

Q&A With Anderson Kill's Larry Kill

Law360, New York (April 24, 2013, 2:19 PM ET) -- Lawrence Kill is a shareholder in the New York office of Anderson Kill & Olick PC and chairman of the firm's corporate and commercial litigation group. He represents clients in complex litigation, with particular emphasis on individual and class treble damage antitrust cases. His litigation experience covers virtually all facets of the antitrust laws, including price-fixing, bid-rigging, allocations of customers and territories, tying, monopolization, dealer termination and price discrimination.

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

A: I had a great challenge — and a good deal of satisfaction — representing defendants in the landmark antitrust litigation and criminal prosecutions involving Archer Daniels Midland, captioned *In Re Amino Acid Lysine Antitrust Litigation*. I defended a Korean company and its president against allegations of participation in an international cartel to fix the prices of lysine and to allocate customers in violation of the Sherman Act. The defendants faced criminal proceedings, a federal treble damage antitrust class action in Chicago, and numerous class actions involving alleged violations of state antitrust laws. The \$100 million fine eventually levied against ADM was the largest ever paid by a U.S. company at that time, and three ADM executives were sentenced to prison.

We were able to negotiate a deal with the government that got our clients off with minimal fines and no prison time. That was possible because through our own investigation we were able to ascertain matters of fact which provided substantial assistance to the government in its case against other defendants. Our challenge was to demonstrate to the government that we had the means to prove these facts. Amassing the evidence and getting the right people in front of the prosecutors took some intricate maneuvering. I am not at liberty to disclose more, but much of the story is well told in Kurt Eichenwald's excellent book about the case, "The Informant," which also became a movie.

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

A: Given the high stakes in antitrust class actions, in which plaintiffs are entitled to treble damages, we need better and somewhat tighter rules regarding who has standing to sue. Under federal antitrust laws, only direct purchasers have such standing. Many states, however, allow indirect purchasers, including retail customers, to sue. That creates a kind of double jeopardy: Defendants face exposure in paying twice for the same alleged offense — which means, in effect, sextuple damages. I am not suggesting that indirect purchasers should never have standing to sue for antitrust. But there ought to be some way of ensuring that only truly injured parties are allowed to recover.

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

A: Antitrust amnesty is an extremely important tool for prosecutors and resource for individuals and companies in the crosshairs of antitrust litigation and prosecution. The policy offers amnesty to the first member of an antitrust conspiracy that admits its conduct and fully cooperates with federal investigators. Only one grant is allowed per conspiracy, so you have to be "first one in." A successful applicant not only avoids prosecution but also gains, as a result of the Antitrust Criminal Penalties Enforcement and Reform Act of 2004, substantial benefits in civil litigation. Specifically, if the amnesty recipient cooperates with plaintiffs in class action litigation, it is only responsible for single damages, not treble, and is not jointly and severally liable, as are other antitrust defendants.

The program has been tremendously successful for antitrust regulators, and I have used it to advantage on behalf of a number of clients.

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

A: Bob Swift of Kohn Swift and Graf, who was counsel for the plaintiffs in the Lysine class action in which I represented the Korean defendants, is not only a master of complex civil litigation but a pioneer in human rights and civil liberties litigation. He has successfully pursued cases against the Marcos family that ruled the Philippines and their financial service providers, and he was our co-counsel in litigation on behalf of Holocaust victims and their families against European, financial and insurance companies, and companies that used slave and forced labor in World War II. We settled the various cases for close to \$6 billion, getting substantial restitution to Holocaust survivors and to their families.

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

A: I am very glad that I began my career in the Antitrust Division of the U.S. Department of Justice in Washington, D.C., which I entered upon graduation from Fordham Law School via a very competitive honors program. I took to antitrust from the start, and the Justice Department was a great proving ground. My work in that division focused on criminal prosecutions and provided relatively scant experience in depositions and trials, however. When I entered private practice, in retrospect, it would have been wise to get more quickly immersed in antitrust trial work, managing complex civil litigations from start to finish. Antitrust litigation is often a marathon; before current rules limited depositions to seven hours, they could go on for a week. My capabilities on that front evolved, and they evolved well. But that process could have happened more quickly. I learned over time that there is no substitute for actual participation in trial.

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