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What Do New Law Grads Know About Antitrust?

By **Jeff Zalesin**

Law360, New York (May 27, 2016, 10:32 PM ET) -- With this year's crop of law school graduates getting ready to enter the workforce, veteran antitrust lawyers are about to meet a new set of colleagues who probably learned competition law with a distinctly 21st-century spin.

Not every law student takes an antitrust course, and there is no standard curriculum across law schools. But in general, antitrust education today reflects the law's shift toward economic analysis and the current importance of topics including merger enforcement and pay-for-delay litigation.

Here, antitrust law professors tell Law360 what they're teaching these kids.

Economic Analysis Has Won

Economic thinking has always played a role in antitrust law, but its status as a dominant force has solidified over the past few decades, professors say. That change has trickled down from law schools, where students are learning to use economic concepts as their primary tools for building antitrust arguments.

"Economic efficiency is the focus of what we teach in law school, and other goals, such as a market that's not concentrated, are not as central a part of antitrust as they were, say, in the 1960s," said Michael Carrier, a professor at Rutgers Law School. "I think that's a general change in antitrust that isn't unique to the law schools."

Robert Lande, a law professor at the University of Baltimore, said that economics has edged out other forms of antitrust analysis as courts have moved away from the "pigeonholes" of legal or illegal actions. Little by little, he said, hard-and-fast rules have been replaced by the rule of reason, a test that turns on overall competitive effects.

"Now there are almost no pigeonholes left, except in the straightforward collusion area," Lande said. "Everything else is rule of reason, and that, of course, means business and economics."

As antitrust lawyers and law students are pushed to think more like economists, that can bring a greater focus on hard, quantitative evidence.

"The main change in my introductory course has been to emphasize the increasing empirical nature of arguments in antitrust litigation and the fact that [students] are going to need to be good consumers of

that literature," said Andrew Chin, who teaches at the University of North Carolina School of Law.

In particular, Chin said, his course has examined the way government agencies have increasingly used empirical studies to assess how a company would perform after a proposed merger.

Antitrust-IP Interplay Is No Sideshow

The interaction between antitrust law and intellectual property is a hot topic among practitioners and legal academics. As a result, some antitrust professors are introducing their students to topics at the IP-antitrust intersection, especially cases over "reverse-payment" pharmaceutical patent settlements that allegedly delay generic competition.

Jonathan Pitt, an antitrust partner at Williams & Connolly LLP who co-teaches an antitrust course at Georgetown University Law Center, said he tries to communicate to students that IP and antitrust are not necessarily in conflict, although they can appear that way. Pay-for-delay cases provide a good example of how courts try to balance the two regimes in practice, he said.

"I think the reverse payment cases are a good example of a changing legal landscape and one that allows us to explore an ever-changing set of concepts," Pitt said.

The U.S. Supreme Court ruled in a 2013 case, Federal Trade Commission v. Actavis, that some reverse-payment patent settlements can raise antitrust problems. That decision has fueled new discussions about how lower courts should handle pay-for-delay cases, Pitt said.

Carrier, who has written extensively about pay-for-delay law, said that the topic is included in his advanced antitrust seminar.

"Once you do get into the material — and, admittedly, it's complex material — it's fascinating because there is so much at stake when you think of the billions of dollars extra that patients could be paying for medicine," he said.

More abstractly, pay-for-delay cases shed light on how antitrust intersects with patent law and the Hatch-Waxman Act, a federal pharmaceutical law, Carrier said. The cases raise questions without simple answers, which adds to students' interest in the area, he said.

Carrier's seminar also covers growing questions for the technology sector at the border of IP and antitrust. For example, he said, students learn about competitive issues raised by patent-assertion entities and standard essential patents.

Merger Review Is Serious Business

Under the Obama administration, merger enforcement has been active, and so has law school instruction on the subject. The key ideas are not new, but instructors are taking advantage of the regulatory climate and using recent cases to help students explore what kinds of deals can be blocked.

"Although mergers are what a lot of antitrust lawyers spend a lot of their time doing, the merger cases in the past have tended not to be necessarily the best teaching tools," Pitt said. "More recently, some of the contested mergers have produced very interesting opinions that provoke thought about a lot of issues."

For example, last year's decision blocking the proposed tie-up of Sysco Corp. and US Foods Inc. allows students to look at a "very specialized, complicated analysis" of relevant market definition in merger litigation, Pitt said.

"That case has been a great teaching tool, and it was only available to us this past year," he said.

Antitrust education has also been bringing in merger-related material from outside the courts, said Loyola University Chicago School of Law professor Spencer Weber Waller. In a move away from Supreme Court-focused reading lists, professors have started to use agency guidelines, consent decrees, closing statements and the like, he said.

"There's been no substantive Supreme Court case law since the '70s" on mergers, Waller said. "There are litigated decisions, but the real action is trying to figure out from the guidelines and other sources whether the government is likely to challenge or even likely to issue a second request."

Politics Plays Into Antitrust Decisions

Antitrust law is a political issue, discussed on the campaign trail by everyone from Bernie Sanders to Donald Trump. Professors of an earlier generation might have tried to keep politics out of the classroom, but instructors are now acknowledging that the law does not exist in a vacuum.

Lande said that he has taught about the differences in what types of antitrust arguments liberals and conservatives tend to find persuasive.

"I think I'm doing a disservice to my students if I pretend this is science," Lande said. "I teach it as a very political subject, and you have to be able to make both arguments, depending on who your client is."

Carrier said that students in his course have discussed the politics of merger enforcement. For example, he said, there is a question about whether political considerations drove the U.S. Department of Justice to accept a relatively lenient settlement in the merger case against US Airways and American Airlines in 2013.

"There is antitrust enforcement, but it does take place in the context of a political overlay in which the enforcement needs to be justifiable," Carrier said.

Some professors are looking at politics not only to explain past antitrust decisions, but to predict future trends. Barak Orbach, a law professor at the University of Arizona, said he tries to teach his students about what the law is about to become, not just what it has been.

"Right now, the sentiments in the United States against large corporations and the relationships among corporations are going to affect policies, including antitrust — and not necessarily in a way that antitrust experts like," Orbach said.

Students Need to Think for Themselves

Law students still read plenty of antitrust cases, but the days of simply memorizing a casebook and reciting Supreme Court holdings on a final exam appear to be over. Antitrust professors are working to get students in the habit of formulating and expressing original arguments.

Pitt said that on the first day of their course, he and his co-instructor, Williams & Connolly partner Steven Kuney, tell the students about a hypothetical action and ask them to vote on whether the conduct is anti-competitive. The teachers then facilitate a debate between students who thought the action would harm competition and those who disagreed.

After that exercise, Pitt said, he and Kuney encourage students not to ignore their intuitive sense of which factors matter in determining whether something is anti-competitive, even as they learn the rules and vocabulary of antitrust.

“It is very much a methodology that we’re trying to teach, rather than a set of doctrines,” he said.

Waller said that he has brought active learning into his teaching of merger law. In a simulation exercise, Waller assigns some students to represent a government agency and others to represent the companies in a proposed merger. The government can ask questions, obtain information and even sue if necessary, with Waller sitting as the judge.

Waller said he is far from the only antitrust instructor to have built an interactive course.

“It’s very different from just going to class, talking about a couple of cases and going on to your next class,” he said. “In general, I think most people are moving in that direction.”

--Editing by Mark Lebetkin and Philip Shea.
