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Q&A With Sidley Austin's John Treece
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John Treece is a partner in Sidley Austin LLP's Chicago office. His practice focuses on antitrust, patent, the intersection between antitrust and patent law, and general commercial litigation. He began his legal career in 1978 at the Chicago law firm of Isham Lincoln & Beale, and moved to Sidley as a partner in 1988. He is now a global coordinator of the firm's antitrust and competition practice and head of the Chicago office's commercial, competition and securities litigation group.

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

A: Most antitrust cases can be bollixed up by either organizational and substantive complexity, and the challenge is not to allow organizational complexity to damage your ability to address the substance or address it cost effectively. My most organizationally challenging matter remains In re Brand Name Prescription Drugs Antitrust Litigation. About 25 defendants organized themselves to defend a large Sherman Act class action, about 45 opt out cases brought by five significant plaintiff groups alleging both Sherman Act and Robinson-Patman Act violations, and 15 state analogue cases that had to be coordinated with the federal actions.

The parties produced more than 45 million documents (no email at the time, thank heavens!), and 1,400 depositions were taken. We got very good at breaking tasks down into bite-sized pieces and giving clear instructions. By the time my client and three other pharmaceutical companies tried the class action, each of us was responsible for knowing our own record and the record created by three of the defendants who had settled. As a result, we learned to define roles clearly and to trust each other to perform; when plaintiffs filed a midtrial motion, no assignments had to be made because we knew without speaking who would take responsibility for it.

My most substantively challenging case was a price-bundling monopolization case we tried for Johnson & Johnson. The plaintiff made just one of the products in what was a very large J&J bundled offering and claimed that the bundle foreclosed it from the market. The case raised what is probably the hardest question in antitrust law — how to distinguish between aggressive competition by a dominant firm (that we want to encourage) from illegal acts of monopolization (that deserve punishment). The jury fortunately agreed that whatever harm consumers suffered by the foreclosure effects of the bundle on the small competitor plaintiff was outweighed by its procompetitive price effects.

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

A: I feel old-fashioned and dull to respond that we still need reform around Illinois Brick. That case transformed a compensatory damage statute (Section 4) into a disgorgement statute; the antitrust defendant must disgorge its overcharge profit (trebled) to the direct buyer, regardless of whether the plaintiff was harmed. The deterrence objective of that rule is understandable, but then under the rubric of state law, we rather uncritically allow lower

levels in the distribution chain to recover either yet another disgorgement (if no pass on defense is allowed) or compensation. While it's uncomfortable to "stand up" for price-fixers, this all occurs in the civil litigation arena — where presumably, the only form of punishment should be statutorily mandated treble damages — resulting in enormous settlement pressures on innocent defendants. And yet, the indirect purchasers/consumers rarely benefit meaningfully from any recovery, given the costs and complexities of administering a distribution. We should stick with the Illinois Brick rule or require all wronged parties to claim against a single disgorgement. But the hybrid approach we've stumbled into isn't working.

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

A: Undoubtedly, the U.S. Supreme Court's 2004 decision in Trinko. As I mentioned before, the hardest question in antitrust law is drawing the line between illegal monopolization and aggressive competition by a dominant firm. Trinko addresses that quandary head-on. First, it reins in many of the broader interpretations of exclusionary conduct given to Aspen Skiing by providing a theoretical underpinning for that case: Conduct is not exclusionary unless it has no business justification except to eliminate or damage the competitive process. As important, for years, courts gave only lip service to the notion that dominant firms should be encouraged to compete vigorously — being quick to condemn conduct they found too aggressive in some marginal sense. Trinko, however, unapologetically extols the virtues of dominant firm competition in very unmistakable language.

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

A: When we tried the Brand Name Drugs case, I had the pleasure of spending several months in trial with Tom Rosch, later (and until this year) a Federal Trade Commissioncommissioner. Tom has a thorough knowledge of antitrust law and is obviously smart, thoughtful and a great trial strategist. When working with him, no proposition goes unexamined. More important than all that, many lawyers think that they should be considered great men (or women) if they're great lawyers. Tom demonstrates that it's the other way around; you can be a great lawyer only if you're a great man. He was always patient with the younger lawyers, a careful listener and respectful to others. In a long case, that gave him tremendous staying power in the defense group and before the jury. I didn't (and don't) always agree with Tom, but if I had a differing view, I would stop and take a deep breath before asking why, and I knew that my view would get a fair and respectful audience.

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

A: Too many to list! First, a set of my many early mistakes can be illustrated by the time I brought a cross-motion for summary judgment on a different theory than my opponent's motion raised. With cross-motions before him, the judge wrongly assumed that there must be no disputed issues of fact and ruled against me. My mistakes: loading too much on the judge's plate at one time, thinking he would find the complexity of the case as interesting and engaging as I did, and believing that I was entitled to as much of the judge's time — just before lunch — as necessary to explain that complexity!

The lessons: Be patient and let the difficult propositions unfold slowly. (I recall thinking long

and hard about when a judge was ready to hear that price “discrimination” — a horrible word — can be a good thing to economists.) Respect the court’s limitations by breaking the management of the case into discrete issues for decision. And never try to argue into the lunch hour!