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FAQs For 3rd Parties In Gov't Merger Suits Amid Pandemic

By **Brian Rafkin** (September 3, 2020, 3:08 PM EDT)


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This is the scenario: You, an in-house counsel, see that the U.S. Department of Justice, Antitrust Division, or the Federal Trade Commission has sued to block a merger between two companies in your industry. Only a few weeks later, you receive a document or deposition subpoena from one of the parties. How do you respond? What is your involvement likely to be going forward?

When the government sues to block a merger on antitrust grounds, it is common for third parties to the transaction to become involved. Both the government and the merging parties seek documents, data and testimony from third parties such as customers, competitors, suppliers and other industry participants.[1]

This process can be frustrating for third parties, who are forced to devote time, energy and money to a matter in which they may have no interest. Adding to the pressure, the merger litigation process is lightning-fast, with trials typically beginning three to five months from the filing of the complaint.[2]

Moreover, the COVID-19 pandemic and resulting financial dislocations have pushed many in-house counsel to manage their matters even more efficiently than they already were doing. With the government promising continued active antitrust enforcement through the pandemic,[3] here are tips companies can use to effectively and efficiently resolve common issues that arise in merger litigation.

Confidentiality

My company produced documents to the government, submitted a declaration, or was deposed during the investigation phase. Will the merging parties get these materials?

Yes. The government will turn these materials over to outside counsel for the merging parties, at a minimum. Early in the case, the court will enter a protective order which governs the confidential treatment of these materials. Each protective order is different, so you should review it to determine whether the protections are sufficient. As discussed below, the most common issue is whether in-house counsel for the merging parties can access third parties' confidential information.

The defense is seeking a provision in the protective order that permits the merging parties' in-house counsel to access to my company's confidential materials. Can I oppose this?

Yes, third parties can intervene to oppose or modify protective order provisions that would permit in-house counsel access.[4] Some courts have granted in-house counsel access and others have not; the analysis is heavily fact-dependent.[5] Most recently, in the FTC v. Peabody Energy Corp. /Arch Coal Inc. litigation, the U.S. District Court for the District of Columbia granted access to one in-house counsel.[6]

In addition to seeking to exclude in-house counsel outright, you also can seek reasonable safeguards to prevent inadvertent disclosure.

For example, you can seek limitations on how and where in-house counsel accesses your materials — e.g., via a document viewing platform vs. receiving documents on their company email server — limitations on what materials in-house counsel can access — e.g., briefs and motions citing confidential materials vs. the confidential materials themselves — or outside counsel only or highly confidential designations for specific categories of documents.

For example, the D.C. district court in U.S. v. AB Electrolux /General Electric Co. granted in-house counsel access but imposed a number of safeguards like these.[7]

Many courts that grant in-house counsel access also mandate hefty fines for protective order violations. In FTC v. Peabody Energy/Arch Coal Inc., for example, the protective order provided for a $250,000 fine that is not reimbursable by the company in the event of any violations.[8]

The litigants are seeking to introduce my company's confidential information into evidence at trial. Can I protect this information from public disclosure?

Courts recognize the importance of protecting third parties' confidential information. The protective order covers confidential information provided in discovery, but it does not always cover confidentiality protections at trial. The court likely will establish a process whereby third parties can file motions seeking confidentiality protection over their materials at trial.

Recognizing the burdens on third parties, courts may waive pro hac requirements or local rules that normally require hiring local counsel. You should review the court's orders and communicate with the litigants' counsel to understand what the court's procedures will be.

One of the parties plans to call a business person from my company to testify at trial. Will our confidential information be presented in open court?

The judge will establish a process for presenting confidential information in court, such as closing the courtroom for confidential sessions or requiring that documents be discussed in such a way that the confidential information is not revealed.

However, some judges are stricter than others about what is confidential. For example, in U.S. v. AT&T Inc./Time Warner Inc. in the District of Columbia the judge conducted almost the entire trial in public.

In contrast, another judge in the same district adopted the more common approach of holding confidential sessions in FTC v. Evonik Industries AG/PeroxyChem Holding Co. You should review the court's orders and communicate with counsel for the side that is calling you as a witness to understand what the court's procedures will be.

Document Discovery

I received a ridiculously overbroad subpoena asking for all documents relating to numerous topics going back several years. And to make matters worse, the subpoena has a one-week deadline. Where do I even start?

There are three things to know up front. First, the subpoena is negotiable – indeed, you should negotiate it. Second, you may have flexibility to control how you respond to the subpoena. Third, the short deadline is artificial but is intended to communicate the need for speed.

Regarding subpoena negotiations, there is no one-size-fits-all approach. By speaking with counsel for the issuing party, you can often narrow the scope of many document requests to tailored requests for key documents. These key documents typically include strategic plans, bidding materials and analyses of the proposed transaction.

Narrowing the scope in such a way can allow for targeted collections as opposed to expansive forensic email and computer searches. Your ability to narrow the scope of the subpoena will depend on a number factors, including:

- The importance of the requested documents to the case;
- The importance of your client to the case, e.g., is it a key competitor or customer?;
- The importance of any requested data to the economic expert's analysis; and
- Whether your company complained about the transaction, provided a declaration or deposition during the investigation phase, or otherwise has a strong favorable or unfavorable view about the transaction.

Regarding the subpoena response, you have greater control over the response than in a typical private litigation or merger investigation. Due to the sheer speed of the case and competing demands on the litigants, the litigants often cannot micromanage your subpoena response.

Third parties to a merger litigation have more leeway to control the custodians searched — e.g., limiting to a few senior executives — search terms used, types of materials collected — e.g., email, computers, hard copy, text messages — responsiveness review methodology — e.g., contract attorney review, technology assisted review — and privilege review.

Regarding timing, it is important to emphasize that although you likely have more time than specified in the subpoena, the parties will still demand a tight turnaround that is far quicker than typical litigation. It is not uncommon to produce documents within a few weeks of the subpoena's issuance. You should speak with the issuing party to understand the true deadline.

My company does not want any involvement in this litigation. Can we quash the subpoena?

You can move to quash a subpoena on the grounds that it is not proportional to the needs of the case[9] or other grounds. But the motion is unlikely to succeed unless there are unique factors weighing in your favor. In addition, fighting the subpoena may be more time consuming and costly than simply responding. As discussed above, there are many ways to reduce the burden of responding.

Will the issuing party reimburse me for the cost of responding to the subpoena?

No. But there are a number of practical ways to minimize the expense of responding.

Depositions

I received a deposition notice specifying a location in Washington, D.C., or location other than where the company is located. Can I make the litigants come to me?

Yes. Under the Federal Rules of Civil Procedure, a witness can only be commanded to appear for deposition within 100 miles from where the witness resides, is employed or regularly transacts business.[10] Witnesses may voluntarily agree to travel to Washington, D.C., for efficiency reasons, e.g., if the witness's counsel and counsel for the litigants are all located there.

Due to COVID-19, the witness does not want to travel or be in the presence of other people. Can we do a remote deposition?

Yes. Due to COVID-19, many depositions have moved to remote video platforms like Zoom or LiveLitigation. In FTC v. Peabody/Arch Coal, for example, my firm represented a third-party witness in both a remote deposition and remote trial testimony. There are positives and negatives to using the technology that are worth an article of their own.

I don't want to submit my executive to a deposition. Can we provide a declaration instead?

Maybe, but it is unlikely. The simple reason is that if a third party submits a declaration for one side, then the other side likely will want to depose that third party.

There can be specific situations where the litigants may accept a declaration in lieu of a deposition. One is where a third party provides to the defense a counter-declaration that supplements, clarifies, contradicts or withdraws a declaration that the third party provided to the government during the investigation phase.

Another example is where the third party can provide factual information on a discrete subject such that a declaration is more efficient than a deposition.

Moreover, drafting a declaration may itself be quite burdensome. You should consider whether it is more efficient to accede to the deposition.

How long is the deposition? Do both sides ask questions?

Depositions are limited to no more than one day of seven hours.[11] The case management or scheduling order in the case will govern the deposition length and allocation of time, with both sides having the opportunity to ask questions. Many depositions of third parties do not last the full seven hours.

Trial

One side insists on calling a company executive as a trial witness. This process has already been time consuming and expensive. Do I have to show up at trial?

The antitrust laws provide for nationwide service of process of trial subpoenas in government-initiated merger litigations.[12] Merger trials typically are bench trials, which means that the judge plays the role of fact finder. Judges often prefer to assess witnesses' credibility in person and they therefore may order your executive travel to the court's jurisdiction to testify.

This is especially likely if your company executive is an important witness. For example, in FTC v. Evonik/PeroxyChem, the D.C. district court denied an important third party's motion to quash a trial subpoena and the witness ultimately testified at trial.[13] The D.C. district court in FTC v. Staples Inc. /Office Depot Inc. likewise ordered a critical witness from Amazon.com Inc. to testify in person at trial.[14]

Unlike with discovery, however, a third party can attempt to seek reimbursement for travel, lodging, meals and other costs associated with testifying.

Due to COVID, the witness does not want to travel or be in the presence of other people. Can we do remote trial testimony?

Yes. In the recent FTC v. Peabody/Arch Coal merger trial, a number of witnesses testified remotely. Courts are adjusting to these new circumstances, but each judge is different and it remains to be seen whether remote testimony will be permitted in the post-pandemic world to ease the burden on third parties.

While this FAQ provides some general considerations for resolving common issues that third parties to antitrust merger litigation face, each situation truly is different. Third parties must carefully contemplate their particular situation and develop a tailored strategy to achieve their strategic goal, whether that is to influence the outcome of the litigation or simply to minimize the burden of participating.

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Disclosure: The author represented DTE Energy Company, a third party customer witness, in FTC v. Peabody/Arch Coal, the seller, General Electric, in U.S. v. Electrolux/General Electric, and the seller, PeroxyChem, in FTC v. Evonik/PeroxyChem.

[1] Divestiture buyers are a special category third-party witness because they have an interest in the outcome of the litigation. This Q&A is general enough to cover divestiture buyers, but there are a number of specific considerations that warrant an article of its own.

[2] See Dechert, DAMITT Q1 2020: No COVID-19 Impact on Merger Investigations…Yet (Apr. 21, 2020), https://www.dechert.com/knowledge/publication/2020/4/damitt-q1-2020--no-impact-from-covid-19---yet.html (finding that the average time from complaint to start of trial for litigated merger challenges in 2019 was 131 days, or a little over four months).

[3] See, e.g., Ian Conner, Antitrust Review at the FTC: Staying the Course During Uncertain Times,

Federal Trade Commission (Apr. 6, 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain?utm_source=govdelivery.

[4] On rare occasions, merging parties may seek access for nonlawyer company executives, but there is no known case in which a court granted such access. This discussion therefore focuses on in-house counsel.

[5] See, e.g., FTC v. Sysco Corp., 83 F. Supp. 3d 1, 3-4 (D.D.C. 2015) (granting access to three in-house counsel and rejecting one in-house counsel who was "too close" to the company's "competitive decision-making").

[6] FTC v. Peabody Energy Corp., No. 4:20-cv-00317, Modified Protective Order ¶ 7 (Apr. 3, 2020).

[7] See United States v. AB Electrolux, No. 1:15-cv-01039, Amended Protective Order ¶ 10(g) (Sept. 15, 2015) (containing a number of restrictions on in-house counsel).

[8] See FTC v. Peabody Energy Corp., No. 4:20-cv-00317, Modified Protective Order ¶ 14 (Apr. 3, 2020) ("Any violation of this Order will be deemed a contempt and punished by a fine of $250,000. This fine will be paid individually by the person who violates this Order. Any violator may not seek to be reimbursed or indemnified for the payment the violator has made.").

[9] See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

[10] See id. at 45(c)(1)(A) ("A subpoena may command a person to attend a trial, hearing, or deposition only as follows…within 100 miles of where the person resides, is employed, or regularly transacts business in person.").

[11] See id. at 30(d)(1) ("Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours.").

[12] 15 U.S.C. § 23 ("In any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district.").

[13] See FTC v. RAG-Stiftung, No. 1:19-cv-02337, Minute Order (Nov. 7, 2019) (ordering the witness to appear at trial because his testimony was "among the most important in the case," because presenting a videotaped deposition "would deprive the Court of the opportunity to assess his credibility and question him," and because it was not an "undue burden.").

[14] See Jimmy Hoover, Judge Threatens Fines for Games in FTC Staples Merger Row, Law360 (Mar. 16, 2016), https://www.law360.com/articles/772285 (explaining that the judge refused to let a witness from Amazon testify remotely via video and "issued a court order demanding he [the Amazon witness] testify in person during the trial so he can ask him questions.").