# DEPARTMENT OF JUSTICE

# Litigation in the Antitrust Division

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**Introduction**

Good morning. It is an honor and pleasure to give the keynote address for this 6th Annual Global Antitrust Enforcement Symposium. I would like to thank Georgetown Law School for once again holding this symposium and Dean Treanor for the warm introduction.

My topic today is litigation and, specifically, the key role that strong and effective litigation capabilities play in supporting our mission to protect consumers and businesses from anticompetitive conduct. Our litigation occurs in U.S. courts, of course, and this is a symposium addressed to global issues. So let me just take a minute to tie my subject to the larger purpose of the symposium. First, on the most practical level, the cases we bring in U.S. courts, whether criminal or civil, often have global effects because they involve international companies. For example, in the past two years the Division has blocked mergers proposed by non-U.S. companies and investigated and prosecuted criminal conduct by companies based outside the United States. Second, our enforcement decisions and our litigation capabilities are often linked as we consider the likelihood of achieving a successful remedy through litigation, whether civil or criminal. So, to have a full appreciation of the division's enforcement program, whether from an international or domestic perspective, you need to understand our approach to litigation.

We have had an active and successful litigation docket over the last two years. In part, this reflects the nature of the matters that have come before us in that time. But it also reflects the division's serious commitment to strengthening and appropriately deploying our litigation capabilities in order to protect consumers and businesses from anticompetitive behavior. We are prepared to go to court to block mergers that may

substantially lessen competition, to prevent anticompetitive practices and to prosecute those who engage in price fixing and bid rigging. And when we file a lawsuit, we litigate to win. It is our willingness and outstanding track record in both criminal and civil litigation that helps secure our other enforcement successes. Parties abandon their deals, enter into consent decrees that resolve our competitive concerns, or plea to criminal charges because they know we are prepared to litigate and because we win.

In short, our commitment to develop and maintain strong, effective litigation capabilities is an essential element in accomplishing the Antitrust Division's mission "to promote economic competition through enforcing and providing guidance on antitrust laws and principles."[1] Our goal is to protect competition so that consumers may benefit from competitive prices, better quality and greater choice. Of course, litigation is not the only or even the primary way that we accomplish our mission.

We provide guidance, for example, through our policy statements, competition advocacy efforts and providing analytical leadership in considering key competition. As an example of the latter, I hope some of you had a chance to attend last week's MFN workshop that we co-hosted with the FTC which provided an opportunity for policy makers, academic experts, industry representatives and the private bar to consider the competitive effects of MFN clauses. We were pleased to have Nelson Jung, the Director of Competition Enforcement at the UK's Office of Fair Trading deliver the keynote address.

In our investigations, we generally seek to resolve our concerns about likely competitive harm through agreement, rather than litigation. In merger review, we

[1] U.S. Dep't of Justice, Antitrust Division, Mission Statement, *available at* http://www.justice.gov/atr/about/mission.html.

investigate whether the proposed transaction is likely to substantially lessen competition and harm consumers. If a deal does not, we close the investigation and the parties may proceed with their deal. But if we conclude that the transaction raises concerns, we open a dialogue with the merging parties and explain our reasoning and intentions. Sometimes, parties decide to abandon their deal altogether in the face of a division challenge. This occurred most recently when 3M and Avery withdrew a proposed transaction after we informed the parties we intended to challenge the deal. More often, parties agree to divestitures or other remedies that allow them to proceed with the parts of their transaction that do not threaten competition.

In civil non-mergers, we seek to enter into consent decrees that prevent anticompetitive activities and restore competition for the benefit of consumers. But when a settlement cannot be reached, we sue to restore competition. We have several cases currently in litigation where we could not reach a consensual resolution.

As many of you know, our concern about the effects of MFNs in the health care industry led the division to challenge Blue Cross Blue Shield of Michigan's use of contractual provisions that force hospitals to charge higher prices to Blue Cross's competitors. Blue Cross contracted with more than half the general acute care hospitals in Michigan to impose MFN and MFN-Plus agreements.[2] As alleged in our complaint, Blue Cross's practices harm competition by raising prices and inhibiting entry or expansion by other insurers.[3]

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[2] Complaint, United States v. Blue Cross Blue Shield of Mich., No. 2:10-cv-15155 (E.D. Mich. Oct. 18, 2010), *available at* http://www.justice.gov/atr/cases/f263200/263235.pdf.

[3] *Id.*

Second, the division is in litigation against American Express over rules that limit merchants' ability to promote competition among credit card networks. As alleged in our complaint, American Express policies obstruct merchants from offering their consumers a discount, a reward or even truthful information about card costs. We also allege that these American Express policies are anticompetitive and ultimately result in consumers paying more.[4] As you know, we reached a settlement with the other defendants, MasterCard and Visa, to end their versions of the same policies.[5]

Most recently, we challenged anticompetitive conduct by Apple and five major book publishers.[6] As in our American Express case, we settled the allegations with multiple defendants while continuing to litigate.[7] The court recently approved the division's settlement with three publishers, which permits retailers to sell ebooks published by the settling defendants at competitive prices.[8] This is a victory for consumers because they will not need to wait until after the trial next spring to enjoy the benefits of restored

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[4] Amended Complaint for Equitable Relief for Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, United States v. American Express Co., No. 1:10-cv-4496 (E.D.N.Y. Dec. 21, 2010), *available at* http://www.justice.gov/atr/cases/f265400/265401.pdf.

[5] Press Release, U.S. Dep't of Justice, Justice Department Sues American Express, MasterCard and Visa to Eliminate Rules Restricting Price Competition; Reaches Settlement with Visa and MasterCard (Oct. 4, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/262867.pdf.

[6] Complaint, United States v. Apple, Inc., No. 1:12-cv-02826 (S.D.N.Y. Apr. 11, 2012), *available at* http://www.justice.gov/atr/cases/f282100/282135.pdf.

[7] Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-Book Prices (Apr.11, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/282133.pdf.

[8] *United States v. Apple, Inc.*, -- F.Supp.2d --, 2012 WL 3865135, No. 1:12-cv-02826 (S.D.N.Y. Sept. 5, 2012), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=special&id=218.

competition. Our litigation against Apple and the publishers -- Penguin and Macmillian -- continues.

On the criminal side, we have devoted substantial resources to identifying and prosecuting cartels and other collusive agreements. Cartels are an affront to properly functioning free markets. We have obtained more than $2 billion in criminal fines and more than 88,000 days of jail time for criminal defendants since the start of 2009. This includes the incarceration of both U.S. and non-U.S. nationals who participated in cartels that harmed the U.S. economy and its consumers.

Much of our success against cartels rests on our leniency program, which provides compelling incentives for corporate defendants to report cartel activity and to cooperate in our investigations. Frequently, therefore, defendants in cartel cases admit liability and agree to substantial fines and incarceration for executives. But where corporations and individual defendants deny liability, we are prepared to vigorously prosecute these cases in court. Our recent trial successes are a testament to our ability to try these often complex cases to a favorable jury verdict. Just in the last eight months, we have secured guilty verdicts in two municipal bond cases in New York, a hospital bid rigging scheme in New York, and the LCD cases in California. We have had this success against some of the very best white collar defense counsel.

So there should be no doubt that the while the division seeks to resolve its concerns consensually it is fully prepared to litigate civil and criminal cases where necessary to protect competition.

**The Division's Litigation Resources**

Our commitment to litigation begins at the top. When Christine Varney became the first head of the Antitrust Division in the Obama Administration, one of her first priorities was strengthening the division's litigation capabilities, and she recruited me and my predecessor Bill Cavanaugh to join the division not only as the deputy responsible for litigation, but also as the division's chief trial counsel. Having a trial lawyer as part of the division's leadership team obviously sends a strong message about our serious commitment to litigation.

We have undertaken a number of other personnel and management issues to strengthen our litigation capabilities.

On the management front, we reorganized our case management system to ensure that litigation issues are considered at a very early stage in both our merger and non-merger investigations. The division's most senior managers, what we call the "front office," including our deputy assistant attorneys general and our directors of criminal and civil enforcement, as well as our newly created director of litigation are involved early and often in civil investigations that may go to litigation. We engage with staff — and often the parties — soon after a civil investigation opens, and sometime even beforehand. Early front office involvement allows us to have staff focus its attention on the most viable theories of anticompetitive harm and discard unpromising ones. The front office is interested in the details of all the division's civil and criminal matters and we endeavor to learn as much about the facts as we can. This enables us to compare investigations across sections to identify the most pressing matters. Most importantly, front office participation,

including the attention of the director of litigation, permits the division to make early strategy decisions during the investigative process to enable us to win cases.

We also take a flexible approach to staffing matters headed towards litigation. While civil sections generally undertake investigations based on industry expertise, we build cross-sectional litigation teams bringing to each team attorneys with the skills and experience necessary to successfully prepare a case for trial and then win in the courtroom. And, where, necessary we have built teams combining civil and criminal attorneys, as we did in the recent AU Optronics criminal prosecution.

We are fortunate to have in place an exceptionally able and committed core of career trial attorneys, many of whom have decades of experience at the division. To augment this team and to ensure that we have sufficient staff with appropriate litigation experience, we undertook a very successful lateral hiring program, bringing into the division nearly a dozen litigators with a wide range of government and private practice trial experience. Many of these attorneys have had leading roles in our recent trials. The division always has attracted the best lawyers in the country. Our recent hires combined with the division's veteran trial attorneys who have a deep understanding of antitrust analysis and sector specific expertise make for a formidable litigation team.

On the management front, we have also reached outside of the division: The head of our New York field office, Deirdre McEvoy, came to us after an active trial practice and management role in the U.S. Attorney's Office in the Southern District of New York. More recently, we created a new position in the front office – director of litigation. This is one of the most important steps that we have taken to solidify the progress we have made in enhancing our litigation capabilities. The position was designed to enhance further our

litigation capabilities and to help facilitate efficient cross-sectional use of the division's litigation resources. This senior career position will ensure consistency in our litigation efforts, even as deputy assistant attorneys general come and go. We were very fortunate to have Mark Ryan join the division as the first director of litigation after a long and distinguished career as a private practice trial attorney. And he has been busy since joining us, supervising our many ongoing litigations, providing key strategic advice to me on litigation matters and ensuring that we provide the training and opportunity for young lawyers to build their trial skills. Mark is also prepared to be our lead trial counsel as needed.

As you can see, we have built a great team of civil and criminal trial attorneys. There are some matters, however, that may present unique challenges requiring us to look outside the division or the department for additional resources. For example, we sometimes face litigation in which the opposing parties field exceptionally large, multi-firm litigation teams, or in which we anticipate the need for specific litigation skills that may not be available to the division. In those rare circumstances, we are prepared to add attorneys from outside of the division, including attorneys from private practice. Our responsibility is to field the very best trial teams capable of trying a case to successful result and we will consider the use of outside counsel when it is necessary to meet this responsibility.

In addition to our management and personnel initiatives, we are continually rethinking our courtroom litigation strategies. Traditionally, one of the handicaps facing government prosecutors in a contested merger or Section 1 case is that the government does not have control over the witnesses with the most knowledge, that is, the merging

parties or the parties to an improper agreement. Putting on its case, therefore, the government might in the past have relied primarily on third party witnesses or experts. In recent cases, we have been more aggressive in using the parties to put on our case – we call the parties' executives as our own witnesses and use the parties' documents in our own case. To do this successfully, of course, we need to have great pre-trial preparation, including taking trial-ready depositions that we can use as the basis for effective courtroom cross-examination. Fortunately, we have skilled trial attorneys who can do this type of pre-trial work very well.

**Further Developing the Division's Litigation Capabilities**

One of my priorities for the division is to ensure that we have an effective program in place to provide training for our young lawyers to develop appropriate trial skills. We have several ongoing formal training programs. For example, the division continues its introductory program for new hires, the Antitrust Institute. The program focuses on fundamental antitrust law and economics, division policies and investigative techniques. And, the division often sends junior and mid-level attorneys on detail to U.S. Attorney Offices in the Washington area to gain valuable courtroom and trial experience as special assistant United States attorneys. Appearing in court on a regular basis is the best way to become comfortable in a courtroom.

In addition, the division and the Federal Trade Commission have initiated a series of joint seminars for attorneys and economists, including a recent gathering designed to enhance our respective litigation skills by sharing some best practices and discussing recent courtroom experiences.

To ensure that all of our trial attorneys maintain their courtroom advocacy skills at the highest possible level, I recently inaugurated the division's litigation management advisory team. The team includes senior, experienced career litigators from both our civil and criminal programs which is headed by our new director of litigation. We have enjoyed great success in our criminal and civil litigation as of late. This team will ensure we do not lose momentum. First, they will examine what the division has done well and institutionalize best practices covering investigations, discovery and courtroom advocacy. Second, the team will develop and implement a system to disseminate lessons learned from our trials, settlements and significant investigations. Third, they will guide the division's skills development through appropriate training and personal benchmarks that will ensure division attorneys grow as litigators. I have great hopes for the litigation management advisory team and I know the team will help the division lay the foundation for our continued success.

**The Division's Recent Courtroom Accomplishments**

So far I have described for you what we have done to enhance what was already a strong litigation capability. Let me turn now to what we have actually done, which I think leaves no doubt about our capability. I will focus on a few of our recent litigation successes.

Let's start with our recent criminal trial against AU Optronics and some of its senior executives. The AUO conviction was a major victory for the division. After an eight week trial, a Californian jury returned guilty verdicts against AUO – the third largest LCD producer in the world – and its U.S. subsidiary, as well as its two top executives. The trial and convictions followed an investigation that had already resulted in more than $890

million in criminal fines and 10 foreign individuals surrendering to U.S. jurisdiction and serving jail sentences here.

The trial also resulted in a historic first. The division alleged in the indictment that AUO and its conspirators derived gross gains of at least $500 million from the conspiracy.[9] The Sherman Act's statutory maximum fine is $100 million.[10] However, the maximum fine for an antitrust crime may be increased to twice the gross gain to the cartel or twice the gross loss suffered by the victims under Title 18 of the Federal Criminal Code.[11] The division has obtained more than 50 fines above the Sherman's Act statutory maximum, but this case marked the first time the division litigated the double the gain or loss issue where we were required to prove the allegation to a jury beyond a reasonable doubt. When the jury returned its verdict, it not only convicted AUO and its U.S. subsidiary, AUOA, for fixing prices of LCD panels, it also found the division had met its proof in alleging gross gains of $500 million or more.[12] As a result, the statutory maximum fines for both AUO and AUOA were each raised from $100 million to $1 billion.

When companies in the future are facing the difficult decision whether to accept responsibility or plead guilty, they will have to consider that AUO endured an eight-week trial that exposed how its top executives harmed Dell, HP, Apple and every other customer that had its prices fixed. Its highest ranking executives face a sentencing hearing tomorrow, which could result in jail time. The court could impose up to a $1 billion fine

[9] Superseding Indictment, United States v. AU Optronics, No. CR-09-0110 (N.D. Ca. June 10, 2010), *available at* http://www.justice.gov/atr/cases/f259800/259889.pdf.

[10] 15 U.S.C. § 1.

[11] 18 U.S.C. § 3571(d).

[12] Special Verdict Form, United States v. AU Optronics Corp., No. CR-09-0110 (N.D. Cal. Mar. 10, 2012) (Docket #851).

on AUO.

*H&R Block* was a major civil victory for the division. It was the first contested merger win in nine years, since the *UPM* label stock litigation.[13] The court's decision was the first judicial opinion adopting the updated Horizontal Merger Guidelines in a division challenge. The court used the new merger guidelines throughout its opinion to address such issues as market definition, concentration, repositioning and efficiencies.[14] The opinion represents a ringing endorsement of the Department of Justice and FTC efforts to update the guidelines.

The real lesson of *H&R Block* for the private bar is how we told our story. In past merger trials, the division has sought to present its case in large part through customer witnesses. That approach provided mixed results and we needed a new strategy. In *H&R Block*, we decided to make our case primarily through the parties' own documents and testimony from their executives. Obtaining concessions from hostile witnesses provided considerable weight and credibility to our case-in-chief. Our attorneys placed the parties' executives in a very uncomfortable position. They were forced to defend and spin their own documents that showed how anticompetitive the deal would likely be. The court found that the testimony and documents from H&R Block and TaxAct executives supported the government's market definition,[15] and demonstrated that TaxAct is a

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[13] *United States v. UPM-Kymmene Oyj*, No. 03-C-2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003) (enjoining the merger).

[14] *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. Nov. 10, 2011).

[15] *Id.* at 56, 61.

particularly impressive and innovative competitor,[16] H&R Block and TaxAct are head-to-head competitors,[17] and that the merger would likely cause both unilateral[18] and coordinated anticompetitive effects.[19]

Focusing on the parties' own words was effective in *H&R Block* and we will use that strategy again. Executives need to think twice before they propose a merger that will lessen competition or before they consider anticompetitive conduct by themselves or in collusion with their competitors. Executives will be forced to explain their actions and their words in open court. Our strong litigating team will put them to the test during depositions and under cross-examination.

Finally, let me talk briefly about the ATT/T-Mobile litigation. As you all know, we didn't need to go to trial; the parties abandoned the proposed transaction four months after we filed our lawsuit. While there are likely a number of reasons that led the parties to abandon the deal, I have no doubt the division's litigation efforts was among the reasons. At the outset, we put together a strong cross-sectional team that included attorneys from most of our sections, as well as from the Civil Division. And, we added two highly experienced trial attorneys from the private sector to help us take on the array of top firms assembled by the parties. Our team performed at the highest level in all aspects of the litigation and made clear that the parties would face a fully prepared trial team ready to

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[16] *Id. a*t 79.

[17] *Id. at* 83, 88.

[18] *Id. a*t 81-84.

[19] *Id. a*t 78-81.

make the government's case effectively using the parties' own executives and documents. This was one of the division's finest litigation accomplishments.

**Conclusion**

In conclusion, the Antitrust Division's core mission is to protect consumers and competitive markets. Our litigation capabilities and our courtroom victories are both keys to succeeding in our task.

We have built a strong trial capability that will only get stronger. Our trial lawyers are proud of their successes and excited about their ability to take cases to trial. And the word is out–we get consent decrees that resolve competitive concerns and plea agreements that punish collusion because parties understand the risks they face in the courtroom.

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