EFFECTIVELY RESPONDING WHEN THE STATE ATTORNEYS GENERAL ARE ARRAYED AGAINST YOUR COMPANY

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When the call came, the state regulators were already in a full sprint and gathering steam. Once again, a company was the subject of a multi-state investigation by state Attorneys General and the situation had spun out of control.

Working with the company's general counsel, we developed a strategic plan designed to (i) control the collateral damage, (ii) ensure that no additional lawsuits were filed, and (iii) prevent more states from joining the multi-state task force.

Following successful motions to dismiss in targeted states, we opened the lines of communication with the key state Attorneys General. Subsequently, the matter was "resolved" to the satisfaction of the remaining state Attorneys General and the task force was disbanded.

During the post-crisis analysis, it struck me that the entire matter -- and most importantly the process by which the matter entered crisis mode -- was as foreign to the private company as trying to litigate overseas without associating local counsel.

In cases of this nature, the governing rules have not been reduced to writing but state Attorneys General nevertheless assiduously follow them. Such rules are not communicated in English, but in "bureaucratese," which can be more difficult to translate than a foreign language. Such cases are particularly difficult due to the (1) special nature of the office of the Attorney General, (2) unique tempo of national investigations or litigation undertaken by state Attorneys General, and (3) substantive legal issues that arise when states act collectively.

While multi-state investigations are difficult and cumbersome, they can be effectively managed and resolved, provided the proper steps are taken and your company resists the temptation to follow the traditional defensive procedures.

The State Attorney General's Office is Unique

The office of Attorney General is unique in that it occupies the intersection of law, policy and politics. The Attorneys General in each state are autonomous state actors, but they have increasingly worked together on national affairs.

After the Attorneys General's success in effectuating the national tobacco settlement, and subsequent actions, such as the multi-state case against Microsoft, they have created a model of advocacy that can drive public policy through actual or threatened litigation. In this new state-based national regulatory environment, a company must adopt a forward leaning position, which in many cases is contrary to corporate tradition, particularly as it relates to multi-state investigations and/or litigation.

Many articles liken the state Attorney General to an aggressive plaintiffs' attorney, but this is simply not true. Unlike traditional wide-scale litigation matters driven by the predictable practices and goals of the plaintiffs' bar, cases involving state Attorneys General are wholly special, both in tempo and substance.

While a garden-variety class action announces itself with the traditional filings and notices, a regulatory dispute with a state may start with a simple phone call asking for innocuous documents. From there, a general counsel will spend a considerable amount of time providing information and answering questions in the hopes that no formal investigation will be initiated.

In the past, a company could respond directly to such an inquiry and deal openly with the state Attorney General, with the expectation that the matter would be resolved once the government's concerns were addressed. This is no longer the case. With state Attorneys General working more closely together on a national scale to leverage their collective power, the states are, in many instances, more threatening than the most high profile plaintiffs' lawyer.

When the investigation is initiated or suit is filed, the Attorney General is usually operating under his authority to investigate violations of the state antitrust or consumer protection laws or, alternatively, pursuant to his parens patriae authority, such that the relief sought may vaguely mirror the relief sought in the traditional class action.

Moreover, in the view of the Attorney General, the action is warranted either because a violation is suspected or the laws are inadequate and collective pressure can bring about the desired change more expeditiously than the legislative process. That said the enforcement actions taken by Attorneys General should not be approached as just another class action.

Different Tempo

Let me dispel a myth. Regardless of the size of the company or the investigation, the first contact will not be made by the Attorney General, but by a member of his staff. Indeed, the first contact often takes the form of a short letter transmitting a "voluntary request for document," which bears a striking resemblance to what one might expect to receive during discovery.

At this point, counsel could simply elect not to respond or treat the state as one would plaintiffs' counsel in a class action

and respond with a flurry of objections designed to narrow the focus of the inquiry.

In multi-state investigations such a response would not be advised. As counsel for a company under investigation by the states, you must resist the urge to engage in the usual litigation dance wherein you force opposing counsel to seek information pursuant to a subpoena and raise every defense possible as early as possible. Taking the dance analogy one more step, in this dance, you must let the state Attorneys General lead.

Allowing the Attorney General to lead does not, however, mean rolling over, but it does require counsel to look before leaping into the customary mass litigation routine. Before assuming the worst, counsel should (i) determine the extent of the investigation, (ii) whether there are several states involved, and (iii) whether this is a matter that involves the antitrust or consumer protection section of an office.

The antitrust or consumer protection divisions of the state Attorneys General's offices generally coordinate multi-state actions. Defense of such actions must mirror the multi-state group and understand the goals or objectives of the group, which, unlike private lawyers, may go far beyond simply monetary recovery. Indeed, a large monetary verdict may be secondary to the goal of changing a company or industry practice.

For this reason, your company should always consider offering creative solutions to resolve the dispute, which, while not costly to your company, provide the Attorney General with sufficient "concessions" to end the investigation.

Develop A Global Litigation Strategy

If you are unsuccessful in your efforts to avoid litigation, you must develop a global litigation strategy predicated upon the applicable state law, and the peculiar traps of litigation involving a governmental entity, e.g., sovereign immunity, the inapplicability of estoppel, administrative pre-requisites, and presumptions favorable to the government.

When faced with litigation or the threat of litigation involving multiple states, you should also consider asserting a violation of the compact clause and the oft-ignored commerce clause.

The U.S. Constitution vests exclusive authority in Congress to regulate "commerce with foreign Nations, and among the several States." After the bar exam, most lawyers, including most litigators, tend to see the commerce clause only as an affirmative grant of power to Congress.

However, since 1949 in Hood & Sons v. Du Mond the Supreme Court has recognized the clause as containing a negative implication that prohibits states from unduly interfering with interstate commerce. Accordingly, serious consideration should be given to alleging that the multi-state efforts, when taken to an impermissible degree, constitute a violation of the commerce clause and the doctrine of separation of powers.

In cases where the states' cooperation has effectively created a national standard to which they seek to hold a company, a credible claim could be advanced that such coordination impermissibly regulates commerce that occurs outside of each state's respective border. Such closely coordinated action creates, for all practical purposes, a national standard, thereby usurping the proper role of Congress. Baldwin v. Seelig, 294 U.S. 511, 521 (1935) (states have no power to project their legislation into other states by regulating prices outside of the state).

Many times, multi-state regulatory action may seem to thwart the democratic process in which elected representatives enact laws pursuant to legislative procedures permitting public input and debate. A court could view such action as unlawfully circumventing the democratic process. This is particularly true when the relief requested would go beyond the states' authority to otherwise regulate commerce.

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