CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
November 2012 (1)

State and Federal Antitrust Enforcement: Complementary or Just Confusing?

Elinor R. Hoffmann

State and Federal Antitrust Enforcement: Complementary or Just Confusing?

Elinor R. Hoffmann[1]

I. STATE AND FEDERAL ANTITRUST ENFORCEMENT: COMPLEMENTARY OR JUST CONFUSING?

Our federalist system and our belief in the social, political, and economic benefits of competition have spawned a multiplicity of antitrust enforcers. On the federal side, the Federal Trade Commission ("FTC") and the Department of Justice's Antitrust Division ("DOJ") have overlapping jurisdiction with regard to civil antitrust enforcement, and the DOJ has sole jurisdiction to prosecute criminal violations of federal antitrust law. In almost every state, the state Attorney General plays a leading role in antitrust enforcement and, in many states, the Attorney General has both civil and criminal authority. On the local level, District Attorneys may prosecute criminal violations of state antitrust law.

Beyond government enforcement, any "person"—individual, firm, or public entity—may sue to enjoin or recover treble damages caused by anticompetitive behavior, and private attorneys often represent classes of consumers who have suffered damage and who likely would not sue as individuals. These "private attorneys general" contribute to the legislative goal of maximizing enforcement of the antitrust laws.

From one point of view, our system looks inefficient and messy. Foreign enforcement officials sometimes quizzically wrinkle their brows, asking "how does this work?" (read, "how is this workable?"). But, history has taught us that this multi-faceted approach works quite well in the context of our competition driven system. Like most good outcomes, however, there are bumps in the road to success. This article focuses on just one type of collaboration—that between state Attorneys General ("state AGs") and the federal enforcement agencies. While the state Attorneys General and the federal enforcement agencies have cooperated across many sectors, and in many contexts, this article will illustrate the state/federal interface by focusing on two specific contexts: (1) collaborative civil investigations, particularly mergers; and (2) state civil investigations that are separate from, but parallel to, federal criminal investigations.

II. FEDERAL TRADE COMMISSION, DEPARTMENT OF JUSTICE, STATE ATTORNEYS GENERAL—COMPARE AND CONTRAST

An analysis of collaborative efforts requires an understanding of the similarities and differences in each agency's authority. The FTC is an administrative agency, headed by a bipartisan five-person Commission. The agency has both a consumer protection and a competition function, and its mission is to "prevent business practices that are anticompetitive or deceptive or unfair to consumers."[2] The Federal Trade Commission Act of 1914 confers broad

[1] Elinor R. Hoffmann, Assistant Attorney General, Office of the New York State Attorney General. The views expressed in the article are the author's own and should not be taken as the views of the Attorney General or any member of his staff.

[2] http://www.ftc.gov/ftc/about.shtm.

investigatory powers on the FTC, and the FTC may seek equitable relief, including injunctive relief, to prevent wrongful conduct and mergers. The FTC has only civil powers, but may bring an action either before an administrative law judge or in a court.

The DOJ enforces the Sherman Act and sections of the Clayton Act. It is part of the United States Department of Justice, which is headed by the Attorney General, a member of the president's cabinet. It has civil and criminal powers, and may seek equitable relief, including injunctive relief and disgorgement, as well as civil and criminal fines and jail sentences in appropriate cases.

Although it varies from state to state, the state AGs generally have all of the authority described above, and then some.[3] They enforce state competition and consumer protection laws, they have the power to seek damages on behalf of natural persons within their state under the federal antitrust laws and they may seek equitable relief under the federal antitrust laws. The State AGs are authorized to seek restitution and/or damages for injured consumers and businesses within their states, and often do. They also may seek state civil and criminal penalties under state antitrust and unfair and deceptive acts and practices statutes.

State AGs have broad pre-complaint investigatory authority under their respective state laws, and may subpoena documents and testimony to help them determine whether to litigate. States may sue in federal court under federal law, bringing pendent state claims, or they may sue in state court under state law. And while any single state AG may be resource constrained, the state AGs often pool financial and legal resources to investigate and prosecute misconduct that affects several or all states.

III. HOSPITAL MERGERS AND OTHER COLLABORATIVE CIVIL INVESTIGATIONS AND PROCEEDINGS

Some of the most fruitful collaborations between the FTC and one or more states have been in health care markets, including those involving hospitals, providers, and pharmaceuticals. Hospital mergers typically have posed difficult local issues ranging from market definition to state regulation. Frequently, a state AG and the FTC will conduct a joint investigation of a local hospital merger. As with most mergers, the parties would prefer a coordinated investigation, and readily provide waivers to give the states access to premerger filings and investigative materials. The states and the FTC may jointly interview payers, physicians, the parties, and the parties' competitors.

The FTC's Bureau of Economics, located in Washington, is involved from the inception, providing an essential resource—economic analysis—that most states do not have the expertise to do in-house. The data that is often most significant in hospital merger analysis is discharge data that state Departments of Health compile and maintain.

In the last five years, the FTC, together with a state, has sued to prevent a number of mergers, including one in Ohio (*Promedica*), one in Virginia (*Inova*), and one in Georgia (*Phoebe Putney*).

[3] Not every state has vested its AG with criminal authority to enforce state antitrust laws.

Inova and *Promedica* posed classic issues: Would the merger between competitors, in both cases not-for-profits, potentially increase prices and deprive consumers of the benefits of competition, thereby violating the antitrust laws? In 2008, the Commonwealth of Virginia and the FTC filed a joint complaint for a preliminary injunction to prevent Inova Health System, the largest hospital system in Northern Virginia, from acquiring its competitor, Prince William Health System. Contemporaneously, the FTC filed an administrative proceeding. One month later, the parties abandoned the transaction without need for further adjudication.

In *Promedica*, the FTC brought an administrative proceeding challenging the consummated acquisition of St. Luke's Hospital by a competitor, Promedica Health System. On the same day, the FTC and the State of Ohio filed a complaint in federal district court, seeking an order to hold separate pending the resolution of the administrative proceeding. The court granted the joint FTC/State of Ohio request.[4] Following a trial, an Administrative Law Judge issued a decision finding that the acquisition was anticompetitive and ordered divestiture. That decision was upheld after appeal to the five-member Federal Trade Commission.[5]

Phoebe Putney raised a different issue: Did the state action doctrine exempt an anticompetitive hospital merger from attack under the federal antitrust laws? The state action doctrine sits squarely at the intersection of state regulatory policy and federal competition policy; it protects anticompetitive conduct by a state agency or local government entity from antitrust challenge if the action is pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. And it protects anticompetitive conduct by a *private* actor if the conduct is pursuant to such a clearly articulated and affirmatively expressed state policy *and* is actively supervised by the state.

In *Phoebe Putney*, the FTC brought an administrative action to stop Phoebe Putney Health System's acquisition of its only competitor hospital in Albany, Georgia: Palmyra Park Hospital. Phoebe Putney's assets were owned by the Hospital Authority of Albany-Dougherty County, and the FTC alleged that Phoebe Putney used the relationship to evade antitrust scrutiny by invoking the State Action doctrine. As in the *Inova* and *Promedica* cases, the FTC and the Attorney General for the State of Georgia filed a complaint in federal district court to enjoin the acquisition pending the outcome of the FTC administrative proceeding. The district court refused to enjoin the merger on state action grounds, the Eleventh Circuit affirmed, and the case is now pending before the United States Supreme Court.

A key question before the Court is whether the State of Georgia's grant of corporate powers to the Hospital Authority is a clearly articulated and affirmatively expressed policy that would immunize an anticompetitive acquisition. The Attorney General of Georgia did not participate in the litigation beyond the District Court stage. However, the state AGs have not been silent—Illinois, joined by 19 other states, filed an *amicus* brief in support of the FTC's position in the Supreme Court.

This type of advocacy is not unusual. State AGs frequently engage in competition advocacy by filing *amicus* briefs in the United States Supreme Court and lower appellate courts,

[4] FTC and State of Ohio v. ProMedica Health System, 2011 WL 1219281 (N.D. Ohio) (March 29, 2011).

[5] In the Matter of ProMedica Health System, Inc., Docket No. 9346 (March 22, 2012).

sometimes in support of another enforcement agency but also in cases involving private litigants that raise issues of significance to the states. As *amici*, the states bring an important perspective to a court: they inform the court of how the resolution of legal issues before the court will affect state regulations, laws, and policies, and how they will impact local residents and businesses. In *Phoebe Putney*, for example, the *amici* states advised the Supreme Court that the position adopted by the Eleventh Circuit would both undermine the ability of states to delegate limited authority to local entities and impair antitrust protections.[6]

In the matters described above, the state AGs and federal enforcement authority sought the same relief—enjoining the merger in question. But that is not always the case. Even in cases where state and federal agencies work cooperatively, or in parallel, they may settle separately, or seek different types of relief. The DOJ, for example, challenged the merger of Long Island Jewish Medical Center and North Shore Health System. The New York Attorney General investigated the merger, but resolved its investigation with a settlement. The DOJ challenge, while unsuccessful, prompted a detailed and instructive court opinion that highlighted the many difficulties with market definition in hospital merger cases.[7]

Another important example was the *Microsoft* monopolization case, which the DOJ and a group of states tried together. The DOJ and half the states settled the case after the D.C. Circuit upheld liability.[8] (The other states pursued a remedies hearing.) The final judgments in the case had a five-year life. However, as the expiration date approached for a portion of the decree, various states moved for an extension, which Microsoft, supported by the DOJ, opposed. The Court granted the states' motion, and so, for several years thereafter, only the states, but not the DOJ, enforced parts of the final judgment.[9]

In cases involving retail services, such as department stores, supermarkets, and telecommunications, a state AG may seek more extensive or different relief from the relief sought by the federal authority investigating the same matter. These settlements are worked out separately between the relevant state and the parties. In one unusual case, a state challenged, albeit unsuccessfully, an Antitrust Division settlement with the parties to a telecommunications merger, arguing to the court charged with approving the settlement that the settlement did not go far enough.[10]

---

[6] BRIEF OF AMICI CURIAE STATES OF ILLINOIS et al IN SUPPORT OF PETITIONER, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-1160_petitioneramcu20states.authcheckdam.pdf. In another example of state advocacy during the current Supreme Court term, New York, joined by 30 other states, filed an *amicus* supporting a grant of *certiorari* to the Eleventh Circuit in FTC v. Watson, where the Eleventh Circuit had rejected the FTC's argument that an agreement between a brand and generic pharmaceutical manufacturer to delay generic competition should be viewed as presumptively unlawful. BRIEF FOR THE STATES OF NEW YORK et al AS AMICI CURIAE, *available at* http://www.ag.ny.gov/antitrust/amicus-curiae-filings-and-other-competition-advocacy.

[7] U.S. v. Long Island Jewish Medical Center, 983 F. Supp. 121 (E.D.N.Y. 1997).

[8] U.S. v. Microsoft Corp., 253 F. 3d 34 (D.C. Cir. 2001).

[9] *See* New York v. Microsoft Corp., 531 F. Supp. 2d 141 (D.D.C. 2008).

[10] United States v. SBC Communications, Inc., 489 F.Supp.2d 1 (D.D.C. 2007).

IV. PARALLEL FEDERAL CRIMINAL INVESTIGATIONS AND STATE CIVIL INVESTIGATIONS

There are some challenges associated with conducting joint state/federal civil investigations like the ones discussed above. But the challenges are relatively easy to manage, and the same factual evidence usually is available to both the state and federal authorities. Parallel criminal and civil investigations raise different and more complex issues. A state AG may not have access to all of the evidence that the DOJ obtains in a criminal investigation. But state AGs may conduct separate civil investigations of the same conduct that is the focus of criminal investigations, with the goal of obtaining monetary settlements or penalties that can be used to make restitution to public and private entities and consumers in their states.

Parallel state civil/federal criminal investigations of anticompetitive and fraudulent conduct in the municipal bond derivatives markets illustrate how this process can work well. Beginning in 2008, twenty-five states, led by Connecticut and New York, pooled resources to investigate financial institutions and brokers that had engaged in wrongful conduct in marketing municipal bond derivatives to public and not-for-profit entities throughout the country. The DOJ has conducted a criminal investigation of the same conduct since at least 2006, and the Securities and Exchange Commission ("SEC"), Office of the Comptroller of the Currency ("OCC"), and Internal Revenue Service ("IRS") also opened investigations some years prior to the multistate effort. The state AGs, using broad pre-complaint investigatory powers, issued subpoenas and examined responsive factual evidence and data. They retained economic consultants to assist in developing evidence of liability and damages. Concurrently, the DOJ proceeded with its criminal investigation, using the tools at its disposal. Several individuals pled guilty and cooperated with the federal authorities; others were convicted after trial. Both the state and federal investigations are ongoing.

These separate, but contemporaneous, investigations have borne fruit. In December 2010, the DOJ, OCC, SEC, IRS, and the state AGs made coordinated announcements of their respective settlements with Bank of America, which had self-reported its employees' wrongful conduct to the DOJ and was the first bank to offer its cooperation. Similar settlements followed: UBS (May 2011), JPMC (July 2011), Wachovia (Wells Fargo) (December 2011), and GEFCMS (December 2011). The multistate settlements alone made available over $275 million for distribution to public and not for profit entities that had been injured by unlawful conduct. Additional tens of millions were distributed through the SEC and OCC settlements. The DOJ has brought six individuals to trial so far, and obtained convictions of all of them. This result demonstrates that the federal and state agencies complement one another in punishing, deterring, and compensating for financial fraud, consistent with the goals of the President's Executive Order creating Financial Fraud Enforcement Task Force early in his first term.[11]

[11] Executive Order 13519 (November 17, 2009), *available a*t http://www.whitehouse.gov/the-press-office/executive-order-financial-fraud-enforcement-task-force. For a description of one such settlement, *see JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $228 Million to Federal and State Agencies* (DOJ Press release, July 7, 2011) *available at* http://www.justice.gov/opa/pr/2011/July/11-at-890.htm.

V. THE TAKE-AWAY

At the outset of this brief overview, allusion was made to our "competition-driven" system; at times, it seems that there is competition among the enforcement agencies themselves, and, to some, that has negative connotations. But the bigger picture sends another message. The state legislatures that wrote state antitrust laws, and the Congresses that wrote the federal antitrust laws, recognized that anticompetitive conduct may have sweeping effects on markets locally and nationally. Whether acting jointly or separately, state and federal enforcement agencies can use their respective tools and remedies to fashion comprehensive solutions to big problems.