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TECHNIQUES FOR IDENTIFYING AND NARROWING ISSUES IN ANTITRUST CASES

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You may well be thinking, "Well these judges have been hearing these things, perhaps, as Judge Higginbotham says, but how do I get my judge to manage this case?" That, I think, is one of the great problems that the practitioner handling complex litigation faces, and it's one of the things that I want to try to address in these opening comments.

It is true that judges have been hearing an increasing amount of talk about the necessity of managing litigation and about how to do it. I suspect that many of you will say that the subject hasn't penetrated very well in many courts around the country—and I think that's probably true—although an increasing number of judges are becoming management-minded. But the reason that many judges continue to be reluctant to manage cases is that, one, it's hard work to get into a case sufficiently to be able to manage it; two, judges may feel that they don't have the time to do it; three, they may not be sufficiently familiar either with the law or the facts; and four, many of them regard management as being contrary to the traditional passive role of the judge in the adversary process.

I would urge you to try to overcome that reluctance of judges to manage in the same way that you overcome their reluctance perhaps to rule in your favor on the merits: that is, to use your skills as an advocate. Just as you urge a judge to adopt your view on the merits, I think that you should use your skills as an advocate to urge the judge to adopt fair and reasonable management programs.

Now, of course, you have to recognize that the judge's perception of the problem is different. The judge is interested in lightening his docket and getting cases behind him, while you're interested in winning your case and your opponent is interested in winning his or her case.

These differences of perception have to be taken into account in the way you present this particular problem to the judge.

But I think it is important that you argue to the judge that concessions have to be made to reflect the shortness of life, and that it is not inherent in due process to explore every conceivable issue, to take every conceivable deposition, or to discover every conceivable document. You need to point out to the judge how the judge will benefit from a management program, and that although it may take some additional time initially, a great deal of time will be saved in the long run by shortening the trial, and perhaps eliminating it altogether by bringing about a settlement of the case.

Now you may find that the judge will try to take the easy way out. There are two ways in which judges are prone to do that. One way is to turn over pretrial proceedings to magistrates. I would urge you to try to persuade the judge not to do that, because the judge's participation in pretrial proceedings is important both to the parties and to the judge. For the judge, it's a way of learning about the case and then, on the basis of what he or she learns, to apply that learning to identifying and limiting issues and controlling discovery. For the parties, the judge's participation is important because magistrates tend to lack either the power or the experience to impose meaningful limitations on the litigation.

Don't assume that the judge will turn this case and the pretrial proceedings over to the magistrate. You can put up a fight about it, you can make a motion, you can ask for a conference, and you can make a showing. You may not succeed, as you may not succeed on many of these things we're going to tell you about, but I think they are worth trying.

The second way which perhaps might be called a "cop-out" is to say, "Well, this case will be subject to the Manual; the Manual will be applied"—meaning the *Manual for Complex Litigation.* Opinions on this differ, but in my view the Manual was a useful tool in the 1960s when we were faced with litigation such as the electrical equipment cases where the issues were clear and the problem was primarily one of coordinating multidistrict discovery and dealing with complex class problems. While it was useful in that context, it is not very useful, and in some ways counterproductive, today because it doesn't address the problem of controlling the litigation, identifying and limiting issues and controlling discovery. I think that the Manual, in its present form, has become largely obsolete as a guide to the effective management of litigation. It's in your interest, and perhaps your duty as an advocate, to point that out

and to try to advocate meaningful management procedures. Those are some of the things that we want to talk to you about today.

Now, in my view, the starting point of any meaningful management program is to attempt to bring about identification and clarification of issues. Nowhere is that more critical than in antitrust cases where issues frequently remain obscure even when the case goes to the jury, because nobody has bothered to figure out what they really are. I think it's critical at the outset to try to get the issues identified clearly—and not in terms of antitrust jargon, such as "this is a *Noerr-Pennington* case," but in plain English: who is suing whom for what; what specific conduct is plaintiff complaining about; what is the agreement which is the source of the litigation; who are supposed to have been the parties to it; what was its effect; what are the products that are affected; and when did the wrongful conduct take place, etc. Comparable questions must be addressed to the defense of course: what is the position of the defense concerning its conduct and its impact, what will be the elements of the defense that are raised, etc.

In particular, I think it's important to address very early in the context of issue clarification what relief is sought in the case, what is the theory of damages, whether the plaintiff has a viable theory of damages, and whether there is meaningful relief available at the end of the litigation. We all know that lawyers have a great tendency to become immersed in the liability issue and think very little about what, if any, damages they might recover. The earlier that issue is clarified, the better handle one gets, first, on managing the issues and, second, approaching settlement in a meaningful way.

Now I'm not suggesting that the parties should necessarily be expected to know all of the facts at the beginning of the lawsuit in order to engage in this issue clarification process. Clearly, they are entitled to discovery in order to facilitate that process. But the point that I am making is that the discovery should be tailored to bring about a clarification of issues rather than a great disgorging of facts, some of which perhaps may be useful somewhere down the line, but many of which will never have any bearing on the case at all. Discovery ought to be tailored at the outset to lead toward issue clarification, and it should proceed from the core to the periphery rather than from the periphery to the core.

While discovery is essential to the process, the most important vehicle for issue clarification is the intelligent and constructive use of conferences, whether you call them "status conferences" or "preliminary pretrial conferences," or whatever. That means more than just going out

and reporting to court. It means a face-to-face confrontation between the lawyers who may not be communicating very well, and between the judge and the lawyers. In that conference, there ought to be discussion in plain language about what really is involved in this case, what are the parties really litigating about, and what specifically is in controversy in order to get beneath the surface and beneath all the antitrust jargon to the real issues in the case.

Not all judges are inclined to do that, but I don't see any reason why you can't make a motion for such a conference if it's not automatically held. In that motion, you should explain to the judge the benefits from having such conferences, and accompany that with a brief and simple explanation of what this case is about as you see it, what you would like to see accomplished in a conference, and an agenda.

The whole conference system is important because it reduces the amount of paper flow in complex litigation. In my experience, paper flow tends to obfuscate, rather than to enlighten. When a lawyer is confronted with the necessity of filing a memorandum, he naturally will put in everything that might possibly be helpful, not so much for the judge, but rather anything that the lawyer thinks might advance his case. Most likely, every conceivable argument and every possible claim will be made—that is particularly true in discovery disputes—and so the dispute, though initially minor, assumes greatly swollen dimensions and the judge is faced with papers often beyond his capacity to read. By eliminating that kind of paperwork, you greatly improve the communication with the judge, he is far more likely to understand what you say than what you have written in a lengthy memorandum.

Following up on the conference and other proceedings for issue clarification are the various techniques available for issue limitation and issue narrowing. Some of that can take place early in the case; some of it can't take place until later. But the effort should be made to begin early in the case to do as much as possible to narrow issues and to eliminate extraneous matters.

A classic procedure is a motion for summary judgment or for partial summary judgment. You might note that, even if summary judgment is denied, the court, under Rule 56(d) Federal Rules of Civil Procedure, may make an order specifying those facts which are genuinely in dispute and those which are not. This is an additional procedure available for issue clarification and narrowing.

Antitrust cases have given summary judgment motions a bad name, but the pendulum has been swinging back and courts are becoming

more sophisticated and understanding about summary judgments in complex cases. The problem here is not so much with the judges as it is with the lawyers who present summary judgment motions in ways that will turn the court off. If a judge receives a summary judgment motion which says, "Well, this is a very simple matter and clearly the issue is one of law and the court can decide it," and is supported by a six-inch stack of affidavits, excerpts from depositions and other papers, he will naturally be skeptical. Even if he found the time to read it all, which is doubtful, it is not a terribly persuasive document. So the key to an effective motion for summary judgment is to zero in on the issue that can be decided without taking facts away from the trier of fact and present it in a neat and persuasive package.

If you examine the cases, you will find a number of different theories on which summary judgment can be rendered. My own analysis of these cases which appears in my book, *Managing Antitrust and Other Complex Litigation,* leads me to identify that there are four distinct grounds:

First, where, notwithstanding the presence of disputed facts, the theory of a claim or defense is deficient as a matter of law;

Second, where the issue turns on the legal effect of undisputed evidence, such as the interpretation of a contract or other document, the application of a per se rule or a standing principle;

Third, where after the moving party has come forward with evidence providing an innocent explanation of its conduct, the opponent fails to produce probative evidence to support its claims; and

Finally, where the issue is one of ultimate fact and only one conclusion can reasonably be reached—as, for example, whether an action has been reasonable or in good faith.

It may come as a surprise to some of you that there is respectable support for the granting of summary judgments on each of these theories. It is certainly something for you to think about in approaching litigation management.

There are other techniques for narrowing issues. One that I would urge you to consider is the bifurcation of issues under Rule 42 of the Federal Rules of Civil Procedure. Bifurcation of issues really takes up where summary judgment leaves off. Antitrust cases don't lend themselves very well to bifurcation of liability and damages, but there are other issues that can be severed from the case and tried separately.

An example of the kind of issue that can productively be tried separately—and I've done it in a number of cases with, I think, very good

results—is the issue of definition of the relevant market and determination of market shares. In many rule of reason cases, the outcome is really dependent on whether the defendant has a sufficient market share to have a significant impact. In one substantial case before me, it became very clear after a couple of days of trial on the market issue that there wasn't any way that one could find a sufficiently significant market share to hold that the challenged practices, even if otherwise in violation of the rule of reason, could be held to violate the Sherman Act. In another case in which monopolization was charged, the definition of the market which was arrived at in the severed trial greatly shortened the length of the subsequent trial on the merits.

There are, of course, some problems here. You have to consider whether using that procedure will in the long run be economical, or whether it will result in duplication. You have to consider whether you need to have the market issue tried before the same jury, if it is to be tried by a jury, or whether the parties will waive the jury. But these are all problems that are manageable; they can be thought through and, as a result, very substantial savings of time may be realized.

There are other things that ought to be considered in connection with the limitation of issues. On factual matters, for example, one procedure that was used very effectively in the *American Telephone* case[1] was the use of statements of contention and proof and stipulations. The parties were directed by the court to submit in series, statements of their factual contentions and the proof that they would adduce. First, one side would file its statements. Then the other side would file its responding statement. By this ongoing exchange of statements of contentions and proof, the issues were gradually narrowed and stipulations reached. That procedure is more useful in bench trials than in jury trials, but it is a process that you might consider.

In antitrust cases the data that are relevant are frequently published economic data, and they are susceptible to judicial notice. The court should be asked to take judicial notice of those kinds of data. They may also be established by requests for admissions, or by stipulation. In this way the scope of evidentiary issues at trial can be greatly reduced.

Another technique which I have found useful is the use of offers of proof. An offer of proof might precede a motion for summary judgment, for example. A party may be asked to submit the evidence it has

[1]United States v. American Telephone & Telegraph Co., No. 74-1698 (D.D.C., filed November 20, 1974) (case awaiting approval of settlement).

to support a particular claim or defense before the motion for summary judgment is made. Then the opponent responds. This simplifies the presentation of the motion. In one case, I have used the offer of proof procedure to determine whether the plaintiff had a viable damage theory, and then ruled on that damage theory accepting as true all of the facts that were contained in the offer of proof; it saved a great deal of time and greatly simplified the trial.

Those are some of the procedures, some of the vehicles, that are available to you for issue narrowing and issue clarification. Many of them may be unfamiliar to a judge, or they may be procedures that the judge is skeptical about. It is your job as advocates to persuade the judge to use these other devices where appropriate. If you succeed in doing that, you may find that it will have a salutary impact on the management of the litigation.

Let me close by reminding you again that I think the most important thing that you can do is to try to establish a direct channel of communication through the use of conferences, both with the court and with opposing counsel. Nothing, I think, is more effective to move the litigation along economically and expeditiously.