

## Q&A With Axinn, Veltrop's John Harkrider

*Monday, Oct 22, 2007* --- Federal guidelines should be redrafted to accurately reflect the agencies' current enforcement positions, says Axinn, Veltrop & Harkrider's John Harkrider in our series of chats with high-profile antitrust lawyers.

### **Q. What attracted you to antitrust as a practice area? And what keeps you interested?**

A. I've always been interested in the role of government in ensuring that markets operate efficiently, which often means that government intervention should be quite limited as the government itself does not always operate efficiently.

### **Q. What's the most challenging antitrust case you've worked on, and why?**

A. AT&T's acquisition of BellSouth. This merger received a significant amount of press coverage because many were concerned it would reassemble Ma Bell. However, a close analysis of the relevant markets revealed that there were no significant antitrust issues raised by the transaction, a conclusion that speaks volumes about the ability of the Department of Justice to conduct a principled and factual investigation free from political pressure.

### **Q. What's the most ridiculous antitrust lawsuit you've defended a client against?**

A. PMBR (a three-day multistate bar prep course) sued Bar/Bri (who offered a full-service course that prepared students for both the state and multistate portion of the exam) when Bar/Bri added extra days to the multistate portion of its full-service course. PMBR's theory was that Bar/Bri engaged in tying (by adding the extra days to an existing product) and predatory pricing (by not charging students extra). Ironically, the reason that Bar/Bri added the extra days was that PMBR ran ads attacking Bar/Bri for not sufficiently preparing students for the multistate examination in its full-service course.

### **Q. Which aspects of antitrust law do you think are in need of reform, and why?**

A. I'm not sure I fully understand why two agencies have concurrent jurisdiction over mergers.

### **Q. If you were in charge of the DOJ's and the FTC's antitrust divisions,**

## **what changes would you make?**

A. I would redraft the guidelines to accurately reflect the agencies' current enforcement positions.

In particular, I would change the HHI presumptions to reflect agency practice; I would redraft the Unilateral Effects section of the guidelines to make clear that market definition is not necessary; I would eliminate the 35% presumption in the Unilateral Effects section; I would make clear that efficiencies are not a defense to an otherwise anti-competitive merger but rather are to be taken into account in determining whether a merger is likely to have an anti-competitive effect. And I would also make clear that the burden is on the agency on all elements set forth in the guidelines.

## **Q. Outside your own firm, can you name one antitrust lawyer who's impressed you and tell us why?**

A. Bill Kolasky [of WilmerHale] does an excellent job of digging down into the facts of a case and also understands economic theory and data. On top of that he brings a level head, good judgment and extensive agency contacts.

## **Q. What advice would you give to a young lawyer who's interested in getting into antitrust law?**

A. Read the merger guidelines from start to finish and try to understand the theory (or lack thereof) behind every sentence in the document.

## **Q. I'm a general counsel with a Fortune 500 company facing a major antitrust lawsuit. Why should I hire your firm?**

A. We'll kill ourselves (and maybe a few others) to win, not through unnecessary and cumulative discovery motions but by living and breathing the facts of the case, arguing innovative economic and legal theories and outworking our adversaries.

*John Harkrider is the chair of Axinn, Veltrop & Harkrider LLP's antitrust practice.*