

Competition Group Of The Year: Latham

By **Evan Weinberger**

Law360, New York (January 7, 2011) -- Through its careful counsel on major mergers and landmark courtroom wins in cases such as Lundbeck Inc.'s defeat of the Federal Trade Commission, Latham & Watkins LLP demonstrated the kind of success and versatility that are hallmarks of Law360's Competition Firms of 2010.

Peggy Zwisler, one of four global co-chairs of Latham's antitrust and competition practice, said the group's strength comes from the broad and varied skills of its 58 partners and over 90 associates around the world. Unlike many firms that focus on one aspect of antitrust law — be it litigation, merger counseling or cartel cases — Latham's team works in all three areas.

"Latham people are both antitrust people and litigators," she said.

That combination of talents was one of the key factors in Latham's signature courtroom win in 2010 — Lundbeck's September victory over the Federal Trade Commission and Minnesota regulators in a case over drugs used to treat congenital heart defects in premature babies.

The FTC filed its suit in 2008 against Ovation Pharmaceuticals after it acquired the rights to NeoProfen and Indocin IV, the only two drugs known at the time to treat patent ductus arteriosus, or PDA. The disease causes irregular blood flow, largely among newborns.

Lundbeck, a unit of Danish drugmaker H. Lundbeck A/S, inherited the lawsuit when it bought Ovation in 2009.

The FTC argued that Deerfield, Ill.-based Ovation's acquisition of the U.S. rights to NeoProfen in 2006 from Abbott Laboratories Inc. stymied competition in violation of the Clayton Act and ran afoul of the FTC Act.

The NeoProfen acquisition came after Ovation purchased rights to the drug Indocin from Merck & Co. Inc. in August 2005.

Upon acquiring NeoProfen, Ovation raised the price it charged hospitals for Indocin nearly 1,300 percent — from \$36 to about \$500 per vial — and when Ovation launched NeoProfen, it set a similar price of about \$483 per vial, according to the FTC's complaint.

Cases such as this one rarely go to trial because companies find it is far easier and more cost-effective to settle with the government, Zwisler said.

"We took this case to trial and beat the government," she said.

It is even more rare for companies to win those cases, Zwisler added.

But Latham partner Al Pfeiffer and his team were able to convince Ovation, and then Lundbeck, that taking the case to

court was the right path and that there was a good chance the company would win.

The decision probably took the government by surprise.

“The government took a very aggressive position with our clients,” Pfeiffer said. “Frankly, I think they thought they had an easy case.”

In the end, Pfeiffer counseled Ovation, and then Lundbeck, that they did not have to capitulate to the government's claims.

What made Pfeiffer's argument easier was that Latham had been Ovation's regular antitrust counsel, handling more mundane, day-to-day concerns, said Mike Egge, one of the three practice group chairs. That allowed them to have the trust to move forward.

But more than trust, they needed an experienced trial hand. According to Egge, Latham had an edge because they didn't need to bring in special litigation counsel, a relative rarity among firms.

Pfeiffer has over 20 years of trial experience focusing on antitrust issues. So when he told Ovation and Lundbeck they could win, they knew they had someone who could deliver, Egge said.

“Ovation could not have taken this case to trial if they didn't have a trial lawyer with the ability and experience to do it,” Egge said.

Pfeiffer said his clients were “pretty ready” to go ahead with the case, given that the FTC had accused them of being “really bad actors.”

In the end, Judge Joan N. Erickson of the U.S. District Court for the District of Minnesota ruled that the FTC did not sufficiently make the case that the drugs, NeoProfen and Indocin IV, were in the same product market.

The judge also dismissed the FTC's argument that the price of the drugs, which sharply spiked in 2006, had much to do with how physicians chose to use them. She agreed with the testimony of several physicians who said they would prescribe whichever drug was safer for the patient, “without regard to cost.”

According to Pfeiffer, the government overplayed its hand.

“The judge commented in her order that the FTC made a big deal that Ovation was acting with bad intent and jacking up prices, and she didn't see that,” he said. “In the end, that backfired on them.”

The FTC has appealed Judge Erickson's decision to the U.S. Court of Appeals for the Eighth Circuit.

The Ovation decision wasn't the only major win that Latham's attorneys racked up in 2010.

In March, Latham won at the class certification stage of a case accusing Time Warner Cable Inc. of violating the Sherman Act by illegally tying its premium cable services to the sale of set-top box rentals. The firm also defeated class certification in a case brought by indirect purchasers of NAND flash memory against Toshiba Corp. and Toshiba America Electronics Components Inc.

Latham had a banner 2010 on the appellate side as well.

In April, the U.S. Court of Appeals for the Third Circuit upheld two victories for artificial-teeth maker Dentsply International Inc. in antitrust suits brought by dental laboratories who claimed Dentsply foreclosed its competitors' access to dealers in dental technology. Latham represented Dentsply.

And in January, Latham attorneys represented egg and potato wholesaler Michael Foods Inc. when the Third Circuit

reversed a lower court ruling that found Michael Foods and food services giant Sodexo Inc. had caused Feesers Inc. competitive injury under the Robinson-Patman Act.

In the Eleventh Circuit, Latham was lead counsel for Palmyra Park Hospital Inc. when the appellate court overturned a lower court ruling and found the medical center had standing to pursue antitrust claims alleging a rival hospital leveraged a state-granted monopoly in certain medical services to tie favorable insurance reimbursement rates to a refusal to include the plaintiff hospital in insurance companies' provider networks.

But Latham's wins weren't just in the trial courts.

The firm shepherded Oracle Corp.'s \$7.3 billion acquisition of Sun Microsystems Inc. through competition reviews in both the United States and European Union, with the EU giving final approval in January 2010.

Latham also managed to steer concert promoter Live Nation Inc.'s \$2.5 billion acquisition of Ticketmaster Inc. through the gauntlet of state, federal and international antitrust review. Final approval for the deal came in the spring of 2010.

Along with the legal expertise that Latham provides, clients come to the firm because of its massive global presence, said Chris Yates, a co-chair of the firm's antitrust practice group. The Live Nation-Ticketmaster and Oracle-Sun approval processes are examples of why such geographic breadth is necessary, he said.

"It's very difficult to find a firm that is as strong in D.C. as they are out here on the West Coast and as they are in Brussels," said Yates, who is based in San Francisco.

The third pillar of antitrust work is providing cartel defense. And while the three co-chairs were unable to discuss many of their victories because of the cases' sensitive nature, they said they were able to close several major investigations with no charges being filed.

Latham has also made an effort to beef up its cartel practice, hiring longtime U.S. Department of Justice antitrust enforcer Niall Lynch in December.

Zwisler said Lynch's hiring was another feather in Latham's cap in 2010, and a sign of the antitrust practice group's strength.

"That should show you that someone who could have chosen any firm came to us," she said.

Methodology: In mid-November Law360 solicited submissions from over 300 law firms for its practice group of the year series. The more than 400 submissions received were reviewed by a committee of four editors. Winners were selected based on the number of significant wins the group had in litigation or the size, number and complexity of deals the group worked on in 2010.