

## Q&A With Labaton Sucharow's Bernard Persky

*Monday, Oct 01, 2007* --- A slowdown in pharmaceutical inflation is proof that the antitrust work of plaintiffs firms is benefiting consumers, Bernard Persky of Labaton Sucharow LLP tells Law360 in our series of chats with high-profile practice leaders.

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

A. I was attracted to antitrust as a practice area for primarily two reasons. First, I was drawn to the intellectual rigor and challenges involved in litigating complex legal, factual and economic issues inherent in the practice of antitrust. Also, it was especially important to me to be working in a field that promotes the public interest by helping to enforce and shape the rules of competition that benefit us all.

In passing the Sherman and Clayton acts, both parties in Congress agreed that free and unfettered competition was necessary in order to make capitalism work. Anti-competitive conduct was seen to be so injurious to the public good that Congress made it a felony. Indeed, Congress believed that protecting competition was so essential that it created a “bounty” in order to persuade private plaintiffs to bring enforcement actions against antitrust offenders by allowing them to recover treble damages as well as attorneys’ fees.

I find my work deeply satisfying — each day brings new and complex challenges, particularly in this technological era where companies are finding more innovative ways in which to thwart competition and injure businesses and consumers.

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

A. The most challenging cases I have worked on have been the pharmaceutical drug cases. These cases involved situations where the major brand-name drug companies suppressed generic drug competition through a variety of unlawful tactics. The issues involved were novel and challenging. The outcomes from these cases were ultimately positive ones where we recovered over \$1 billion for consumers and their health insurers.

Interestingly, on Sept. 21, I read an article in the New York Times titled “Helped by Generics, Inflation of Drug Costs Slows.” The article stated that annual inflation of drug costs is at the lowest rate in three decades because more people are turning to generics and because generic versions of some

of the most common drugs have recently come on the market. This is proof that our efforts benefited consumers.

More recently, Labaton Sucharow was appointed co-lead counsel in *In re Air Cargo Services Antitrust Litigation* where we represent direct purchasers of airfreight shipping services against 40 airlines alleged to have engaged in an international cartel in which they conspired to fix the prices of such services worldwide. This very important case presents innumerable challenges, particularly involving the international aspects of the conspiracy.

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

A. In *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981), I represented Fedders Corporation, a small air conditioner company that purchased the assets of Airtemp, Chrysler's non-automotive air-conditioning division.

After the purchase contract was executed, Chrysler brought an action that claimed Fedders conspired to drive Chrysler out of the non-automotive air-conditioning market in violation of antitrust laws.

The court accepted our arguments and dismissed those claims against Fedders, holding that Chrysler did not suffer antitrust injury. The court found that Chrysler voluntarily withdrew from competition in the non-automotive air-conditioning market and that it had in fact covenanted not to compete in that market.

In short, the court found that Chrysler's real complaint was not that it was driven out of the market by a competitor but that it had not been paid for doing so.

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

A. I would like to see reforms in the applicability of U.S. antitrust laws to combat global conspiracies. Namely, U.S. courts should have jurisdiction to hear cases brought by foreign consumers suffering antitrust injury abroad if the alleged conspiracy is international in scope and includes the United States, it involves a commodity product in a worldwide market and the global conspiracy is interconnected with the price-fixing conduct in the United States.

Most foreign countries do not permit antitrust class actions. Thus, there is an imbalance in enforcement that favors the company that engages in a worldwide price-fixing cartel. Such companies may find it economically rational to engage in a worldwide conspiracy because the losses they face from a successful antitrust class action in the United States could be substantially less than the financial gains made elsewhere where consumers

do not have adequate means to seek a monetary recovery.

**Q. If you were in charge of DOJ's and the FTC's antitrust divisions, what changes would you make?**

A. If I were in charge of the DOJ and/or FTC, I would strive to work more closely and actively with private counsel on antitrust matters that were primarily developed and pursued by such private counsel. Private antitrust litigation is a critical component of enforcing the antitrust laws and additional support from the public enforcement agencies would be beneficial.

Without question, the antitrust laws have been positively developed and refined through the efforts of private antitrust counsel, and government enforcers should partner with private counsel in cases developed and initially brought by them.

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

A. The individual I most admire in the antitrust field is undoubtedly the late professor Phillip Areeda. He was my antitrust law professor at Harvard Law School and inspired me to be stimulated by this field's many intellectual challenges and professional rewards.

His influence was instrumental in my decision to pursue a career in antitrust law. His wisdom and many valuable insights live on in his authoritative antitrust treatise, which is universally consulted by all serious antitrust practitioners.

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

A. I often advise young lawyers or law students who are interested in a career in antitrust law to take business-related law and economics courses. I also urge prospective antitrust lawyers to take administrative law and federal practice and procedure courses as well as trial-preparation courses.

Antitrust is much more than counseling — it is complex litigation, but litigation that provides a tremendous amount of personal satisfaction in an area of great public importance.

*Bernard Persky is the head of the antitrust practice group at Labaton Sucharow LLP.*