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# The State of State-Federal Cooperation at the Antitrust Division: A View from the Front Row

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## I. INTRODUCTION

Under the leadership of former Assistant Attorney General ("AAG") Christine Varney and Acting Assistant Attorneys General Sharis Pozen and Joseph Wayland, the U.S. Department of Justice Antitrust Division has renewed and expanded federal-state partnerships that are essential to many of the division's accomplishments. As AAG Varney stated in an early speech to the state Attorney General ("AG") antitrust community, the division is prepared to work "hand-in-glove with our partners in State Attorney General Offices."[2] For my part, having worked more than 20 years as a state antitrust enforcer at the Texas Attorney General's Office before coming to Washington, I know first-hand that effective federal-state coordination, like we have, does not happen accidently. In truth, it cannot occur without open communication, constant nurturing, and a large measure of mutual good will.

Of course, the focus on the importance of cooperation is not new for the Antitrust Division. Earlier this year, when the former AAG for Antitrust James Rill received the Department of Justice's ("DOJ's") John Sherman Award for lifetime accomplishment in antitrust, much of the praise was for Rill's contribution to the development of international cooperation mechanisms in antitrust law and publication of the first joint Department of Justice/Federal Trade Commission ("DOJ/FTC") horizontal merger guidelines. In his acceptance speech, Rill took pains to emphasize another important accomplishment: His work in the late 1980s and early 1990s developing protocols and mechanisms to promote federal-state cooperation in mergers, such as the National Association of Attorneys General ("NAAG") Voluntary Pre-Merger Disclosure Compact ("NAAG Merger Compact") and the Executive Working Group on Antitrust ("EWG-A").

Rill's emphasis was not misplaced and has been carried forward most recently by former AAG Varney and her successors Acting AAGs Sharis Pozen and Joseph Wayland. Today, effective federal-state cooperation is a given fact-of-life in the antitrust universe, integrally, and permanently woven into the fabric of antitrust enforcement.

The record of cooperation in antitrust between the states and the DOJ over the past three years illustrates the prescience of AAG Varney's words. It also demonstrates the importance and continuing vitality of the federal-state partnership. Many of the Antitrust Division's hardest won accomplishments during this time have been forged with the help of the states.

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[1] Special Counsel, State Relations and Agriculture, Antitrust Division, U.S. Department of Justice. The views and opinions expressed herein are not purported to reflect those of the United States Department of Justice.

[2] Christine A. Varney, *Antitrust Federalism: Enhancing Federal/State Cooperation* (Oct. 7, 2009), *available at* http://www.justice.gov/atr/public/speeches/250635.htm.

Having served for the past three years as Special Counsel for State Relations and Agriculture at the Antitrust Division, I am honored to offer my perspectives on the state of state-federal relations from my current position in the division. My view is that the record of the past three years is testament to, and the result of, a strong commitment from both the state AGs and the division to make the partnership work as well as it can for the benefit of competition and the American consumer.

## II. MECHANICS OF COOPERATION

There are many reasons why federal-state cooperation in the civil arena should be the order of the day.[3] One reason is that we in the federal antitrust agencies enjoy concurrent authority with the state AGs to enforce the federal antitrust laws. Because of this fact, care must be taken to ensure that we do not unwittingly get in each other's way or unnecessarily duplicate efforts. We work hard every day to avoid working at cross-purposes especially with regard to mergers, which tend to be more time-sensitive.

It is not surprising that, in recent years, the states have become more frequently involved in the antitrust review of mergers. In addition to the injunctive standing under Section 16 of the Clayton Act, the states have standing under the *parens patriae* provisions of the Clayton Act to seek to prevent mergers that cause harm to the general economy of the state. Yet, only the federal agencies receive Hart-Scott-Rodino Act ("HSR") pre-merger notification. So it may be necessary at times for the division to reach out to states to call their attention to mergers that may affect local markets, local customers, or state and local institutions disproportionately.

The framework for reviewing mergers jointly with the states involves very few rigid procedures but, instead, has many layers that help smooth the way. The foundation documents continue to be the NAAG Merger Compact and the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General ("Merger Coordination Protocol").

The NAAG Merger Compact, first enacted in 1987 and substantially revised in 1994, allows any merging party to deposit one copy of the HSR initial filing and all subsequent document productions with a specified liaison state or with the Chair of the NAAG Multistate Task Force. The liaison may then distribute copies of HSR materials to other signatories of the compact. A filing under the compact obviates the need to negotiate HSR confidentiality waivers with multiple states.[4]

The Merger Coordination Protocol, enacted in 1998, provides a general set of procedural ground rules and guidelines for the joint review of transactions where an HSR confidentiality waiver has been given by the merging parties.[5]

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[3] State-federal cooperation happens in criminal matters as well as civil through the criminal cross-designation program. Such coordination is beyond the scope of this article.

[4] NAT'L ASS'N OF ATTORNEYS GENERAL, VOLUNTARY PRE-MERGER COMPACT (1994), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,410.

[5] NAT'L ASS'N OF ATTORNEYS GENERAL, PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS BETWEEN THE FEDERAL ENFORCEMENT AGENCIES AND STATE ATTORNEYS GENERAL (1998), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,420.

Just as important as any protocol, we let each other know when things are not going as expected. Feedback comes frequently through various channels—through the AG-level NAAG Antitrust Committee, from division or state AG staff, through the NAAG Task Force Chair, and through meetings of the State-Federal Cooperation Committee.

I especially want to emphasize the work of the State-Federal Cooperation Committee. It meets monthly by telephone and includes representatives from DOJ, the FTC Bureau of Competition, and the state AGs. Its primary mission is to raise and resolve any issues in ongoing federal-state investigations.

One byproduct of years of cooperation between the states and DOJ in merger review—of immeasurable value to the public and business community—is the substantial convergence that has happened with respect to analytical approach. Even though the states may continue to consult the 1994 NAAG Horizontal Merger Guidelines for the purpose of joint merger reviews, analysis converges around the new federal horizontal merger guidelines for the purpose of joint merger reviews. Many states work on a variety of transactions yearly with both DOJ and the FTC. Consequently, they are fully conversant with how the federal agencies approach merger investigations; indeed, a growing number of the antitrust staff in the states are division or FTC Bureau of Competition alums and vice versa.

Cooperation is the watchword in the civil, non-merger area as well. The states have different statutory authority to return antitrust overcharges to consumers by virtue of the states' *parens patriae* authority under the Clayton Act. In addition, because states are frequently major purchasers of goods and services, in civil, non-merger matters the states tend to focus on different types of cases than the federal enforcers, such as actions based on federal criminal price-fixing convictions,[6] resale price maintenance cases,[7] and suits for overcharges that stem from the suppression of generic pharmaceuticals.[8]

The division's emphasis on deterring anticompetitive conduct in industries that directly impact consumers' pocketbooks such as communications, health care, financial services, and agriculture, fits well with historical state enforcement priorities. As a consequence, during the last three years, the states and DOJ have joined forces to litigate several high profile non-merger matters.

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[6] *See, e.g.*, Order Granting Final Approval, TFT-LCD (Flat Panel) Antitrust Litigation, U.S. District Court, Northern District of California, No. 07-md-01827 (07/11/12); Bank of America Settlement Agreement, *In re Municipal Derivatives Antitrust Litigation,* MDL No. 1950, Master Civil Action No. 08-2516 (S.D.N.Y.) (12/07/10) available at http://www.stateagmunisettlement.com.

[7] *See, e.g., New York ex rel. Vacco v. Reebok Int'l, Ltd.*, 903 F. Supp. 532, (S.D.N.Y. 1995), *Texas v. Zeneca, Inc.*, 1997-2 Trade Cas. (CCH) ¶71,888 (N.D. Tex. 1997) (Older cases settled before *Leegi*n); *See, also, People v. Bioelements Inc.,* File No. 10011659 (Cal. Super. Ct. Riverside County, filed Dec. 30, 2010) (injunction); *People v. DermaQuest,* Case No. RG10497526 (Cal. Super. Ct. Alameda County, filed Feb. 23, 2010) (injunction). (Recent *per se* cases brought post-*Leegin* under California state law).

[8] Settlement Agreement, TriCor Antitrust Litigation (*State of Florida et al v. Abbott Labs et al*), C.A. No. 08-155 (SLR)(12/31/09), *available at* http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/antitrust/TriCor_Settlement_Agreement2.pdf; In re: *Remeron End-Payor Antitrust Litig.*, No. 02-CV-2007, 2005 WL 2230314 (D.N.J. 2004).

## III. RECENT STATE-FEDERAL CASES

During the last three years, we have worked with large groups of states on matters national in scope and on local or regional matters with single or small groups of states.

We filed 15 civil cases either jointly with the states or in parallel actions after joint investigation, including three ongoing lawsuits. In addition, I am aware of more than two-dozen joint investigations involving state AGs during the last three years that did not result in lawsuits or settlements. Some of the more significant matters are highlighted:

### *A. AT&T/ T-Mobile*

Cooperation can be particularly valuable in large transactions. In 2011, DOJ and a group of states challenged AT&T's $39 billion proposed acquisition of T-Mobile resulting in AT&T abandoning the transaction four months after we filed suit. More than two-dozen states working closely with DOJ combined forces to examine the competitive effects of the proposed merger in scores of local and national markets. In this instance, the states quickly assumed responsibility for interviews of large, so-called enterprise customers, which typically seek a wireless carrier that, among other things, can provide services to employees, facilities, and devices that are geographically dispersed. The states also took responsibility for monitoring parallel state regulatory proceedings before administrative agencies, some of which had the potential to influence the ongoing federal review.

In the end, we concluded that the transaction would likely raise rates for wireless services important to businesses and consumers alike. California, Illinois, Massachusetts, New York, Ohio, Pennsylvania, Puerto Rico, and Washington joined DOJ in an amended complaint to block the merger. The states' presence in the suit showed important competitive concern at both the Federal and state levels.

### *B. TicketMaster/Live Nation*

Culminating in a suit and settlement in January 2010, DOJ and a large group of states investigated the $2.5 billion proposed merger between the dominant provider of primary concert ticketing services, Ticketmaster, and the largest concert tour promoter, Live Nation. Live Nation controlled a substantial number of concert venues and had recently rolled out its own ticketing service for venues it controlled.

The state AGs proved to be valuable partners in this investigation. They were instrumental in helping to develop an understanding of the nature of competition for primary ticketing services for major concert venues in various locations around the country. State AG involvement was also particularly useful in facilitating access to potential witnesses because many of most important concert venues were owned by states or municipalities but managed, promoted, or ticketed by the merging parties or their competitors. Nineteen states joined DOJ in filing an amended complaint and proposed final judgment. These states are also helping to monitor compliance with anti-retaliation and other provisions in the settlement.

### *C. Dean/Foremost*

In April 2009, Dean Foods acquired Foremost Farm's Consumer Products Division, including its dairy processing plants in Waukesha and De Pere, Wisconsin. In January 2010, DOJ, joined by Illinois, Wisconsin, and Michigan, sued to unwind the consummated merger

involving the processing and sale of fluid milk sold to schools, grocery stores, convenience stores, and other retailers in Wisconsin, northeastern Illinois, and the Upper Peninsula of Michigan —a matter of concern to consumers in those areas.

After roughly 15 months of litigation, in late March 2011 we entered into a settlement to resolve ongoing competitive concerns. The joint federal-state settlement required Dean to divest a significant milk processing plant in Waukesha and related assets that it acquired from Foremost, including the Golden Guernsey brand name. A separate settlement by the state of Michigan with Dean provides price caps for the next five years based on bids by Dean in 2010 for school milk in the Upper Peninsula.[9]

### *D. United Regional Health Care System*

In February 2011, following a closely coordinated joint investigation, DOJ and Texas entered into a comprehensive settlement with United Regional Health Care System, the dominant hospital system in Wichita Falls, Texas. The settlement prohibits United Regional from entering into contracts that improperly inhibit commercial health insurers from contracting with competitors of United Regional. DOJ and Texas alleged that United Regional used exclusionary contracts to maintain its monopoly for hospital services in violation of Section 2 of the Sherman Act, causing patients to pay higher prices for health care services.

This was the first case brought by DOJ since 1999 that challenged a monopolist with engaging in traditional unilateral anticompetitive conduct. Aside from the tactical expertise and knowledge of the market that Texas brought to the table, having the state attorney general aligned with us was important in this case because we anticipated that the hospital might argue that state legislation passed in 1997 immunized the conduct at issue, a proposition with which both we and the Texas AG disagreed.

## III. ACTIVE STATE-FEDERAL LITIGATION

In addition, a number of important state-federal matters brought during this period remain in active litigation:

### *A. Credit Cards*

DOJ and 17 states are litigating a case in the U.S. District Court for the Eastern District of New York challenging rules that American Express, MasterCard and Visa[10] have in place that prevent merchants from offering consumers discounts, rewards, and information about card costs, ultimately resulting in consumers paying more for their purchases. We also contend that the rules increase merchants' costs of doing business.

In October 2010, at the time that suit was filed, Visa and MasterCard settled under terms that would require the two companies to allow merchants to offer discounts, incentives, and

[9] Single states or groups of states occasionally negotiate relief supplemental to the terms provided in federal final judgments by side letter. *See, e.g.,* Agreement in Republic Services, Inc./Allied Waste Industries, Inc. merger; letter between D. Barclay, Sr. V.P. and Gen'l Counsel, Republic Services, Inc. and Kim Van Winkle, Ass't Att'y Gen'l, Texas Att'y Gen'l's Office (11/18/08), *available at* https://www.oag.state.tx.us/newspubs/releases/2008/120308mccommas waiver.pdf.

[10] More information is *available at* http://www.justice.gov/atr/cases/americanexpress.html.

information to consumers to encourage the use of less costly payment methods. According to the joint complaint, American Express continues to maintain rules that prohibit merchants from encouraging consumers to use lower-cost payment methods when making purchases. For example, the rules prohibit merchants from offering discounts or other incentives to consumers in order to encourage them to pay with credit cards that cost the merchant less to accept.

### B. eBooks

DOJ and a group of 33 states and territories continue to litigate parallel suits consolidated in federal district court in the Southern District of New York in April 2012, against Apple Inc. and two publishers, Macmillan and Penguin. At the time the lawsuits were filed, the department announced settlements with three other publishers, Hachette, HarperCollins, and Simon & Schuster and the states announced settlements with Hachette and HarperCollins. Roughly a month later, the states settled with Simon & Schuster. The settlements require these companies to grant retailers—such as Amazon and Barnes & Noble—the freedom to reduce the prices of their eBook titles. The parallel complaints, which will be tried jointly on the question of liability, allege that the publishers conspired to fix prices and prevent retail price competition, resulting in consumers paying millions of dollars more for their eBooks. Trial against the non-settling defendants is scheduled to begin in June, 2013.

The states, led by Texas, Connecticut, and Ohio, and joined in the settlement by 52 other states and territories, settled with the same three publishers on injunctive terms that mirror those negotiated by DOJ. In addition, the states used *parens patriae* authority to obtain a $69 million settlement fund to compensate eBook consumers nationally for the higher prices they were forced to pay as a result of the alleged conspiracy.

### C. Blue Cross and Blue Shield of Michigan

In October 2010, the Michigan Attorney General's office joined forces with DOJ to bring suit against the largest insurer in the state, Blue Cross and Blue Shield of Michigan. The lawsuit seeks to preclude Blue Cross from including "most favored nation" clauses ("MFNs") in its contracts with hospitals in Michigan, to prevent the enforcement of such clauses by Blue Cross, and to remove those clauses from existing contracts. We allege that Blue Cross contracted with more than half of the general acute care hospitals in Michigan to impose MFN and MFN-Plus agreements and that Blue Cross's practices harm competition by raising prices and inhibiting entry or expansion by other insurers. Trial is scheduled to begin in August, 2013.

## V. CONCLUSION

In short, the record speaks for itself: Federal-state cooperation is the norm, not the rarity, in the U.S. antitrust enforcement landscape today. We collaborate with our state partners because it makes practical and economic sense. Effective state-federal cooperation preserves scarce enforcement resources, protects consumers, minimizes the chance of conflicting outcomes, and promotes analytical convergence. When we do the hard work it takes to make such cooperation work well—as we have over the past three years—everyone benefits.