

Competition Group Of The Year: WilmerHale

By **Hilary Russ**

Law360, New York (January 10, 2011) -- The close-knit relationship between WilmerHale's competition attorneys and its intellectual property lawyers has helped the firm land some huge clients — including Apple Inc., Intel Corp., Cisco Systems Inc. and Cephalon Inc. — caught up in controversial and cutting-edge cases, earning the firm's antitrust and competition practice group a spot on Law360's Competition Groups of 2010.

That intersection of antitrust and IP work — and its cross-office antitrust integration — has aided WilmerHale in its defense of Apple in litigation with Nokia Corp. over licensing fees for cell phone technology patents, and of Cephalon Inc. after the company was hit with a slew of pay-to-delay allegations over its narcolepsy drug Provigil.

Facing an all-out assault from the Federal Trade Commission, competitors, and direct and indirect purchasers in civil litigation, Cephalon has been fending off accusations that it delayed the release of generic alternatives to Provigil — its biggest moneymaker — by buying off generic manufacturers through settlements in underlying patent litigation.

With an IP team in place working hand-in-hand with antitrust lawyers — and with antitrust teams in both its Boston and Washington offices "fully geared up" — the firm is "able to pull resources from two cities, and we also have the IP resources to deal with those issues that are still present in the [Cephalon] case," said Michelle D. Miller, co-chair of WilmerHale's antitrust group and part of its Boston office.

"It's really critical to have that kind of team when you are facing claims on so many fronts," she said. Partner James Burling in Boston is leading WilmerHale's antitrust team in the Cephalon matter.

Cross-office synchronicity has also helped the firm's 73 competition attorneys weave together broad cases, and the close working relationship between lawyers from different U.S. cities and in Europe has been a key to the group's success, she said.

Citing client confidentiality, she declined to discuss Apple. But the case involves issues on the forefront of that intersection between IP and antitrust law that involves licensing obligations, often mandated by

standards-setting organizations, called FRANDs, or "fair, reasonable and nondiscriminatory terms."

Such agreements ensure that devices manufactured by different companies within an industry remain compatible and interoperable for consumers.

In counterclaims, Apple accused Nokia of trying to gain an unfair advantage by deliberately and deceptively failing to disclose IP rights to the relevant standards-setting organization prior to the incorporation of technologies purportedly covered by those patents.

Moreover, Nokia allegedly refused to offer fair license terms to Apple in violation of its contractual obligations to do so, and then sued when Apple refused to pay nonfair terms.

The case is ongoing in the U.S. District Court for the District of Delaware, where the companies are still sending out subpoenas and preparing to depose witnesses.

Aside from its work for big tech companies on the cutting edge, the firm has also won some high-profile mergers and a far-reaching U.S. Supreme Court case, and helped clients resolve tricky FTC actions and cartel investigations.

Long before WilmerHale helped parcel tanker company Odfjell ASA win *Stolt-Nielsen SA et al. v. Animalfeeds International Corp.* in the Supreme Court on April 27, the firm's antitrust attorneys were clearing other hurdles along the way.

As early as 2003, the firm was representing the company when, as part of criminal probes into bid-rigging and price-fixing, the U.S. Department of Justice and the European Commission issues subpoenas and conducted searches of Odfjell, according to antitrust and competition practice group co-chair Thomas Mueller in the firm's Washington office.

Mueller and William J. Kolasky helped the company strike a plea agreement with the Justice Department that included a substantial downward departure to resolve the allegations in, remarkably, less than a year, Mueller said.

They convinced the EC to dismiss its investigation in part by going to member states to get immunity.

At the same time, the group — primarily Kolasky and Steven F. Cherry, and later Mueller and Leon B. Greenfield — started to represent the company as defense attorneys in a price-fixing putative class action.

They took to the U.S. Court of Appeals for the Second Circuit an argument that Odfjell could force civil claims into arbitration — an argument WilmerHale won.

That "allowed the company to deal with this not through the normal civil litigation and class litigation but to deal with it through their customer relations with big chemical firms outside of court," Mueller said, calling the decision "very beneficial" to Odfjell.

Later in the case, the plaintiffs' attorneys sought to pursue remaining claims in arbitration as a class. The case originally accused Stolt-Nielsen, Odfjell and other companies of fixing freight rates for shipping liquid chemicals in parcel tankers moving in and out of the U.S.

WilmerHale took Odfjell's defense all the way to the Supreme Court and won, with former Solicitor General and partner Seth Waxman arguing the case. The decision is expected to have a broad impact on businesses, in particular in the maritime industry, employing arbitration clauses that don't specifically authorize class arbitration.

"It was a very big thing to have someone of Seth's caliber able to argue before the court," Mueller said. "We're able to bring resources to bear that make our antitrust practice even stronger."

Overall, the ability to tap into its European antitrust lawyers let the practice group, working with Odfjell's local counsel in Norway, create a strategy for its client that encompassed civil litigation, arbitration and matters on two continents, Mueller said.

"That clearly allowed us to put an effective and cost-effective strategy together for our client, having strengths in all those areas," he said.

WilmerHale antitrust lawyers have also shined in their ability to secure mergers even in the face of significant opposition.

In particular, competitors on both sides of the Atlantic tried to scuttle Cisco Systems Inc.'s \$3.3 billion acquisition of Norwegian videoconferencing company Tandberg ASA with complaints about highly technical horizontal, vertical and conglomerate issues.

But working on behalf of Cisco, the firm got first-phase clearance from the European Union by negotiating an innovative agreement in which Cisco said it would divest its interoperability protocol for video communications to an independent industry body, the firm said.

That agreement also led the Justice Department to announce — just twenty minutes after the EC's decision — that it was closing its own investigation into the merger without a need for a separate consent decree.

On March 29, in announcing its approval of the Cisco merger, the DOJ's antitrust division hailed the deal as a model of close international cooperation aided by the lawyers involved.

Only a few months before, relations between the EC and the DOJ had been tense after the two agencies initially were at odds in Oracle Corp.'s proposed acquisition of Sun Microsystems Inc.

That the DOJ required no additional consent decree for Cisco, and that the department publicly lauded the attorneys for their work, was something Mueller said he's never seen before.

"It speaks volumes to the good work" of the group, he said.

WilmerHale also represented Qwest Communications International Inc. in winning DOJ and FTC clearance for its \$11 billion merger with CenturyLink Inc. in July. The deal, which must still get regulatory approval from the Federal Communications Commission and antitrust regulators in a handful of states, is expected to close in the first half of the year.

Another big tech client is Intel, for whom WilmerHale's competition attorneys reached a settlement, announced Aug. 4, laying to rest claims by the FTC that the microprocessor giant illegally curbed competition in the market for computer chips.

The FTC said the settlement went beyond terms Intel had agreed to in resolving previous actions against the company because it applied not only to central processing units but also to graphics processing units and integrated chipsets.

The case was one of the largest and broadest brought by the FTC in the last several decades, the firm said.

The group also helped Chi Mei Optoelectronics Corp. obtain "a remarkably successful resolution" to the DOJ's investigation into cartels among major manufacturers of thin film transistor liquid crystal displays, or TFT-LCDs, in Korea, Taiwan and Japan, the firm said.

Despite being seventh in line among companies to settle with authorities — and despite not beginning to cooperate for two years after other defendants did — Chi Mei won a downward departure in its fine that was greater than the ones obtained by several other defendants after it brought in WilmerHale at a late stage in the game.

The WilmerHale competition group also defended class actions, including a multidistrict litigation accusing national insurers of violating the Sherman Act by allegedly paying contingent commissions to insurance brokers.

In August, the U.S. Court of Appeals for the Third Circuit affirmed the dismissal of all federal antitrust and racketeering claims against WilmerHale client Hartford Financial Services Group Inc. WilmerHale's motion to dismiss remaining state law claims is pending.

Kolasky and Ali M. Stoeppelwerth worked on that case extensively. Mueller said part of the reason for their success was "[Kolasky's] creativity in coming up with a good strategy."

With successes large and small under its belt and with no sign that antitrust work will taper off, the group expects to keep adding to its ranks, most immediately in the Washington office, according to Miller.

Its powerhouse Boston office will remain key. She also said that she anticipates the firm will add to the group's West Coast presence "at some point down the road."

The firm's strong antitrust presence in its Brussels, Berlin and Frankfurt offices are also expected to remain the base for the group in Europe, she said.

And she sees even more work ahead, in particular in the intersection between IP rights and antitrust law.

"I really do anticipate seeing continued growth in these areas," she said. "It's going to continue to be at the forefront as telecommunication companies continue to wrangle with each other about FRAND issues."

--Additional reporting by Jocelyn Allison, Erin Coe, Ben James and Jacqueline Bell

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