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Q&A With Dechert's George Gordon

Law360, New York (June 26, 2012, 1:48 PM ET) -- George G. Gordon is a partner in Dechert LLP's Philadelphia office, where he co-chairs the firm's antitrust and life sciences practice groups. He focuses his practice on antitrust litigation, counseling and government investigations. His experience includes antitrust class action litigation as well as antitrust matters involving claims of monopolization, unlawful price discrimination, unlawful group boycotts, predatory pricing and monopoly leveraging. He has represented clients in several nonpublic investigations by the Federal Trade Commission and the U.S. Department of Justice, Antitrust Division.

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

A: I led a Dechert team in a capital case in which we successfully challenged a death sentence for a mentally retarded client under the Supreme Court's decision in Atkins v. Virginia. Although neither a life sciences nor an antitrust matter, that was likely the most challenging case for me personally because someone's life was at stake.

In the area of life sciences, a number of years ago I represented a branded pharmaceutical client in a battle to preserve the sale of one of its principal products and related intellectual property in a deal that was mission critical to its financial recovery program. The problem was that, just days before closing, the Federal Trade Commission sent both parties to the deal a letter informing them of an investigation into the potential competitive effects of our client's listing of the relevant patent in the U.S. Food and Drug Administration's Orange Book. The patent was an important part of the assets being acquired, and the buyer backed out of the deal, claiming a "material adverse event" under the asset purchase agreement.

We spent the next two months scrambling to resolve the FTC's concerns and close the investigation, pursuing an expedited injunction in New York state court to force the buyer to close the deal. Within a week, we put together a team of more than 100 lawyers and paralegals working around the clock preparing client representatives for FTC interviews, depositions in the APA litigation, document production for the FTC and the litigation, as well as a white paper for the FTC and briefing for the litigation. We probably completed a good two years' worth of discovery and briefing in about six to eight weeks.

What made this matter particularly challenging was the critical importance to the client, the need to resolve the FTC investigation immediately and the overlapping demands of the FTC investigation and state court preliminary injunction litigation. In the end, we persuaded the FTC to close the investigation in less than two months, which was fairly quick for a nonmerger investigation in which the FTC is not under any statutory deadlines. The closing of the investigation allowed the client to successfully resolve the APA litigation and close the deal. The result was professionally and personally gratifying. In fact, the client held a dinner for our team after the deal was closed during which several employees thanked us for saving the company and their jobs.

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

A: Many of the cases and FTC matters that I handle involve the interplay between intellectual property enforcement, the FDA regulatory regime and antitrust law. My sense is that much of the concern about the enforcement of patents in the pharmaceutical industry arises from a fundamental lack of confidence in the patent system. This lack of confidence infects the manner in which the antitrust enforcement authorities and, at times, courts view efforts to acquire and enforce patents, and to settle patent infringement litigation. Steps to increase the confidence in the "quality" of patents being awarded by the PTO — such as increasing funding, hiring additional qualified examiners and other measures that would allow examiners to spend more time on each application — could help in this regard.

On another front, with respect to the pleading requirements for antitrust litigation, the Supreme Court in Twombly and Iqbal developed fairly clear guidelines for the role of the trial courts in analyzing the adequacy of pleadings. In particular, Twombly and Iqbal clearly teach that district court judges are permitted, indeed required, to weigh and compare the inferences that plaintiffs seek to draw from alleged facts against alternative, benign inferences. If the alternative, benign inferences are at least as plausible as the plaintiff's proffered inferences, the case should be dismissed. Lower courts, including the courts of appeal, have been uneven in their application of Twombly and Iqbal, which subject the defendants to unnecessary and extraordinarily expensive document discovery, depositions and summary judgment motion practice.

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

A: We have been watching the antitrust cases involving allegedly unlawful patent settlement agreements very closely — the so-called "pay-for-delay" cases. For example, the Third Circuit has heard argument in the case involving the settlement of the K-Dur patent litigation. The trial court dismissed the case on the grounds that the restrictions in the settlement did not go beyond the scope of the patent, a holding in keeping with appellate decisions in the Second, Eleventh and Federal Circuits. The Third Circuit will be the next appellate court to rule on the validity and application of the "scope of the patent" test. Similarly, we are also watching the progress of the antitrust challenges to Cephalon's settlements of the patent litigation involving Provigil, which survived an early-stage motion to dismiss.

These cases are of obvious importance for purposes of counseling clients involved in potential patent litigation settlements. They, however, have broader implications regarding the interplay of intellectual property and antitrust law that will affect antitrust actions arising from allegations of sham patent litigation, alleged fraud on the patent office and intellectual property strategies more generally. With the exception of an early decision by the Sixth Circuit in a case involving Cardizem, the courts of appeal have largely respected the legitimate exclusionary potential of a patent and how that affects the parties' judgments in assessing the strengths and weaknesses of an infringement case. We will see how the Third Circuit handles the issue.

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

A: I have been generally impressed by Eric Cramer, a plaintiffs' class action lawyer at Berger & Montague, in Philadelphia. I have been on the opposite side of Eric in a few cases, and we have been on antitrust-related panels together. Although we probably have very different views, I have generally found him to be an intelligent, thoughtful and capable adversary.

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

A: I learned very early on the importance of providing advice and counsel that is creative, and practically useful. I recall one incident in particular: As a very young associate, I was providing one of the partners, who had a penchant for the dramatic, with my "insights" based on some research he had asked me to do (I no longer remember the issue). I made the mistake of saying "it depends on …" and "if this, then that …" one too many times.

The partner stopped me mid-sentence and said (not unkindly, but with some flair), "If, if, if … if the queen had a [expletive deleted], she'd be king, tell me what you think we should do." I had no answer. At that point in my career, I thought the most important question we were supposed to be answering as lawyers was "What is the law?" as opposed to "What do you think we should do?" I did not make that mistake again. The experience impressed on me the importance, whether in the context of litigation, a deal or counseling, of providing clients with clear advice in the form of a practical game plan to achieve their objectives.

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