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EXPERT ANALYSIS

Surviving Settlement Provisions in Joint Defense Agreements

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Anyone who watches "Survivor" or "Game of Thrones" knows that alliances are critical. And while they may be necessary to endure from one day to the next, alliances are inevitably broken.

Co-defendants in antitrust cases can draw lessons from these shows. Like alliances, joint defense agreements help facilitate defendants' common interests. JDAs create efficiencies and cost savings by "present[ing] a pooling of resources, a healthy exchange of vital information, a united front against a common litigious foe, and the marshaling of legal talent and advice."[1]

Under the right circumstances, JDAs also serve the vital purpose of allowing defendants to realize those benefits without waiving privilege.[2]

Like the parties to any alliance, signatories to JDAs must recognize the real possibility that there will be a divergence of interests among defendants, most typically when one defendant begins settlement discussions. Alarm bells ring for non-settling defendants as they must decide whether to continue sharing information with a party talking settlement with plaintiffs, and whether to then try to beat the settling defendant and other defendants to the table to get the best deal.

When and how co-defendants must provide one another with notice of settlement is an often debated but rarely litigated issue germane to most antitrust cases. Counsel for the settling defendants also risk being in breach of contract if they do not abide by a JDA's provisions, including the notice-of-settlement terms.[3]

These considerations can be addressed by taking inventory of a client's incentives from the very beginning of a case and effectively drafting and understanding the plain language of a JDA.

CONSIDER INCENTIVES BEFORE DRAFTING

At the outset of litigation or investigation, it is important to have a defined vision for the case. Creating a litigation plan requires defining your ultimate goals and predicting how things may change over the course of the litigation.

Antitrust cases may last five or 10 years, and clients and counsel will need to live with the JDA they draft at the outset of the case. Counsel and clients must think about these questions prior to entering into a JDA:

- Is this the type of rare antitrust case that will proceed to trial, or will you pursue settlement immediately after an unsuccessful bid for dismissal?
- How will this litigation affect your business, and what external factors may encourage an early settlement? Perhaps your client plans to sell its business in the near future, or perhaps one of the co-defendants is facing financial trouble. What is the client's appetite for the inherent risks and exposure to a potentially large damages award?

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- In a multi-defendant conspiracy lawsuit, do plaintiffs view your client as a "core member" or a fringe player? Will plaintiffs try to drive a wedge between your client and its co-defendants?
- What is your client's business relationship with its co-defendants? They may be fierce rivals. Could you envision one of your client's co-defendants "turning" and cooperating with the plaintiffs? Or perhaps the co-defendants and your client work closely together and will rely on one another for continuing business that will last long after the case ends.
- Will the plaintiffs perceive your client as a key source of information?
- What does your initial assessment tell you about the evidence? Will the key "bad documents" be in your client's possession or reference its company?

DRAFTING THE NOTICE-OF-SETTLEMENT PROVISION

Notice-of-settlement provisions typically require a defendant that engages in settlement discussions or reaches a settlement with plaintiffs to provide notice to its co-defendants. The notice-of-settlement provision can be one of the thorniest issues for defense counsel and their clients in antitrust cases.

The decision of a co-defendant to settle can be particularly acrimonious in antitrust cases, as the antitrust laws saddle the remaining defendants with a disproportionate level of risk by virtue of treble damages and joint and several liability, with no right of contribution.

If your client's goal is to exit the case as soon as possible, you may prefer a cut-and-dried notice-of-settlement provision that simply obligates the settling party to provide notice to co-defendants upon entering into a settlement agreement.

If you or your client does not anticipate being the first defendant to settle, it makes sense to obligate your co-defendants to comply with strict notice provisions that require prompt (within 24 to 48 hours) written notice of each occurrence of settlement discussions, settlement demands or settlement offers.

Though it may be in your interest to continue to litigate the case to its conclusion, a strict notice provision also allows the opportunity to reassess your position and prepare for settlement discussions if you decide that you do not want to be the only remaining defendant.

A more down-the-middle option is to limit settlement notice to situations where the parties have taken substantial steps to discuss settlement (like selecting mediators or where the parties engage in a back-and-forth settlement negotiation).

Couching the provision in terms of "substantive" discussions may allow for exploratory discussions without triggering any notice obligation.

Suppose, however, that the lawsuit is a multi-district litigation involving multiple classes of plaintiffs and numerous opt-out cases. It is possible, and perhaps likely, that over the life of a case certain defendants will settle portions of cases. If a single JDA governs more than one case or class of plaintiffs, the defendants may include a provision requiring written assurances upon settlement that the settling defendant continues to share a common interest with the non-settling defendants.

COOPERATION OBLIGATIONS AND CONTINUING CONFIDENTIALITY

Most JDAs terminate a settling defendant's participation upon its settlement of the case. Non-settling defendants, however, will want to know if the settling defendant is now cooperating with plaintiffs, as that may affect their litigation strategy. To address that issue, defendants may wish to include language in the notice-of-settlement provision requiring that settling defendants inform the non-settling defendants if such cooperation with any plaintiff or governmental entity is part of any settlement or settlement discussion.

Toward the same end, when a party enters into negotiations to settle or cooperate (and thus terminate participation in the JDA), the JDA should make clear that the parties' confidentiality obligations remain ongoing with respect to information acquired as part of the joint defense agreement.

JUDGMENT SHARING AGREEMENTS

Parties can also contract to align their incentives by participating in judgment sharing agreements and avoid much of the gamesmanship often associated with notice-of-settlement provisions. Although the antitrust laws do not create a right of contribution, co-defendants can contract for it.

JSAs commonly result in smaller settlements because defendants have no incentive to settle early to avoid the hydraulic pressure of being the defendant left holding the bag.[4] Whereas early settlers might settle early to avoid that risk, JSAs remove that threat altogether.[5]

And because defendants in JSAs have each contracted to pay a defined percentage of total damages, group settlements are more likely and there is less of a chance that one defendant will begin settlement discussions before the others.

Defendants are often blindsided when a co-defendant settles, and bad blood may develop between the non-settling and settling defendants. Knowing this, plaintiffs employ whipsaw tactics to ratchet up the pressure on remaining defendants.

JDAs are crucial to mount a successful joint defense effort. Though the benefits are myriad, defendants are wise to consider the risks and incentives before signing any such agreement.

NOTES

[1] *Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003).

[2] *Id.*

[3] *See, e.g., United States v. Salvagno*, 306 F. Supp. 2d 258, 270-74 (N.D.N.Y. 2004) (detailing allegations that former co-defendant breached JDA).

[4] *See Christopher R. Leslie, Judgment-Sharing Agreements,* 58 Duke L.J. 747, 779 (2009) (noting that a JSA "shifts incentives, reduces the benefits of individual settlement, and thus reduces the pressure to expose cartel activity").

[5] *See id.* (describing JSAs "as a solution to the prisoner's dilemma").

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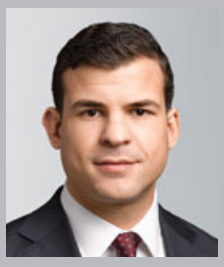

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