**Single State, Multistate, or Federal Investigations -Pros and Cons**

1. Single State (Gwen and Max in the lead)
2. When you get a complaint about an antitrust issue, what factors should you consider in deciding whether it’s something I should or can pursue on my own?

G: Most importantly is “what is the impact on Wisconsin.” If I think worth pursuing and affects more than one state, then I reach out the multistate. I always prefer to work with colleagues.

G talk about Dean Foods.

1. Should I do something initially before deciding whether to try to involve other states or the feds and, if so, what?

G talk about aftermarket helmets; initial research, affected states, call Sarah, call feds.

1. What outside resources are available to help me make an initial evaluation?

G: State Center for Econ!

1. What about retaining outside counsel – what are the pros, cons and pitfalls?

G: Can’t do it under state statute w/o legislative approval.

1. If it is something I can do on my own or with others, what are the reasons I might want to do it on my own? What might be lost by teaming with others? Does this calculus differ for a larger state?

G: If you want to go swiftly go alone, if you want to go far, go together. It is helpful in these huge cases like Suboxone, GDMS, T-Mobile, DRAM, LCDs: these are heavy, long-lasting lifts. Really no choice. G talk about LCDs and the fractured litigation and the “fab five.”

G: comment on personnel issues.

1. Each state is a sovereign which is not a problem working on your own, but how much should I be concerned about giving up some sovereignty if I work with other states?

G: I do not worry too much about surrendering sovereignty. I have found that the states who work are able to shape the litigation in a direction favorable to their state, with few exceptions. I am concerned more about the leadership and direction of the individual attorneys

1. If I decide I’d like to get another state or one of the federal agencies involved, how do I do that?

G: Call them.

1. What issues should I anticipate working with my front office and p.r. folks?

G: 4 administrations, all different. All issues are different. Know what you are asking for, know what other states are doing. If you are doing something different from them, know why. PR also different. Know that press folks do not know about antitrust so you should send them draft releases that make sense to normal people, not just to antitrust lawyers.

1. Multistate (Bob in the lead)
2. When I hear there’s an opportunity to join a multistate, what should I think about in deciding whether that makes sense for me and my state?

I think a multistate should be evaluated like you do any other opportunity: how does the alleged violation impact the interests that you are trying to vindicate; are the potential returns worth your effort; does this impact something your office is interested in separate and apart from the competition concerns. I like multistate activities because working with other states is far less hierarchical. Effort and persuasiveness matters more than title.

1. What will other states expect of me in terms of financial and resource commitments?

It depends. You should understand what’s expected going in.

1. How do cost shares work?

Various costs are defined as shared and paying those costs is made from a fund filled with assessments usually based on population.

1. How much do FOIA issues complicate working with other states and how do you minimize them?

States freedom of information laws vary quite a bit. Competition issues are much more an exception to the usual state rules because we focus on competitive information that should not be shared/disclosed.

1. Will I or should I have an equal voice with other states which have made a greater commitment to the case?

Deference is generally and appropriately accorded those doing the work. You don’t get to instruct other states on how you think that state should act.

1. What are the ways of setting up a multistate and are some better than others in terms of efficiency or otherwise?

The structure should be adapted to the need. I prefer to limit multistate calls to an hour, start on time, and have a regular time for the calls.

1. What about long conference calls – are they useful, not a good use of my time when I can be doing other things, an excuse for billing hours, none of the above or all of the above?

Conference calls enable participation in a lot of activities without travel, which can be quite useful. You should always consider whether your participation adds value and act accordingly.

1. How are monetary proceeds after a settlement or a trial divvied up?

Based on the claims being resolved. Damages do to those who have damage claims and were harmed. Dividing up penalties and other monetary payments also depend on your state’s authority to recover penalties. Fees are based on time reflected in contemporaneous records.

1. Working with the Feds (Mike in the lead)
2. Are there special issues when working with the feds either on your own or in a multistate setting and what are they?

* MJ: yes. Participation with other states more frequent. But single state collaboration is possible. Examples: in oil/gas, hospitals,
  + Sometime only California issues: example: One case dealt with Cal. AG involvement in the FTC administrative tribunal. In 1996, the FTC had opened an investigation into the conduct of the Union Oil Company of California (Unocal). Industry participants complained to the FTC that Unocal had made misrepresentations to the California Air Resources Board (CARB) while the Board was engaged in a rulemaking to establish regulations and standards governing the composition of reformulated gasoline. According to the complainants, Unocal had misrepresented its intellectual property rights in technology to refine, produce, and supply low emission reformulated gasoline, telling CARB that its intellectual property was non-proprietary.
    - AG represented CARB (Cal. Air Resources Board) in administrative proceedings over whether Unocal conduct was protected under *Noerr-Pennington* exemption.
    - In July 2004, the Commission, sitting as a judicial tribunal reviewing Unocal‘s motion to dismiss, found Unocal‘s alleged conduct not protected by the Noerr-Pennington doctrine, and a full trial on the merits was scheduled. The trial never occurred, as the next year Chevron and Unocal announced an intention to merge and the FTC allowed the transaction to proceed only on the condition that Chevron not enforce Unocal‘s patent rights associated with the technology incorporated into the CARB reformulated gasoline standard.

1. How do joint federal/state cases work? Are the teams integrated and, if so, how? What will the feds expect from me and what should I expect from them?

MJ: They are integrated but DOJ is formal in terms of controlling the proceeding and relationship with states.

MJ: We are talking about merger and conduct cases. Criminal enforcement is DOJ only and while it’s possible to cross-designate as AUSA it’s not done in California yet.

MJ: The FTC/State AG relationship is critical in responding to reverse payment schemes.

MJ: Feds and states share work on areas of common interest. For example expert analysis on damages and disgorgement calculations.  Ag’s also shared findings of hot docs with the FTC/DOJ and vice versa.

1. Should I expect any differences in the working relationships with DOJ and the FTC and, if so, what are they?

Yes, slightly different processes and different people

FTC form 712 and sending waiver

DOJ –confidentiality agreement

1. Do politics come more into play when the federal agencies are involved and how should that be handled?

Mj: shouldn’t be. Staff focus should primarily be on enforcing antitrust laws.

1. What happens after an investigation if the state or states reach a different conclusion about whether to sue, settle or take no action?

MJ: there are options. States may not join settlement, submit tunney act comment, separately settle, or sue.