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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Changing Law and Practice: A Columnist Looks Back

Editors' Note: With this article, Neal R. Stoll ends more than 30 years as a columnist with the New York Law Journal. The editors appreciate his candid assessment of the editing process in this column, but would like to clarify that the views expressed here are solely those of the author. While these contrary views are eloquently expressed and likely shared by a majority of the Law Journal's hard-working, dedicated and independent-minded regular columnists, the editors have no intention of giving up control over the headlines, word limits or any other aspect of the publishing process. That said, Mr. Stoll, we gratefully acknowledge your contributions to the field of Antitrust through the pages of the Law Journal.

By **Neal R. Stoll**

Beginning in the mid-1970s, I have worn many hats concerning the publishing of the Axinn, Stoll, Goldfein monthly column on antitrust trade and regulation for the New York Law Journal. As an associate I was credited for assisting Steve Axinn in the preparation of the column. When I was elevated to partner, I joined the column's byline as coauthor, and when Steve stepped away, Shep joined me as coauthor.

I can't completely convey the pride and excitement that I experienced in 1981 when I was given this opportunity. But what I never could have contemplated is that I'd continue writing the column for over three decades. It started innocently enough, you receive a deadline schedule from the NYLJ editor, you assign an associate to assist you with the technical components of the column, you prepare as many drafts as necessary to satisfy your journalistic values, and, finally, submit the column to the editors for their professional honing.

Once the process starts, it takes on a life of itself. You just keep writing. And then you sit down preparing to write your 400th column and something inside your brain, stomach or soul shouts out stop, can someone please end this insanity. You start to recall that the road to 400 was 30 percent good, 30 percent bad, 30 percent ugly, 100 percent frustrating, and 100 percent satisfying. So in the interests of passing on a mosaicism of anecdotal experiences and tips to any future columnists, hopefully, I can increase your gratification and decrease your anxiety. (The following thoughts are in no particular order. They appear in the random sequence that they were retrieved from my neurons.)

Elements of a Column

The title of the column is the most important part. If the title is too specific, it may discourage the reader from continuing to read your finely constructed prose for a multitude of reasons. The title should be subtle in order to lure the reader to move to the column's body where the substance will enlighten the reader and make his knowledge of antirust law all the more richer.

During the first 25 years of the column, the NYLJ editors maintained absolute control of the title. There is nothing more upsetting than submitting your final draft with your chosen title and seeing the column published in the NYLJ with a different title that may or may not have any connection to the subject matter being discussed. Rule 1 is inviolate, keep control of the title.

Choosing the topic of the column isn't necessarily easy and can be somewhat time-consuming. Some months there's a plethora of worthy antitrust cases or developments to comment upon. During one rapid stretch of time, the Supreme Court wrote a series of decisions discussing the application of the state action doctrine. We wrote columns about all of them. (If you're interested in the doctrine, just gather the group of columns and you'll be the star of your next state action doctrine trivia party.) However, there are months when you'll find yourself in an antitrust desert. These conditions will test all of your creative abilities. One month we had to descend to the bottom of the rain barrel and write on the application of the

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antitrust laws to the allocation of landing slots at LaGuardia airport.

Attribution for everything you write is the best prophylactic against unintended plagiarism. Understand, your column will not be alone in discussing current significant antitrust developments. Furthermore, depending on the NYLJ's release schedule, your article may be first, last, or somewhere in the middle of the publishing cycle. There absolutely is no shame in crediting a third person for turning an interesting phrase or uniquely summarizing facts or precedent. We considered attribution a universal axiom. This practice allowed us to maintain a zero tolerance record against even a marginal claim of literary larceny.

Choosing the topic can create a potential conflict of interest with an existing client or the subject matter of a client's legal position. As Skadden grew, we had to assure that we didn't discuss an issue that would be adverse to any of our clients or the positions they were arguing in pending or potential adversarial situations. We were very fortunate that such a situation arose only once in 1982. The consequences were not pretty, but the pain ultimately passed and we learned a valuable lesson that prevented us from repeating the error for the next 30 years.

Selecting the writing style is closely related to avoiding client relationship issues. The great majority of the columns are expository. We discuss the facts objectively, we even handily compare and contrast the precedents applied by the courts and finish with a noncontroversial conclusion that includes as many probable colorable outcomes we can conjure. However, every once in a while, you have to experiment with other writing styles. Thus, over the years we have borrowed, always with attribution, some unconventional writing formats. I once used Larry King's USA Today's "run-on, stream of consciousness" banter. Also I borrowed from Keith Olbermann's "worst five people in the world." I'm sure I used other elocutions when appropriate. Have some fun, antitrust isn't rocket science.

Word and footnote limitations constitute an unreasonable restraint under Section 1 of the Sherman Act. I'm sure publications vary, but the NYLJ imposes a 2,000-word limitation, including footnotes (limited to 15), give or take 500 words. Trying to discuss the Supreme Court's majority and two concurring opinions in *Hasbrouck v. Texaco*, 496 U.S. 543 (1990) (a tertiary line Robinson-Patman case) within these boundaries is like fitting a size 6 shoe to a size 12 foot. Another Herculean task was parsing through the majority and dissenting opinions in *Brooke Group v. Brown & Williamson Tobacco*, 509 US 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993), the court's seminal predatory pricing decision. There is, however, one overarching benefit to master this technique. You'll never be criticized for not being able to write a short brief. (One of Bill Meagher's frequent comments to the new associates' drafting abilities was, "I guess you guys just didn't have enough time to write a short brief.")

What I never could have contemplated is that I'd continue writing the column for over three decades.

Feedback, readership, and recognition are sparse but flattering. We can count all of our fingers and toes and still fall short of the written responses we have received concerning our columns over the past 30 years. However, don't assume that no one reads the column. Frequently, I've been approached by strangers on the subway or bus who ask if they know me. Often I look familiar because they saw my picture in the NYLJ. Most important, however, is never assume staff and management at the antitrust enforcement agencies don't read the column. Two years ago at the start of a meeting with Commissioner William E. Kovacic, he told me how much he enjoyed reading the column. My next meeting was with Commissioner J. Thomas Rosch. Unfortunately, the commissioner took exception to the views I expressed in a column concerning one of his strongly felt dissenting opinions. I didn't remember saying anything too critical, however. I was somewhat unsettled until the commission issued its 5-0 vote in favor of my client.

One acknowledgment that blew my brain box. I was serving jury duty in New York state criminal court. I was just excused from a fifth jury panel by the assistant district attorney (just look at my picture for the reason). I asked the judge if I could discuss the remote chance I'd have serving on any criminal jury during my service. The judge was very sympathetic and agreed that the law and my clients would most likely be better served if I was excused from my last day of duty. I thanked the judge and as I turned to leave the courtroom, the judge shouted after me how much he enjoyed reading the monthly trade regulation column in the NYLJ. Never forget, if you write it someone will read it.

One of the perks of writing the column is having your picture appear in the NYLJ's hard copy and online editions. At first, it's a real ego booster. But there is a limit, on how often you want to see your portrait published; and thirty two years clearly exceeds it. Also the picture plays a cruel trick on the author. Unlike the Picture of Dorian Gray, the picture accompanying the NYLJ doesn't age a pixel; while the author succumbs to every extant aging element. Unfortunately, no good outcome is perpetual.

Non-Bias

Confirmation bias is a common side effect of experiencing the repetition of too much of the same thing. When I first started practicing and then writing extensively about antitrust law I wasn't aware that I had any innate biases that would interfere with my objectively commenting on the practice application and policy of antitrust law. But bias is insidious. It stealthily seeps into your thoughts, your words, your opinions, subtly eroding your objectivity. At first, the bias is a gossamer, you're hardly aware of its effect on your thinking. However, year after year on the battlefield and using the column as a soapbox to express your positions, creates stenosis that only allows the bias to be communicated to the reader. Don't get me wrong, at some point during your practice and writing you'll develop some degree of confirmation bias. Just be aware of the possibility, and keep leaning toward the center to avoid being characterized as a narrow-minded inflexible ideologue.

Nostradamus delusion is another affliction caused by overwriting. Every time you reach the conclusion of your column

you're ready to confidently predict the future of the subject you've addressed. You must be very careful and choose wisely when to venture into the chaos of the future or wait for an easier case. Every once in a while the antitrust titans throw you a softball. In *A.A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396 (7th Cir. 1989), Judge Frank Easterbrook affirmed a jury's judgment for the plaintiff applying the flawed reasoning of the Supreme Court's highly criticized decision in *Utah Pie v. Continental Baking,* 386 U.S. 685 (1967). However, Judge Easterbrook's opinion bears some resemblance to Marcus Brutus' speech justifying Caesar's murder.

Four years later in *Brooke Group v. Brown & Williamson Tobacco*, the Supreme Court buried *Utah Pie* with the cold and calculating prose of Brutus; rather than the rhetorical verse of Mark Antony. One of my memorable "fall on your face predictions" was that the Supreme Court would grant cert. in *LePage's v. 3M,* 324 F.3d 141 (3d Cir. 2003). C'est la guerre. I can't resist one last prediction. In late February, newly appointed FTC Commissioner Joshua D. Wright delivered a speech, Evidence-Based Antitrust Enforcement in the Technology Sector, in Beijing. According to Wright,

> "Evidence-based antitrust," expressed simply, is the common-sense dictum that antitrust agencies can and should make enforcement decisions based upon sound economic and empirical foundations. This focus requires three methodological commitments from antitrust institutions. The first is the integration of economic analysis into all stages of enforcement decision-making. The second is the integration of empirical evidence into the decision-making process. The third is a commitment to competition policy applying basic insights from decision theory to minimize the costs of enforcement decisions and the design of legal rules. (Footnote omitted)

Wright continued, "It is especially critical to remain faithful to evidence-based principles when contemplating enforcement in high-tech markets where the stakes are highest for consumers and errors can dampen economic growth."

Contemporaneously, Renata B. Hesse, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, delivered a speech guaranteeing "that the division means it when we say we are prepared to go to court—we are—and the quality of division trial lawyering also should be clear." (footnote omitted.)

Application of the antitrust laws to our free market economy is a holistic exercise. All facts concerning the past and present competitive dynamism are relevant. There is no single fact, legal precedent, or economic test that is sufficient to discern the effects of a single firm's or multiple firms' competitive conduct.

My takeaway from Wright and Hesse is that the agencies will prepare for litigation in appropriate cases from the time the Hart-Scott-Rodino pre-merger notification is filed. While the agencies will still issue requests for additional information, they will no longer use the requests as a delaying tactic. When ready, the agencies will file their opposition to the merger or challenged conduct whether or not the parties have complied with outstanding pre-complaint discovery. Finally and most important, the agencies will not ground their cases on market shares, market definition, HHI deltas, or other structural market characteristics. They'll be gathering hard, rather than heuristic, evidence of anticompetitive effects to meet their burden of proof. Litigation will be the first, not the last line of defense of the agencies. As a private party, it will be better to have and not need than to need and not have its opposition evidence and litigation strategy ready to go in short order.

Passing the Pen

True goodbyes are the ones never said or explained. —Unknown

Over the past 35 years, the last 32 as coauthor, I have been associated with the New York Law Journal's Antitrust Trade and Practice column. It has been a great experience. The column provided me with a monthly "speakers' corner" to interpret, deconstruct, criticize, trend-spot, and speculate on the productivity of government and private U.S. antitrust enforcement.

Simply stated, at some point on the time continuum, a commentator inevitably tends to become a little less objective and a lot more myopic. This is especially the case when the writer adopts an entrenched philosophy concerning the subject matter of his oeuvre.

After scrupulously examining the leaves, limbs, saplings, and trees of the antitrust forest, I finally started exploring the forest rather than its individual components. And then came the epiphany. Application of the antitrust laws to our free market economy is a holistic exercise. All facts concerning the past and present competitive dynamism are relevant. There is no single fact, legal precedent, or economic test that is sufficient to discern the effects of a single firm's or multiple firms' competitive conduct. Thus as my usefulness as an antitrust commentator has suffered complete entropy; it's time to pass the pen. The column will continue to be written by my colleagues.

I want to thank Skadden LLP, its associates, my coauthors, and the editorial staff of the NYLJ for all of the assistance they provided over the past three decades to facilitate the preparation of the column. I won't miss the monthly deadlines. I will, however, miss my soapbox.

They afterwards took me to a dancing saloon where I saw the only rational method of art criticism I have ever come across. Over the piano was printed a notice- 'Please do not shoot the pianist. He is doing his best.' —Oscar Wilde

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