

AAI/State Center Symposium on Private Antitrust Enforcement

April 18, 2007

First Discussion: Pre-Filing and Post-Complaint Issues

The first panel focused on both pre-filing and post complaint issues, and focused on areas in which the states and private parties could cooperate more effectively.

The program began with introductions by Bert Foer and Steve Houck explaining the purpose of the program and the importance of cooperation between states and the private bar. The purpose of this program was to facilitate a dialogue between the private bar and the states so that they could identify common purposes and litigate cases more effectively. The ground rule for the program was for an open frank discussion, with this report anticipated, not identifying who said what, except for the prepared remarks.

Bob Lande of AAI made an opening presentation about the importance of teamwork in state and private enforcement. He described these as companion participants in an absolutely critical system of private enforcement. He identified several examples of successful enforcement cooperation by state and private enforcers which led to significant recoveries for consumers.

Pre Complaint Issues

The first part of the discussion focused on pre-filing and case identification issues. A private practitioner identified the criteria for case selection for private attorneys. They look at a variety of factors, including:

- Strength and size of the claim.
- The significance of damages
- The solvency of the defendant and whether private parties can effectively collect damages.
- Whether the case can gain leverage from successful prior litigation.

A state AAG noted that when the states get involved the private attorneys are normally already on the scene. The factors considered by the state AGs are similar but the assessment of these factors may differ from the state's perspective. He noted that the states might look at the size and strength of a case differently. A state attorney general might be more willing to take a case in which the substantive merits were more in doubt in order to try to clarify the law. States would also focus on factors such as the egregiousness of the conduct and the population involved. The states might be more willing to bring a case where the population was particularly vulnerable to anticompetitive conduct (e.g., the elderly).

Another factor is the ability to secure recovery for consumers – thus, whether the Illinois Brick limitation on recovery for indirect purchasers has been repealed is an important factor.

Some commentators noted that State Attorneys General have a more broad and nuanced responsibility and a much broader enforcement mandate. Another state official described four different case selection criteria:

- Is the State Attorney General the only person capable of bringing the case?
- Is there broad consumer injury?
- Is there complex injunctive relief?
- Is there a private plaintiff who has already brought a case?

Another state commentator noted that the effectiveness of representation by private attorneys may be an important factor in the states deciding to stay their hand.

A private practitioner noted that state involvement in private litigation is sometimes may have pluses and minuses from the perspective of the private bar. On the one hand the state might get involved in second guessing some of the decisions of the private attorneys and might adversely affect the recovery of damages. On the other hand the involvement of the states will give the litigation credibility and help the plaintiffs identify certain facts.

Another private commentator noted that states can be helpful on class certification issues.

There was a discussion about at the point at which it is useful to have the states involved. The private practitioners tended to think that the earlier the states got involved the better. The states noted the difficulty on timing because they need to do a more thorough precomplaint investigation than private plaintiffs. Another state speaker noted that when the antitrust staff brings the case they must bring it in the voice of the Attorney General and that may limit their options.

A representative of the state coordinating task force identified two major issues:

- The difficulty with class certification has driven private attorneys into State AG offices seeking to be retained. If the states contract out, there is a threat that they will lose credibility.
- There is an increased willingness of private attorneys to go straight to the State Attorney General and ignore the antitrust staff.

Post Complaint Issues

The second part of the discussion covered a variety of post complaint issues, including how the states and private parties coordinate litigation and recovery issues.

One private attorney noted two ways that states can help once the litigation begins. He suggested that the states need to organize themselves as private attorneys do. The states can be particularly helpful on issues such as document production and depositions.

The private attorney also noted the importance of having the states effectively coordinate their activities when there is a multi-state effort. The states should work to:

- Avoid conflicting positions.
- Join in retaining experts.
- Secure cooperation of witnesses.
- Assist in media relations.
- Identify a single state to take the lead in negotiating injunctive relief.

There was a discussion of state cooperation and examples where the states worked well together. The three examples were the insurance cases, the CD case and the Vitamin litigation.

In cases where the relief was basically monetary there is less of an urgent need for state involvement. There are several concerns raised about the involvement of states. One person noted that the states differ in terms of their Illinois Brick coverage so that creating a team of states may be harder. Another state official noted that state participation may be resource constrained. The discussion focused on recovery issues and the difficulty of getting awards to the injured consumers and claims administration issues.

A member of the state coordinating task force concluded the discussion by noting:

- The states need to be better organized. Frequently it is necessary for the antitrust attorneys to “manage up”. The Attorney Generals need the best judgment of its antitrust lawyers.
- To a certain extent there is a “herd mentality” and the vast majority of states don’t have the capability to take on substantial work. The current system effectively creates a disincentive to do the work. And a diminishing number of state Attorneys General are willing to put the resources into the work.

Second Discussion: Post-Liability Issues

The questions presented to the group were, What happens after liability has been determined? What are the states’ strengths and weaknesses? What are plaintiffs’ counsel’s strengths and weaknesses? What is being missed that can be improved? To what extent can politics be overcome by professionalism? The goal is to get the most money to the correct people in the most efficient and effective way possible. How can we achieve that goal?

The discussion centered first on *cy pres* distribution. It was noted that indirect purchaser class actions are a target for multiple interests, and are therefore under intense scrutiny. Weaknesses in the process include the large amounts of money spent on claims administration,

coupons, claims forms difficult for consumers to complete. Better and more efficient remedies will help the public view indirect purchaser class actions more favorably.

The states have an interest in *cy pres* distributions because the Attorneys General are also typically a reviewer of charities. They have the potential ability and time to do the legwork on appropriate *cy pres* distributions. One interesting example has been the Insurance litigation, which resulted in the creation of an important new national institute, the Public Entity Risk Institute. A more typical outcome is a competitive grant-making process. This process has great upside potential, in terms of making the public aware of the value of indirect purchaser litigation, but also presents risks.

To do this right, there must be an impartial administrator, broad outreach to potential grantees to avoid the appearance of grants to an “inner circle,” an important nexus to the class harmed, and a strong analysis of applicants. The money to establish this process should come out of the settlement funds. The states are developing model motions and orders, which carve out 5-10 percent of the settlement funds for *cy pres* administration. This is consistent with the funding used in private foundations.

It is possible that in future settlements with *cy pres* distributions, state Attorneys General will be involved in the process even if they are not involved in the case.

A number of observations about settlement of class action litigation were made by plaintiffs’ class counsel.

- Class counsel do not typically include government entities in their class definition. Class counsel generally take the view that including them would raise unnecessary problems with the states.
- States using their *parens patriae* authority can typically only represent natural persons. This leaves third-party payors out if only Attorneys General are involved.
- There is typically little friction as to the actual amount of money being offered for a release of claims.
- Private plaintiffs’ counsel focus more on securing money damages than injunctive relief. One reason for this is that courts look at the money recovered in determining appropriate fees, but do not typically consider injunctive relief.
- There are differences among the states, as noted most prominently by Judge Young in the *Relafen* litigation. He created very fine distinctions between states based on the strength of their different indirect purchaser remedies. Among the states themselves, it may be politically problematic to recognize such differences.
- Members of a class consisting of third-party payors and consumers do not always have the same interests. Typically, plaintiffs’ class counsel negotiate a price for the entire pot,

then appoint counsel who represent individual consumers and counsel who represent third-party payors.

- Getting money to class members is very tough to do, and plaintiffs' counsel haven't always done it as well as they might have. In *BuSpar*, the states took on this job. In *Relafen*, Judge Young awarded attorneys fees based on exactly how much went to class members. In that case, purchase information was subpoenaed from pharmacies and PBMs. There was no claim form—consumers just received a check based on their purchases. There is a problem with drug cases—the privacy rules under HIPPA preclude revealing this except under court order.
- There is always a role for *cy pres* distribution, but distribution to consumers must be first.

There was further discussion of the *cy pres* process. It was suggested that plaintiffs and states vigorously reach out to potential grantees, urge six or seven candidates to submit applications to the court and let the court choose the grantees. Of course, there could be a situation where the court picks its own favorite.

The next topic was the recommendations of the AMC as to *Illinois Brick* and *Hanover Shoe*. There was concern over the deleterious implications of reversing *Hanover Shoe* and requiring direct purchasers to prove actual damages. This will be a very difficult task, requiring a large amount of information about prices to the next level. This could eliminate direct purchasers as a robust method of antitrust enforcement. Sometimes, indirect purchaser actions are not appropriate. For example, no indirect purchaser would sue for damages resulting from price-fixing of high fructose corn syrup. This could eliminate private enforcement. It will be more difficult to get a class certified, even when there are meritorious actions. Even with more robust enforcement by indirect purchasers, overall, private enforcement will have decreased.

Another problem with the AMC proposal is the cap on damages at direct purchaser damages (trebled). This doesn't take into account mark-ups suffered by indirect purchasers. In some cases, there will not be any direct in the case, so the indirect purchasers will have to figure out the direct damages with no assistance from a party.

Returning to distribution of damages, it was suggested that in some indirect purchaser cases, rather than *cy pres* distribution, the money should just be given back to the state, which could then forego tax increases or rebate taxes. There is a due process objection to this, and consumer groups have opposed such a remedy in the past. It was suggested that the Sherman Act has a compensatory function, which complements its deterrence function, and compensation of victims should be important.

The group next discussed how best to cooperate with one another on amicus briefs. Generally, the system can work well, as in the DDAVP litigation, where the private bar was contacted by the states, who urged that an amicus brief be filed. It was suggested that it might be helpful to have a place to go to get information on specific provisions of 50 state laws, and that NAAG might fulfill that function. It was noted that many states as a policy matter will not sign on to briefs authored by anyone but another state. Most states have Solicitors General, who are

also involved in the amicus process.. It is appropriate that they participate in order to make sure the state is speaking consistently each time it addresses the court.

Turning to CAFA, there were questions as to whether states are policing the fees awarded to private class counsel in the CAFA notices that are sent to the state Attorney General. It was noted that states have objected to fees before, although not in the CAFA context. There was some discussion of where the notices go in the Attorney General's office.

The group briefly discussed the tobacco litigation. It was noted that there was a perception, however erroneous, that the Attorneys General had turned over their law enforcement function to people who had a stake in the outcome. The results are still being felt today.

The group discussed possible next meetings, generally feeling that additional meetings would be useful.