



ARTICLES

Of Lions And Lambs In The Time Of Coronavirus

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In the midst of the coronavirus pandemic, the Bureau of Competition of the Federal Trade Commission and Antitrust Division of the Department of Justice, are fostering something of a Peaceable Commercial Kingdom and loosening some restrictions on competitor collaborations.

Beginning in the 1830s, the Quaker artist Edward Hicks began to paint what would become a long series of paintings (over 60) on the theme of the Peaceable Kingdom. These paintings, based in part on scriptural references to a messianic age after a period of great strife, often feature predator and prey living in harmony. Now, in the midst of the coronavirus pandemic, the Bureau of Competition of the Federal Trade Commission and Antitrust Division of the Department of Justice, are fostering something of a Peaceable Commercial Kingdom and loosening some restrictions on competitor collaborations.

The agencies start from the proposition that addressing the spread of the coronavirus (COVID-19) “will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans’ health and safety.” Accordingly, they “wish to make clear to the public that there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws.”

The agencies’ action plan has both procedural and substantive components. First, they are committed to expediting COVID-19-related requests under the Antitrust Division’s [Business Review Process](#) and the Federal Trade Commission’s [Advisory Opinion Process](#) “and to resolve those addressing public health and safety within seven calendar days of receiving all necessary information.” In a related vein, the agencies —recognizing the efficacy of certain joint ventures in expanding capacity

and developing and delivering products and services—“will also work to expeditiously process filings under the National Cooperative Research and Production Act (as amended by the Standards Development Organization Advancement Act).

Second, the agencies recognize that even expedited procedures may not be fast enough in some situations, and so they emphasize that “many types of collaborative activities designed to improve the health and safety response to the pandemic would be consistent with the antitrust laws.” They draw particular attention to the following:

- When firms collaborate on research and development, this “efficiency-enhancing integration of economic activity” is typically procompetitive, as noted in the Federal Trade Commission and the U.S. Department of Justice, [Antitrust Guidelines for Collaborations Among Competitors](#) issued in 2000.
- Sharing technical know-how, rather than company-specific data about prices, wages, outputs, or costs, may be “necessary to achieve the procompetitive benefits of certain collaborations.” This and other important tips—which turn out to be uber relevant under this pandemic—are found in the Federal Trade Commission’s 2014 [Information Exchange: Be Reasonable](#).
- The agencies will not usually challenge health care providers’ development of suggested practice parameters—standards for patient management developed to assist providers in clinical decision-making—that also may provide useful information to patients, providers, and purchasers, as described in the agencies’ [Statement of Antitrust Enforcement Policy in Health Care](#).
- Most joint purchasing arrangements among health care providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, do not raise antitrust concerns.
- The *Noerr-Pennington* doctrine continues to immunize private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19, “insofar as those activities comprise mere solicitation of governmental action with respect to the passage and enforcement of laws.”

The agencies also acknowledge that “health care facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care” and that other “businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed.”

Additionally, both agencies stand ready to assist in coordinating with other branches of the federal government, “such as by working with the Department of Health and Human Services to effectuate the Defense

Production Act and the Pandemic and All-Hazards Preparedness Act, as appropriate, along with other agencies working to address COVID-19.” So will all go well in the Peaceable Kingdom? As one 19th century wag warned, “The lion and the lamb may possibly sometimes lie down together; but if you’ll notice carefully, when the lion gets up, the lamb is generally missing.”

Not surprisingly, then, the agencies issued some warnings of their own: “While many individuals and businesses have and will demonstrate extraordinary compassion and flexibility in responding to COVID-19, others may use it as an opportunity to subvert competition or prey on vulnerable Americans. The division and the bureau will not hesitate to seek to hold accountable those who do so.” They will be particularly on the lookout for “agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct.” And, as usual, they will look to ferret out hard-core violations like price fixing, bid rigging and market allocation.

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