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Q&A: Gibson Dunn's Cynthia Richman

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Cynthia Richman is a partner at Gibson Dunn & Crutcher's Washington, DC office, practising in the firm's antitrust and trade regulation group. In the ongoing Apple e-books litigation that hits New York's federal appeals court today, Richman is a leader on the team representing Apple. Here, she dishes on what (else) is piquing her interest in the world of antitrust.

What do you think are the most interesting issues in antitrust right now?

There are a host of important class action issues in antitrust cases that are percolating right now and that seem to arise almost daily in our defence of alleged price-fixing claims in trial courts and on appeal. One question that has cropped up in several of my matters over the past year and that appears destined for Supreme Court review given the growing circuit split is whether courts can certify a class that includes – even under plaintiffs' models – uninjured members. Another that we are briefing now is whether plaintiffs can rely exclusively on aggregate damages models that calculate damages purportedly incurred by the class as a whole, rather than by individual class members.

Is there any antitrust litigation you are following closely besides the cases you are working on personally? Why?

In light of its recent decision in ZF Meritor, *LLC v Eaton Corp*., I am curious to see what the Third Circuit does in *Eisai Inc v Sanofi-aventis US* – a lawsuit challenging as exclusionary a market-share and volume rebate offered in a single-product market. The district court concluded (rightly, I believe) that price was the predominant mechanism of the alleged exclusion and, as a result, the price-cost test (and not the exclusive dealing framework) applied. Because Sanofi's prices were at all times above its costs, the district court found it was entitled to summary judgment. The case is on appeal and one of the central issues is whether the exclusionary mechanism was "price" or whether, as Eisai claims, there was "something more" (ie, the mechanism of exclusion was "non-price"). The distinction between price and non-price conduct is sometimes murky – practices characterised as non-price are directly related to price levels. It will be interesting to see whether the Third Circuit clarifies the distinction, or acknowledges the relationship and difficulty in drawing the line, something it did not do in *Eaton*.

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What issues are you keeping an eye on internationally? How will they affect the practice of antitrust law?

Sticking with the loyalty discount theme, I will be paying attention to the appeal of the EU General Court's decision condemning as *per se* illegal the rebates in the *Intel* case. In light of that decision, it seems (even more) inevitable that the differing standards in the US and Europe will create compliance challenges for international companies with international customers, and that pricing practices will have to be carefully tailored to individual jurisdictions.

If you could give one piece of advice to the DoJ or FTC, what would it be, and why?

I don't think the agencies can go wrong by increasing the transparency of their decision-making or disclosing concerns early in the process, whether in the litigation, merger or cartel context. It's beneficial to all sides – as a defence attorney, it makes it easier to explain regulators' decisions to clients and avoid surprises. It also provides the opportunity to address misunderstandings or points of confusion in a constructive and efficient manner before they snowball into larger disputes.

Whom do you most admire in the antitrust community right now, and why?

I am fortunate to have worked with a very talented group of attorneys, both inside and outside my law firm. I have great respect for Dan Swanson, a terrific mentor whose mastery of every aspect of antitrust law is inspiring. I'm also a big fan of Debbie Feinstein's. She is a great role model, attorney and an all-around class act – I learned a lot from her example when we were working opposite each other on a difficult merger back in my junior associate days.

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