Q&A With Adams And Reese's Mark Beebe

Law360, New York (March 22, 2013, 4:39 PM ET) -- Mark R. Beebe is a partner in Adams and Reese LLP's New Orleans office. He focuses his practice in the areas of antitrust, competition securities litigation, officers and directors duties, contractual obligations and business and contractual disputes. He advises clients on competition issues including noncompetes, joint ventures and mergers and acquisitions. He has represented PepsiAmericas Inc., Core Laboratories, W.M. Barr & Company Inc., New Orleans Metropolitan Convention and Visitors Bureau Inc., and Marshall & Swift/Boeckh.

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

A: In the antitrust arena, one of the most challenging cases was my defense of a state governing board and its individual board members against antitrust claims brought against them by a national investment house and some of its account representatives. The plaintiff account representatives were licensed by the state board as certified public accountants (CPAs), but they also sold securities for the national investment firm. Under the federal antitrust statutes, plaintiffs challenged the board's rules that prohibited CPAs from engaging in the practice of "incompatible professions" and from receiving commissions. The district court denied our motion to dismiss, which was based on state action and Eleventh Amendment immunity. On behalf of the board and its members, we sought an interlocutory appeal before the United States Fifth Circuit Court of Appeals. The Fifth Circuit reversed the district court and held that the board was entitled to immunity under the Eleventh Amendment, and the individual board members were entitled to state-action immunity from federal antitrust laws. An important aside: after this successful appeal, the national investment firm and account representatives resolved all claims by paying a settlement to the board. It was the first time that I had a client sued and which found themselves receiving a settlement to resolve the case. The primary challenge in this case arose from not only the complexity of the matter and a strong legal team representing the plaintiffs, but from the fact that it was a case of first impression. Ultimately, this case has served as a seminal pronouncement on Eleventh Amendment immunity in the Fifth Circuit, with the added benefit of further defining the scope of state action immunity in the antitrust arena.

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

A: Under the current administration, both investigations and civil actions are on the rise. Businesses should continue to restrict and monitor any chosen interaction with competitors, to protect jealously certain proprietary and trade secret information, and to

scrutinize carefully their actions in the marketplace to remain highly competitive. With that said, I caution against the expansion by the courts and the agencies of antitrust law and its related regulations and state analogs. In order for American businesses to remain competitive in the global economy, the sharing of ideas, advanced technology and research through competitive collaborations will assist in maintaining a competitive advantage against unfair, as well as fair foreign competition. Strong American business will lead ultimately to greater consumer welfare. In addition, the expansion of state's little FTC §5 laws and their application should be resisted. It appears that creative suits are being brought under these state's laws to increase the recovery through the more attractive panoply of damages that is often available under these and state antitrust laws, such as the recovery of attorney's fees and treble damages. These laws were not meant to cover garden variety business torts and breach of contract claims, but something more egregious.

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

A: This term, the U.S. Supreme Court will address some important antitrust issues. Among them is whether "delay payments" used to settle pharmaceutical patent litigation are valid and do not violate the antitrust laws. In *FTC v. Watson Pharmaceuticals, Inc*., we expect the Court to determine whether the consensus among the Second, Eleventh and DC Circuits, finding "delay" or "reverse" payments from pharmaceutical manufacturers to generic manufacturers are immune from antitrust challenge provided the there was no fraud in obtaining a patent and alleged anticompetitive effects fall within the scope of the exclusionary potential of the patent. The prevailing reasoning is that while payments from one competitor to another not to enter a market is prohibited under the antitrust laws, a valid patent alters this analysis. It is noteworthy, that recently, the Third Circuit in *In re K-Dur Antitrust Litigation* has disagreed and found "reverse payment" settlement agreements presumptively anticompetitive and illegal. The *Watson* case will have significant implications for the pharmaceutical industry.

In *Behrend v. Comcast Corp*., the Court will decide "whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." Last year, the Court took-up a similar issue in *Wal-Mart v. Dukes*, but did not address whether expert witness testimony on damages must meet the rigorous *Daubert* standard. *Behrend* will review whether the plaintiff must demonstrate that there is a predominance of common questions affecting the class over individual questions in context of damages. If the Court decides that the trial court must undertake a more substantial damage analysis before certifying an antitrust class, or in other words, answer the question posed, "No," then class certification is likely to become more difficult in antitrust cases. In contrast, should the Court choose not to apply the *Daubert* standard, defendants could be exposed to class litigation without an appropriate review of whether the requested damage remedy could be awarded on a class-wide basis.

In February, the Supreme Court in *FTC v. Phoebe Putney Health System, Inc*., reviewed whether the state action doctrine exempts a hospital acquisition from the antitrust

laws. The Eleventh Circuit had held that the immunity applied under the *Ticor/Parker* analysis and that the acquisition was authorized pursuant to a clearly articulated state policy to displace competition. The FTC's challenge of three hospital mergers since 2011 was one of the key factors why the FTC sought review of the *Phoebe* acquisition. The Supreme Court reversed the Eleventh Circuit and held that the hospital authority was not entitled to state-action immunity from federal antitrust laws. This decision is expected to have significant implications for mergers, not only for hospitals, but likely for other business mergers as well.

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

A: Over my career I have had the pleasure of working with many superb antitrust and trial lawyers. None has been more impressive than Dan Kolb of Davis Polk. While Dan is not a current practitioner of antitrust law, he is by far and away the finest trial lawyer I ever seen. I had the distinct pleasure of working with Dan in Baton Rouge state court on a challenging matter whereby the plaintiff sought "One Billion Dollars" when a billion dollar demand was beyond extraordinary. Dan handled the trial with such aplomb, intelligence and trial savvy that it's something that remains with me to this day as one of the finest trial performances and experiences of my career. Dan is one of a kind!

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

A: It is not so much a "mistake" *per se*, as it advice that has proven true over my 24-year career and something that I recommend even the youngest practitioner pursue — "know your client's business." Take time with your client and its chosen leaders in the areas of finances, operations and governance. To provide the best antitrust advice, it is essential for the practitioner to understand the client's economics, its market and the competitive landscape. Visit the operations, talk with the managers and spend the time — "on your own nickel" — to know better your client and their objectives, needs, and aspirations. "Learn the business."