Supplier Retaliation Against Civil Antitrust Plaintiffs Is Not a Major Concern

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When customers consider whether to cooperate in governmental antitrust investigations against their suppliers or file civil antitrust lawsuits seeking damages for themselves, their in-house counsel often hear fears that the suppliers will take vengeance by disrupting their supply or otherwise injure the ongoing business relationship.

Recent legislative efforts, like the Criminal Antitrust Anti-Retaliation Act that passed the Senate last year, have focused on protecting whistleblowers of antitrust violations from retaliation by their employers; however, there is no statute protecting corporations that assist the government’s investigation into a supplier’s antitrust violations or sue the supplier to recover for its antitrust injuries. But it appears no additional legislation protection is needed as there is little evidence that such supplier retaliation has occurred. In fact, the trend is moving in the opposite direction: purchasers who are dependent upon suppliers increasingly pursue antitrust claims against those suppliers with no apparent disruption in their ongoing business relationships.

In-house counsel considering cooperation with antitrust investigations or filing a lawsuit can, thus, advise their clients that there is little to fear from retaliation.

A common example where a company’s concern of retaliation might arise is in the context of a purchaser-supplier relationship where the purchaser relies heavily on the supplier for key component parts. In recent years, many component parts have been the subject of criminal antitrust investigations and civil antitrust litigations, including computer parts (DRAM, SRAM, graphic processor units, liquid crystal display panels), automobile parts, and various vitamins for foodstuffs and animal feed. When the suppliers are alleged to have colluded to engage in a price-fixed conspiracy, companies may fear that those same companies could, for purposes of intimidation or vengeance, unilaterally or together cut-off supply or increase price to the purchaser, disrupting the purchasers’ ability to manufacture its products. Even if not afraid of such straightforward retaliation, companies may fear that assisting an antitrust investigation or bringing an antitrust litigation might injure the business relationship to the purchaser’s detriment. See e.g., In re Linerboard Antitrust Litig., MDL No. 1261, 2004 BL 2907, *18 (E.D. Pa. June 2, 2004) (“taking a high profile role threatened to jeopardize class representatives relationships with their suppliers.”).

But there are not many real-life examples of supplier-to-purchaser retaliation in this context. An example in
the healthcare industry shows that even where retaliation is documented, it is quickly resolved.

In In re Blue Cross Blue Shield Antitrust Litigation, physicians and other medical services providers alleged that the Blue Cross Blue Shield (“BCBS”) medical insurance companies engaged in a conspiracy to geographically allocate the market for medical insurance. See, MDL No. 2406, No. 2:13-CV-20000-RDP (S.D. Ala. filed July 1, 2013). A few months after the case was filed, fears of retaliation surfaced during an evidentiary hearing, where plaintiff-physicians expressed concern about Blue Cross’ potential reaction to their participation in the class:

Your Honor, we have lots of Class representatives, not only with [the co-defendant], that are very worried about retaliation. I had a phone call this morning from a potential Class representative expressing concern about possible retaliation if the Class representative goes forward as a plaintiff in this case. They are worried about it. Not all of the [defendants] are as bold in their retaliation as [this particular defendant]. Some of the [defendants] are more responsible. But many of them have such an enormous market power that Providers out there are very concerned. They have to do business with them or they’re out of business.

Id., Evidentiary Hr’g Tr. (Docket No. 60), 61:2-14–April 23, 2013.

One of the named plaintiff-physicians later filed an emergency motion requesting that the court enjoin BCBS from altering its contract with her. The plaintiff asserted that “less than two months after she became a named plaintiff in this action, [plaintiff-physician] received a letter from [BCBS of Kansas, Inc.] terminating her Competitive Allowance Program [.] contract[.]” The termination provided only a few months’ notice “without offering any cause for the termination.” Thus, the plaintiff-physician concluded, and based her motion for relief, upon the theory that:

While [BCBS] claims that it is simply invoking the contractual provision which effectively permits a “no cause” termination, the abrupt “no cause” termination of a respected pediatrician with a sixteen-year track record as a [BCBS] provider only a matter of weeks after she joined a lawsuit alleging conspiratorial conduct and price-fixing against [BCBS,] leaves little question as to the motivation behind this outrageous decision.

Id., Mot. for Prelim. Injunction (Docket No.102), at 1-2, filed September 17, 2013.

The parties quickly reached resolution of the matter after the motion was brought. Even examples like this one, where the threat of retaliation is raised to the court and then is resolved before the court can intervene, are very few.

It is possible that the lack of evidence of retaliation is due in some part to the success of retaliatory threats. Some commentators have suggested that direct purchasers avoid suing their suppliers for fear of retaliation, and as quid pro quo for their inaction solidly preserve future business dealings with critical suppliers. In other words, the preservation of these long-term relationships—with suppliers upon which the purchasers are economically dependent—outweighs the possible recovery through filing an antitrust litigation, especially when those purchasers can often recover passively as a member of a class action. See A. Gehring, The Power of the Purchaser: The Effect of Indirect Purchaser Damages Suits on Deterring Antitrust Violations, 5 NYU J.L. & Liberty 208, 216 (2010); R. Lande, Justice for the Forgotten: New Legislation to Protect Indirect Victims of Antitrust Violations, 2 n.7, 9-10, available at http://works.bepress.com/robert_lande/2.

But this position is belied by the growing trend in opt-out litigation, which sees more and more corporate plaintiffs electing to bring their own actions against their suppliers instead of remaining as class members. For example, in the antitrust litigation related to the liquid crystal display flat panel industry, over 35 companies, both big and small, opted out of the class action litigation and sued their suppliers directly. None of them reported retaliation from any of their LCD suppliers.

Based on this trend of increased opt-out litigation and the lack of documented instances of retaliation against corporate plaintiffs, corporate counsel can advise their customer clients that supplier retaliation rarely occurs. Nor is there need for additional legislation to protect corporate plaintiffs against retaliation, which rarely occurs and, when it does, can be promptly dealt with by the parties and the courts.

New protectionist legislation would only create the risk of frivolous litigation without advancing enforcement of the antitrust laws.