

October 11, 2007

Summary of Second Meeting on Private/State Antitrust Enforcement

AAI and the State Center for Antitrust and Consumer Protection jointly sponsored a second meeting of a group of State Assistant Attorneys General, private antitrust trial lawyers, and academics to discuss issues of mutual concern involving private/state antitrust enforcement. These notes summarize the discussion at the meeting, which was held on October 8, 2007, in St. Louis. Notes of prior meeting, which was held in Washington D.C. in April 2007, are available at <http://www.antitrustinstitute.org/Archives/states.ashx>

The program began with introductions by Steve Houck and Bert Foer explaining the purpose of the program and the importance of cooperation between the states and the private plaintiffs' bar. As with the prior meeting, the ground rule for the program was for an open and frank discussion, with this report anticipated. The three principal areas of discussion were: 1. Practical ideas for improving coordination and relationships; 2. the post-*Leegin* landscape; and 3. *cy pres*.

Practical Ideas for Coordination

This discussion was introduced by a private practitioner who noted that there was often a commonality of interest between class counsel and state enforcers in that both are representing victims of alleged antitrust violations. Accordingly, the practical question is how to coordinate better to bring common resources and expertise to bear, particularly in light of recent case developments adverse to antitrust plaintiffs. The session focused on CAFA and how to derive maximum benefit from the resources the states and private plaintiffs bring to bear in particular kinds of actions or claims; *Twombly* and the extent to which the states' ability to conduct precomplaint investigations might provide advantages in certain types of cases; and the states' position on attorneys' fees awards.

Certain differences between the states' and private plaintiffs' ability to bring cases were discussed. For example, as a practical matter under CAFA, only states can bring actions in state courts. And since states' *parens patriae* authority generally extends only to natural persons, and does not include businesses, only private lawyers can ordinarily bring actions on behalf of direct purchasers or intermediate indirect purchasers. It is generally not the case that only states can bring actions to recover for governmental purchasers; in most states, private class actions could include state agencies as part of the class, although in practice most private counsel simply exclude all governmental entities. With respect to representation of consumer indirect purchasers, state *parens* actions may, in certain circumstances, be favored by some courts over private actions. States can seek certain remedies, such as civil penalties, that private plaintiffs cannot.

There was a discussion of the types of cases that states are (or should be) interested in (or not) based on the kind of products at issue (e.g., pharmaceuticals where states are major customers) or based on whether the case is merely a "follow on" (to a

federal indictment or investigation) or is a “proprietary” case (developed by investigation by the states or private lawyers). It was suggested that case selection for the states has become more critical given the limited resources available and the increased difficulty of bringing cases. It is important for private counsel and state enforcers to better understand each other’s case selection criteria to avoid needless duplication and wasted effort.

The group also discussed the benefits of having both the states and private bar involved in the same matter, including the credibility the states bring, the resources that the private bar can call on, the ability to share resources and expertise and reduce expenses, and the avoidance of potential conflicts involved in class actions with both direct and indirect purchasers. There may be collateral estoppel and other benefits of having separate actions in state and federal courts.

It was suggested that a mechanism might be established for private lawyers to determine whether a state wished to allow its agencies to be a part of a class action.

A private practitioner noted that, in light of *Twombly*, states may have advantages with regard to certain cases that require a precomplaint investigation. There was a discussion as to how private counsel might bring appropriate matters of which they were aware to the attention of the state enforcement agencies. It was recognized, however, that coordination between the states and private plaintiffs at the investigation phase is constrained by confidentiality requirements.

An assistant attorney general noted that experiences in particular cases can provide a template for state-private cooperation. A private attorney suggested that cooperation between private attorneys and states could be difficult in a case involving multiple private attorneys *prior* to the selection of lead class counsel by the court, but might be more productive after that point and before an amended class action complaint is filed. In cases where states are not yet involved, consultation would give the states an opportunity to get involved in a timely manner. The suggestion was made that it is important for the states and private counsel to agree on the strongest claims and prosecute those, rather than trying maximize the size of the class.

With respect to attorneys’ fees there was a discussion of whether it might be possible to establish a set of best practices for private attorneys to minimize disputes regarding fee petitions. Such objections are common in securities cases, and could arise in antitrust cases (under CAFA) even when the states are not parties to the case. A private attorney stated that it is difficult at the outset of a case to determine what a reasonable fee award might look like, but it may be possible to identify in general terms a range of reasonableness (in terms of a percentage of the common fund, lodestar, and expenses), and factors that would support an award at the low or high end of the range. A private attorney noted that fair compensation for class counsel should take into consideration such factors as delayed payment, the risk in bringing an action, and the fact that some cases may result in no fee award at all if ultimately unsuccessful.

It was suggested that just as the NAAG multistate antitrust task force fostered cooperation among the states, there was good reason to think that cooperation between the states and private plaintiffs' bar to further their common interests was possible.

There was some discussion of *Illinois Brick* repeal and the AMC recommendations, and it was noted that AAI will be featuring a debate between Eric Cramer and AMC member Jonathan Jacobson on this issue at its conference on the future of private enforcement, to be held on December 10th in Washington, D.C.

Resale Price Maintenance

The discussion focused on the prospects of RPM litigation by the states and/or private plaintiffs in light of the Supreme Court's *Leegin* decision overturning the *per se* rule. It was suggested that *Leegin* created an opportunity for the states to shape the law by bringing test cases and advocating a structured rule of reason under the Sherman Act (following the Supreme Court's paradigm), or by bringing cases under state law and urging continued application of the *per se* rule.

Cy Pres

Cy pres awards can be very useful and beneficial to antitrust victims, but must be handled with care by the private bar, attorneys general, and the judiciary to avoid potential problems. In some cases courts have provided little oversight. *Cy pres* represents a method to benefit the victims of anticompetitive conduct by redirecting funds to the "next best use" when it is impractical to return them to the actual victims themselves. It is important to avoid conflicts of interests and for states to monitor how the money has been spent.

There was discussion of the need to promulgate best practices in this area. Bert Foer offered a 9 point proposal that emphasized the following points: the first priority in a damage award in an antitrust case is to return the damages to the injured class members; *cy pres* should be used only if the class is so large compared to the size of the fund that the transactions costs render a distribution of cash infeasible; if a *cy pres* award is made, there must be an adequate nexus between the nature of the claim and the uses to which the *cy pres* funds will be put; where the fund is sufficiently large, a foundation-like process should be used to oversee the selection of the recipients and oversight of their expenditures; if the fund is not sufficiently large, plaintiffs should present one or more candidates for the court to select based on detailed proposals by the candidates.

One AAG emphasized the importance of obtaining court approval for specific grants rather than allowing unfettered discretion to the attorneys, private or public, in the distribution of funds. Another emphasized the importance of states having written guidelines. A private attorney suggested it might be advisable to provide the court with several qualified applicants from which to choose.

There was a discussion as to whether it was appropriate for an AG to bring a case if she knows in advance that no funds can practicably be returned to victims. It was pointed out that it would be rare that it would be known in advance that the recovery would not be sufficiently large to support a claims process, and that recovery has a penal and deterrent effect that civil penalties generally cannot match. Moreover, settlements are often disgorgement remedies.

Cases in which creative ways of returning money to victims were discussed. Ideas were exchanged on how states (and perhaps the private bar) could share certain functions in the *cy pres* process. One suggestion was that a clearinghouse could be established to investigate grant applicants or to handle the follow-up process.