STATES AND THE DEVELOPMENT OF THE ANTITRUST LAWS

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I. INTRODUCTION

Upon hearing any mention of the word "antitrust," most casual observers will immediately turn their thoughts to the federal government.

And certainly, for good reasons. Decades of enforcement, competition advocacy, business review letters, workshops, and scholarship, have cemented the Antitrust Division of the Department of Justice and the Federal Trade Commission as the quintessential stewards of the development of the federal antitrust laws.

But the picture would not be complete without a proper account of the role state antitrust enforcement has played in shaping the progression of the antitrust laws. Indeed, the states' willingness in many cases to step outside the parameters of the federal antitrust laws and to act under state law, has plowed a road for the pervasiveness of the antitrust laws in the everyday lives of our casual observers. This article explores some of the reasons the states have left an indelible mark on competition enforcement.

II. HUMBLE BEGINNINGS

For decades, the bedrock of antitrust enforcement has been the Sherman Act. Yet, it is a common misconception that the Sherman Act, enacted in 1890, was the first antitrust statute in the United States. In fact, the first codification of the antitrust laws came from the states a year before the enactment of the Sherman Act, with Kansas codifying the first state antitrust statute in March 1889. Texas legislation followed shortly thereafter.

It makes sense that the states were the first to act; at the turn of the 20th century, trade regulation was the unique province of the states. Through the common law doctrine of restraint of trade and corporation laws, states had several tools available to regulate corporate behavior. The states utilized these tools in a variety of actions to dissolve corporations for illegally creating a monopoly and engaging in illegal combinations. Although the realities of a global economy and the resources required to litigate antitrust cases have fueled the development and reach of the federal antitrust, one can see how the historical development of the antitrust laws set the stage for our system of antitrust federalism – and the states have seen fit to chart their own course at the appropriate times.

III. INDIRECT PURCHASERS

Perhaps one of the most significant developments in the antitrust laws has been the disparate treatment of direct and indirect purchasers. In *Illinois Brick*, the United States Supreme Court closed the courthouse doors to indirect purchaser plaintiffs seeking monetary recovery as a result of a Section 1 violation. And when recently presented with an opportunity to revisit or at least debate the wisdom of *Illinois Brick*, the Court held firm to its prior precedent. The wall of bricks remains intact.

Illinois Brick set the stage for a dramatic course correction under the state antitrust laws. In response to the Supreme Court's decision, states began enacting "*Brick*-repealer" statutes; laws that were intended to give indirect purchasers an avenue for recovery under state antitrust laws. When the constitutionality of these statutes was challenged, the Supreme Court, in *California v. Arc America*, 490 U.S. 93 (1989), made clear that the states were free to enact *Brick*-repealer statues because Congress had not preempted state regulation of anticompetitive conduct.

States have taken a variety of approaches to this issue over the years. Some states grant a private right of action to indirect purchasers.[2] Other states, like WA, permit indirect purchaser recovery, but only through an action by the State Attorney General (an "AG-only state").[3] In some states, the authority is statutory, while in other courts have interpreted state law to permit indirect purchaser actions.

Antitrust federalism indeed. By electing to depart from the federal antitrust law's bar on indirect purchaser recovery, the states re-affirmed a core principle of their role in a system of concurrent antitrust enforcement: consumers are of paramount concern for the states. The states are often the first, and in many cases the only, resources for consumers to bring their complaints to. The States have both common law and statutory authority to represent their consumers as *parens patriae* – a distinct form of a lawsuit that is an exercise of sovereignty, and generally not subject to the same procedural requirements of certifying a class.

As an AG-only state, representing our indirect purchaser consumers is a core and crucial function of the Washington State Attorney General's Office. In the last several years, the Antitrust Division has vigorously represented indirect purchaser consumers, recovering over $100 million for consumers and state agencies harmed through cartel conduct, and intervening in actions to protect our right to exclusively represent our indirect purchaser consumers.

IV. ANTITRUST AND LABOR

Over the last several years, there has been significant attention on the intersection of the antitrust laws and labor markets. While the antitrust analysis of labor markets is by no means a new or controversial subject – whether in a downstream or an input market, the antitrust laws play an important role in safeguarding competition on the merits – the states have been at the forefront of renewed interest in this space, both legislatively, and through enforcement actions.

In early 2018, the Antitrust Division of the Washington State Attorney General's Office initiated a review of no-poach clauses appearing in fast-food franchise agreements. No-poach provisions prohibit employees from moving among stores in the same franchise chain. Economists studying the use of no-poach provisions in franchise agreements have concluded that they reduce job opportunities for low-wage workers, put downward pressure on wages, and limit workers' ability to improve their working conditions. Our office determined that the use of these provisions has been pervasive in franchise agreements and over the course of the investigation, it expanded beyond fast-food and quick-serve franchises, to a broad array of business, including automotive services, child care, parcel services, tax preparation, to name a few.

As a result of this investigation, since early 2018, the Attorney General's Office has reached agreement with over 60 national franchisors requiring them to (1) immediately stop enforcing no-poach clauses in their existing franchise agreements; (2) refrain from including no-poach provisions in any new franchise disclosure documents; and (3) immediately amend existing franchise agreements in WA to remove these provisions. It is estimated that these agreements have benefitted over tens of thousands of workers at more than 2,500 locations nationwide.[4] In addition, in October 2018, we filed the first suit by a State Attorney General against a franchisor that refused to enter into a legally binding agreement regarding its use of no-poach provisions.[5] In early 2019, the judge denied a motion to dismiss the lawsuit, ruling that it could proceed on a *per se* and quick look theory.[6]

2 See, e.g. California Cartwright Act, Cal. Bus. & Prof. Code §16700 et seq.

3 See RCW 19.86.080.

4 Washington State Office of the Attorney General, News Release, *AG Ferguson's Initiative Ends No-poach Clauses at Five More Corporate Chains Nationwide* (May 14, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-ends-no-poach-clauses-five-more-corporate-chains.

5 Washington State Office of the Attorney General, News Release, *AG Ferguson announces major milestones in initiative to eliminate no-poach clauses nationwide, files lawsuit against Jersey Mike's* (October 15, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-major-milestones-initiative-eliminate-no-poach-clauses.

6 Washington State Office of the Attorney General, News Release, *Judge rejects Jersey Mike's motion to dismiss AG Ferguson's no-poach lawsuit* (January 28, 2019), https://www.atg.wa.gov/news/news-releases/judge-rejects-jersey-mike-s-motion-dismiss-ag-ferguson-s-no-poach-lawsuit.

The States have continued to press these issues. Recently, as part of the Federal Trade Commission's workshops on Antitrust and Consumer Protection in the 21st century, a collation of 18 states sent a comment to the FTC on antitrust and labor issues. In that comment, the States have provided a series of recommendations on developing further insight into analyzing labor markets under the antitrust laws, including incorporating labor monopsony concerns into merger review, the potential use of non-compete agreements to entrench monopoly power, and possible use of the FTC's Section 5 authority to prohibit no-poach and non-compete agreements.

On a separate front, many states have enacted or are actively considering legislation specifically targeting anticompetitive conduct in labor markets. For example, in the last three years, at least five states, including Washington, have passed laws banning or limiting the use of non-compete agreements, and at least two are actively exploring it.

The chapter on antitrust and labor issues is still being written, with much work left to do. We will likely continue to see new and significant developments in this rapidly evolving area.

V. ACTING SEPARATELY FROM THE FEDERAL ENFORCERS

As sovereigns, the states retain authority to act independent of one another and the federal government. The states have the authority to enforce the federal antitrust laws, and virtually every state has enacted some form of antitrust or competition law. Their potential to do so is particularly potent and meaningful as antitrust enforcers and the states have a long history of acting independently of the federal enforcers when necessary.

A. The Microsoft Litigation

While the *Microsoft* case has been described as a model of federal-state cooperation, it is also an important example of the states' willingness and ability to litigate cases without the federal enforcers. Our casual observer from earlier will almost certainly remember that the federal government sued Microsoft to break up their monopoly on the browser market. That same casual observer might express surprise at being told that 20 States also sued Microsoft on the very same day in a separate complaint, based on a largely separate investigation designed to allow the states to proceed independently if DOJ did not file litigation. That casual observer might also be surprised to learn that, in 2008, when a portion of the Final Judgment was due to expire, the states filed a motion to extend the Final Judgment, which was opposed by the DOJ and Microsoft. The Court granted the States' request to extend the consent decree by an additional 18 months, and it was enforced solely by the states for the remainder of the decree period.

B. California v. Valero.

In June 2017, the State of California filed suit in the Northern District of California to enjoin Valero's proposed acquisition of two Northern California petroleum storage and distribution terminals from Plains All America Pipeline. Among other things, California alleged that the transaction was anticompetitive because it would result in several critical petroleum terminals being operated by refiners that could reduce competitor access to the terminal hub, resulting in increased fuel prices. Although the judge denied California's request for a preliminary injunction, in a written order, the judge largely agreed with California's competitive concerns and expressed skepticism over Valero's claims. After several months, the parties announced that they were abandoning the proposed transaction.

Notably, the *Valero* matter began as a joint investigation between California and the Federal Trade Commission. The FTC ultimately decided to close its investigation with no action, leaving California with the choice of whether to follow suit or to proceed further on its own. Faced with a transaction that raised significant local competitive concerns, California opted to take action, and was ultimately successful. *Valero* is but one example of state enforcers bringing cases when the federal agencies decline to do so.

C. State of Washington v. Franciscan

In August 2017, the Washington State Attorney General's Office filed suit against CHI Franciscan, alleging that two non-HSR-reportable, consummated healthcare transactions violated federal and state antitrust laws.

In 2016, CHI Franciscan acquired WestSound Orthopaedics, a seven-physician orthopedic practice, and entered into a Professional Services Agreement ("PSA") with The Doctors Clinic, a multi-specialty practice with more than 50 physicians, under which The Doctors Clinic remained a separate entity but joined CHI Franciscan's payer contracts in seven locations throughout the relevant geographic market. Washington alleged that the acquisition of WestSound Orthopaedics substantially lessened competition in orthopedic physician services, and that the PSA constituted a price-fixing agreement because it amounted to joint negotiation of reimbursement rates between competitors. The parties resolved the litigation 5 days before trial through a Consent Decree providing for both retrospective and prospective relief to remedy the anticompetitive effects alleged in the state's complaint.

Like California's *Valero* case, *Franciscan* is a recent example of state enforcers proceeding without the involvement of the federal agencies. Indeed, and in contrast to *Valero*, the transactions at issue in *Franciscan* were non-reportable, and there was no involvement from the federal agencies at any point.

D. T-Mobile-Sprint Merger Lawsuit

Finally, the ability of the States to act independent of the federal enforcers is currently on full display in the recently-filed challenge to the proposed T-Mobile Sprint merger. On June 10, 2019, a group of 9 states and the District of Columbia, led by NY and CA, filed suit in the Southern District of New York seeking to enjoin the proposed action. Shortly thereafter, the complaint was amended to add four additional states. Regardless of how the litigation plays out, the lawsuit is a potent reminder of the state's authority to act independently of the federal government, even in mergers with nationwide impact.

At a minimum, these cases are an important reminder of the importance to engage with state antitrust enforcers early and often, just as parties do with the federal enforcers. Being proactive about understanding and addressing a state's competitive concerns may mean the difference between a transaction that clears or an enforcement action.

VI. CONCLUSION

It is no mystery that state antitrust enforcement faces obstacles that the federal government does not share. Nevertheless, as the brief sampling of matters in this article demonstrate, state antitrust enforcement remains vibrant, and states are prepared to bring enforcement actions when appropriate, whether acting jointly through coordinated investigations and litigation, or on their own, to obtain the appropriate competitive relief. This is a desirable result, and very much the intended outcome of Congress's intentional design for dual enforcement of the antitrust laws. The United States has long been viewed as a model for effective competition law enforcement, and advancing the development of the antitrust laws. Although the currents of concurrent antitrust enforcement have been rocky at times, history proves that the states have successfully charted a course that balances cooperative and complementary enforcement with the responsibility to act in the best interests of their state and consumers.

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