

A Conversation About Antitrust

What Michigan Practitioners Must Know

By Heather J. E. Simmons and Steven J. Cernak

Steve Cernak was one of the first attorneys I met when I became the law librarian for General Motors. He worked in the marketing and trade regulation practice area. I did research for him on matters relating to counterfeit auto parts. When a group of librarians and analysts were doing a big competitive intelligence project, Steve sat in on our weekly conference calls to ensure our methodology was legal and ethical.

Steve agreed to answer some questions about what general practitioners need to know about antitrust law.

— Heather J. E. Simmons

Simmons: How did you first become interested in antitrust law?

Cernak: I was a summer associate with General Motors' legal staff after my first year at the University of Michigan Law School. Because I was getting my master's in economics at the same time as my law degree, the folks at GM suggested I work with the antitrust lawyers. I knew nothing about antitrust—I thought it was spelled with a hyphen—but I enjoyed the work and the people, and ended up returning to the subject and GM when I graduated.

Simmons: What was your most interesting antitrust case/matter?

Cernak: The most interesting work I did was being lead counsel for GM's Service Parts Operations. I had to learn all about the complicated business of selling parts to dealers, distributors, and mass merchandisers. As I learned more, I was better able to apply the antitrust laws and help the clients meet their business goals.

If I have to choose just one case, I would choose our long-running grey market cases.

We had to fight off various government investigations and class-action litigation alleging we had agreed with our competitors about the no-export policies in our dealer agreements. It was a high-stakes chance to apply antitrust laws in various settings and with different groups of lawyers.

Simmons: What issues should general practitioners be aware of regarding antitrust?

Cernak: While there are plenty of potential antitrust problems in dealing with suppliers and customers, the most common and serious antitrust issues arise from dealings with competitors. If your client is doing something with a competitor—even just talking—your antennae should go up. Even if the contact ends up being fine, you and your client should document it well enough to later prove what happened—and did not happen. You need to ask such a client one question: “Why?” If the answer is that this competitor contact will help the client succeed by better serving customers, you are probably fine. If the answer is that the client will succeed by harming customers or other competitors, then you are more likely to face future trouble. You have to know your client's business well enough to recognize which answer you are getting.

Simmons: How do you know when to call in an antitrust specialist?

Cernak: Well, certainly if you get the “bad” answer referred to in the prior question, it's a good time to consult with someone who does antitrust work on a regular basis. If your issue raises questions about more arcane aspects of the law, like price discrimination or some of the exemptions to the antitrust laws, you probably don't want somebody who just dabbles in the area.

Another subspecialty is merger review. The pre-merger filing requirements are more like the tax code and have their own lore that only regular practitioners understand. While many specialists work in Washington, D.C., it is simply a fallacy to think that even these complicated matters require hiring someone from D.C. There are plenty of us outside the Beltway who have that kind of experience. Clients can waste money and not get the representation they need if they overlook the great resources right here in Michigan.

Simmons: If attorneys wanted to learn more about antitrust where should they start?

Cernak: The best complete single source is *Antitrust Law Developments* by the American Bar Association Antitrust Section. Now in its seventh edition, this two-volume set offers concise summaries, complete coverage, and thousands of case citations if you need more detail. If you are looking for something

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shorter (and less expensive), I have two suggestions. First, the ABA Antitrust Section publishes *Frequently Asked Antitrust Questions*, a book that, as the name suggests, provides short basic answers to questions that arise most often. Finally, I think my own *Cernak's Antitrust Simulations* from West Academic can be useful to practitioners. It summarizes important cases in key areas and provides real-world hypotheticals for students and practicing lawyers alike.

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Simmons: Why should law students consider practicing antitrust law or at least take a course in the subject?

Cernak: Let me give both a practical and philosophical answer. When I started practicing in 1989, antitrust work was in the doldrums. Government enforcement was down. There were few private lawsuits, also, partially because antitrust trials seemed too big and expensive. Now, government enforcement is back at all levels and through all administrations—even states like Michigan are active—and private litigation has taken off as courts and practitioners have become comfortable with many kinds of large cases, including antitrust ones. Whether class actions or business-versus-business litigation, there is a lot more antitrust activity than before, and there is a good chance you and your clients will be involved.

Also, this work can be satisfying in other ways. It is intellectually stimulating because the concepts are complicated and require deep knowledge of how the economy, an industry, and even a particular business

operate. You learn a lot doing this kind of work. Also, you can affect a lot of people through these matters, whether protecting a group of consumers or helping a business determine the best way to get its work done.

Simmons: How can you keep up on the latest developments, whether a specialist or not?

Cernak: Actually, there are so many sources of latest developments, the bigger issue might be picking the ones that work for you. Again, the ABA Antitrust Section has offerings that I think are useful to both specialists and generalists alike. Section members can get daily e-mails with links to the top antitrust stories. The section's Corporate Counseling Committee offers monthly dial-in seminars during which top firms summarize the latest developments. The Law360 service offers a competition law daily e-mail. MLex also offers daily links to top stories plus numerous e-mails throughout the day with up-to-the-minute updates on enforcer speeches and litigation developments. Finally, there are various blogs that offer analyses from those who do this work on a regular basis. One free one I like (and contribute to) is AntitrustConnect.com from Wolters Kluwer.

Simmons: What are the hot topics for antitrust specialists today?

Cernak: I would raise two. First, there is a series of investigations by the U.S. and several foreign governments into alleged collusion in the sale of many types of auto parts. The investigations have generated hundreds of millions of dollars in fines imposed on many different companies around the globe and, as of this writing, do not seem to be slowing down. In short, it has become the biggest set of antitrust cases of

all time. It has also spawned a series of private suits, most of which are right here in Michigan courts. While the theoretical issues might not be cutting-edge, the litigation strategy issues are.

Second, the question of the legality of loyalty discounts continues to bedevil courts and antitrust thinkers. These arrangements are common—if you agree to buy more from me, say 90 percent of your needs, I will give you a lower price on each one. Generally, antitrust law likes lower prices for consumers. But what if such a program is offered by a business that already has a high market share? And what if the discounts are so enticing that so many customers feel obliged to take them that competitors are foreclosed from the market? Can such low prices be bad for competition under those circumstances? These kinds of questions have generated a split among the U.S. appellate courts and many articles and speeches by antitrust specialists around the globe but, so far, no definitive standard of analysis. ■



Heather J. E. Simmons is an assistant professor of library service at the University of Illinois College of Law. Previously, she worked at the General Motors library and Wayne State University's law library. Ms. Simmons was admitted to the State Bar of Michigan in 1985 and is currently serving her third term on the Libraries, Legal Research, and Legal Publications Committee. She is also active in the American Association of Law Libraries.



Steven J. Cernak is of counsel at Schiff Hardin. He spent 23 years at General Motors practicing antitrust and trade regulation law, and served as lead competition law counsel for GM globally. He now assists new clients on antitrust matters. He teaches at the University of Michigan Law School and Wayne State University Law School, and in Western Michigan University Cooley Law School's Corporate and Finance LLM program.