Multi-State Investigations:

What They Are and What To Do When Your Company Is the Subject of One

Presented by
ACCA-SoCal and
Kirkpatrick & Lockhart Nicholson Graham LLP

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What Is a Multi-State Investigation, Where Do They Come From, and Why Don’t You Want One?

Paul W. Sweeney, Partner
Ronald W. Stevens, Partner
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Role of State Attorneys General

Moving force behind all multi-state investigations

Functions are similar to Department of Justice:
- Bring civil suits on behalf of states
- Enforce antitrust, consumer protection & environmental statutes
- Represent states and state agencies in civil suits
- Handle criminal appeals
Election versus Appointment of AGs

Popularly elected in 43 states (including CA), Guam
Appointed by governor in 5 states (AK, HI, NH, NJ, WY), 4 jurisdictions (American Samoa, Northern Mariana Islands, Puerto Rico, Virgin Islands)
Selected by secret ballot of legislature (ME)
Selected by state Supreme Court (TN)
Appointed by Mayor (DC) (similar powers & duties)
National Association of Attorneys General (NAAG)

Membership
Attorneys General of all states, District of Columbia
Attorneys General of Commonwealths of Puerto Rico, Northern Mariana Islands, territories of American Samoa, Guam, Virgin Islands
United States Attorney General (honorary member)
NAAG Organization

Executive Director, General Counsel, staff, counsels
President (elected by membership)
NAAG Committees
NAAG Projects
NAAG Committees

1. Antitrust* Committee
2. Civil Rights Committee
3. Consumer Protection* Committee
4. Criminal Law Committee
5. Environmental* and Public Health Committee
6. Tobacco Committee

* Multi-state investigations & prosecutions have concentrated in these areas.
NAAG Special Committees

1. Pharmaceutical Issues Committee
2. Youth Access to Alcohol Committee
3. Financial Practices Committee
4. Telecommunications Issues Committee
NAAG Projects

Antitrust
Bankruptcy
Civil Rights
Consumer Protection
Criminal Law
Cybercrime

Environment
Legislation
Medicaid Fraud
Supreme Court
Tobacco
Violence Against Women
NAAG Antitrust Committee and Task Force

Composed of staff attorneys in state Attorneys General offices.

Chairperson is principal spokesperson for states on antitrust enforcement.

Task Force coordinates multi-state investigations and litigation through committees.
NAAG Antitrust Task Force Committees

Petroleum Products Working Group
Pharmaceutical Industry Working Group
Real Estate Working Group
Telecommunications Working Group
Banking Industry Liaison

Contact Lens Industry Liaison
Health Care Industry Liaison
Payment Systems Industry Liaison
PBM (Pharmacy Benefit Management) Committee
Technology Committee
NAAG Consumer Protection Committees

FTC Working Group
Internet Working Group
Environmental Marketing Task Force
Sweepstakes Task Force
Telemarketing Task Force

Multilevel Marketing Task Force
Automobile Subcommittee
Elderly & Consumer Law Subcommittee
Telecommunications Subcommittee
Projects and Committees work in conjunction with a number of task forces & subcommittees. Many of the foregoing work in conjunction with representatives from the U.S. Department of Justice or other federal agencies with jurisdiction over same/similar subject matter in pursuit of combined federal & multi-state prosecutions.
Federal Antitrust Statutes

Sherman Act
Clayton Act
Federal Trade Commission (FTC) Act
Sherman Act

*Section 1*  Prohibits conduct between companies or persons in restraint of trade.

*Section 2*  Prohibits monopolies.

Violation is a felony:

- **Corporation**: Fine up to $10 million
- **Person**: Fine up to $350,000 and/or imprisonment up to 3 years
Sherman Act (cont.)

Three per se criminal violations:
  Price fixing
  Bid rigging
  Market allocation conspiracies
Sherman Act Civil Violations

Some cases are adjudicated in civil proceedings under a "rule of reason" standard. Courts examine economic benefits & harm of allegedly anti-competitive conduct to determine whether it is, on balance, beneficial to consumers & should be permitted to continue.
Sherman Act - Enforcement

Antitrust Division of DOJ has sole authority to file criminal antitrust cases.

Under Clayton Act, individuals may seek injunctive relief and recover damages (tripled) plus costs and attorneys’ fees.

State Attorneys General may bring
injunction actions in federal court on behalf of their citizens.
damage actions, as *parens patriae*, on behalf of natural persons residing within their states for treble damages, plus costs and attorneys’ fees.
**Clayton Act**

*Section 2* (added by Robinson-Patman Act) Prohibits discrimination in price, services or facilities when it creates a monopoly, restrains competition or violates trade regulations.

*Section 3* Prohibits exclusive-dealing contracts, tying agreements, or requirement contracts.
Clayton Act (cont.)

Section 7  Prohibits mergers that substantially lessen competition.

*Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act)*
Requires company meeting filing requirements to submit advance notice of merger plans for pre-approval to FTC and Antitrust Division of DOJ.

Section 8  Prohibits interlocking directorates.
Clayton Act - Enforcement

Antitrust Division of DOJ enforces criminal sanctions.
FTC and DOJ enforce Section 7 (M&A).
FTC enforces anti-price discrimination, pre-merger approval & interlocking directorate provisions (DOJ participates if it wishes).
Antitrust Division of DOJ may sue for injunctive relief.
Individuals may sue for treble damages and legal fees, seek injunctive relief.
State Attorneys General do NOT have authority to enforce Clayton Act.
Federal Trade Commission (FTC) Act

Section 5  Prohibits unfair methods of competition, and unfair/deceptive acts or practices, in or affecting commerce

Includes violations of Sherman Act.
**FTC Act (cont.)**

*Section 45 (n)*  FTC can declare act or practice unlawful, but only if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.
FTC Act (cont.)

FTC also enforces special statutes that prohibit specifically defined trade practices:

- Truth-in-Lending Act
- Fair Credit Reporting Act
- Wool Products Labeling Act

Effectively govern advertising, sales practices, credit practices & professional services practices.
FTC Act - Enforcement

Enforced by FTC.
Initially, all FTC could do was hold an administrative hearing to issue a cease and desist order and impose fines up to $10,000 if such an order was violated.
FTC Act   Enforcement (cont.)

Act amended to permit FTC to seek a preliminary injunction halting false advertisements re food, drugs, devices, services or cosmetics pending completion of an administrative proceeding. 15 U.S.C. § 53(a)

Then FTC given right to obtain temporary restraining orders & preliminary injunctions against any person, corporation or partnership that is violating/about to violate any law enforceable by the FTC if the FTC believes it to be in the public interest. 15 U.S.C. § 53(b)

Requires standard balancing of equities, consideration of FTC’s likelihood of success & prior notice.
Courts (led by Ninth Circuit) have held that courts can exercise all ancillary equitable powers in action for an injunction, including:

- asset freezes,
- appointment of receivers,
- restitution and other relief

to redress injury resulting from consumer fraud.
State Antitrust Laws

Most state civil antitrust statutes parallel
Section 1 of Sherman Act
Section 2 of Sherman Act (but not CA)
State AG can seek treble damages, injunctive relief, attorneys fees & criminal penalties.
Cartwright Act

California's principal antitrust provisions (Calif. Bus. & Prof. Code § 16700 et seq.)

Prohibits people or businesses from acting together to:

- Restrict trade
- Reduce production or competition
- Increase or fix prices
- Agree not to sell a commodity
- Engage in tying arrangements or loss leaders
California Remedies under Cartwright Act

Permits AG and DAs to sue for treble damages, costs, attorneys’ fees, injunctive relief.
Mandatory injunctions needed to restore competition.
AG and DAs may obtain forfeiture of charter rights, franchises.

Criminal penalties:
- **Corporation**: fine up to $1 million
- **Individual**: imprisonment up to 3 years, fine up to $250,000
Multi-State Antitrust Actions

Most state AGs file cases in federal court with pendent state antitrust claims.
States participating in multi-state investigations usually execute cost-sharing agreements (based on population).
State AGs are free to challenge & seek divestiture in connection with merger transactions that a federal agency declines to challenge under the Clayton Act.
State Consumer Protection Statutes
Mini FTC Acts

Consumer protection investigations have overtaken multi-state antitrust cases.

Every state has unfair and deceptive acts and practices (UDAP) statute.

Enforceable by state AG & individuals.

NAAG Consumer Protection Project promotes information exchange among states.
State agencies of regulated industries often have concurrent jurisdiction.

Regulated industries include:
- Mortgage lenders,
- Other financial institutions,
- Insurance,
- Healthcare, and
- Telecommunications
California's Unfair Competition Act (§ 17200)

Prohibits unfair competition, defined as:
"unlawful, unfair or fraudulent act or practice and unfair, deceptive, untrue or misleading advertising.

Unlawful means in violation of any state or federal statute.

Violation of Cartwright Act = independent violation of §17200
California’s Unfair Competition Act -- Remedies

Limited to equitable relief -- no jury trials. Just as for FTC Act, remedies can include injunctive relief, restitution, appointment of a receiver.
Many states have passed little FTC Acts. In a number of cases, violating corporations may be fined from $1,000 to as high as $25,000 per violation. Per violation means per customer in some states.
How Multi-State Actions Get Started

Discussions among staff in state AG offices.
Can start with one state, one consumer complaint.
States may pool resources if a company is subject of similar complaints or operating in several states.
A working group / Executive Committee may be formed, comprising representatives from state AG offices & agencies with concurrent jurisdiction.
How Multi-State Actions Get Started (cont.)

Other states may join investigation, either actively or passively.
Settlement is usually with all states who have joined investigation.

Possible to settle with some but not all.
If litigation ensues, each state must sue in own state court to seek relief under its state statutes.
Multi-State Settlements During 2005-2006

Western Union
Ameriquest Mortgage Company
Western Union Settlement

$8.1 million settlement based on concerns regarding fraud-induced wire transfers
National consumer awareness program
Consumer warnings in English and Spanish
Enhanced agent training
Reimbursement to consumers who try to stop orders on wires because of reasonable suspicion of fraud
Blocking of wire transfers if fraud is suspected
Ameriquest Mortgage Company Settlement

$325 million settlement with 49 states, District of Columbia & District Attorneys of 6 California counties.

Allegations regarding retail, non-prime lending practices of Ameriquest & two affiliated companies.

Settlement followed $484 million agreement in 2002 with Household Finance Corporation and $215 million settlement with Citigroup, Inc. to resolve claims of predatory lending practices to non-prime borrowers.

Ameriquest settlement includes both AGs & state agencies regulating mortgage bankers.
Terms of Ameriquest Settlement

$295 million in restitution to certain borrowers obtaining loans from 1999-2005:

$175 million through nationwide claims process, for loans obtained 1999-2003

$120 million to settling states, based on percentage of loans held by consumers in each state, to compensate customers for loans obtained 1999-2005

$30 million to 49 settling states and DC to cover costs and fund education & enforcement programs
Injunctive Relief in Ameriquest Settlement: Reform of Lending Practices

Offer same rates and points to similar consumers.
Provide training about settlement agreement to all employees.
Give full disclosure of rates, points, prepayment penalties.
Overhaul appraisal practices.
Not encourage borrowers to misstate income sources/levels.
Provide accurate, good faith estimates.
Injunctive Relief in Ameriquest Settlement: Reform of Lending Practices (cont.)

Limit prepayment penalty periods on variable rate mortgages.

Not engage in refinancing solicitations for first 24 months of loan.

Use independent loan closers.

Adopt policies to protect whistle blowers.

Appoint independent monitor to oversee compliance with settlement terms, at Ameriquest's expense.