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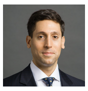
Delaware Chancery Court Enforces Specific Performance and Forces Merger to Close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A recent decision of the Delaware Court of Chancery reinforces the importance of deal certainty, particularly when it comes to efforts-based covenants in merger agreements. In *Desktop Metal Inc. v. Nano Dimension Ltd*., the Court considered whether a buyer breached its obligations by not diligently pursuing regulatory approvals. The case not only demonstrates the strength of a "reasonable best efforts" standard but also highlights the Court's willingness to enforce "hell-or-high-water provisions" when it has concerns that a buyer is stalling to avoid a closing.

Desktop Metal Inc. and Nano Dimension Ltd. are both public companies in the 3D printing industry. On July 2, 2024, Nano and Desktop entered into a Merger Agreement setting forth the terms by which Nano would acquire Desktop. Following execution of the Merger Agreement, both parties underwent substantial change.

An activist investor in Nano with observer representation on its board had opposed a transaction with Desktop from the outset. Following board approval of the deal and execution of the Merger Agreement, the investor launched a proxy contest and successfully replaced, or caused to resign, the full board of Nano and removed key Nano executives, through a campaign focused primarily on unwinding the Desktop deal. During merger negotiations, Desktop was concerned about its cashflow and therefore pushed Nano to agree to limited closing conditions and an accelerated timeline. After execution of the Merger Agreement, Desktop's cash position continued to decline and the company included a going concern qualification in its next 10-Q Quarterly Report disclosing "substantial doubt as to [its] ability to satisfy [its] obligations as they become due within one year from the date of filing".

The Court pointed out that as part of merger negotiations, speed and certainty of closing were critical to Desktop and, as a result, the parties carefully negotiated the regulatory approvals covenants and conditions in the Merger Agreement. Pursuant to the executed Merger Agreement, Nano was required to (1) use its "reasonable best efforts" to close the deal "as soon as reasonably possible," and (2) "use its reasonable best efforts to resolve any objection" from "any Governmental Entity", including taking all steps necessary to obtain approval from the Committee on Foreign Investment in the United States ("CFIUS"). As to this second term, often referred to as a "hell-or-high-water" provision, the Merger Agreement required Nano to take all actions necessary to obtain CFIUS approval, with one exception allowing Nano to terminate the agreement if CFIUS required Nano to cede control of 10% or more of Desktop's business based on revenues. This exception was further limited by a schedule of mitigation measures that Nano had already agreed to accept, regardless of their impact on control; a factor the Court pointed to as evidence that the parties deliberately negotiated a high bar on CFIUS efforts. The opinion notes that during negotiations, Desktop had offered Nano the option of a reverse termination fee if Nano decided not to close the transaction and accept mitigation measures imposed by CFIUS, but that the parties agreed instead on the "hell-or-high-water" efforts covenant included in the Merger Agreement.

When the transaction did not close on the expected timeline, Desktop filed a complaint in the Delaware Court of Chancery alleging that Nano did not comply with its obligations, including to use “reasonable best efforts” to obtain CFIUS approval, and requested an expedited trial to enforce the Merger Agreement.

After a two-day bench trial, the Court found that Nano breached its contractual obligations, noting that the new leadership at Nano had openly pledged to “scuttle the Desktop deal,” and deliberately stalled discussions with CFIUS, including a delay of 38 days to respond to minimal CFIUS comments on requested mitigation measures and subsequent delayed back and forth and introductions of new positions, on the part of Nano. As a result, the Court ordered specific performance, compelling Nano to consummate the merger.

The Court found that reasonable best efforts provisions require each party to “take all reasonable steps to solve problems and consummate the transaction” and to take “appropriate actions to keep the deal on track,” including forthright discussions between the parties. Further recognizing “the range of concessions to a reasonable-best-efforts provision that a seller may secure from a buyer,” the Court noted that “hell-or-high-water provisions are the most ‘extreme.’ They are the strongest possible commitment a party can make in a merger agreement with request to regulatory approval.” Further stressing the high level of efforts required by the best efforts covenant, the Court highlighted the fact that the parties specifically negotiated a 10% carveout to give Nano flexibility, but that this carveout was not implicated by the mitigation measures imposed by CFIUS.

While Nano argued it did not breach the CFIUS provision, much of Nano’s arguments focused on the worsening financial condition of Desktop as a reason for not consummating the transaction. However, the Court was not swayed citing to the fact that (1) Desktop’s cash issues were known and existed at signing and (2) Nano had negotiated numerous provisions in the Merger Agreement to protect it in the event Desktop’s condition substantially worsened, including contractual provisions addressing a potential bankruptcy of Desktop, the need for additional financing and limitations on Desktop’s spending, including a condition requiring Desktop to keep its cash burn below certain levels.

Nano argued that Desktop breached the bridge-loan provision in the Merger Agreement which obligated Nano to provide Desktop a multi-draw bridge loan up to $20 million if additional cash flow was necessary due to delays in regulatory approvals. Under the Merger Agreement, Desktop was obligated to work in good faith with Nano to finalize loan documentation no later than 30 days after signing the Merger Agreement. Nano claimed Desktop breached this by halting negotiations, but the Court found Desktop’s refusal reasonable and consistent with continued negotiation of the terms. The Court also noted it was “hard to make sense of Nano’s claim” since the bridge loan provision was included in the Merger Agreement to benefit Desktop, if it needed cash. Nano also claimed that Desktop breached the transaction-expenses covenant set forth in the Merger Agreement. This provision capped Desktop’s transaction-related costs at $15 million. While Desktop stayed under the cap, Nano argued litigation costs to enforce the merger should count, but the Court disagreed, finding those costs outside the covenant’s scope and rejecting an interpretation that would unfairly penalize Desktop for defending its rights.

Additionally, Nano argued that it had the right to terminate the deal because Desktop had entered “bankruptcy,” citing the company’s deteriorating financial condition. Under the Merger Agreement, “bankruptcy” included an admission in writing by Desktop that it could not pay its debts as they matured. The Court rejected Nano’s argument, stating that insolvency itself does not constitute “bankruptcy” under the agreement, noting that the parties had discussed a solvency representation during negotiations but agreed not to include one in the executed Merger Agreement. Furthermore, even if it did, the Court found that Nano “materially contributed” to Desktop’s financial distress in delaying regulatory approval.

This decision is an affirmation of Delaware’s commitment to deal certainty, especially when a buyer agrees to strong efforts-based covenants. Additionally, the case provides timely guidance on the interpretation of “hell-or-high-water” provisions, especially in the context of CFIUS. For parties negotiating cross-border deals, this ruling underscores the importance of clearly defining obligations and understanding the weight that Delaware courts will place on efforts provisions.

Finally, the swift timeline, from complaint to decision in just over three months, demonstrates the Chancery Court’s ability to handle disputes on an expedited basis when necessary.

Watch Out for Auto-Delete: Delaware Court of Chancery Sanctions Former Meta Officer for Deleting Personal Emails


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In a recent decision, *In re Facebook Inc. Derivative Litigation*,[1] Vice Chancellor J. Travis Laster of the Delaware Court of Chancery imposed litigation sanctions on a former officer and director of Meta Platforms, Inc. ("Meta") for deleting personal emails potentially relevant to claims concerning unauthorized third-party access of Facebook users' private information. The Court also determined that an outside director's six-month auto-delete policy on his personal emails was potentially sanctionable but for his lack of real-time involvement in the relevant events. The decision is a good reminder for companies, and their officers and directors, to take document preservation obligations seriously once potential litigation is reasonably anticipated, including identifying and suspending any customary deletion practices.

Background

The dispute in *In re Facebook* arose in derivative litigation based on data analytics company Cambridge Analytica's harvesting of private information from more than 50 million Facebook users in the 2010s. After the *New York Times* first broke news of the conduct in 2018, Meta (f/k/a Facebook Inc.) issued a document preservation notice (known as a "legal hold") to its officers and directors, including Sheryl Sandberg (then Chief Operating Officer), instructing recipients that they (1) "have a legal obligation to preserve and not destroy any pertinent evidence in [their] possession that could be relevant to this matter[]" and (2) "do not delete or destroy" documents.[2] Soon thereafter, plaintiffs (Meta stockholders) brought a derivative suit, alleging that the company's officers and directors (including Sandberg) breached their fiduciary duties by allowing the company to improperly sell user data and remove disclosures from privacy settings.[3] Jeffrey Zients, who served on the Special Committee that authorized the settlement with the Federal Trade Commission, joined the Facebook Inc. board shortly after the suit was filed. After he joined the board, Facebook Inc. added Zients to the legal hold that Sandberg received.[4]

The matter proceeded to discovery, during which defendants produced a voluminous amount of documents. In 2024, plaintiffs asked defendants about the preservation of electronically stored information ("ESI"), including emails. In response to plaintiffs' interrogatories, defendants disclosed that Sandberg used a personal Gmail account to discuss issues potentially pertinent to the matter and regularly deleted emails over 30-days old. Further, defendants could identify "no specific date" upon which the practice ceased.[5] Similarly, Zients's personal emails were subject to a six-month automatic deletion protocol during his service on the board of directors. Defendants revealed that no one collected emails from Zients's personal account, and thus, the emails were irreparably lost. After these revelations regarding Sandberg and Zients's failure to properly preserve ESI, the defendants "investigated whether the data could be obtained" from other sources and "examined the ESI that remained in an effort to draw inferences about what the lost ESI might have contained."[6]

Unable to confirm recovery of all of Sandberg and Zients's deleted emails, however, plaintiffs filed a motion asking the Court to impose curative sanctions against Sandberg and Zients for spoliation under Rule 37(e) of the Court of Chancery Rules. Specifically, plaintiffs requested that the Court: (1) increase Sandberg and Zients's "burden of proof for affirmative defenses[,]" from a "preponderance of the evidence" standard to "clear and convincing evidence"; (2) prevent them from testifying about information received from their personal email accounts as part of any defense in their case-in-chief at trial; (3) bar them from moving for summary judgment; and (4) award Plaintiffs incurred expenses in connection with the spoliation motion.[7]

The Court of Chancery's Decision

Vice Chancellor Laster granted plaintiffs' motion in part. To impose spoliation sanctions for failing to preserve ESI, the moving party must show that: (1) "the responding party had a duty to preserve the ESI"; (2) "the ESI is lost"; (3) "the loss is attributable to the responding party's failure to take reasonable steps to preserve the ESI"; and (4) the "requesting party suffered prejudice."[8]

As to the first factor, no party disputed that Sandberg and Zients were subject to a duty to preserve. As the Court explained, a party has an obligation to "preserve potentially relevant evidence as soon as the party either actually anticipates litigation or reasonably should have anticipated litigation."[9] "An organization's decision to circulate a [legal] hold[,]" as the company did in 2018 before the derivative suit was filed, is a "strong indication that a duty to preserve evidence exists, because it shows that the organization subjectively anticipates litigation."[10] Although "[a] party is not obligated to preserve every shred of paper, every e-mail or electronic document[,]" the duty to preserve extends to "personal emails" to the extent they are potentially relevant or reasonably likely to be requested during discovery.[11]

Likewise, the Court had no trouble concluding that the second factor—"the ESI is lost"—was met. On that point, the Court rejected defendants' argument that the messages from their personal accounts were not "lost" because they would neither have been responsive nor relevant. Although relevance may be considered in assessing "prejudice," the sole criterion here is whether all emails in question could be retrieved from other sources. Here, it was not possible to recover all of the deleted emails.

Nor, in the Court's view, did defendants take "reasonable steps" to identify, collect and preserve the ESI in question.[12] It is not enough, the Court explained, to circulate a legal hold. A company must also make sure recipients understand the legal hold's contents and abide by it. Notably, that includes "disabl[ing] auto-delete functions that would otherwise destroy emails or texts[]" and backing up information from personal devices before deleting the information.[13] In this case, the failure to identify, collect, and preserve Sandberg's and Zients's personal emails was particularly inexcusable, in the Court's estimation, because the legal hold specifically referenced "all correspondence (such as email, instant messages, Skype messages, WhatsApp messages, FB Messages, text messages, FB Group posts, and letters)."[14]

Finally, as to the fourth factor regarding "prejudice," the Court made a distinction between Sandberg and Zients. As to Sandberg, the Court held that plaintiffs met their burden of establishing the potential relevance of Sandberg's personal emails, and that plaintiffs were thus prejudiced by their deletion, as the subset of emails retrieved showed that she routinely conducted business via her Gmail account. The Court further noted that Sandberg admitted to selectively deleting emails, suggesting that her most sensitive exchanges were likely irretrievably lost. By contrast, Zients was an outside director who joined the board after the relevant time period. Although Zients also used his personal email account for company-related business and "put himself at risk of sanctions by maintaining the auto-delete feature on his personal email account," plaintiffs failed to demonstrate that any relevant evidence was lost from Zients's deletion practices.[15] Consequently, the Court imposed sanctions as to Sandberg—increasing her burden of proof on any affirmative defense to the "clear and convincing evidence" standard, and requiring her to pay plaintiffs' expenses in seeking sanctions—but declined to do so as to Zients.[16]

Takeaways

In re Facebook is a good reminder for companies—and their officers, directors, and employees—to take affirmative steps to preserve all potentially relevant documents, wherever they may be found, when potential litigation arises. Issuing a legal hold, while a best practice, is not sufficient by itself.[17] To minimize the risk of sanctions, the company and legal hold recipients must take affirmative steps to abide by the notice, including ensuring that ordinary data deletion practices (whether discretionary, as in Sandberg's case, or automatic, as in Zients's) are suspended. That applies not only to company-wide repositories of responsive documents and official methods of communication (such as company-issued email accounts), but also to personal email accounts, text messages, and other electronic forms of communication, to the extent that they are used to conduct relevant business.

Here, the company took proper action by sending a broad legal hold to knowledgeable officers and directors the moment litigation became reasonably anticipated, after publication of the 2018 *New York Times* article. It likewise acted appropriately by sharing the legal hold with a new director who joined soon thereafter. However, the company (guided by its legal advisors) should have gone a step further by thoroughly investigating the methods of electronic communication utilized by each recipient and ensuring that any deletion policies or practices applied to those communications were promptly suspended. For their part, Sandberg and Zients should have proactively sought to comply with the legal hold, including by putting a stop to their personal deletion practices and inquiring with counsel if they had any questions.

In re Facebook, it should be noted, does not pass judgment on an officer or director's ability to delete emails or personal data as a general matter. Unless otherwise proscribed by law, regulation, or company policy, there is nothing inherently problematic with the six-month auto-delete function utilized by Zients, for example. *In re Facebook*, however, stands for the proposition that continuing to delete data once litigation is reasonably anticipated, can have potentially serious repercussions down the road if litigation proceeds. Although the sanctions imposed on Sandberg were relatively mild (essentially, an increased burden of proof on any defenses she might raise, plus the other side's expenses), courts are typically afforded wide discretion in imposing sanctions, including dismissal and issuance of a default judgment in the most serious cases.[18] The best way to avoid such outcomes is a proactive approach to document preservation, in close consultation with counsel, when the prospect of litigation arises.

[1] Consolidated C.A. No. 2018-0307-JTL, 2025 WL 262194 (Del. Ch. Jan. 21, 2025).

[2] *Id.* at *3 (internal quotations and citations omitted). On March 22, 2018, Sandberg received a legal hold about documents pertaining to developer access to user data or Cambridge Analytica.

[3] In 2011, the Federal Trade Commission brought an action against Facebook Inc., alleging that it permitted third parties to operate applications on Facebook that allowed third parties to receive Facebook users' personal information. In 2012, Facebook Inc. settled the Federal Trade Commission charges by entering into a Consent Decree; the Consent Decree required Facebook Inc. to, among other things, obtain consumers' consent before enacting changes that supersede their privacy preferences.

[4] *See In re Facebook Inc. Deriv. Litig.*, Consolidated C.A. No. 2018-0307-JTL, at 2 (Del. Ch. Oct. 3, 2024) (Trans. ID 74655892).

[5] *In re Facebook Inc. Deriv. Litig.*, Consolidated C.A. No. 2018-0307-JTL, 2025 WL 262194, at *4-*5 (Del. Ch. Jan. 21, 2025) (internal quotations and citations

omitted).

[6] *Id.* at *5.

[7] *Id.* at *12.

[8] *Id.* at *6 (citing *Goldstein v. Denner*, 310 A.3d 548, 571 (Del. Ch. 2024)).

[9] *Id.* (internal quotations and citations omitted).

[10] *Id.* at *7 (internal quotations and citations omitted).

[11] *Id.* at *6-*7 (internal quotations and citations omitted).

[12] *Id.* at *9.

[13] *Id.* at *8 (internal quotations and citations omitted).

[14] *Id.* at *9 (internal quotations and citations omitted).

[15] *Id.* at *11.

[16] *Id.* at *12-*13.

[17] *See Goldstein*, 310 A.3d at 576-77; *see also*, *e.g.*, *DR Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 933 (N.D. Ill. 2021) ("The issuance of a litigation hold does not end counsel's duty in preserving ESI."); *Lokai Holdings LLC v. Twin Tiger USA LLC*, No. 15cv9363 (ALC) (DF), 2018 WL 1512055, at *11 (S.D.N.Y. 2018) (noting that defense counsel was "obligated to 'oversee compliance with [a] litigation hold, monitoring the party's efforts to retain and produce the relevant documents,' and to 'become fully familiar with [their] client's document retention policies, as well as the client's data retention architecture[.]'" (internal citation omitted)); *Youngevity Int'l v. Smith*, No. 3:16-cv-704-BTM-JLB, 2020 WL 7048687, at *3 (S.D. Cal. 2020) ("Here, the defendants' [legal] hold, consisting of a conference call informing unidentified defendants to preserve ESI relevant to litigation, is insufficient because after it occurred[,] the Relevant Defendants took no affirmative steps to preserve text messages, resulting in their deletion.").

[18] *See* Ct. Ch. R. 37(b) (allowing a court to impose multiple sanctions to cure prejudice, including entering default judgment); *see also*, *e.g.*, *In re Rinehardt*, 575 A.2d 1079, 1083 (Del. 1990) ("When a party announces that it will persist in its refusal to make discovery, . . . then a trial judge should not hesitate to impose an array of sanctions[,] including, if necessary, the ultimate sanction of a default judgment.").

Washington State Adopts First Broad State Antitrust Premerger Notification Act and Filing Requirement


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Effective July 27, 2025, any person that files a Hart-Scott-Rodino (HSR) Act Notification and Report Form (HSR Form) with the Federal Trade Commission (FTC) and the Department of Justice (DOJ) must also submit an electronic copy of the HSR Form to the Washington State Attorney General (Attorney General) if it meets any one of three additional jurisdictional tests. There is no filing fee associated with the filing.

Jurisdictional Requirements

Washington State's Antitrust Premerger Notification Act (the Act) sets forth three alternative jurisdictional tests that trigger the state notice requirement for persons subject to the HSR Act's filing requirements:

1. the person has its principal place of business in the State of Washington;
2. the person (or a person that it controls directly or indirectly) had annual net sales in the State of Washington of the goods or services involved in the transaction of at least 20% of the HSR Act's $126.4 million filing threshold (as adjusted annually); or
3. the person is a healthcare provider or provider organization (as defined in the Revised Code of Washington) conducting business in the State of Washington.

"Principal place of business" is not defined by the Act. It is not necessarily the state of incorporation or registration but in corporate law generally refers to the place where the corporation's highest level officers direct, control and coordinate the corporation's activities.

Filing Requirements, Confidentiality Protections, and Penalty for Failure to Comply

If the person has its principal place of business in the State of Washington, it must provide its HSR Filing (the HSR Form and the documentary attachments) to the Attorney General contemporaneously with its filing with the FTC and DOJ. If the person does not have its principal place of business in the State of Washington, it must still provide its HSR Form to the Attorney General at the time of its filing with the FTC and DOJ, but is not required to include the documentary attachments required by an HSR Filing. However, the Attorney General has the authority to require such persons to provide the HSR Filing within seven (7) days of a request.

The HSR Form, the HSR Filing, the fact of a notifiable transaction, and the notice to the Attorney General are confidential and not subject to public release under Washington's Freedom of Information Act. With a protective order, the HSR Form and HSR Filing may be used in an administrative or judicial proceeding related to the transaction. The Act allows the Attorney General to share an HSR Form, or HSR Filing, with any Attorney General of a state that has adopted the same or similar state premerger notification filing requirement, and contains similar confidentiality requirements. The Act does not allow for sharing with any competition agencies or other law enforcement agencies outside the United States; merging parties may grant such rights, however.

Any person that fails to comply with the state's notification requirement is subject to civil penalties of up to $10,000 per day, for each day out of compliance.

Impact of Washington State's Notification Requirement

The filing with the Attorney General does not initiate a waiting period or otherwise suspend closing of the notified transaction. The Act does not grant the Attorney General authority to issue a Request for Additional Information (a Second Request) but the Attorney General can use existing investigatory tools to require the production of documents and data and to compel testimony from any person that is a party to a transaction or any relevant third party.

The Growth of State Premerger Notification Requirements

States routinely join merger (and non-merger) investigations and litigations initiated by the DOJ and FTC. Examples of joint state/federal antitrust investigations include the recent challenge by the FTC and the states of Illinois and Minnesota to the acquisition of Surmodics by GTCR, LLC; the challenge by the DOJ and the states of California, Maryland, Massachusetts, New Jersey, New York, North Carolina, and the District of Columbia to the Jet Blue/Spirit Airlines merger; and the DOJ's monopolization suit against Google, which was joined by California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia.

States also routinely initiate their own merger (and non-merger) antitrust investigations, sometimes alone, and sometimes with other states. Recent significant matters are the 2019 multi-state challenge to the T-Mobile/Sprint merger and Colorado's recent separate challenge to the Kroger/Albertsons merger (which was also challenged by the FTC and eight (8) states, plus the District of Columbia, in a separate action).

Notwithstanding the important and growing role of the states in merger investigations, Washington is the first state to adopt the Uniform Antitrust Premerger Notification Act (Uniform Act), promulgated by the Uniform Law Commission in July 2024. More states seem likely to adopt broad premerger notification requirements in the future. California, Colorado, Hawaii, Nevada, Utah, West Virginia, and the District of Columbia are actively considering adoption of the Uniform Act. New York is again considering changes to the Donnelly Act (its general antitrust act) to include a premerger notification program, significantly more burdensome than the requirements of the Uniform Act. Maine already requires 90 day notice of consummation of an acquisition of the assets of a retail gasoline business or the acquisition of the assets of a heating oil business; this notification requirement initiated the FTC's and Maine's review of and challenge to Irving Oil's acquisition of petroleum storage terminals from Exxon.

Many States Require Premerger Notification for Healthcare Transactions

Many states have adopted premerger notification statutes for healthcare transactions. Washington's healthcare premerger notification statute requires sixty (60)-day pre-consummation notice of mergers, acquisitions, or contracting affiliations between two (2) or more hospitals, hospital systems, or provider organizations that operate within the state (subject to certain jurisdictional thresholds). More than a dozen other states have mandatory merger notification filing requirements for healthcare transactions, including California (for health care entities and retail drug firms), Colorado, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, and Vermont. The Texas legislature is considering a healthcare facility premerger notification requirement.

These healthcare-specific premerger notification requirements capture, and are intended to capture, transactions that are unlikely to require notification to the FTC and DOJ under the HSR Act. State and federal antitrust enforcement agencies and state legislatures are paying close attention to empirical literature which suggests transactions that do not meet the HSR Act's size-of-transaction filing requirement can have significant anticompetitive effects. The FTC's 2023 challenge to U.S. Anesthesia Partners "roll-up" of anesthesiology practices in Texas is an example of a post-acquisition challenge to small value acquisitions.

Commentary on State Merger Review

State Attorneys General are increasingly active participants in antitrust merger (and non-merger) investigations. Consideration of state-level general premerger notification requirements, and the broad, and relatively recent adoption of state-level premerger notification requirements for healthcare transactions are, and will be, instrumental tools for this more aggressive push at the state level. Budget cuts for the federal antitrust agencies and the future consolidation of federal antitrust enforcement at the DOJ, if either occurs, will undoubtedly lead state Attorneys General to increase their attention to mergers that may harm competition in local and state-wide markets. This presents both a risk and opportunity for merging parties.

Local concerns, including political concerns, will influence state Attorneys General much more so than the leadership of federal agencies. Although state Attorneys General have, overall, fewer resources to devote to antitrust matters—and often use their scare resources to duplicate work done by the federal agencies—they often are tasked with identifying and investigating the local effects of transactions with national scope, e.g., the merger of integrated refiners and retail gasoline stations. Or, in transactions reportable under the HSR Act, but with strictly local effects, the federal government may defer to their evaluation of the transaction to preserve federal agency resources. An Attorney General's conclusions as to whether harm will occur at the local level, or how to remedy that harm, can be determinative of whether relief will be sought and the scope of that relief.

State Attorneys General have historically been more open to remedying anticompetitive mergers through future price regulation, rather than divestiture of assets. Additionally, transactions that raise only intrastate concerns can be immunized from challenge by state legislative action; the choice to do so is often influenced by the position of the state's Attorney General (and the Governor). When choosing to immunize a transaction, the legislature often relies on the state Attorney General to oversee the merged entity, so as to limit the mergers anticompetitive effects. The states have been active in immunizing certain healthcare transactions from antitrust review and challenge; and the FTC has been active in petitioning states not to do so, including most recently in Indiana, New York, and Texas. In an initiative announced during the first Trump Administration, the FTC's Office of Policy Planning is studying the effects of such immunity grants.

State Attorneys General are elected officials, and as such are both politicians and enforcement officers. Antitrust merger practice at the state level often requires a different approach than at the federal level. Counsel and businesses not familiar with practicing before state Attorneys General operate at a significant disadvantage.