

How to Navigate the Antitrust Cartel Labyrinth

Moderator: Barbara T. Sicalides, Pepper Hamilton LLP

Panelists:

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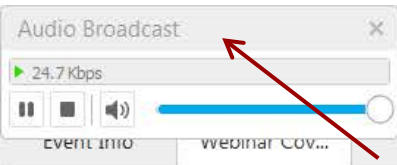
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Pepper Hamilton LLP
Attorneys at Law

October 27, 2016

Audio



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Pepper Hamilton Webinar



A screenshot of the webinar interface. At the top right, there are icons for 'Participants', 'Chat', and 'Q&A'. Below these is a 'Participants' list showing 'Speaking:' and 'Panelists: 1' (Brian Dolan, Host) and 'Attendees: Webinar Guest (me)'. A 'Q&A' section is visible with a dropdown menu set to 'All (0)'. At the bottom, there is an 'Ask:' dropdown menu set to 'All Panelists', a text input field with a placeholder 'Select a panelist in the Ask menu first and then type your question here. There is a 256-character limit.', and a 'Send' button.

Audio

The screenshot shows the Cisco WebEx Event Center interface. At the top, there is a menu bar with 'File', 'Edit', 'View', 'Communicate', 'Participant', 'Event', and 'Help'. Below the menu bar, there are tabs for 'Event Info' and 'Webinar Cov...'. The main content area is divided into two sections. The top section is a white background with a red text overlay that reads: 'If you cannot stream audio, click phone icon and a phone number will be sent to you'. A red arrow points from this text to a phone icon in the 'Participants' panel on the right. The bottom section is a white background with a red text overlay that reads: 'Pepper Hamilton Web'. Below this text is a slide that says 'CELEBRATING 125 Years 1890 2015 Pepper Hamilton LLP Attorneys at Law'. The right side of the interface shows a 'Participants' panel with a list of participants: 'Brian Dolan (Host)' and 'Webinar Guest (me)'. Below the participants list, there is a 'Q&A' panel with a dropdown menu set to 'All (0)'. At the bottom right, there is a 'Send' button and a 'Connected' status indicator.

Cisco WebEx Event Center

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01

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Pepper Hamilton Web

Audio Connection

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Participants

Speaking:

- Panelists: 1
 - Brian Dolan (Host)
- Attendees:
 - Webinar Guest (me)**

Q&A

All (0)

Ask: All Panelists

Select a panelist in the Ask menu first and then type your question here. There is a 256-character limit.

Send

3 Connected

Q&A

Cisco WebEx Event Center

File Edit View Communicate Participant Event Help

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01

Participants Chat Q&A

Participants

Speaking:

Panelists: 1

Brian Dolan (Host)

Attendees:

Webinar Guest (me)

Q&A

All (0)

Ask: All Panelists

Type question here... Send

Connected

Send us questions

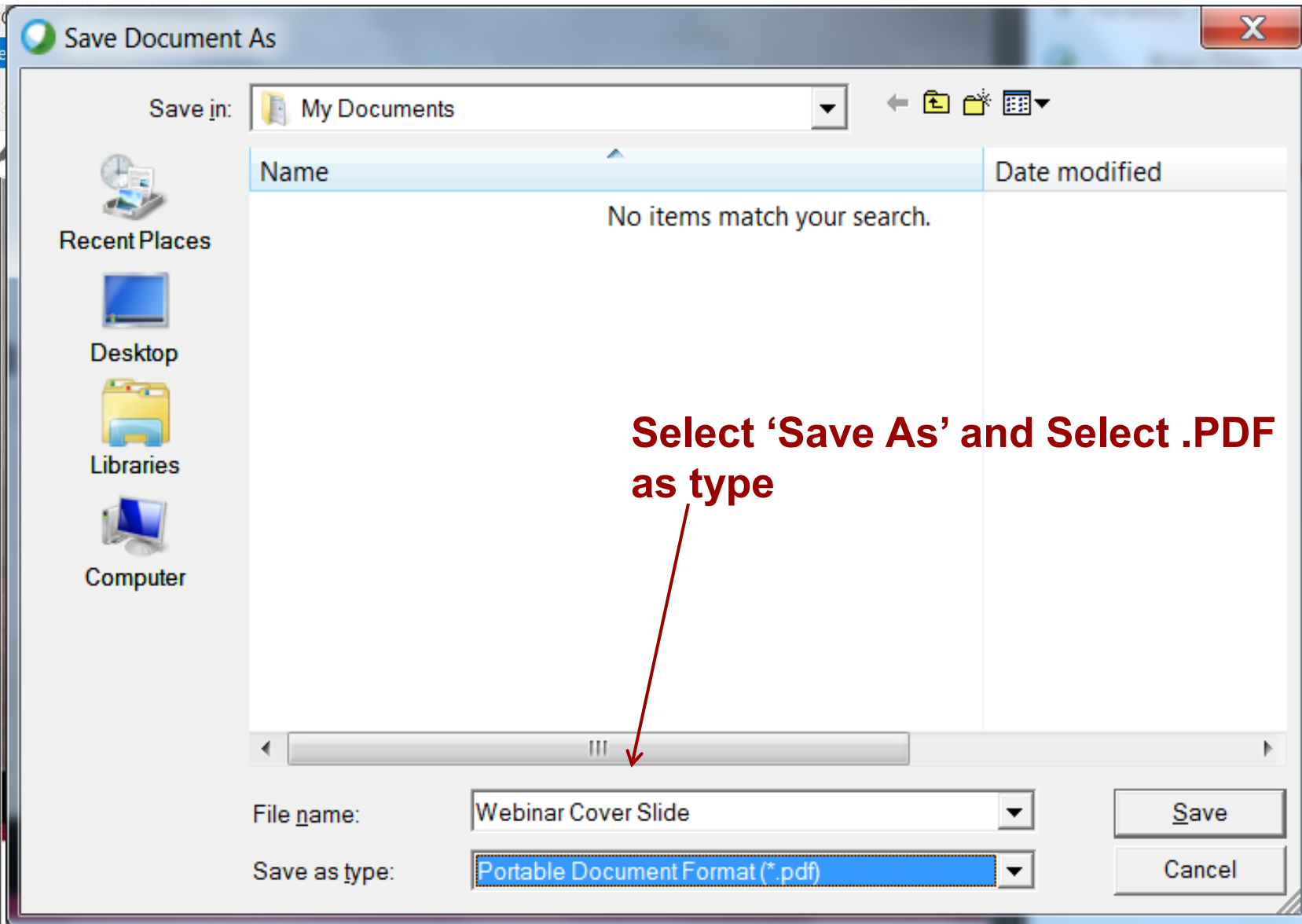
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Overview – Section 1 Conspiracy

- ▶ The “crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (internal quotations omitted)
- ▶ Agreement defined as “a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)
- ▶ Summary judgment standard: whether the evidence tends to exclude the possibility that the alleged conspirators acted independently

“Parallel Plus”

- ▶ “Smoking gun”—direct evidence of an illicit agreement—is rarely found
- ▶ Typical path is to allege parallel conduct with “plus factors”
- ▶ Typical Plus Factors:
 - Motive
 - Actions Against Self-Interest
 - Traditional Evidence of Conspiracy
- ▶ Third factor is often described as “non-economic evidence” that shows assurances of common action even if there is no evidence of actual meetings, conversations, or exchanged documents
- ▶ However, courts still include economic factors (pre-conspiracy and post-conspiracy profits, demand and capacity, etc.) in this plus factor as well as evidence of meetings, conversations, or exchanged information
- ▶ The third factor effectively becomes a catch-all

Changes to Prices and Pricing Structures

- ▶ *Twombly* acknowledged that a plausible conspiracy may be inferred from
 - Complex and historically unprecedented changes in pricing structure,
 - Made at the same time by multiple competitors,
 - For no discernible reason other than anticompetitive ends
- ▶ Courts have occasionally taken an inference of conspiracy where price increases were either of a significant magnitude or part of a new, complex, and uniformly adopted pricing system
- ▶ Courts also analyze whether the parallel price increases were supported by market conditions:
 - Generally weak market/low demand
 - Tight margins
 - Capacity
- ▶ Has the company documented its independent business justification for the pricing conduct?

Trade Associations

- ▶ Parallel plus cases often involve allegations of defendants' participation in trade associations, trade groups, or other industry organizations
- ▶ Common theme is that these associations are used as an avenue for communications or illegal information exchange among competitors
- ▶ Examples of trade association activities that have drawn scrutiny:
 - Exchange of pricing-related information at meetings
 - Defendants' role in a leadership council, executive board, or other high-level subgroup tasked with decision-making for the association
 - Ancillary meetings among Defendants' executives or high-level employees at trade association functions
 - Evidence that price increases or other alleged collusive conduct followed trade association meetings close in time

Competitor Contacts

- ▶ There are often perfectly legal contacts between competitors that plaintiffs will use as traditional conspiracy evidence:
 - Communications regarding a vertical relationship or supply agreement
 - Communications regarding swap and setoff agreements
 - Meetings regarding joint ventures or joint use of facilities
- ▶ Courts have treated this type of evidence differently
 - Some acknowledge the normality and procompetitive aspects of things like swap and buy-sell transactions
 - Others acknowledge general legality of contacts, but have still drawn an inference of conspiracy where alleged anticompetitive contact was temporally related to meetings or communications regarding agreements between defendants
- ▶ Personal or social contacts between defendants' employees also viewed differently depending on court

Competitive Intelligence

- ▶ Defendants' individual efforts to gather competitive intelligence may also result in ambiguous evidence that can be used offensively by plaintiffs:
 - Possession of competitors' price lists or other business information
 - Multiple defendants' use of same industry consultants or competitive intelligence companies
 - Defendants' shared receipt of industry data that could potentially be disaggregated to determine individual defendant's pricing, capacity, sales programs, etc.
 - Ambiguous communications from customers providing competitors' pricing information, especially where forward-looking or indicating parallel action

- ▶ Can competitive intelligence gathering be put in context where it is viewed as a means by which the defendants shared information and coordinated prices?

Foreign Cartels

- ▶ Plaintiffs likely to point to anticompetitive wrongdoing among defendants' affiliates in other geographic markets to argue that same illicit conduct was occurring in the United States
- ▶ Currently, courts require evidence of “linkage” between foreign conduct and domestic conduct – a plaintiff cannot simply say “if it happened there, it could have happened here”
- ▶ To find the factual link, courts may analyze whether foreign conduct actuated, facilitated, or informed U.S. conduct, and will look for:
 - Overlap between entities in foreign and alleged domestic conspiracies (are they legally separate and distinct?)
 - Overlap in the individuals involved in the foreign and alleged domestic conspiracies
 - Whether U.S. employees had responsibility or authority for pricing or other conspiracy-related conduct in foreign market
 - Whether employees of foreign affiliates had responsibility or authority for pricing in U.S. market
 - Evidence that alleged domestic conspiracy operated similarly to foreign conspiracy, including use of the same implementing and policing mechanisms

What is ACPERA?

- ▶ Antitrust Criminal Penalty Enhancement and Reform Act of 2004
 - Statute extended in 2010 through 2020
 - Statute is grounded in the idea that criminal enforcement with a DOJ amnesty program is the best way to enforce antitrust laws
 - Increases maximum fines and jail time
 - Enhances incentives for corporations to self-report their cartel activities, by limiting civil antitrust liability:
 - Eliminates treble damages
 - Eliminates joint and several liability

Who Qualifies Under ACPERA

Ties to Criminal Leniency

- ▶ **Central condition: Having received criminal leniency from the Antitrust Division.**
 - Being the first in the cartel to report the activity
 - Reporting to the DOJ before it received information from any other source
 - Having taken prompt and effective action to terminate its participation to the illegal activity upon discovery
 - Reported with candor and completeness and provides full cooperation throughout the investigation
 - The confession is not an individual action but a corporate act
 - The corporation makes the restitution to injured parties if possible
 - The corporation is not a leader of the activity and did not coerce other parties to participate

ACPERA and Satisfactory Cooperation

Statutory Definition

- ▶ Provide a “full account” to the plaintiff of all facts known relevant to the civil case
- ▶ Provide all documents relevant to the civil action
- ▶ Make oneself or a corporation’s witnesses available for interviews, depositions and to testify at trial.
- ▶ Respond completely and truthfully to questions asked by civil claimants in interviews, depositions and at trial

ACPERA and Satisfactory Cooperation

Court Opinions

- ▶ *In re Sulfuric Acid Litig.*, 231 F.R.D. 320 (N.D. IL. 2005).
 - The defendants sufficiently cooperated by complying with discovery requests and using best efforts to make witnesses available.
- ▶ *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 2013 U.S. Dist. LEXIS 126308 (C.D. Cal. Aug. 26, 2013)
 - The defendants did not sufficiently cooperate because they did not “provide a full account of all facts known and all documents that are potentially relevant to the civil action.”
 - The defendants withheld certain information from plaintiffs until after the plaintiffs could valuably make use of the information.

Questions & Answers

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- ▶ Co-chair of the Antitrust and Competition Section of the firm's Commercial Litigation Practice Group.
- ▶ Antitrust litigation experience has included a wide range of antitrust claims under the Sherman Act, Robinson-Patman Act, Clayton Act and numerous state statutory and common laws.
- ▶ Extensive experience responding to government investigations of alleged cartel activity, including price-fixing and market allocation.

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- ▶ Concentrates his practice in commercial litigation, with a particular emphasis on complex breach of contract litigation, arbitration, international matters and antitrust litigation.
- ▶ Active in pro bono matters, including obtaining a favorable settlement in prisoner civil rights litigation.



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- ▶ Carol M. Gray is the Vice President, Deputy General Counsel and Secretary at Saint-Gobain Corporation.
- ▶ Saint-Gobain is the world's largest building materials company and is headquartered in Valley Forge, Pennsylvania.

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- ▶ Concentrates his practice on complex litigation, antitrust law and white collar defense.
- ▶ Substantial experience counseling clients on antitrust issues present in supplier and distributor agreements.
- ▶ Member of the Antitrust Law Committee of the American Bar Association Young Lawyers Division.



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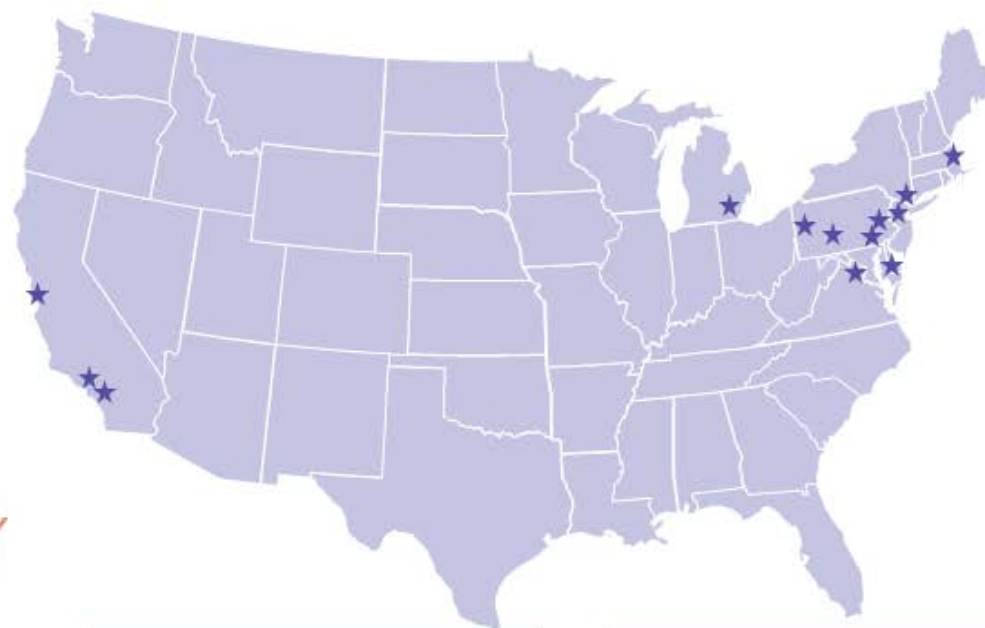
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