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State-Federal Relations

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I. INTRODUCTION

Antitrust enforcers in the offices of state attorneys general frequently find ourselves between a rock and a hard place when it comes to public perceptions of our work. State antitrust enforcement tends to be subject to criticism as misguided—or worse—whenever it diverges publicly from enforcement by the federal agencies. Yet when it doesn't diverge it is often labeled "redundant" in the pejorative sense of that term.[2] The reality is a good bit different from the perception in either case.

Much of the perception is a legacy of the historic 2001 split between the U.S. Department of Justice Antitrust Division ("DOJ") and state government prosecutors over appropriate remedies in the *Microsoft* case, which arose after an exemplary partnership throughout the liability phase of the case. The rupture led to two contemporaneous and highly visible tracks through the same courtroom in early 2002: a Tunney Act review of whether the DOJ settlement (joined by nine states) was in the public interest, and a six-week merits trial in which nine other states sought to prove that far stiffer remedies should be required. Judge Kollar-Kotelly's ultimate rulings rejected most of the state-requested remedies but added some terms to the DOJ settlement, thus largely conforming the state and federal results. The subsequent years of joint enforcement of the affirmative mandates of the *Microsoft* decree under active court supervision marked a return to smooth sailing between the state and federal agencies and close cooperation in executing their shared enforcement responsibilities.

The wave of criticism following the initial split, however, by then had taken on a life of its own. It was promptly formalized in the initial agenda of the Antitrust Modernization Commission, which reviewed and debated at length the history of dual state-federal enforcement and considered, but ultimately rejected, various proposals for partial preemption of state authority. Its conclusion, reached in 2007,[3] was that no changes to the institutional structure were warranted. The AMC did note, as others have, that further efforts by state and federal enforcers to harmonize their work would be salutary.

While *Microsoft* is an undeniable and extreme exception to their usual consistency, it is not the only time that state and federal agencies have differed in recent years. Typically, the differences can be viewed as healthy ones that foster the overall goal of preserving competition,

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[2] "Redundancy" has a far from pejorative meaning in other contexts. Civil engineers, for example, design "redundancy" into numerous structures and systems, both public and private, which are considered too important to fail.

[3] Antitrust Modernization Commission, final Report and Recommendations, submitted to Congress April 2, 2007.

and rarely manifest themselves as public disagreements over major policy issues. No generalizations are possible, however, without distinguishing between merger reviews and non-merger situations.

II. MERGERS

In 1990 California secured a key U.S. Supreme Court decision[4] fully confirming the right of state attorneys general to challenge mergers, and to seek divestiture as a merger remedy, in federal court. That set the stage for what is now a reasonably well-oiled mechanism for joint federal-state merger review, described in an explicit jointly developed protocol,[5] and understood and accepted by most merging parties.

The mechanism gears up infrequently, however, because state review is not required by law, and most mergers do not attract state scrutiny. Even large states like California review no more than four or five mergers a year, out of the 900-plus scrutinized by the DOJ and the FTC under Hart-Scott-Rodino. The choice by a state to investigate, and possibly challenge, a merger can be motivated by a variety of concerns, but certain themes can be viewed as common to most decisions by most states to embark on a merger investigation. These include impacts on individual rather than corporate consumers, impacts primarily at the local level, impacts on state or local government's own coffers, and impacts in areas of traditional state concern or responsibility. Even the states with the fewest enforcement resources thus may be seen stepping up to the plate when it comes to mergers arising in their healthcare, gasoline, grocery, department store, and waste disposal markets.

The state experience is more limited than that of the federal agencies but, like them, states have relied to a large degree on the market definitions and concentration formulas that the federal courts traditionally accept as determinants of market power. The NAAG Horizontal Merger Guidelines differ from the federal guidelines, though, in their explicit recognition that a merger may be considered anticompetitive when a submarket could be disproportionately impacted, a consideration that reflects the local-market, consumer-protection orientation of state attorneys general.

Possibly, had the trial in the ATT-T-Mobile merger gone forward in early 2012, it would have served to illustrate a mature collaboration of state and federal forces in a market that legitimately can be considered crucial to both. Although the scale and service offerings of the merging parties were national, the competition between them for customers was taking place in local markets, in some of which little consumer choice might have been left had the merger been consummated, especially at the low end of the economic spectrum. Further, the uneasy dependence of smaller wireless carriers on the wireline giants had become a topic of active concern to some state telecom regulators.

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[4] *California v. American Stores Co.*, 495 U.S. 271 (1990).

[5] Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (1998). The NAAG Voluntary Pre-Merger Disclosure Compact supplements the Protocol by providing that merging parties may reduce the burden of complying with multiple state subpoenas by producing a single set of required materials to the designated "liaison state." *See* www.naag.org/protocols.php for copies of both the Protocol and the Compact.

Notwithstanding the many examples of joint prosecutorial unity over the years, there have been a few exceptions. While no one thinks twice about a federal merger review that the states don't join, the antitrust community does sit up and take notice when states challenge a merger that the feds haven't. Most often, the result is a state settlement, as in the multistate Federated-May merger settlement in 2005 and several individual state hospital merger settlements over the last decade. But in the case of Monsanto's acquisition of Delta & Pine, several states, unhappy with the divestiture package that had been negotiated by the DOJ in the course of a joint investigation, took the unusual step of utilizing the ensuing Tunney Act proceedings to lay out their views of its inadequacies.

Rarely, a state goes to trial, as New York did to block the merger of the May Company and two other department stores in 1994, and as California did to block Sutter Health's acquisition of Summit Medical Center in Oakland in 1999. In each of those cases the federal agency had worked closely with the state in investigating potential merger impacts, and the fact that the federal agency had made a different decision inevitably created an additional hurdle for the state to try to overcome. Yet the authority of states to proceed independently has consistently been upheld, most strikingly when Puerto Rico took action under state law in 2002 to block WalMart's acquisition of Amigo grocery stores, in the face of a divestiture package the merging parties had already worked out with the FTC.

III. NON-MERGER CASES

The relationship between state and federal antitrust activities in prosecuting unlawful conduct is far less discernible, and perhaps commensurately more intriguing, than in merger review. Their laws are often different, their jurisdictions are different (especially in the criminal arena), their remedies may be different, and the range of markets to probe and policy choices to make for each is wide enough to encompass a good bit of divergence. Moreover, the state-federal protocol that applies to mergers does not automatically carry over to investigations of possible Section 1 or Section 2 violations. Still further, the states have a state court/state law option that may possess strategic value in a potentially multijurisdictional matter.[6] As a result, truly joint prosecutions are the exception rather than the rule.[7]

Remedies alone argue for different treatment, and usually lead to separate filings. The availability of monetary recompense for consumer harm under the *parens patriae* authority of state Attorneys General, especially when coupled with state *Brick* repealer statutes authorizing damage claims for indirect purchasers, has made for dissimilar prosecution priorities in numerous areas. For example, resale price maintenance cases were often prosecuted by multistate groups but rarely by federal enforcers even during the pre-*Leegin* years. States with their own criminal enforcement powers have thus far opted to pursue only civil remedies against international cartels targeted by the DOJ. Even in civil horizontal price-fixing cases that were investigated and filed jointly by state and federal enforcers, such as the pending *eBooks* litigation, it can be seen that the *parens patriae* monetary remedy pleaded by the states can lead defendants

[6] The intricacies of multistate cases under numerous state laws is a different and broader topic.

[7] Even when the agencies decide against joint prosecution, they may later support each other by filing *amicus* briefs. An early example was the *California v. Hartford* case filed by 18 states in 1988, with later *amicus* support from the DOJ before the Ninth Circuit in 1991 and the Supreme Court in 1993.

to treat state and federal claims quite differently when making choices on whether to settle or to litigate.

State enforcement responses to the *Leegin* decision also serve to illustrate the role that differences between state and federal competition law may play, with several state attorneys general and, most recently, the Kansas Supreme Court, asserting continued *per se* treatment under their respective state laws. In other arenas, such as insurance and more recently some aspects of healthcare, states have often opted for regulatory oversight in lieu of antitrust enforcement. The fact that most Circuits have accepted the view that the Class Action Fairness Act does not operate to force *parens patriae* cases brought under state laws into federal court could encourage attorneys general to utilize state courts more often to elaborate other differences that have heretofore been uncertain.

A very interesting blend of state and federal prosecution priorities as well as turf can be seen in the municipal bonds derivatives bid-rigging matter. The conduct, long under investigation by the DOJ, first came to public light with the filing of private class action cases several years ago. But many of the principal victims were state and local government entities. State Attorneys General opted to work closely with the DOJ on behalf of those entities, never filing their own lawsuit but ultimately entering into a series of joint state-federal settlements with major financial institutions over the last year that yielded substantial recoveries as a form of restitution for the affected agencies. Whether that very successful collaboration could become a model for future cases, or extend to other classes of victims, is not clear.

While differences in black-letter law, in investigative rules such as confidentiality of documents, in technology, and in resource capability present hurdles to be overcome each time federal and state enforcers partner with each other, progress has been made with each new experience. Both the FTC and the DOJ deserve much credit for their willingness in recent years to adjust their own procedures in order to explore the possibilities that joint state-federal enforcement may offer in appropriate situations. The states themselves have worked out many solutions in the course of their own purely multistate collaborations that carry over to state-federal matters. In addition, all of the agencies are developing better insights into the practical and, on occasion, the strategic possibilities inherent in joint exercise of their diverse powers and responsibilities.