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Q&A With Mayer Brown's Britt Miller

Law360, New York (May 02, 2013, 1:04 PM ET) -- Britt Miller is a partner in Mayer Brown LLP's Chicago office. She is co-leader of the Chicago litigation and dispute resolution practice and is one of the leaders of the firm's antitrust and competition group. She practices in the areas of antitrust litigation and complex commercial litigation and primarily focuses on representing domestic and international corporations in price-fixing, market allocation, monopolization and conspiracy cases, and also has counseled clients on general antitrust issues. Her antitrust work has involved a variety of products and industries including synthetic rubber, aspartame, paper products, household moving services, consumer health products, industrial chemicals, nursing services, fertilizers and vitamins.

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

A: Although every case presents its own challenges, I think the most challenging case I worked on was In re Vitamins Antitrust Litigation, which was my first antitrust case and the one that got me "hooked" on antitrust law. As you will recall, in 1999 the then-largest vitamin producers pled guilty to conspiring to fix vitamin prices from 1990 to 1999 and paid fines of over $870 million in the United States (and over $1.6 billion worldwide). Civil suits, of course, followed — some 200-plus private actions were brought in the U.S. At the time, it was the largest antitrust case in U.S. history.

Vitamins was a challenge in so many ways — its size and scope, the massive factual record, the number of law firms (and attendant personalities) involved, its use of a very early precursor of ECF (Verilaw, now Lexis-Nexis File & Serve), the tension between those defendants who had pled guilty and those who had not, the list goes on and on. But perhaps the biggest challenge from a legal (as opposed to logistics) perspective — and the part that most people remember — was the part of the case that made it up to the U.S. Supreme Court in a case which would ultimately be known as F. Hoffmann-La Roche Ltd. v. Empagran SA.

At the time, the case was being closely watched by practitioners and clients alike as it raised incredibly important issues about the ability of foreign purchasers to bring treble damages claims under the U.S. antitrust laws for injuries sustained in foreign commerce where the alleged underlying conduct also caused "effects" in the U.S. In short, it was the first real test of the Foreign Trade Antitrust Improvements Act's "direct, substantial and reasonably foreseeable" standard that had generated a very publicized split amongst the circuits. Ultimately, the court clarified that the FTAIA precludes foreign purchasers from bringing Sherman Act claims where their foreign-based injuries are "independent of any adverse domestic effect."

Empagran remains a seminal decision in the debate over the scope of the FTAIA (which continues to this day).

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

A: As the world has become more electronic (and as a result the practice of "electronic discovery" has become a specialization at many firms), the boxes of paper we all used to pore through in responding to discovery requests has become a thing of the past and we all now talk about gigabytes, terabytes and "ingestion costs." And although this issue certainly is not unique to antitrust law, I would have to say that electronic discovery — particularly in civil litigation — needs to be meaningfully addressed in the short term. I have lost track of the number of times I have heard counsel represent to a court that emails, transactional data, databases and other electronic documents can be gathered and produced "at the touch of a button" when, in reality, nothing could be farther from the truth.

Moreover, what constitutes "proportionality" and "reasonability" seems to be inexorably linked to the amount of damages claimed in a given matter. But simply because plaintiffs claim "billions" of dollars in damages does not mean that a given case is worth that much or even that plaintiffs' case has any merit. So it should not logically follow that simply because plaintiffs claim a case is worth billions, it is "proportional" and "reasonable" to require defendants to spend tens of millions of dollars to track down every document from every custodian and every location anywhere in the world.

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

A: There are a number of critical issues working their way through the courts right now, but two of the most important are issues that have been at the forefront of antitrust jurisprudence for years: class certification and the extraterritorial reach of the U.S. antitrust laws.

As to the first, the Supreme Court just issued its decision in Comcast v. Behrend (11-00864) on March 27, 2013. By a 5-4 vote, the Supreme Court reversed the Third Circuit's affirmance of the lower court's class certification decision explaining that the Third Circuit erred in refusing to take a "close look" at the methodology underlying plaintiffs' proposed damages model and that courts must seriously consider challenges to class certification even if those challenges encroach on "merits" issues.

In a strong dissent, Justices Ruth Bader Ginsburg and Stephen Breyer sought to limit the majority's decision to the facts of the case and emphasized that they believed that no new ground was broken by the instant decision (they also opined that they believed that review had been improvidently granted and that, as a matter of substantive antitrust law, the plaintiffs' damages methodology was sufficient to support class certification). This is obviously a very important decision for anyone involved in class actions as it confirms that courts must scrutinize plaintiffs' evidentiary showings at the class stage — including as to damages — even if that analysis overlaps with the merits of a given case and it will be interesting to see how the lower courts apply it going forward.

As to the second, the FTAIA, the Foreign Sovereign Immunities Act and issues of international comity continue to be of considerable importance to practitioners, clients and politicians alike. Most recently, we have seen these issues raised in cases like Minn-Chem and Animal Science. Given the decisions coming out of the various circuits on these issues, as well as the potential impact of those decisions on foreign companies doing business in the U.S., I would think this is an issue that will make its way to the Supreme Court before too long.

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

A: This question was harder to answer than one might think — it is sort of asking someone what their "favorite" movie or song is — as few people can pick just one. And it is even harder to pick someone outside of my own firm as I think (and I am admittedly biased) that I happen to work with some of the most talented antitrust practitioners in the world. That said, my recent work on the Potash antitrust litigation has put James "Bo" Pearl [of O'Melveny & Myers LLP] on my short list (he was counsel for one of the other defendants in the case). In addition to being very smart, Bo is quick on his feet, a creative thinker, and a dogged advocate for his clients. Very practical and result-oriented, Bo made a challenging case a little easier for all of us.

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

A: Remember that you are not always the smartest person in the room. One of my very first assignments as a young associate was to track down the answer to a legal question posed by one of the firm's senior appellate partners. At the time, I knew the partner only by reputation and was determined to prove to him that I was not your average first-year associate. So I went to his office, where he proceeded to tell me what the issue was and what he "thought" the answer was (including citations to various cases and treatises). I spent the next week scouring Westlaw, the treatises (we still used books back then) and every law review article I could get my hands on to try to find something — anything — that would add to the "answer" the partner had already given me. I came up dry.

Deflated and dejected, I marched back to the partner's office to admit my failure, seriously questioning whether I had made a poor career choice. To my surprise, after patiently listening to me explain my research trail and my conclusions, he thanked me for my work, told me that it was extremely helpful, and sent me on my way. Dumbfounded, I returned to my office and regaled my office neighbors with my story only to be told that mine was a common experience and that I was lucky to have gotten the praise that I did.

In the years since then, the partner in question and I have worked together on a number of cases. And even though I am no longer the one doing the research, but am now one of the people proffering the "answers," I remain very aware of the fact that when he is there, I certainly am not the smartest person in the room.

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