Q&A With Mintz Levin's Bruce Sokler

Law360, New York (April 10, 2013, 1:25 PM ET) -- Bruce D. Sokler chairs Mintz Levin Cohn Ferris Glovsky & Popeo PC's antitrust section in Washington, D.C. His practice includes antitrust counseling and representation in connection with federal and state governmental matters, as well as private antitrust litigation. He represents Fortune 100 companies, not-for-profits, startup entities, and domestic and international joint ventures. Sokler has been involved in antitrust matters spanning a range of industries with particular experience in the communications, health care, and retail. In addition, he represents clients before the Federal Communications Commission and the courts in a wide variety of matters, including rulemakings and their judicial review, constitutional issues raised by FCC actions, and merger reviews.

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

A: In my over 35 years in private practice, I have been fortunate enough to be involved in a number of interesting and challenging cases. One that has always stood out in my mind was the U.S. Department of Justice Antitrust Division’s investigation in the late 1980s of the Ivy League colleges’ Overlap financial aid practice, which dated back 40 years, and where colleges who were commonly admitting students harmonized the financial aid packages they would award such students on a student-by-student basis.

The substantive antitrust issue involved a clash between educational missions and objectives with antitrust notions regarding markets and pricing/discounts. One particular challenging aspect was counseling and assisting the eight Ivy League presidents on the investigation and possible resolutions, particularly since four of them at the time were former law school deans or professors. The eight colleges ultimately entered into a consent decree, while MIT, who also participated in the program, held out. The litigation resulted in a per se condemnation by the district court, followed by a “not-so-fast” reversal by the Third Circuit. The issue was ultimately “settled” by legislation that restored some, but not all, of the Overlap program.

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

A: Despite commendable efforts by DOJ and the Federal Trade Commission to address the process, the cost and burden of Second Requests remain remarkably high. The agencies are so concerned that they will miss something and so mesmerized by “hot language” in emails that they cast their net broadly, particularly in the case of electronic documents, emails, shared drives and the like. As more and more data exists, and with spotty compliance by employees with document protection policies, the expense and time wasted for all concerned remains considerable.

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

A: The substantive antitrust issue involved a clash between educational missions and objectives with antitrust notions regarding markets and pricing/discounts. One particular challenging aspect was counseling and assisting the eight Ivy League presidents on the investigation and possible resolutions, particularly since four of them at the time were former law school deans or professors. The eight colleges ultimately entered into a consent decree, while MIT, who also participated in the program, held out. The litigation resulted in a per se condemnation by the district court, followed by a “not-so-fast” reversal by the Third Circuit. The issue was ultimately “settled” by legislation that restored some, but not all, of the Overlap program.
A: An important part of my antitrust practice involves the health care industry. The thrust of the Affordable Care Act quite often cuts in a different direction than the antitrust competitive paradigm. The antitrust enforcement agencies remain quite active in the health care provider space, including hospital merger challenges, contracting, review of physician acquisitions and conduct, contracting practices and the like. Over the next several years, particularly with the emphasis on “bending the health care cost curve,” the two will need to be better harmonized.

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

A: Toby Singer, a partner in Jones Day's D.C. office. Toby works primarily in health care antitrust. She understands the industry, the substantive legal issues, and has good insights into the enforcement agencies. She can be effective as both a counselor and an advocate.

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

A: Learning when you have done enough research/analysis to be comfortable with your judgment or conclusion. Sometimes it will take you twice as long to get from being 90 percent to 95 percent confident in your answer — and the client may not want to pay double for the incremental 5 percent. Sometimes a client just needs a Chevy, not a Cadillac. Particularly in today’s environment, that is an important lesson to remember, and one I try to impart to the younger lawyers that work with me.

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