

How Issue-Based ADR Can Streamline Antitrust Cases

By **Ronald Ravikoff and Barbara Reeves** (April 9, 2018, 1:18 PM EDT)

Handling the complex, multiparty, multi-issue, or “bet the company” antitrust matter in a cost-effective and timely manner is often a significant challenge for both plaintiff and company litigation counsel.

These cases frequently have secondary and/or collateral issues that take on a life of their own, resulting in the projected timelines and costs promised to the client to quickly exceed expectations.

Savvy litigators are more and more turning to limited or “targeted” alternative dispute resolution to resolve these “sub-issues” while continuing to prepare for trial. This approach has the added benefit of, as these issues become eliminated, enhancing the possibility of an ultimate resolution of the whole matter.

Each complex antitrust case had its own idiosyncrasies and sophisticated counsel will need to tailor the process to fit the circumstances.

The most common approaches that should be considered are issue-based (as opposed to case-based) approaches — using, for example, techniques such as evaluative mediation, special masters and nonbinding arbitration.

Some of the more promising applications are discussed below but obviously can be expanded to fit the unique needs of the case.

Discovery

In an antitrust case, discovery, particularly e-discovery, can be overwhelming. Rather than expend time and the clients’ money on such efforts, the most common approach is to appoint a special master. This of course is definitive, but it does remove all control from counsel once the dispute is submitted and may require multiple hearings before the special master. An alternative approach is to bring in a discovery “mediator” (preferably one knowledgeable about e-discovery, if applicable). This process allows the parties to keep an open negotiation process in place that can be revisited as often as necessary as the case unfolds. This also has the benefit of leaving the decision-making process with the parties and their counsel.



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This approach can be further refined for discovery topics as appropriate. The discovery necessary as to the more specific fact-based issues (i.e., the “contract, combination or conspiracy”) can be left to traditional discovery methods while specialized discovery (as to, say, market definition) can utilize one of these targeted approaches.

Procedural Matters and Disputes

Procedural disputes focus on a wide range of issues that do not necessarily go to the underlying substantive issues to be resolved. Such issues may be venue, personal or subject matter jurisdiction, sufficiency of process, conflicts of interest, or discovery process and scheduling. These disputes are prevalent in complex, multiparty antitrust disputes and can unnecessarily exacerbate the litigation process in terms of time and costs. Many of these are well-suited to a mediated resolution or even nonbinding arbitration. Where the issue must be preserved for appeal, the agreement may be as simple as preserving the issue for later in the case when the substantive issues are more fully developed.

Experts

Antitrust cases are often expert-driven. The nature of the expert testimony needed and how that expert testimony will be presented is frequently a significant cost in the litigation. ADR as to the nature and extent of expert testimony can help reduce that cost. As an example, in antitrust cases, market definition is often a significant and highly expert-centric process. The decision-maker frequently has little expertise in the area and the result is left to the testimony of “dueling experts.” Counsel may well be served by utilizing an industry expert as a mediator to assist the parties in agreeing to a stipulated product or geographic market definition, particularly when dealing with a “rule of reason” case.

Class Actions

Class definition is akin to the “procedural disputes” discussed above. The parties may choose to have a mediator or special master oversee just class discovery, thus limiting its burden and cost. Counsel should also consider using a mediator after class discovery to assist in arriving at an agreed upon class definition.

Damages and/or Liability

When it is obvious early in the case that either damages or liability issues will predominate while the other will be relatively straightforward, the use of an ADR process applied to the straightforward issue will expedite the matter.

Separate Settlements

Often in multi-issue/multiparty antitrust cases, separate settlements may be desirable on an issue or party-based basis. When such an opportunity presents itself, bringing in a neutral to negotiate this path may be beneficial. This also may result in settlement of the overall dispute or some issues with others left unresolved. This approach may significantly streamline the entire case.

Levels of Insurance Coverage

In antitrust cases, there are often secondary claims for which insurance coverage is available. Differing levels of available coverage add further complexity to the mix. A carrier with high limits insuring a

defendant with only marginal liability will view settlement very differently from one that is covering an insured with clear liability. The availability and extent of insurance coverage can be greatly assisted by a mediator.

Settlement of Defendants' Allocation

In multidefendant cases, the issue may not be so much how much to pay the plaintiff as how the defendants should allocate such expense among themselves. A "defendants only" mediation can cut through this.

Attorneys' Fees and Costs

At the conclusion of a matter, the parties may need to engage in further litigation to resolve the issue of fees and costs. This can result in additional costs and expert depositions. Nonbinding arbitration or mediation is well-suited to resolve these differences at a greatly reduced cost.

Conclusion

Sophisticated litigators are moving away from the all-or-nothing approach to litigation and ADR. ADR need not be seen only as a vehicle to resolve the whole case, nor do all issues have to be litigated. The use of targeted and limited ADR for specific issue resolution can greatly reduce litigation time and costs. It is no longer "settle or litigate" — but "settle and litigate."

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