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I. INTRODUCTION

Most state antitrust enforcement actions are brought by a single state acting on its own rather than jointly with other states or the federal agencies. The broad antitrust jurisdiction of state attorneys general, however, does overlap significantly with that of the two federal antitrust enforcement agencies. According to one study, approximately 25 percent of state antitrust cases have had at least some relationship to federal enforcement efforts.[2]

Those matters in which both federal and state antitrust authorities do take an interest usually have significant impacts across state lines and even international borders. The parallel federal/state investigations to which they give rise present unique challenges for all concerned, including counsel for the subjects as well as the participating enforcers. It is important, therefore, to understand how they work, how to take advantage of the opportunities they present, and how to avoid the pitfalls.

Defense counsel often dread the prospect of having to deal with two sets of enforcement officials. My own experience is that, despite some inefficiency, parallel investigations generally lead to a sounder enforcement decision because of the interchange of views among enforcement officials with varying perspectives. Parallel investigations also provide additional entry points for outside counsel to ensure that their views are heard and considered and to overcome potential bias within a single agency. Moreover, well-coordinated parallel investigations substantially increase the likelihood of a common resolution—invariably a desirable result for everyone concerned.

II. TYPES OF PARALLEL INVESTIGATIONS

A. *Merger Investigations*

Merger investigations are the most common type of parallel federal/state antitrust investigations. They have become routine since the promulgation of the Protocol For Coordination In Merger Investigations Between The Federal Enforcement Agencies And State Attorneys General, which I negotiated on behalf of the states in 1998.[3] Use of the Protocol has maximized coordination, minimized conflict, and accelerated the process.

There is still room for improvement, however. Too much time is wasted at the outset of joint merger investigations negotiating confidential treatment of HSR materials provided to the states. Whatever the cause, the states should find a way to fix the problem because delays in receiving these often voluminous materials put them at a disadvantage to the federal agencies in what can be relatively fast-moving investigations. The states should also do a better job of

[1] Of counsel, Menaker & Herrmann. The author was Chief of the Antitrust Bureau, New York State Attorney General's Office, from 1995 to 1999.

[2] Statement of Harry First, Antitrust Modernization Commission, at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf.

[3] *See* http://www.justice.gov/atr/public/guidelines/1773.htm.

explaining and documenting requests for reimbursement of the costs of investigation, which are often sought in lieu of the HSR filing fees received by the federal agencies.

B. Conduct Investigations

There is no template comparable to the Protocol for parallel conduct (*i.e.*, non-merger) investigations. Each is different, depending on the agencies and states involved, the industries that are the focus of the investigation, and the issues at stake. There are various models for parallel state/federal conduct investigations, ranging from complete integration to completely separate investigations with very little coordination.

Both extremes are rare. Complete integration is unusual because state and federal antitrust enforcers work for independent sovereigns zealous of their own prerogatives. Completely separate, uncoordinated investigations are equally rare because they create unnecessary burdens on all concerned and are potentially embarrassing to the agencies themselves should the enforcement decisions be inconsistent and conflicting.

Most common is some form of parallel investigation in which state and federal antitrust enforcers coordinate discovery and share at least some thinking about facts, theories, and likely enforcement decisions. There are variations within this model, depending on a number of factors. For instance, the states may organize themselves very differently along a continuum, from pooling the resources necessary to conduct their own full-scale investigation to simply monitoring the federal investigation. In any event, the extent of coordination will depend on the nature of the case and its sensitivity, the relative commitment of state and federal resources, and the level of confidence each set of enforcers has in the others. At a minimum, however, document discovery and depositions usually will be coordinated to minimize the burden on subjects and witnesses.

III. OPTIMIZING PARALLEL INVESTIGATIONS

Misguided defense counsel sometimes try to sabotage state investigations because they prefer to deal only with the federal agencies and view state enforcement officials as undesirable interlopers. Such conduct is invariably counterproductive and may actually increase the level of state participation. To counter such tactics, the states may issue their own CIDs and launch their own deposition programs without any coordination at all with the federal agencies, considerably exacerbating the burden on the uncooperative counsel's client. The states have other options available in such situations, including the filing of *amicus* briefs in support of the federal agencies.

In short, resistance by counsel to parallel investigations makes it appear as if there is something to hide and may actually whet the states' appetites rather than discourage their involvement. The truth is that parallel investigations by federal/state antitrust authorities are inevitable. The real question is how to make them work as well as possible.

The biggest mistake that defense counsel make, inadvertently or otherwise, is impeding coordination between the federal and state antitrust enforcement agencies by restricting the sharing of information. There may be legitimate reasons why information cannot be shared equally. And, to be sure, providing voluminous materials to multiple agencies can be expensive and time-consuming.

Private counsel should recognize, however, that facilitating cooperation between the agencies is invariably beneficial. There is no better way to encourage a uniform result—be it a decision not to commence an enforcement action, a settlement that provides universal resolution, or litigation in one forum instead of many. Even if state antitrust enforcers have sufficient resources to pursue a case on their own, they will have a high burden justifying to their superiors—and to the courts—why it is necessary to do so when their federal counterparts have concluded that no enforcement action is warranted based on a review of the same evidence.

Parallel investigations also produce suboptimal results when enforcement officials fail to work well with defense counsel or with each other. Enforcement officials should recognize that defense counsel do have legitimate concerns about confidentiality and burden. They should avoid duplicative, inconsistent, and unreasonable discovery demands. Where more than one state is involved, a lead state should be designated to receive and coordinate discovery on behalf of all the states.

Equally important, federal and state enforcement officials must work well with each other. At a minimum, they should give adequate notice to one another about key events in the investigation, including the likely timing of any enforcement decision. Nothing creates more ill will than one agency trying to "one up" another. To avoid the appearance of even trying to do so, they should coordinate press communications and keep each other advised of any settlement discussions. Failure to follow these basic precepts is not only detrimental to the investigation, but will sabotage future working relationships.

IV. CONCLUSION

Parallel federal/state investigations can be viewed as a form of competition, and those participants involved—as in any industry—don't always like it. Private counsel resent the inefficiency. Federal enforcers don't like the prospect of being second-guessed on their enforcement decisions. And state enforcers don't like the influence wielded by the larger enforcement agencies in Washington. But just as in the marketplace for goods and services, competition invariably produces a better product. Everyone involved in a parallel federal/state antitrust enforcement investigation should accept that fact, respect the legitimate interests of others, and cooperate to make the process work as smoothly as possible.