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Q&A With Mayer Brown's Bob Bloch

Law360, New York (October 06, 2009) -- Robert E. Bloch is an antitrust partner at Mayer Brown LLP. His litigation practice focuses on the defense of major national corporations, nonprofit entities, and corporate officials in criminal and civil investigations before the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission for price fixing, bid rigging, boycotts, pricing and marketing policies, and mergers. He also defends companies in private class action litigation in federal and state courts.

Q: What is the most challenging case you have worked on, and why?

A: Over a long career, it is hard to pick one case when you have been fortunate enough to have several unique experiences involving different parts of the economy. There are three challenging cases that had significant public impact, each of which occurred when I worked in the Antitrust Division of the Department of Justice.

The first was the case brought against Ivy League colleges and MIT (U.S. v. Brown University et al.) in which the division alleged that these institutions agreed to fix financial aid to their commonly admitted undergraduate applicants, a practice that went on for decades. This was a high-profile case because of the number of students affected and the prominence of the defendants. The case was settled by all of the defendants except MIT which went to trial and lost.

On appeal, the core finding against MIT was upheld, but the case was remanded for other reasons and eventually settled on terms that made it clear that the colleges could not engage in collusive conduct to fix financial aid and permitted colleges to compete for students based on financial aid and/or merit scholarships.

The second case involved the first criminal prosecution against medical professionals in 50 years since the AMA was convicted for violating the antitrust laws in 1940, which was affirmed by the US Supreme Court. The case, U.S. v. Alston, involved a boycott and price-fixing conspiracy by approximately 30 dentists in Tucson, Arizona, against

health plans offering dental services. The three ringleaders (and two professional corporations) were convicted after a jury trial.

On appeal, the Ninth Circuit remanded the case for a variety of reasons, but two of the defendants eventually entered plea agreements. This case reaffirmed the importance of the Supreme Court's previous ruling in the Maricopa County case that the antitrust laws apply to medical professionals and highlighted the risk to providers of engaging in price fixing.

The third case was a challenge to the merger of the two principal hospitals in Roanoke, Virginia (US v. Carillion). The case was unique because it was the first time in the history of merger enforcement by the Antitrust Division, that a merger case was tried to an advisory jury; normally, merger cases are tried to a court. The case was tried in a jurisdiction that was particularly challenging for the Antitrust Division.

After a lengthy trial which uniquely involved giving jury instructions to the advisory jury, the jury returned conflicting answers to questions it was asked to answer about market definition and the effects of the merger on competition. The trial court eventually resolved that conflict in favor of the defendants.

The fact that a merger case was tried to a jury illustrated dramatically how the complicated dynamics of a merger case changed when they had to be presented to lay jurors who were not accustomed to dealing with complex antitrust and economic issues. The lawyers were required to adapt to a unique setting and experience.

Q: What accomplishment as an attorney are you most proud of?

A: I'm not sure I would point to one matter although there are a number of cases and mergers that have been hard fought and successfully concluded.

Two things stand out. First, the nearly 18 years I spent in the Antitrust Division and the mission of that institution were very special. It involved a total commitment to serving the public interest with fellow professionals who shared the same goal.

It was about trying to "get it right," whatever the issue because it mattered to the parties and the public. It was about being part of a great institution that had an important role to play in the economic affairs of the country; and it was about the fact that wherever you went, courts and the parties you dealt with expected you to do the right thing for the right reasons—win or lose. That sense of camaraderie and purpose is hard to find in today's commercial world.

Second, there is always a great deal of professional satisfaction in being asked to help clients and resolve difficult problems. The challenge is enormous; and the consequences are always very important to the parties involved and highly personal when they involve criminal matters.

But, when you are able to help a client or resolve an intractable problem or persuade a government agency not to challenge a deal or indict a client, the satisfaction of meeting that challenge is always special. And, when those occasions also actually benefit the public or the community, they are an added bonus.

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

A: Government enforcement agencies have a great deal of power. They also have a great deal of discretion in deciding who is prosecuted, what mergers are challenged and whether the guiding principles they follow are applied consistently.

The greatest "enemy" of the public good is when those affected by the government's decisions don't understand them, why or how they are made. This goes to the heart of due process and public trust. Many substantive areas of antitrust law are well-defined.

There are some areas like the enforcement of Section 5 of the FTC Act, administrative versus court challenges to cases brought by the FTC, procedural aspects of merger investigations, including the length of time it takes to review mergers, and certain internal decision making about when certain types of conduct or transactions are challenged, that are less clear to the affected parties who do not deal with the agencies on a regular basis, and even to some who do.

The greatest "reform" would be more transparency in decision-making and more public explanations about underlying policy in major areas of enforcement as well as the processes by which decisions are made in each agency, including why some cases are not brought. Also, a more expedited merger review process would be beneficial.

Q: Where do you see the next wave of cases in your practice area coming from?

A: There are four areas where there is likely to be an uptick in antitrust activity.

First is criminal price fixing investigations. Past history has shown that periods of deep economic recession result in cartels to avoid the impact of an economic downturn.

Second, there will continue to be challenges to pharmaceutical settlements that involve reverse payments or have terms the agencies consider to be anticompetitive because they delay entry by lower-priced generics.

Third, there are likely to be an increased number of mergers in the financial services industry that will get close scrutiny because of increased concentration.

Fourth, there may be an renewed interest in innovation markets, as there was in the mid-90s, as the economy recovers, and there is increased interest in healthcare reform, alternative energy sources and new waves of high-tech development.

Q: Outside your own firm, name one lawyer who has impressed you and why?

A: I have met many fine lawyers, but one that stands out is Seth Jacobs, general counsel for Blue Shield of California. What makes him notable is that he is not only a hard-working, excellent corporate lawyer, but he has the unusual skill of knowing how to create confidence and trust in the outside counsel with whom he works —not only from my firm but others as well.

He is what I call an “enabler,” someone who inspires trust and confidence, creates the aspiration and expectation of high performance and success that makes the lawyers who work with him and the company want to succeed.

Q: What advice would you give to a young lawyer entering your practice area?

A: The best preparation was working in the government. Exposure to many important aspects of antitrust enforcement provide insight into and practical experience with the underlying policy, importance, process of decision making and role of antitrust in a real world setting. The importance of disciplined analysis; the marriage of economics and enforcement; learning how to try cases and, more importantly, how to win them.