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Current Trends and Issues in State Antitrust Enforcement

By Patricia A. Conners*

I. Introduction

It is a very exciting time to be involved in state antitrust enforcement. While state attorneys general have been consistently active in the enforcement of the state and federal antitrust laws for more than twenty years, over the last few years, the focus of the multistate enforcement effort has become more diverse than ever. The result has been effective enforcement that has yielded significant results for consumers. In recent years, state attorneys general have turned their attention to potential abuses of the antitrust laws within particular industries, such as the pharmaceuticals, health care, and telecommunications industries, while continuing their enforcement efforts with respect to specific violations of the antitrust laws, like horizontal price-fixing and unlawful vertical pricing restraints. In the last year, state attorneys general have recovered nearly \$400 million on behalf of consumers and public entities, as either direct or indirect purchasers, from the settlement of five separate antitrust cases.¹

* This article represents my views as the Chair of the National Association of Attorneys General (“NAAG”) Multistate Antitrust Task Force. My views are my own and do not necessarily reflect the views of NAAG, the Attorney General for the State of Florida or any other individual state attorney general. This paper was originally presented in the form of a speech as part of a panel discussion with state antitrust enforcers at the Spring Meeting of the American Bar Association’s (“ABA”) Section of Antitrust Law in April, 2003. The panel discussion was sponsored by the ABA Section’s State Antitrust Enforcement Committee. In being re-printed for this publication, the speech has been substantially modified, expanded upon, and where appropriate, updated to better conform it to an article format. The paper is being re-printed with the permission of the ABA.

¹ New York v. Aventis, MDL No. 1278, No. 01-CV-71835 (E.D. Mich. Jan. 29, 2003) (preliminary approval granted) (\$80 million settlement involving the heart drug, Cardizem); Alabama v. Bristol-Myers Squibb, MDL Nos. 1420 & 1413, No. 01-Civ. 11401 (JGK) (S.D.N.Y. Mar. 7, 2003) (preliminary approval granted) (\$100 million settlement involving the anti-anxiety drug, BuSpar); Ohio v. Bristol-

Many of these successes have been enhanced by unprecedented cooperation between the state attorneys general and federal antitrust enforcement agencies. Due to the high level of state-federal cooperation, state attorneys general have also played a significant role in a number of merger reviews with important local or regional market implications.

The purpose of this article is to provide some background and some current information about how state attorneys general work together to enforce state and federal antitrust laws, discuss some of the recent developments in state antitrust enforcement, and demonstrate why state attorneys general remain uniquely qualified to represent the interests of their consumers and public entities in state and federal antitrust matters. Specifically, this article will do three things: (1) give a general overview of the current trends and issues in state antitrust enforcement; (2) discuss the Multistate Antitrust Task Force ("Task Force") and some of the ways state enforcement may differ from federal enforcement in focus, approach, and available remedies; and (3) provide some practice pointers for defense attorneys who may find their clients the subject of a multistate antitrust investigation.

II. Trends and Issues in State Antitrust Enforcement

State attorneys general have been active in antitrust enforcement in the multistate sense since the early 1980s. In 1983, the Task Force was established as a permanent subcommittee of the National Association of Attorneys General ("NAAG") Antitrust Committee.² State involvement in antitrust enforcement at that time can be attributed to at least three factors.

First, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino")³ provided state attorneys general with

Myers Squibb, Civ. No. 2:02 CV 01080 (EGS) (D.D.C. Apr. 24, 2003) (preliminary approval granted, Sept. 26, 2003) (\$55 million settlement involving the breast cancer drug, Taxol), available at http://www.abanet.org/antitrust/committees/state-antitrust/taxol_settlement.pdf; New York v. Salton, Inc., 265 F. Supp. 2d 310, 312 (S.D.N.Y. 2003) (\$8 million settlement involving George Foreman grills); In re Compact Disc Minimum Advertised Price Antitrust Litigation, No. 1361, 2003 WL 21685581, at *2 (D. Me. July 18, 2003) (approving \$142 million settlement involving compact discs).

² Report from *Officialdom: 60 Minutes with Robert M. Langer, Assistant Attorney General State of Connecticut, and Chair, NAAG Multistate Antitrust Task Force*, 60 Antitrust L.J. 197, 199 (1991).

³ 15 U.S.C.A. § 15(c) (West 1997 and West Supp. 2003).

the express statutory authority to sue for monetary damages on behalf of natural persons.⁴ The Act was a very important nod by Congress because there was no antitrust enforcement agency in place looking after the individual consumer's monetary interest in antitrust cases, even where the consumer injury was obvious.

Second, at about the same time Hart-Scott-Rodino became law, Congress amended the Crime Control Act to provide funding for state antitrust enforcement.⁵ This measure was an extremely important development as it provided the seed money for many states to establish units devoted solely to antitrust enforcement. Without these funds and the general initiative of the federal government to foster antitrust enforcement by the states, many state antitrust enforcement units would never have been formed.

The final factor that contributed to the establishment of the multistate enforcement effort is the perceived decline during the Reagan administration of antitrust enforcement by the Federal Trade Commission ("FTC") and the United States Department of Justice Antitrust Division ("DOJ"), the two federal agencies charged with enforcement of the federal antitrust laws.⁶ Once properly funded and given expanded federal authority, the ability for state attorneys general to enforce the antitrust laws and fill the gap left by the reduced federal effort was enhanced. The creation of the Task Force can primarily be attributed to the convergence of these three events. With the Task Force established, state attorneys general became more active than ever, bringing a variety of antitrust enforcement matters. Action has been taken, both individually and together, having monetary and non-monetary results.

Task Force enforcement priorities over the years have generally focused upon such areas as bid-rigging,⁷ merger challenges, general conspiracies to restrain trade (both horizontal and vertical)

⁴ *Id.*

⁵ See Crime Control Act of 1976, Pub. L. No. 94-503, § 309, 90 Stat. 2407, 2415 (1976), amended by Act of Dec. 27, 1979, Pub. L. No. 96-157, 93 Stat. 1167 (codified as amended in scattered sections of 42 U.S.C. (1979)).

⁶ See William J. Haynes, Jr., Preface to, William J. Haynes Jr., *State Antitrust Laws*, pp. vii-ix (1988).

⁷ Bid-rigging occurs when competing bidders on procurement contracts conspire in advance of the submission of bids to ensure that a particular bidder or bidders win(s) the contract or contracts being let for bid at an agreed-upon price or prices.

and cases brought on behalf of consumers as indirect purchasers.⁸ These cases, all of which have settled either prior to the commencement of litigation or well before the commencement of trial, have resolved antitrust allegations against oil companies, cement makers, agricultural chemical manufacturers, pharmaceutical companies, shoe manufacturers, appliance and electronics manufacturers, compact disc distributors, and toy companies, among others.

Many of these cases have established important precedent for the special role the state attorneys general play in federal antitrust enforcement. For example, in the area of merger litigation, *California v. American Stores Co.* involved California's challenge to a merger after the FTC had already negotiated a remedy as a condition for approving the transaction.⁹ The United States Supreme Court upheld the state's challenge, finding that Section 16 of the Clayton Act¹⁰ authorized state attorneys general to pursue injunctive relief even after the FTC obtained a negotiated consent decree.¹¹

In *Hartford Fire Insurance Co. v. California*, the state attorneys general again established important precedent in the area of conspiracies in restraint of trade.¹² There, nineteen states sued several of the major domestic insurers, domestic and foreign re-insurers, and insurance brokers after the DOJ declined a request by the state attorneys general to investigate an alleged conspiracy between the companies to boycott general liability insurers and force those

⁸ Federal law limits the recovery of damages in price-fixing cases only to those persons who directly purchased the price-fixed product from the company or companies engaged in the price-fixing. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977). However, at least 23 state attorneys general have authority under state law, either express or established by case law, to represent consumers who purchased a price-fixed product indirectly through the chain of distribution from the company or companies engaged in the price-fixing conspiracy. Statutes expressly imbuing this authority are known as "indirect purchaser statutes" or "*Illinois Brick* repealers." See *infra* note 25. Where the indirect purchaser authority has been established through case law, typically state courts have interpreted a state's deceptive and unfair trade practices act to permit an action on behalf of indirect purchasers, even where the state antitrust statute is limited to actions by direct purchasers. See, e.g., *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 106 (Fla. Dist. Ct. App. 1996).

⁹ *California v. American Stores Co.*, 495 U.S. 271, 275-76 (1990).

¹⁰ 15 U.S.C.A. §26 (West 1997 and West Supp. 2003).

¹¹ *American Stores*, 495 U.S. at 295-96.

¹² *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993).

insurers to conform the terms of their domestic commercial general liability policies to the forms used by the defendants.¹³ The alleged boycott had an adverse impact upon municipalities, because it effectively foreclosed cities and counties from obtaining beneficial commercial general liability insurance terms. The case eventually resulted in a United States Supreme Court decision, re-defining the antitrust term “group boycott” and establishing the principles of comity that are the foundation of the federal agencies’ efforts against international cartels today.¹⁴ The ruling obtained in *Hartford* is a prime example of the role state attorneys general often play in shaping federal antitrust jurisprudence. Had it not been for the decision of the state attorneys general to pursue this case, after the federal agencies had declined to pursue it, the two key findings in the case, that have helped shape subsequent enforcement efforts, would not have been established.

In *California v. ARC America Corp.*, Alabama, Arizona, California, and Minnesota, on their own behalf and on behalf of classes of all governmental entities within each state, sued various cement producers in federal court, alleging a nationwide conspiracy to fix cement prices.¹⁵ The states sought damages under both federal and state antitrust laws.¹⁶ After a settlement was obtained with several of the defendants, the states sought payment out of the settlement fund for the governmental entities they represented.¹⁷ However, at least some of the plaintiff public entities were indirect purchasers of cement products, which meant, pursuant to the earlier Supreme Court decision of *Illinois Brick Co. v. Illinois*,¹⁸ they were not entitled to recover damages under federal antitrust laws. Based on *Illinois Brick*, members of the direct purchaser class objected to any governmental entities that were indirect purchasers participating in the settlement.¹⁹ The states argued that the holding in *Illinois Brick* did not affect the standing of these indirect purchasers, under each state’s respective antitrust law, to recover all of the overcharges passed on to them by the direct purchasers of the cement and that, as

¹³ *Id.* at 764.

¹⁴ *Id.* at 798-99, 801-03.

¹⁵ *California v. ARC America Corp.*, 490 U.S. 93, 97 (1989).

¹⁶ *Id.* at 97-98.

¹⁷ *Id.* at 98-99.

¹⁸ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

¹⁹ *ARC America*, 490 U.S. at 99.

a result, they should be permitted to receive payment from the settlement fund.²⁰

After the district court refused to allow the claims²¹ and the Ninth Circuit Court of Appeals affirmed,²² the United States Supreme Court reversed, holding that the ruling in *Illinois Brick* limiting recoveries to direct purchasers did not prevent indirect purchasers of a price-fixed product from recovering damages for violations of state antitrust law.²³ The Court concluded that federal antitrust law did not expressly pre-empt state antitrust law and there was no legislative intent to occupy the field.²⁴ This seminal decision became the impetus for state legislatures around the country to pass so-called “*Illinois Brick* repealers” or “indirect purchaser statutes,” which provided state attorneys general with the authority to recover damages on behalf of consumers and public agencies who were indirect purchasers of a price-fixed product, even though a similar cause of action was not available to these purchasers under federal antitrust laws.²⁵ The decision also opened the door for plaintiffs to argue for interpretations of existing state antitrust or consumer protection laws that were inconsistent with the *Illinois Brick* decision.²⁶

²⁰ *Id.*

²¹ See *In re Cement and Concrete Antitrust Litigation*, No. 296-PHX-MLR, 1985 WL 25742 (D. Ariz. Jan. 23, 1985).

²² See *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435 (9th Cir. 1987).

²³ *Id.* at 100, 105-06.

²⁴ *Id.* at 105-06.

²⁵ There are at least eighteen states with explicit indirect purchaser statutes: CAL. BUS. & PROF. CODE § 16750(a) (enacted in 1978); D.C. CODE ANN. § 28-4509 (1980); HAW. REV. STAT. § 480-14 (enacted in 1987); IDAHO CODE § 48-108(2) (2000); 740 ILL. COMP. STAT. ANN. 10/7(2) (1979); KAN. STAT. ANN. § 50-161 (enacted in 1985); MD. CODE ANN. COM. LAW § 11-209(b)(2)(ii) (enacted in 1982); ME. REV. STAT. ANN. 10, § 1104 (enacted in 1989); MICH. COMP. LAWS § 445.778(2) (enacted in 1984); MINN. STAT. ANN. § 325D.57 (enacted in 1984); N.Y. GEN. BUS. § 340(6) (enacted in 1998); R.I. GEN. LAWS § 6-36-12(g) (1979); S.D. CODIFIED LAWS § 37-1-33 (enacted in 1980); VT. STAT. ANN. 9, § 2465(b) (1999); WIS. STAT. ANN. § 133.18(1)(a) (enacted in 1979). Prior to *Illinois Brick*, two states already expressly permitted indirect purchaser suits. ALA. CODE § 6-5-60 (2003); MISS. CODE ANN. § 75-21-9 (2003).

²⁶ See, e.g., *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 106 (Fla. Dist. Ct. App. 1996) (interpreting Florida’s state consumer protection law to permit indirect purchasers to sue for damages); *Hyde v. Abbott Lab, Inc.*, 473 S.E.2d 680

These three cases demonstrate how the efforts of the state attorneys general, during a time of perceived decline in antitrust enforcement by the FTC and DOJ, helped shape antitrust jurisprudence in significant and lasting ways. Today, during a period of increased federal enforcement activity, state attorneys general continue to pursue antitrust matters on behalf of consumers and public entities, an area that remains outside the purview of the federal enforcement agencies. In particular, state attorneys general continue to represent their consumers and public agencies in direct and indirect purchaser actions for violations of state and federal antitrust laws. As it was twenty years ago, this area remains one that, but for the effort of the state attorneys general, would likely result in significant underrepresentation of consumers (despite the presence of a very active private class action bar) and virtually no representation of public entities.

III. State Antitrust Enforcement Today

While the Task Force continues to tackle a number of cases against a variety of companies engaged in horizontal and vertical price-fixing conspiracies, it has concentrated on three industries in particular, getting involved in competition issues arising in these industries in both the litigation and legislative context: health care, pharmaceuticals and telecommunications. The multistate effort in these areas is in addition to the Task Force's continuing pursuit of egregious price-fixing conduct and vertical restraint cases, together which remain the "meat and potatoes" of the multistate enforcement effort. The Task Force's efforts in each of these areas illustrates the role the state attorneys general typically play to redress harm or preserve competition, especially with respect to situations not likely to be addressed by the federal enforcement agencies.

A. The Health Care Industry

Over the years, the health care industry has received more attention from state antitrust enforcers than any other industry, and it remains an important enforcement priority today for a number of

(N.C. Ct. App. 1996), *discretionary review denied*, 478 S.E.2d 5 (N.C. Ct. App. 1996); *Blake v. Abbott Labs, Inc.*, No. 03A01-9509-CV-00307, 1997 WL 134947 (Tenn. Ct. App., Mar. 27, 1996); *Blewett v. Abbott Lab.*, 938 P.2d 842 (Wash. 1997); *Bunker's Glass Co. v. Pilkington PIC*, 47 P.3d 1119 (Ariz. Ct. App. 2002); *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002); *Ciradi v. Hoffman-LaRoach, Ltd.*, 762 N.E.2d 303 (Mass. 2002).

reasons. Perhaps most important, health care markets are typically local in nature and therefore, more likely to draw the attention of state attorneys general. Of course, the increasingly high costs of health care, health care insurance, and pharmaceuticals also make it a prime issue of concern for state attorneys general acting on behalf of consumers. Accordingly, the involvement of state attorneys general in health care issues has been necessarily diverse. Additionally, depending on how local the markets are or how widespread the effect of the conduct, antitrust enforcement efforts in health care may be pursued by just one attorney general or may be undertaken as a multistate effort. The fact that a health care initiative may be undertaken by an individual attorney general alone does not reduce its significance to the larger multistate enforcement priority of ensuring competition in the health care industry through vigilant antitrust enforcement where appropriate.

For example, one health care area the Task Force and its members continue to challenge, where appropriate, is health care mergers. Most of these challenges have been targeted toward hospital mergers or purported joint ventures, which means that because of the local markets involved, the proposed transaction will be challenged only by the individual attorney general whose state contains the hospital affected by the merger. The two most recent hospital challenges brought by state attorneys general, *California v. Sutter Health System*²⁷ and *New York v. Saint Francis Hospital*²⁸ ended in opposite results, but nonetheless demonstrate the commitment of state attorneys general to preserving competition in this industry wherever possible.

In *Sutter Health*, California challenged a proposed hospital merger in the San Francisco bay area, after the FTC passed on challenging the transaction.²⁹ The California Attorney General did not agree with the FTC that the proposed merger would not result in adverse effects on competition in the bay area's local hospital market.³⁰ The court, however, declined to enjoin the proposed merger,³¹ and the ruling was upheld on appeal.³² Subsequently, the

²⁷ *California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057 (N.D. Cal. 2000), *aff'd mem.*, 217 F.3d 846 (9th Cir. 2000) (opinion not for publication), *available at* 2000 WL 531847, *opinion after remand*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001).

²⁸ *New York v. Saint Francis Hosp.*, 94 F. Supp. 2d 399 (S.D.N.Y. 2000).

²⁹ *Sutter Health*, 84 F. Supp. 2d at 1066.

³⁰ *Id.*

³¹ *Id.* at 1086.

merger was consummated.

In *Saint Francis Hospital*, the New York Attorney General's Office challenged a purported joint operating agreement between two hospitals engaging in joint negotiation of contracts and allocation of services, contending that the agreement constituted price-fixing. The DOJ had earlier declined to pursue the case, concluding that the proposed arrangement would not produce significant anticompetitive effects. This time, the court sided with the state attorney general and enjoined the joint operating agreement.³³

While one challenge was successful and one was not, what is important is that the state attorneys general involved felt compelled by the circumstances, including the decision of the federal enforcement agencies not to act, to pursue the challenges to ensure a competitive marketplace. As can be seen from the opposite results in the two cases, states win and they lose. Regardless of the outcome, however, the key is that the attorneys general took action when they thought it right to do so.

Many state attorneys general continue to be confronted with the efforts of the American Medical Association ("AMA") and their state counterparts to obtain state legislation that would permit physicians to collectively negotiate with third party health care payors supposedly without running afoul of the antitrust laws. Some state attorneys general have successfully turned back similar proposed legislation in recent years, arguing that bills that attempt to immunize such negotiations from the application of the antitrust laws have an adverse effect on competition. However, various iterations of this proposed legislation have been enacted in at least four states.³⁴ Most recently, despite strong objections from the Attorney General of Alaska and the FTC, the Alaska legislature became the latest of these four states to enact such legislation.³⁵

Despite these setbacks, the Task Force continues to assist states wherever possible to thwart efforts of the AMA and others

³² *Sutter Health*, 217 F.3d at 846 (opinion not for publication), available at 2000 WL 531847.

³³ *New York v. Saint Francis Hospital*, No. 98 Civ. 939 (WCC) (S.D. N.Y. June 30, 2000), Final Consent Judgment available at [http://www.abanet.org/antitrust/committees/state-antitrust/taxol settlement.pdf](http://www.abanet.org/antitrust/committees/state-antitrust/taxol%20settlement.pdf).

³⁴ See, e.g., Ch. 29 TEX. INS. CODE § 29.01, et seq. (2003); WASH. REV. CODE § 43.72.310 (2003); N.J. STAT. ANN. § 52:17B-196 (2003); ALASKA STAT. § 23.50.010 (2003).

³⁵ ALASKA STAT. § 23.50.010 (2003).

attempting to establish unprecedented antitrust immunity for physicians. The Task Force also intends to weigh in, as necessary, on any similar legislative effort at the federal level.

Finally, it is important to mention that state attorneys general are also regularly involved in reviewing proposed hospital conversions.³⁶ Conversions of hospitals from not-for-profit to for-profit hospitals may not give rise to antitrust concerns, but can concern state attorneys general nonetheless where community assets invested in the not-for-profit establishment may potentially end up being absorbed into the for-profit as a result of the conversion to the detriment of the community and its citizens who made the original and ongoing investments. Many state attorneys general have the statutory authority to review such transactions to ensure that the community investment is either protected or adequately redressed, and they routinely exercise this authority wherever it appears appropriate to do so.³⁷

B. The Pharmaceutical Industry

Over the last five years in particular, state attorneys general have also made challenging abuses within the pharmaceuticals industry a primary enforcement initiative. Since January 2003, state attorneys general have announced three major settlements with pharmaceutical companies, totaling \$235 million.

First, in January, all fifty states settled *New York v. Aventis S.A.*³⁸ on behalf of affected consumers and public entities as part of an \$80 million settlement to benefit all end users. The settlement resolved allegations that Aventis, the branded maker of a certain heart medication, unlawfully extended its patent for the drug by agreeing to pay a generic company to delay entry of its generic equivalent. This delay allowed Aventis to continue to charge monopoly prices for its heart drug when, had the generic company entered the market when originally intended, Aventis would have had to price its drug more competitively. As a result, those who purchased heart medication, while the agreement was in place, paid more for the medication than they would have had generic

³⁶ See, e.g., *Florida v. Catholic Health East, et al.*, No., CL 01-0068 AB (15th Jud. Cir., Palm Beach County, 2001).

³⁷ See, e.g., 760 ILL. COMP. STAT. ANN. 55/9; CAL. GOV'T CODE § 12598 (2003).

³⁸ *New York v. Aventis S.A.*, MDL No. 1278, No. 01-CV-71835 (NGE) (E.D. Mich. Jan. 29, 2003).

competition been present. The terms of the settlement permit eligible purchasers of the drug, Cardizem CD, to make claims to recover any overcharges they may have paid as a result of the unlawful agreement.

Then, in February 2003, all fifty states settled *Alabama v. Bristol-Myers Squibb*, for \$100 million on behalf of consumers and public entities.³⁹ The states had alleged that Bristol-Myers Squibb had attempted to extend an unlawful monopoly over the market for BuSpar tablets, an anti-anxiety medication, by fraudulently exploiting federal patent and drug laws.⁴⁰ The unlawful extension of the patent resulted in delaying the entry of generic competition which kept the price for BuSpar higher than it would have been had competition existed from generic equivalents. Consequently, purchasers of the anti-anxiety drug paid more than they otherwise would have. As a result of the settlement, eligible individuals who purchased BuSpar during the period when there should have been generic drug alternatives available at lower prices may file claims to recover their overcharges.

Finally, in April 2003, all fifty states finalized a settlement in *Ohio v. Bristol-Myers Squibb*.⁴¹ That case tentatively settled for \$55 million and resolved allegations that Bristol-Myers Squibb attempted to extend its unlawful monopoly over the market for the breast cancer drug Taxol, by once again manipulating the patent process and fraudulently securing patents that had no legal validity. The effect on consumers was similar to the BuSpar case, with patients and public health facilities paying more for Taxol than would have been the case had the patent been allowed to expire lawfully. The settlement provides an opportunity for purchasers of the drug during the time the patent was unlawfully extended to make claims for any overcharges they may have paid.

As long as the Task Force is able to detect potential violations of the antitrust laws in the pharmaceuticals industry, state attorneys general will continue to make their efforts in this area an important enforcement priority.

³⁹ *Alabama v. Bristol-Myers Squibb*, MDL Nos. 1410 & 1413, No. 01-Civ. 11401 (JGK) (S.D.N.Y. Mar. 7, 2003).

⁴⁰ *Id.*

⁴¹ *Ohio v. Bristol-Myers Squibb*, Civ. No. 2:02 CV 01080 (EGS) (D.D.C. Apr. 24, 2003), available at [http://www.abanet.org/antitrust/committees/state-antitrust/taxol settlement.pdf](http://www.abanet.org/antitrust/committees/state-antitrust/taxol%20settlement.pdf).

C. Telecommunications Industry

A third trend in state antitrust enforcement has been in the telecommunications area. Like hospitals, the telecommunications industry often operates within small local markets and is an industry in which quality of service, consumer choice, and competitive pricing are important to consumers. As a result, state attorneys general have made it a priority to address increasing market concentration in this industry as well as other issues affecting competition. Over the last two years, there have been multistate reviews of four proposed mergers of telecommunications conglomerates: (1) *Echostar Communications Corporation* and *Hughes Electronics Corporation* (“*DirectTV*”); (2) *AT&T Broadband Corporation* and *Comcast Corporation*; (3) *Hispanic Broadcasting Corporation* and *Univision Communications, Incorporated*; and (4) *News Corporation* and *DirectTV*.

Of these, the merger of biggest concern was *Echostar* and *DirectTV* because once the companies merged, there would be no viable satellite dish companies remaining to provide competition. After considerable review, twenty-three states and the DOJ jointly challenged the proposed merger.⁴² In late 2002, as a result of the filing of the joint state-federal complaint, *Echostar* and *DirectTV* decided to abandon their effort. The result for consumers is that they continue to have two viable choices in satellite dish technology, service, and product offerings.

In addition to undertaking merger challenges, state attorneys general have also submitted *amicus curiae* briefs in telecommunications matters where competition, or the lack thereof, has been an issue. Earlier this year, several state attorneys general filed *amicus curiae* briefs in *Covad Communications v. Bell Atlantic Corp.*, currently pending in the D.C. Circuit Court of Appeals.⁴³ The states argued in support of *Covad* that the obligations placed upon incumbent local telephone companies by the Telecommunications Act of 1996 (“Telecom Act”)⁴⁴ do not preclude competitors from

⁴² Complaint, *United States v. Echostar Communications Corp.* (D.D.C. Oct. 31, 2002) (No. 02-CV-2138), available at <http://www.usdoj.gov/atr/cases/f200400/200409/pdf>.

⁴³ *Covad Communications v. Bell Atlantic Corp.* (D.C. Cir.) (No. 02-7057) (pending review).

⁴⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C. § 151 (1996)).

seeking relief under the antitrust laws.⁴⁵ The primary rationale behind the states' position is that the Telecom Act contains an express antitrust savings clause and that clause, in addition to the absence of any clear conflict between the antitrust laws and the regulatory system established by the Act, means there was no intent to effect an implied repeal of the antitrust laws where the failure to fulfill certain obligations under the Act may also constitute an antitrust violation.⁴⁶ This case is important to consumers because the continued application of the antitrust laws to telecommunications companies, as they are gradually deregulated pursuant to the Telecom Act, will ensure an avenue to redress potential anticompetitive conduct designed to preserve existing monopolies despite the intent behind the Act to establish competition in local telephone markets.⁴⁷

More recently, the state attorneys general have split in their support of the parties in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, recently accepted for certiorari by the United States Supreme Court.⁴⁸ Thirteen states and two territories submitted an *amicus curiae* brief in support of Trinko while eight states filed an *amicus curiae* brief in support of Verizon. At issue is the Second Circuit's holding which affirmed Trinko's standing to sue Verizon under the Telecom Act and determined that Trinko could pursue the case under either of two particular antitrust theories, monopoly leveraging or essential facilities.⁴⁹ The states' divergent views primarily stem from whether the facts presented in *Trinko* provide an adequate basis for a monopoly leveraging or essential facilities theory in light of the obligations imposed by the Telecom Act upon incumbent local phone companies.⁵⁰

While it is unusual that state attorneys general take opposing

⁴⁵ Brief of Amicus Curiae States in Support of Covad Communications, *Covad Communications v. Bell Atlantic Corp.* (D.C. Cir.) (No. 02-7057), available at <http://www.abanet.org/antitrust/committees/state-antitrust/advocacy.html#acb>.

⁴⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 601, 110 Stat. 56 (reproduced in note to 47 U.S.C. § 152 (1996)).

⁴⁷ H.R. CONF. REP. NO. 104-458, at 1 (1996) (noting that a primary purpose of the Telecom Act is to open all telecommunications markets to competition).

⁴⁸ *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), cert. granted mem. sub. nom. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 123 S. Ct. 1480 (2003) (No. 02-682).

⁴⁹ *Bell Atlantic Corp.*, 305 F.3d at 108-09.

⁵⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 § U.S.C. 151 (1996)).

positions, it does happen on occasion, just as it sometimes happens that the FTC and DOJ do not agree on whether particular antitrust theories may be viably pursued. The *Trinko* situation demonstrates how difficult it sometimes is to parse through antitrust analysis and that divergent views among plaintiffs may be the result. The fact that state attorneys general have weighed in on either side of the debate in *Trinko* lends support to the overarching view that the more opportunities there are for antitrust law to be developed, the more likely that uncertainties in antitrust jurisprudence will be resolved quickly. This will eventually result in a more consistent application of the antitrust laws in future cases.

Because the health care, pharmaceutical, and telecommunications industries are rapidly changing and directly impact consumers in their everyday lives, state attorneys general will continue to devote a significant portion of their enforcement efforts to these industries. These efforts will ensure that consumers of the products and services provided by these industries will continue to reap the benefits of the evolving competition they are experiencing.

D. Price-fixing Cases: The “Meat and Potatoes” of State Antitrust Enforcement

Up to this point, the enforcement priorities of state attorneys general have been discussed in terms of the focus of attorneys general on particular industries, but regardless of the industry under scrutiny, the core enforcement priorities of state attorneys general over the last twenty years have typically focused on three specific types of antitrust cases: (1) price-fixing, in particular, bid-rigging cases; (2) indirect purchaser cases; and (3) vertical restraints. Each of these enforcement priorities is important because each significantly impacts consumers and state and local public entities and, more important, these are cases that are rarely pursued by federal enforcement authorities. For example, bid-rigging cases are usually local in nature and, as a result, the federal agencies expect state attorneys general will pursue such cases. With respect to indirect purchaser cases, the federal enforcement agencies either do not exercise their jurisdiction or have no jurisdiction to represent consumers or public entities that are indirect purchasers of price-fixed products. Many state attorneys general do have such authority under their state laws.⁵¹ Finally, with respect to vertical restraints, the federal agencies rarely pursue these kinds of price-fixing cases,

⁵¹ See *supra* text accompanying note 25.

which means that government enforcement in this area is left almost entirely in the hands of state attorneys general.

Price-fixing, given its pernicious nature, has always been and will continue to be a focus of state antitrust enforcement. Over the years, state attorneys general have pursued price-fixing conspiracy cases, both tacit and express, involving a number of products, including, school milk, water treatment chemicals, shoes, farm chemicals, infant formula products, cement products, compact disks, collectible stamps, tour bus operations, and retail gasoline, to name a few. Price-fixing conspiracies can either be horizontal, between competitors, or vertical, between a manufacturer and a retailer. In the area of horizontal price-fixing conspiracies, the most recent efforts by state attorneys general have involved bid-rigging conspiracies, one of the most egregious forms of horizontal price-fixing.

1. Bid-Rigging Conspiracies

Most bid-rigging conspiracies, by their very nature, are typically going to be limited to a particular state or local market. As a result, these cases are not only cases that the federal agencies likely will not review but also cases that will not be large enough to involve more than one state attorney general. This fact makes it all the more imperative that state attorneys general make the detection and prosecution of bid-rigging cases an ongoing enforcement priority, as they likely constitute the first and last deterrent with respect to such conduct.

One of the most recent bid-rigging cases comes out of Florida, *Florida v. Saul & Co.*, which involved bid-rigging at a tax certificate auction in Lee County, Florida, in 1998.⁵² Several bidders allegedly conspired to allocate bids during the auction so as to insure that each bidder secured tax-delinquent properties at higher interest rates than would have been obtained had the bidding actually been competitive.⁵³ The twenty-two companies involved in the alleged conspiracy settled in 2002 for nearly \$800,000. The settlement monies have been used to reimburse those property owners who paid the price-fixed interest rates when they redeemed their tax certificates. Any unclaimed funds were slated for distribution to various Lee County area charities for housing-related programs.

⁵² See Complaint and Demand for Jury Trial, *Florida ex rel. Butterworth v. Saul & Co.* (Fla. Lee County Ct. filed May 23, 2002) (No. 02-5768), available at <http://www.myfloridalegal.com/taxcerts.pdf>.

⁵³ *Id.*

This case and others like it are important reminders to companies that engage in competitive bidding of government contracts that they must avoid communications with competitors regarding bidding and pricing. Procurement officials increasingly are trained to spot potential bid-rigging conduct and are reporting suspicious conduct to their state attorney general to investigate. That is how the Florida Attorney General's Office became aware of the Lee County scheme.

Another recent bid-rigging case is *New York v. Feldman*.⁵⁴ In 2001, New York, Maryland, and California sued eight individual stamp dealers and two corporations in a federal civil court action, alleging a bid rigging conspiracy involving auctions for collectible postage stamps over a twenty-year period.⁵⁵ While the case is still pending, no matter what its outcome, it represents another excellent example of multistate coordination in antitrust enforcement. Three separate state attorneys general coordinated their investigative and litigation efforts and jointly sued to obtain the appropriate relief. Additionally, this case is an example of a bid-rigging case brought by state attorneys general in a private auction situation. Most bid-rigging cases involve government auctions or government procurement contracts. However, when consumers or public entities are directly affected by the rigging of bids or auctions conducted by private entities, this case demonstrates that state attorneys general will act as necessary to secure the appropriate relief by those consumers who were harmed by the alleged unlawful conduct.

2. Indirect Purchaser Cases

In addition to bid-rigging schemes, price-fixing that affects indirect purchasers remains a focus of state antitrust enforcers. Ever since the seminal case of *California v. ARC America*,⁵⁶ state attorneys general have endeavored to represent their consumers as indirect purchasers in state and federal antitrust actions.

The most important recent case in which state attorneys general represented consumers as indirect purchasers actually was not a price-fixing case; it was a monopolization case. But, the result in the case was so substantial it nonetheless requires mentioning as an example of what state attorneys general are currently doing on behalf

⁵⁴ *New York v. Feldman*, No. 01-CIV-6691 (S.D.N.Y. filed July 23, 2001) (pending).

⁵⁵ *See id.*

⁵⁶ *California v. ARC America Corp.*, 490 U.S. 93 (1989)

of consumers as indirect purchasers. The case is *Connecticut v. Mylan Laboratories*,⁵⁷ which settled in 2001 for \$100 million. In that case, the states, on behalf of consumers and state and local public entities, alleged that Mylan had unlawfully monopolized the market for the active ingredient in two of its anti-anxiety drugs by entering into exclusive agreements with the only suppliers of this ingredient.⁵⁸ The consumer fund portion of the settlement, approximately \$72 million was distributed in 2002 following an extensive notice program and claims process. Affected consumers who filed valid claims received full reimbursement of their overcharges, a tremendous result by any measure. Unclaimed consumer funds went to governmental and not-for-profit mental health programs under terms approved by the district court.

3. Vertical Price-Fixing

Finally, state attorneys general continue, as they have for the last two decades, to pursue vertical price-fixing cases. Vertical price-fixing occurs when firms at different levels of distribution agree to fix prices at one or both levels at a set amount or within a prescribed range. Indeed, this is an area that has been almost entirely relegated to state enforcers, as the federal enforcement agencies have rarely brought cases in this area.

In the last year, state attorneys general have settled two vertical price-fixing cases. First, in September 2002, forty-seven states, the District of Columbia, and Puerto Rico settled a minimum resale price maintenance case against Salton Corporation, the maker of the popular George Foreman indoor contact grills, for nearly \$8 million.⁵⁹ The settlement resolved allegations that Salton had coerced retailers, who had been discounting the retail price of the grills in agreeing to increase their prices or having the sale of the grills to them suspended in violation of Salton's resale pricing policy. This conduct, known as "minimum resale price maintenance" constitutes vertical price-fixing and is therefore unlawful. In addition to paying

⁵⁷ *Connecticut v. Mylan Lab.*, No. 1:98 CV 03115 (D.D.C. filed Dec. 22, 1998), *settlement approved sub nom.* In re Lorazepam & Clorazepate Antitrust Litigation, 205 F.R.D. 369, 402 (D.D.C. Feb. 1, 2002), *available at* <http://www.abanet.org/antitrust/committees/state-antitrust/mylan.pdf>.

⁵⁸ *Id.*

⁵⁹ *New York v. Salton, Inc.*, 265 F. Supp. 2d 310, 312 (S.D.N.Y. 2002), *settlement agreement available at* <http://www.abanet.org/antitrust/committees/state-antitrust/saltonsettle.pdf>.

the settlement sum, Salton agreed to cease enforcing its unlawful pricing policy.

Later, in September 2002, forty states and the District of Columbia settled *In re Compact Disc Minimum Advertised Price Antitrust Litigation* against the five major distributors of compact discs and certain traditional CD retailers.⁶⁰ The states alleged that the distributors and retailers had conspired to impose ever-more stringent minimum advertising pricing ("MAP") policies, resulting in higher CD prices at retail than would normally exist in a purely competitive retail environment. The case settled for \$142 million, \$75 million of which is to be distributed to schools, libraries and other charitable institutions in the form of free compact discs and \$67 million in cash to go to eligible consumers. Consumers are eligible if they purchased one or more CDs during the period the MAP policies were in effect. The amount of money each consumer ultimately will receive as part of the settlement depends upon the total number of eligible claims received.

The four price-fixing cases described in this section, involving four distinct products or services, illustrate that price-fixing remains a significant problem. As such, the aggressive pursuit of horizontal and vertical price-fixing cases, including bid-rigging and vertical restraint agreements, must continue to be a key enforcement priority for state attorneys general. Likewise, state attorneys general must also continue to make the recovery of overcharges for consumers and public entities that are indirect purchasers of a price-fixed or unlawfully monopolized product or service an enforcement priority. This is especially important when federal enforcement agencies either do not have jurisdiction or choose not to exercise it with respect to these areas. In these instances, state attorneys general play a very important role in ensuring that consumers and public entities are properly redressed for antitrust violations that would otherwise go unchallenged.

IV. Multistate Antitrust Task Force Structure, Functions and Approach

To appreciate how the enforcement priorities just discussed are practically pursued through the Task Force, it is important to understand how the Task Force is structured, its particular functions,

⁶⁰ *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, MDL No. 1361, 2003 WL 21685581 (D. Me. July 18, 2003), settlement available at <http://www.abanet.org/antitrust/committees/state-antitrust/cd-order.pdf>.

and the manner in which the Task Force typically undertakes a multistate investigation or litigation.

The structure of the Task Force is uniquely different from its federal antitrust enforcement agency counterparts. The DOJ Antitrust Division is headed up by an Assistant Attorney General who reports to the United States Attorney General. While it does have civil non-merger enforcement authority, the DOJ primarily pursues criminal antitrust violations, including international cartels, and conducts civil merger enforcement. The remedies typically available to the DOJ in a non-merger case are criminal fines, jail terms, and equitable relief, usually in the form of an injunction. The DOJ has no jurisdiction to recover damages on behalf of consumers or state and local public entities.

The FTC has a chair and four other commissioners, who are charged with, among other things, enforcing Section 5 of the Federal Trade Commission Act.⁶¹ The FTC typically takes on various civil enforcement merger and non-merger matters and may seek equitable remedies such as injunctions and, in some cases, disgorgement or restitution. However, the FTC has no authority to represent consumers or state and local public entities to recover damages incurred by them.⁶²

By contrast, the Task Force is comprised of fifty-six different sovereign jurisdictions, all with different laws and procedures. But the state attorneys general all have a few key things in common. First, they are their state's chief legal officer, charged with protecting the interests of its consumers and public entities. Second, largely because of the role they play in their states, they all have been given the express authority by Congress to represent natural persons and recover monetary damages for violations of federal antitrust laws.⁶³ Likewise, they all may seek injunctive relief under these laws as well.⁶⁴ Finally, they nearly all have in place state antitrust enforcement offices that provide the resources the Task Force needs

⁶¹ 15 U.S.C.A. §§ 41, 45 (West 2003).

⁶² While numerous district courts have permitted the FTC to pursue monetary relief under Section 13(b) of the Federal Trade Commission Act ("FTCA"), *see, e.g.,* *FTC v. Mylan Lab.*, 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999); *and* *FTC v. Gem Merchandising*, 87 F.3d 460, 470 (11th Cir. 1996), these decisions are limited to awarding monetary relief as a form of equitable ancillary relief. There is no provision in the FTCA that gives the FTC the authority to seek damages on behalf of consumers or public entities.

⁶³ 15 U.S.C.A. § 15 (West 2003).

⁶⁴ 15 U.S.C.A. § 26 (West 2003).

to coordinate and effectively pursue antitrust investigations and litigation.

A. The Multistate Task Force Structure

The Task Force was established in 1983, in conjunction with the NAAG Antitrust Committee "to improve, enhance, and coordinate state antitrust enforcement."⁶⁵ The Task Force has four major functions: (1) to facilitate the multistate investigative and litigation process; (2) to facilitate the state attorneys general participation as *amicus curiae* in antitrust matters where appropriate; (3) to suggest or comment upon legislation for Congress and state legislatures; and (4) to develop policy positions on antitrust issues.

The Task Force is headed by a chair and vice chair, who are selected by the Convener of the NAAG Antitrust Committee. There are also four regional vice chairs for the Northeast, West, Mid-West, and Southeast, who are charged with four responsibilities: (1) facilitating the coordination of investigations and the prosecution of cases with regional, but not national, implications; (2) establishing and maintaining communications with the regional offices of the FTC and DOJ located in their respective regions; (3) making action recommendations to the Task Force regarding potential *amicus curiae* opportunities or taking action on pending state or federal legislation arising out of or affecting their respective regions; and (4) recommending investigations to the Task Force that are appropriate for either national enforcement or enforcement in other regions. Additionally, there are also vice chairs in charge of *amicus* efforts, policy and legislation, state and federal coordination, planning and education, and litigation training. The remainder of the Task Force is broken into three kinds of working groups: (1) industry working groups; (2) litigation working groups; and (3) investigative working groups. The industry working groups are permanent working groups formed to facilitate the flow of information and education and training with respect to particular industries that historically have faced consistent antitrust scrutiny. Presently, these industry working groups include: telecommunications, airlines, health care, petroleum products, energy, banking, payment systems, and pharmaceuticals. The litigation working groups and investigative working groups are established as new cases are developed and filed.

⁶⁵ Michael F. Brockmeyer, *Report from the National Association of Attorneys General - State Antitrust Enforcement Programs: Report on the NAAG Multi-State Task Force*, 58 Antitrust L.J. 215, 216 n.3 (1989).

Multistate cases generally begin with just a few states. Once the case appears to be one having multistate implications, the states that initiated the matter will propose a multistate working group and typically offer to chair and organize the group. This working group, once established, will coordinate the issuance of subpoenas or civil investigative demands (“CIDs”), the receipt and review of CID documents and other material, and the retention of experts to help hone issues and establish possible liability and damage theories. Meetings with opposing counsel, witness interviews, and the drafting and filing of a proposed multistate complaint are generally coordinated through the working group.

Given the multistate aspect of the investigation, subpoena or CID recipients often ask for confidentiality agreements restricting disclosure of material provided. States have become quite adept at coordinating among themselves while still ensuring the confidentiality of materials provided in response to a particular state’s subpoena.

Most states have provisions in their own law that permit them to maintain the confidentiality of any materials deemed confidential by another state.⁶⁶ If there is any doubt as to whether material can be kept confidential by a particular state, the state seeking to obtain access to confidential material will simply resort to its own compulsory process to obtain the material, while still ensuring maximum confidentiality protection for the producing party consistent with both its investigative obligations and any state public records laws.

If litigation appears the likely result of a multistate investigation, a complaint will be circulated for comment to all the working group states. In fact, in most instances, all fifty states, the District of Columbia, and the five territories, will be given an opportunity to review and sign on to the complaint. Multistate complaints are typically a single document filed in a federal district court setting forth both federal and state-specific antitrust claims. However, there are instances where states have filed separate complaints in state court and coordinated their cases in parallel fashion. Of course, this is not the preferred approach since it is not as efficient as the federal court approach.

Once suit is filed, the states run the litigation through a committee structure with an executive committee, which oversees the day-to-day case developments and interacts with opposing counsel and the court, and other committees focusing on such things as

⁶⁶ See, e.g., FLA. STAT. § 501.2065 (2002).

discovery, experts, and settlement.

B. State and Federal Enforcement

As noted above, there are instances where the states will pursue a matter that the federal government is also reviewing. In the civil non-merger context, the FTC may be looking at obtaining strong equitable relief. The states, on the other hand, are seeking to recover damages and injunctive relief on behalf of consumers and state and local public entities. Additionally, although the DOJ primarily focuses on criminal antitrust enforcement, the states again may pursue the same companies on behalf of their consumers and public entities to recover any monetary damages or obtain any injunctive relief warranted by the circumstances. So, although the federal agencies may be reviewing a case also being reviewed by the states, it is almost always for the purpose of obtaining different remedies on behalf of different constituencies.

One area of enforcement that does overlap between the state and federal enforcers, in the sense that the same remedies may be sought by both state and federal enforcers, is civil merger enforcement. This is because most mergers are sizable enough in terms of the value of the combined assets to trigger federal antitrust review, yet they also have state and local market implications that raise concerns about the impact of competition at the state level. Although there exists a written protocol⁶⁷ agreed upon by the federal agencies and the state attorneys general regarding the procedures and practices to be undertaken to effectively coordinate a state-federal merger review, both the federal agencies and the states agree that there is always room for improvement. Therefore, the Task Force continues to work with the federal agencies to improve upon federal-state coordination and cooperation in the civil merger review context.

C. The Task Force and the Multistate Investigative Process

There are several criteria that generally dictate whether a state or states will choose to pursue an antitrust matter:

- (1) Does the matter have a local or regional impact upon

⁶⁷ Antitrust Div., U.S. Dept. of Justice, *Protocol For Coordination In Merger Investigations Between The Federal Enforcement Agencies And State Attorneys General* (1998) published in 1998-4 Trade Reg. Rep. (CCH) &13, 420, available at <http://www.usdoj.gov/atr/public/guidelines/1773.wpd>.

the state's consumers or economy?

(2) Does the matter affect the public interest?

(3) Are state or local governmental agencies impacted?

(4) Can consumers directly or indirectly benefit from state enforcement regarding this matter?

(5) Is the matter already being adequately addressed by the federal antitrust agencies or private plaintiffs? If so, has adequate injunctive relief been obtained?

(6) Is it the right thing to do?

Under these criteria, the primary focus of the state attorneys general is to recover damages on behalf of consumers and state and local public entities, especially in instances where there is not the possibility of recovery through other avenues.

Although seeking monetary relief and strong injunctive relief is the primary focus for the states when pursuing violations under the federal antitrust laws, it must not be forgotten that many states also have the ability to seek and obtain additional relief in either state court, or in some instances, as supplemental claims in federal court. These options may also dictate whether states will get involved in an antitrust matter. For example, many state statutes allow for civil penalties, restitution, and disgorgement.⁶⁸ Some states even have debarment from selling to the state as a remedy.⁶⁹ If a company is found in violation of state or federal antitrust laws, it may be removed from the state's vendor list and prohibited from doing business with state and local agencies. Finally, most states also have the ability to prosecute antitrust violations criminally.⁷⁰

⁶⁸ See, e.g., FLA. STAT. § 542.21 (2003) (civil penalties); COLO. REV. STAT. § 6-4-112 (2003) (civil penalties).

⁶⁹ See, e.g., ARIZ. REV. STAT. §§ 34.255, 34.257 (2003); MD. CODE ANN., STATE FIN. & PROC., § 16-203 (West 2002); WIS. STAT. § 133.12 (2002); FLA. STAT. § 287.132-33 (2003).

⁷⁰ Forty-seven states have some form of criminal penalty for at least some violations of state antitrust laws. Only Connecticut, Washington, and North Dakota have no state criminal antitrust jurisdiction.

So, while the Task Force structure, functions, and approach to enforcement are unique to government enforcement, its efforts have been no less effective than its federal agency counterparts. The very nature of the structure of the Task Force, however, and the fact that the Task Force is not a single enforcement entity, but is made up of multiple jurisdictions with different laws and different enforcement capabilities, has caused more than a little confusion for the defense bar over the years. This confusion, however, is often largely the result of neither knowing nor appreciating that the state attorneys general do generally work together through an organized structure, the Task Force, to coordinate their multistate enforcement efforts and to avoid duplication of those efforts. Consequently, it pays for defense counsel to take the time to learn about the Task Force and how it works. At the very least, defense counsel should be aware that the working group is generally the format adopted by state attorneys general to coordinate a civil merger or non-merger investigation and that there are typically one or two lead states that head up a working group. Once that basic premise is understood, it should be easier for defense counsel interested in coordinating or cooperating with the multistate investigation to do so more efficiently and effectively. Of course, there are always other factors to consider when confronted with a state or multistate investigation.

V. Practice Pointers for Defense Counsel in Multistate Investigations

Given the background, structure, focus, and priorities of the Task Force described above, how best does antitrust counsel go about dealing with a state or multistate investigation? Generally, there are three fairly constant factors to always keep in mind with respect to any multistate situation:

First, it never hurts to open the doors of communication early to discuss the issues and facts with the lead states in the working group. Whether an investigation or litigation, merger or non-merger, antitrust issues are rarely black and white. Having a candid discussion as early as practicable about the strengths and weaknesses of the case is always productive for both sides. Conversely, to ignore the state attorneys general may have significant and costly repercussions for your client.

Also, keep in mind that, in most cases, the state attorney general is representing either consumers or public entities and seeking damages or restitution and injunctive relief on their behalf. If the damages do not appear significant or injunctive relief has become

moot for whatever reason, then these are good reasons not to go forward with an investigation and litigation, and states may be persuaded that it is not a case in which to devote limited resources.

Finally, never assume that state attorneys general will not be interested in a matter already being handled by the federal agencies or private bar. The state attorneys general may be interested in seeking relief in addition to that being pursued by the federal agencies or the private bar and on behalf of individuals or entities whose interests are not being represented by others. Consequently, it is important not to overlook state attorneys general during the investigative phase, even where other agencies or plaintiffs are already pursuing the matter, especially if your client is interested in resolving any inquiry quickly.

Those are a few general pointers to consider for attorneys representing clients in potential multistate antitrust matters. They are not the only factors to consider, but they are generally the key things to consider when faced with any state or multistate civil merger or non-merger review. If these simple suggestions are followed, defense counsel will at least be better informed regarding the investigation and its potential as well as the options he likely has available to him, and, in turn, he can better represent his client.

VI. Conclusion

The Task Force is not a single entity and its success depends largely on the ability of its individual members to coordinate their efforts towards achieving common goals. Therefore, it has become clear to those who participate in the Task Force that this seemingly amorphous structure has given rise to significant misperceptions. There is an assumption, for example, that when state attorneys general become involved in a matter, a client must be concerned with dealing with each of them individually. There is an assumption that state attorneys general never originate their own cases and merely duplicate the federal enforcement effort, and as a corollary, there is the assumption that state attorneys general do not focus on matters of local and state significance and in particular, of significance to their consumers.

While this article is not intended to be a comprehensive treatise on multistate antitrust enforcement, it demonstrates that these assumptions are simply uninformed. The Task Force's success is largely because of its individual members ability to coordinate effectively and efficiently. Its working group structure works well for both its members and for the defense counsel who work with them.

Likewise, state attorneys general continue to pursue effectively cases, many of which are originated by state attorneys general, with local and regional market implications and, as a result, have managed to recoup hundreds of millions of dollars for consumers and public entities.

Finally, when state attorneys general do pursue cases also being handled by the FTC or the DOJ, it is not typically to duplicate the federal enforcement effort, but to effect their responsibility under federal and state law to recover damages and obtain the appropriate equitable relief on behalf of consumers and public entities who otherwise may not be recompensed for the financial harm caused them by the unlawful conduct. I would venture to guess that consumers and public entities who have seen the direct benefit of these efforts would likely disagree with those who suggest that state attorneys general add nothing to antitrust enforcement. Whether viewed as filling a gap in government antitrust enforcement or blazing its own trail, state antitrust enforcement has had a significant hand in shaping antitrust jurisprudence as well as the manner in which the antitrust laws are enforced in this country. Competition and consumers have unquestionably benefited as a result.