

Acting Antitrust Chief Attributes Recent Enforcement Successes to Focus on Litigation Skills

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Yesterday, the federal district court in San Francisco imposed a record-tying \$500 million fine on AU Optronics Corporation (AUO), a Taiwan-based liquid crystal display (LCD) producer, for its participation in a five-year conspiracy to fix the prices of thin-film transistor LCD panels. The company and its U.S. subsidiary also were placed on probation for three years and ordered to implement antitrust compliance programs.

The sentencing follows a jury's conviction in March 2012 of AU Optronics Corporation, AU Optronics Corporation America, and two high-level executives—Hsuan Bin Chen, and Hui Hsiung.

Joseph Wayland, Acting Assistant Attorney General in charge of the Department of Justice Antitrust Division, has touted the verdict in the AUO case as a major victory.

Although the Antitrust Division had sought stiffer penalties on the convicted companies and executives than those imposed, the sentences are still significant. The fine against AUO is matched only by a 1999 fine against F. Hoffmann-La Roche, Ltd. for participating in a conspiracy in the vitamins industry. The executives were sentenced to three-year prison terms and each fined \$200,000.

The government had sought a \$1 billion fine against AUO and maximum 10-year prison terms for the convicted executives. The Probation Office had recommended a \$500 million fine for AUO.

Speaking today at Fordham's 39th Annual International Antitrust Law & Policy Conference in New York City, Wayland would not comment on the sentences other than to say that the \$500 million fine was "substantial" and was something that corporations need to think seriously about. He cautioned that the matter could be appealed.

The day before the sentences were handed down, Wayland spoke of the jury verdict and attributed the successful prosecution of AUO and other litigation successes at least in part to recent efforts to strengthen litigation capabilities at the Antitrust Division.

Addressing attendees of Georgetown Law's Sixth Annual Global Antitrust Enforcement Symposium on September 19, in Washington, D.C., Wayland noted personnel and management changes to strengthen the Antitrust Division's litigation capabilities.

The Antitrust Division has "built a great team of civil and criminal trial attorneys," Wayland said in remarks, entitled "Litigation in the Antitrust Division." Nearly a dozen litigators with a wide range of government and private practice trial experience have been hired at the agency. The Antitrust Division also created a new position in the front office - director of litigation. Mark Ryan was named the first director of litigation. Wayland also mentioned the Antitrust Division's willingness to use attorneys from private practice in those rare circumstances when "unique challenges require[e] us to look outside the division or the department for additional resources," such as in the AT&T/T-Mobile litigation.

The Antitrust Division also has reorganized its case management system to ensure that litigation issues are considered at a very early stage in both merger and non-merger investigations. The "front office," the Antitrust Division's most senior managers, get involved early in the process, allowing permits the Antitrust Division to make early strategy decisions during the investigative process to help win cases.

In addition, Wayland discussed new courtroom strategies. Although the

government usually does not have control over the witnesses with the most knowledge—that is, the merging parties or the parties to an improper agreement—the Antitrust Division has used the parties to put on the government’s case. The Antitrust Division calls the parties’ executives as its own witnesses and uses the parties’ documents in the government’s case. There is less reliance on third party witnesses or experts, the official explained.

“To do this successfully, of course, we need to have great pre-trial preparation, including taking trial-ready depositions that we can use as the basis for effective courtroom cross-examination,” Wayland said. “Fortunately, we have skilled trial attorneys who can do this type of pre-trial work very well.”