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Don't Stand Passive Against Anti-Competitive Behavior: U.S. Court Endorses Private Sector Antitrust Tools

Companies looking to fend off anti-competitive behavior from others often think they have to wait for the government to step in. This is not true – as a recent U.S. appeals court decision affirms, private parties have the power to unwind mergers that even regulators had thought unobjectionable. Below, our global Antitrust team explains how this demonstrates the number of strategies private parties can leverage to fight back against competitive challenges themselves.

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Companies embroiled in competitive disputes may believe that their fates depend on government intervention. Not so. A recent U.S. court decision illustrates the affirmative strategies companies can take to fend off anti-competitive behavior themselves.

Companies seeking to halt their peers' anti-competitive actions got a boost recently when an appellate court in the United States confirmed that private parties—not just the government—have the power to unwind mergers that have already closed.

The case—*Steves and Sons, Inc. v. Jeld-Wen, Inc.*, in the Fourth Circuit Court of Appeals—arose out of a long-running dispute between a customer and its supplier in the door manufacturing industry. Following a breakdown in contract negotiations, the customer sued to force the supplier to sell off an essential plant it had acquired in a merger to restore competition to the market. The court held that the customer could obtain this relief, even though the U.S. Department of Justice had already investigated the supplier's merger—twice—and found it unobjectionable.

Such challenges to "consummated" mergers can deliver benefits by opening up more supply sources, allowing for more competitive pricing, or curbing the power of dominant firms. This litigation strategy is just one of several affirmative antitrust tools companies can deploy when facing competitive challenges.

1. Obtain Discovery in One Jurisdiction, in Aid of Potential Antitrust Litigation Elsewhere

Tribunals in numerous jurisdictions are becoming more comfortable with antitrust law, including applying it to a broader range of conduct. Increasingly, courts and regulators are scrutinizing the actions of large companies—such as below-cost pricing, bundling products together and locking up customers in exclusive contracts—as potential "abuses of dominance." However, one challenge for any firm seeking to challenge these actions is the difficulty of obtaining discovery through litigation in many legal systems.

One solution to this problem involves seeking documents and testimony in the United States through a 1782 application. Such an application can be brought even before litigation has begun and can be used to obtain U.S.-based evidence of foreign antitrust violations, even where such conduct would not violate U.S. antitrust law.

2. Develop the Evidence Before the Government Gets Involved

The common misperception is that only government actors have the power to obtain evidence of anti-competitive conduct outside the context of litigation. But companies, too, can call upon lawful investigatory techniques to develop a record against their competitors or other adversaries. One example is for counsel to identify and cultivate witnesses who have inside knowledge of improper conduct in an industry. This strategy is particularly useful to show that even a seemingly innocuous business practice, such as a company entering long-term exclusive contracts with customers, may be motivated by a desire to push a rival out of the market.

The developed evidence can then be referred to government authorities or used in a public relations campaign.

3. Consider Nontraditional Forums

Bringing an antitrust lawsuit in U.S. federal court is a well-known method for achieving relief from a competitive problem. So is making a complaint to the Department of Justice Antitrust Division or the Federal Trade Commission—the main U.S. agencies tasked with enforcing the antitrust law. But other forums can also hear companies' competitive grievances and may be a better choice in certain circumstances.

One such forum is the International Trade Commission. This U.S. agency has the power to block imports into the U.S. where a foreign manufacturer has engaged in an "unfair method of competition," such as an antitrust violation. Cases at the International Trade Commission are often concluded in under a year, providing an incredibly swift way to secure a remedy.

Companies can also consider referring anti-competitive conduct to U.S. state attorneys general offices, which have ramped up antitrust enforcement in recent years. Another advantage companies can leverage is to approach antitrust enforcers located outside the United States, as several tend to apply antitrust law broadly. Given the healthy competition among enforcers within the international antitrust community, counsel should consider whether involvement by one jurisdiction increases the likelihood of another becoming engaged.

About Kobre & Kim's Antitrust Team

Kobre & Kim is an Am Law 200 law firm focused on disputes and investigations, including high-stakes antitrust matters implicating multiple jurisdictions. Our team of former U.S. government lawyers stationed in the U.S., Europe, Asia, South America, and the Middle East has extensive experience engaging with antitrust enforcers such as the U.S. Department of Justice Antitrust Division, the Federal Trade Commission, state attorneys general, and agencies located outside the United States. Kobre & Kim's conflict-free, special counsel model allows us to vigorously pursue a client's objectives in complex, competitive disputes which involve multiple competing industry interests.