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[Back to Article](#)

Practicing as a Competition Lawyer in the 21st Century

Carl W. Hittinger and Jarod M. Bona

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While often called "antitrust" lawyers, the term "competition" better favors what such lawyers do because it more broadly captures the practice in the 21st century. The term "antitrust" initially was hyphenated as "Anti-Trust" when the original federal acts, like the Sherman Act were passed at the turn of the 20th century to deal with the big oil, railroad and steel trusts, for example. Although the term — without the hyphen — is now used more broadly, it is still too narrow to capture the practice area. That is because the practice today includes federal, state and international issues plus a myriad of related economic, academic and policy issues.

Outside of the United States, lawyers in the practice area are called competition lawyers, which more accurately paints the picture of what they do. Everything they tackle involves competition in one form or another. The stated goal in the legal universe is to promote and protect competition. Of course, there is wide disagreement across jurisdictions, government agencies, courts, academics, economists and lawyers about the best means to reach those laudable goals. That struggle still continues a hundred years after the birth of the antitrust laws. In China, which just enacted its first antitrust law, the same debate has only just begun.

While there are some competition matters that do not count in an international element, an increasing number of them do. Since competition law disproportionately affects very large companies — often called dominant firms or monopolists — it is common that those companies have a global footprint. Economies of scale will often lead them to participate in similar product or service markets throughout the world. When a government agency in one country challenges that company's behavior, government agencies in other countries often follow — in addition to private litigation (particularly in the United States). Private antitrust litigation in Europe may increase in the near future as the European Commission is currently considering its policy on antitrust class actions. And it isn't just challenges to alleged exclusionary conduct — cartel investigations and merger reviews also often create multi-jurisdictional issues. For example, when preparing mandatory government filings for mergers and acquisitions that involve global companies, counsel must often analyze the filing requirements in dozens of jurisdictions.

In addition, there is increasing cooperation and communication among the world's antitrust authorities. They not only share information about specific investigations, but also work together to develop enforcement practices and priorities. Thus, even competition lawyers without an international matter must follow competition developments throughout the world because they often reverberate back here in the United States. As but one example, although the agency has not been explicit about it, the Federal Trade Commission appears to be moving in the direction of the European Commission on many competition issues. So following EC competition developments even helps U.S. lawyers to counsel U.S. companies.

One important international issue that is worth following, however, is that it is unclear whether communications from a non-EU lawyer with an EU-based client are privileged. A recent European Court of Justice decision raised that issue when it confirmed that privilege under EU law does not extend to communications with in-house counsel. How this decision helps lawyers adequately counsel international clients to avoid antitrust problems is a conundrum. Non-EU American lawyers should, therefore, exercise caution when advising companies under EU law.

Competition Law Is Rapidly Changing

Antitrust "law" is not just a unitary concept, but increasingly includes (often conflicting) judicial and administrative opinions, agency pronouncements, state and federal statutes, and, again, international developments. For example, federal antitrust law — as interpreted by the U.S. Supreme Court and lower federal courts — has, for the last several years, become less and less interventionist. The courts are increasingly recognizing that antitrust litigation is very expensive, disruptive and often crippling and that the prospect of a treble damage lawsuit alone often deters conduct like price-cutting that is the very

essence of competition, as the Supreme Court itself has stated. Thus, antitrust plaintiffs have a more difficult road to success — both procedurally and substantively.

In contrast, state law has to some extent filled in that vacuum by reducing barriers to antitrust claims. In California, for example, state courts recently departed from federal law by permitting a state predatory pricing claim without proof of competitive harm, and confirming that both direct and indirect purchasers have standing under state law. In addition, both the FTC and the Antitrust Division of the Department of Justice have expressly called for greater antitrust scrutiny — which, in practice, may collide with current law. The bottom line is that the conversation has certainly changed from the turn of the 20th century, when J.P. Morgan went to the White House to meet with President Theodore Roosevelt about the Northern Securities railroad antitrust investigation and said, "If we have done anything wrong, send your man to my man and they can fix it up." Roosevelt replied, "That can't be done." The antitrust world is much more complicated today.

Competition Law's Academic Element Is Significant

The primary reason that antitrust law changes so rapidly is because it evolves in tandem with economic and academic developments. Unlike many specialties, the academic world has a relatively close relationship to the practical world of competition law. A competition lawyer who wants to predict where the law will go must keep up with academic and economic developments.

A recent example of this symbiotic relationship is Justice Anthony Kennedy's majority opinion in *Leegin Creative Leather Products Inc. v. PSKS Inc.*, where the U.S. Supreme Court overturned an almost 100-year-old decision, *Dr. Miles*, on the standard to review resale price maintenance agreements. In explaining the court's decision, Kennedy emphasized the importance of the academic and economic literature to the decision in the new century to reverse the long-standing precedent from the prior century.

One academic area that has already affected competition law and may grow more prominent over the next several years is behavioral economics. Advocates of behavioral economics challenge the rationality assumptions of classical economics by trying to demonstrate — often empirically — that people are essentially systematically irrational. This school of thought has already influenced the Obama administration, is embedded in EC competition law and appears to be advocated at the FTC. This school has a strong interventionist bent, which would collide with recent federal antitrust law developments and make for interesting debates for years.

Competition Lawyers Play Many Roles

The world of a competition lawyer not only includes academic exposure, but also an opportunity to play just about every role that a lawyer can play. Practicing competition law is a chance to be a trial and appellate lawyer, a counselor, an administrative lawyer, a corporate lawyer (mergers & acquisitions), and an international lawyer. In addition, intellectual property cases often create competition issues because of the relationship between the limited monopolies from patents and the competition-law concern with monopolies.

Competition lawyers protect their clients' interests, but do so by protecting competition. The core of every argument made is that competition will benefit from certain conduct or action. In fact, a plaintiff cannot prevail under the antitrust laws unless it proves that not only was it injured (just like any other type of claim), but also that competition itself was harmed by defendant's actions. In that sense, competition lawyers, private and governmental, are the defenders of the free-market economy that has, as its foundation, the right and ability of disparate people and entities to compete to provide the best product or service at the best price. "Competition" is not just an abstract term, but a description of the underlying force that leads individuals and groups to both survive and thrive.

This protection of the free market includes competitive abuses like price-fixing and unfair monopolization, but also addresses the ability of competitors to compete vigorously, even if they have market power. Indeed, large companies with market power have a strong history of innovation, which underscores the duty to protect them from an over-exuberant application of law that might harm competition itself.

For example, competitors may file suit complaining that a company with market power is offering price-discounts that make it hard for the plaintiff to compete. While there are rare instances that price-cutting harms competition, in most cases, it is, in fact, beneficial to consumers and competition. The present antitrust-active Supreme Court has acknowledged this reality increasingly in recent opinions.

Therefore, not surprisingly, agencies, economists, academics, judges, and competition lawyers often disagree about the proper means of protecting competition, and even developed views may undergo change as various theories ascend or fall. Right now, this divergence is in full force moving into the 21st century as competition law is plenty full of issues of controversy. As but a few examples, consensus has not been reached after 100 years of jurisprudence on how to handle loyalty discounts offered by companies with market power, exclusive dealing, reverse payment settlement agreements

between brand-name and generic pharmaceutical companies, the FTC's authority under Section 5 of the FTC Act, certain behavior involving standard-setting bodies, the scope and definition of an enterprise for purposes of engaging in a conspiracy and standards for reviewing horizontal mergers.

The list goes on but one thing is certain, "Anti-Trust Law" is hardly settled after more than 100 years but is still constantly evolving and causing competition lawyers to be faced with a kaleidoscope of challenges into the 21st century. Stay tuned. •

Carl W. Hittinger is the chairman of DLA Piper's litigation group in Philadelphia, where he concentrates his practice in complex commercial trial and appellate litigation with particular emphasis on antitrust and unfair competition matters. Hittinger is also a frequent lecturer and writer on antitrust issues and has extensive experience counseling clients on all aspects of civil and criminal antitrust law. He can be reached at 215-656-2449, or carl.hittinger@dlapiper.com.

Jarod M. Bona is a competition attorney and trial and appellate litigator in the firm's Minneapolis office. He has represented clients involving state, federal, and international competition issues. After graduating from Harvard Law School in 2001, he clerked for Judge James B. Loken of the 8th U.S. Circuit Court of Appeals. He can be reached at 612-524-3049 or jarod.bona@dlapiper.com.