a young antitrust lawyer who is just starting out?

I look to my own experience: working in and out of government is a very valuable thing to do. There are some lawyers who spend their entire careers in government or their entire careers in private practice who are really outstanding, but I think it's easier to get there if you have both perspectives and you can understand how the enforcement process actually works – what the incentives are and why folks are doing what they're doing. It may be a little mysterious if you've never actually had to go through the decision process yourself; if you've never had to make an enforcement recommendation; if you've never had to make resource trade-offs. Those are the sorts of things that you really get a better understanding of with experience.

Similarly, in private practice you get a better understanding of the practical constraints that clients are under – what they're trying to achieve from a business perspective and how antitrust intersects with it. It's a hard thing to fully develop a view on while you're sitting as an enforcer.

Doing both jobs is very valuable for your career.

The other piece of advice I would have for young lawyers is to get out of your office. Usually the press of business means your default is to stay at your desk and grind through your work, but I think you're missing something. The antitrust bar is really a community, and you'll get more out of your career if you involve yourself with the community – either through the American Bar Association, or in my case the American Health Lawyers Association has active antitrust components to it. Other fora for public speaking – all that is very valuable, not only to raise your own profile, but to interact with folks who might disagree with you and really get a different perspective on what you're doing for your own work.

Is there anyone in the antitrust world or elsewhere who has influenced you or whom you admire?

Those interested in both scholarship and policy while also engaging in enforcement work have been influential – people like Bill Kovacic, Tim Muris, Maureen Ohlhausen and Josh Wright. Those folks really set the tone for thoughtful enforcement – whether you agree with them or not, they bring a lot of learning to enforcement matters. Bob Pitofsky, as well, falls within that mode.

In terms of practitioners, Mark Botti was my boss at the DoJ, and I learned a lot from him on both how to be a better lawyer and also how to manage both people and matters. He's a very thoughtful, effective lawyer. Lastly, Art Lerner, who is one of my partners at Crowell, is an outstanding health-care lawyer as well as being a top-notch antitrust lawyer. He's built an amazing practice here at Crowell with his expertise in both health care and antitrust. He's a big part of why I decided to come here.

First published on the *Global Competition Review* website, 18 April 2016
www.globalcompetitionreview.com