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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Reinvigorated Antitrust Enforcement Has Arrived

Law360, New York (January 22, 2013, 4:28 PM ET) -- Antitrust enforcement activity is on the rise, and civil litigation is escalating at the intersection of competition law and intellectual property rights. After the 2008 U.S. presidential election, many observers expected to see an immediate spike in antitrust enforcement activity and a weakening of patent rights in an attempt to boost competition. But neither expected trend materialized — until 2012. The prophesied reinvigorated antitrust enforcement is now here. Escalating government and private enforcement activity is trending toward higher fines, prison sentences and civil recoveries, as well as competitive limitations on patent rights and remedies.

The past year has seen a number of prominent examples of that increased activity. Most prominently, the U.S. Department of Justice objected to AT&T Inc.'s proposed $39 billion acquisition of T-Mobile USA Inc. In a criminal cartel case involving alleged price fixing among liquid crystal display manufacturers, several companies agreed to a $571 million fine in a plea agreement. One defendant, AU Optronics Corp., went to trial and lost; it was fined $500 million, and two of its executives were sentenced to prison. In a civil LCD cartel suit, Motorola Mobility Inc. obtained a $150 million settlement from Epson Imaging Devices Corp. Finally, in payment-card litigation relating to credit card interchange fees, Visa, MasterCard and their member banks entered into a $7.25 billion settlement of proposed class actions. And the list goes on.

In this environment, it's more important than ever to have a robust antitrust prevention training program and conduct frequent audits of "hot spots," such as sales and expatriates. And companies victimized by alleged cartels should seek out experienced counsel to recover their losses.

Competitive Limitations on Patent Rights

On another front, antitrust litigation is moving into uncharted territory. The law is still developing at the intersection of IP and antitrust — it's the new frontier, and there are a lot of questions. And a lot of the answers will be hammered out in litigation.

In 2012, the DOJ and the Federal Trade Commission established policy positions favoring, in essence, compulsory licensing of standard-essential patents (SEPs) on reasonable and nondiscriminatory (RAND) terms. Their rationale, much like that of the European Commission, is that during the technology standard-setting process, when holders of SEPs make a RAND commitment, they are inherently making both a commitment to license and a commitment to license on RAND terms.

The FTC's recent settlement with Google Inc. regarding enforcement of SEPs crystallized those positions; it requires Google to attempt to negotiate a RAND license before seeking injunctive relief based on infringement of its RAND commitment-encumbered SEPs. This heightens the tension between competition law and patent rights, which otherwise enable patent holders to exclude others from practicing their inventions altogether.

It's not clear in practice how RAND terms would be determined under compulsory licensing. No cases have gone the distance to clarify which methodology should be used in every case. A federal judge in Washington state may soon issue an opinion on the subject; he heard evidence in a court trial between Microsoft Corp. and Motorola in November. There is also the question of who bears the burden of proving RAND terms. Must the patent owner prove the terms it offered are reasonable? Or must the infringer prove they aren't? There is no answer yet. With so much in flux, companies can look for opportunities to develop the law by litigating test cases that are most favorable to them.

At the same time, we can expect more antitrust scrutiny of standard-setting organizations (SSOs) dealing with emerging technologies, given the high stakes often involved. This is already being seen in the mobile space. In Corr Wireless v. AT&T, for example, SSO member companies had been sued for their work on technology standards relating to 4G-LTE mobile communications. The SSO members won motions to dismiss the antitrust case this past August.

Going forward, companies involved with SSOs should expect to run into such challenges more frequently. With that in mind, companies should be ready to defend their standard-setting participation not only by demonstrating strict compliance with the SSO's rules, but also by identifying ways in which its conduct promotes innovation and competition.

MFNs Out of Favor

Most-favored nation (MFN) clauses, in which a company agrees to give a customer the best terms it makes available to any other customer, are also in the enforcement agencies' crosshairs this year. MFNs are very common and have long been regarded as fostering competition. But the agencies have declared that it's time to re-examine the effect of MFNs in various industries. In September 2012, a DOJ/FTC conference called for more antitrust scrutiny of such agreements; the agencies' view is that, when employed by companies with market power, MFNs can effectively prevent scrappy competitors from selling below the dominant companies' prices.

The agencies didn't specify which industries, but several actions over the past months provide some clues. For example, DOJ civil actions have alleged that the use of MFNs in the health insurance and e-book industries violated Section 1 of the Sherman Act. The idea is that companies could use e-books, for example, to set prices and hurt consumers. There has also been private enforcement and class-action litigation alleging that use of MFNs by online travel agencies operated to increase the price of online hotel room rentals. These developments are still playing out, but companies that utilize MFN agreements need to be aware of the increased focus.

Cases to Watch

In the months ahead, the decisions in the following cases will be indicative of what we can expect at the intersection of competition law and IP rights:

- Trueposition v. Ericsson — SSO members and the SSO itself are being sued in private litigation over the standard-setting process for mobile caller location technology.

- Apple v. Samsung — After Apple won a $1 billion patent-infringement jury verdict, the trial judge refused to permanently enjoin Samsung from selling its infringing products, ruling that Apple failed to prove the features copied played a decisive role in a consumer's choice of a phone. These companies are now litigating a second group of patents. That litigation will no doubt yield new and important rulings regarding the boundary between competition law and IP rights.

- FTC v. Phoebe Putney — The U.S. Supreme Court is considering whether the "state action doctrine" applies to a merger of Georgia health care organizations. A decision in favor of Phoebe could broaden antitrust immunity in health care and other regulated industries.

A Measure Of Enforcement

Several enforcement measures reflect the increasing activity.

Looking at civil litigation enforcement (by both private plaintiffs and government agencies) during the past five years, the number of civil antitrust cases filed in federal court peaked in 2008 with 1,244 cases. The numbers declined significantly in the following three years with 754 cases in 2009, 546 in 2010, and a low of 447 in 2011. In 2012, however, new filings climbed again to 707.

Criminal antitrust prison sentences are also on the rise. The average prison sentence for convicted executives in antitrust cases between 1990 and 1999 was eight months. It rose to an average of 20 months between 2000 and 2009. In the last few years, the average sentence has climbed even higher to an average of 25 months.
Now that the predictions regarding reinvigorated enforcement have come true, companies need to be strategically prepared for the realities of the new antitrust landscape in 2013 and beyond.

--By John S. Gibson, Crowell & Moring LLP

John Gibson is a trial lawyer and partner in Crowell & Moring's antitrust group in the firm's Orange County, Calif., office.

Crowell & Moring represented AT&T in its proposed acquisition of T-Mobile USA. The firm represented Motorola in Corr Wireless v. AT&T and in the civil LCD cartel suit referenced in this article.

This article was adapted from the firm's newly published "Litigation Forecast 2013."