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Joint State and Federal Enforcement of the Antitrust Laws: More Historic than Conflicting

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The concept of a statute to temper or eradicate the market power of trusts and cartels of businesses that agreed not to compete against one another first arose in state legislatures, notably Missouri and Kansas, prior to the passage of the Sherman Act in 1890. These statutes codified and expanded common law prohibitions on monopolies and restraints of trade that had their foundation in the common law of England.

The Sherman Act and the Clayton Act, passed in 1912, vested, in the federal government, the authority the states had exercised to break up trusts and monopolies. With the passage of these laws state enforcement waned until the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

That act provided funding for states to start, or restart, an antitrust enforcement unit. The event prompting such funding was the rejection of several classes where consumers were the ultimate victims of an antitrust violation, but the court refused to certify a class. The Hart-Scott-Rodino Act addressed that problem through two prongs, one funding state antitrust enforcement and another allowing Attorneys General to bring damages actions as *parens patriae* on behalf of natural person consumers for violations of the Sherman and Clayton Acts.

By the early 1980's most Attorneys General offices had antitrust sections. They initially brought actions to follow on a string of highway bid-rigging actions, or brought actions as *parens patriae* on behalf of consumers for local price-fixing conspiracies.[2] By the mid 1980's the Attorneys General began to organize themselves as a law firm without walls to bring a series of cases in an area of law that the federal government had ignored: resale price maintenance.[3]

While the federal agencies did not bring these actions, in part because the philosophy of the administration at the time viewed resale price maintenance as having benefits outweighing the harms of resale price maintenance,[4] there was not an overt conflict with the federal agencies because Resale Price Maintenance was *per se* illegal[5] and there was no federal action at all with which the state Attorneys General were contradicting.

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[2] *Pennsylvania v. Professional Land Surveyors of Erie County*, Civ. Action No. 85-99 (W.D. Pa., filed April 1, 1985)(price fixing of land survey prices by land surveyors); *Pennsylvania v. Blair County Beverage, Inc.*, Civ Action No. 87-2111 (W.D. Pa. filed October 6, 1987)(price fixing of beer sold to consumers by beer distributors).

[3] *In re Minolta Camera Products Antitrust Litig.*, 668 F. Supp. 456 (D. Md. 1987); *In re Panasonic Consumer Electronics Products Antitrust Litig.*, 1989 WL 63240 (S.D.N.Y. June 5, 1989).

[4] The states have consistently maintained that none of the articles purporting to identify efficiencies of Resale Price Maintenance contain any empirical evidence to support the existence of any efficiencies, let alone enough efficiencies to outweigh the competitive harm from Resale Price Maintenance.

[5] *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911) overruled by *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

That changed when the states began to involve themselves in merger enforcement and took on national market power cases that the federal agencies either ignored or had closed. In the merger arena, three states—California, New York, and Pennsylvania—all brought actions involving mergers where the federal agencies had closed their investigations or had reached a settlement.

California v. American Stores involved a merger of grocery stores chains in California where the Federal Trade Commission had reached a divestiture deal with the chains. Despite that deal, the California Attorney General challenged the transaction, even with the divestitures, as anticompetitive. The Attorney General's ability to obtain greater divestitures went all the way to the U.S. Supreme Court where the court held that California could obtain additional divestitures.

New York and Pennsylvania both challenged department store mergers where the FTC had taken no action. In both cases, one by court order and one by settlement, the states blocked the mergers as they impacted specific local markets. In the case of New York, the market was Rochester. In Pennsylvania, the market was Pittsburgh.

In the conduct arena, the states took on two national cases that impacted core state constituencies, local governments, and consumers. In *California v. Hartford*, the states challenged a conspiracy among reinsurers to boycott certain types of liability insurance, including the types of liability insurance purchased by the local governments. That case went to the Supreme Court on the question of the applicability of the federal antitrust laws to an extra-territorial conspiracy. Neither federal agency took any action on various allegations of a horizontal conspiracy to refuse to write certain types of insurance.

Primestar[6] was another action brought by the states, and later joined by the United States Department of Justice. That case involved an attempt by cable operators to both limit access to programming necessary for nascent high powered satellite television companies and to set up their own satellite operation to siphon off the supply of satellite customers.

These cases established that the state Attorneys General were going to bring actions in a large swath of areas, including areas that the federal agencies had almost exclusively occupied, like merger enforcement. These cases also brought cries of duplicative enforcement. [7]

In response, the Attorneys General and the federal agencies took two steps. Together they established a protocol for joint merger enforcement. They also established a compact for joint merger enforcement among the states setting forth a procedure for states to coordinate merger review among themselves.

Joint state and federal enforcement continues. In merger cases, coordination has become routine. The Attorneys General appoint lead states, which provide a coordinated point of contact between the states and the federal agencies as well as between the states and merging parties. In many cases, the merging parties distribute only a single set of documents to the states to distribute among themselves.

[6] *State of N.Y. by Abrams v. Primestar Partners, L.P.*, 1993 WL 720677 (S.D.N.Y. Sept. 14, 1993).

[7] David A. Zimmerman, *Why State Attorneys General Should Have A Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 EMORY L.J. 337 (1999).

While investigations usually run smoothly, litigation and settlement sometimes do not. In some cases, the states and the federal agencies have diverged on the approach to resolving a case. The two most prominent examples of this are *Microsoft*, where a group of states split off from the Department of Justice and their own state colleagues to litigate a different remedy.[8] The other case is *Verizon/MCI* where the New York Attorney General's office filed a Tunney Act comment criticizing the United States Department of Justice settlement in that merger case. [9]

The differences in litigation and settlement strategy stem from two factors. First, the states and the federal government are separate sovereigns, meaning a federal decision does not bind the states to make the same decision. Second, the state perspective often focuses on a local interest; how particular conduct affects the citizens or businesses of a state. Sometimes, the difference in local focus arises from the size of local markets. In retailing mergers, for example, where hundreds of local markets may be impacted, the federal focus is often on those markets where the largest amount of commerce is involved. The states may focus on markets with a smaller amount of commerce because consumers in small cities are entitled to the same protection under the antitrust laws as consumers in large markets.

Local impacts can involve an amount of commerce the federal agencies think are inconsequential. But that does not mean the amounts are inconsequential to the local population. Pennsylvania has taken two actions this year involving small hospital mergers that would have had distinct impacts on local populations. In the Geisinger/Shamokin merger, the impact addressed involved Medicare Advantage customers who would otherwise see their local hospital go out of network. In the Geisinger/Bloomsburg merger, the impact would have been on self-insured employers whose health plan had a contract with Bloomsburg, but not Geisinger, and who again risked having their local hospital go out of network. Also, when the local impact is especially focused on a key business in a state, the state can take a different view than the federal agencies.

More troubling to some commentators is when the states take a different path than the federal agencies because a case has a more significant impact on a local business. The principal example of this type of case is *Pennsylvania v. Russell Stover*, where Pennsylvania challenged Russell Stover's acquisition of its gift box chocolate competitor, Whitman Chocolates. Whitman was headquartered in Philadelphia and its operation would be moved out of state by the acquisition. Pennsylvania was unsuccessful in its attempt to block the transaction.[10]

On the whole, Federal/State cooperation and coordination are the norm and disagreements are the exception. Years of constant communication and coordination of investigations and litigation make the federal/state antitrust review process seamless to most parties.

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[8] Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004).

[9] Response to Public Comments on the Proposed Final Judgments in *United States v. SBC Communications, Inc. and AT&T Corp*. and *United States v. Verizon Communications Inc. and MCI, Inc*., 71 FR 17164-01.

[10] *Com. of Pa. v. Russell Stover Candies, Inc.*, CIV. A. 93-1972, 1993 WL 145264 (E.D. Pa. May 6, 1993).