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I. INTRODUCTION

For over two decades, the relationship between the state and federal antitrust enforcement authorities has varied from productive cooperative efforts to, at times, outright hostility. By most accounts, however, the relationship in the past few years has been quite productive both with respect to merger reviews and non-merger conduct investigations and lawsuits.

However, there are important nuances to the state-federal relationship that bear emphasis. First, over the past twenty-five years, the state enforcers and the federal agencies have created a system of joint merger review that can be quite efficient and likely to lead the multiple enforcers to a common end point if handled competently by the parties to the transaction. That said, there are often difficult issues that need to be carefully addressed at the beginning and at the end of merger reviews. For example, merging parties enjoy comprehensive confidentiality protection with the federal agencies under the Hart-Scott-Rodino regime. But parties often struggle with how to create or at least simulate this confidentiality regime with state enforcers in the face of expansive state public records laws and the absence, at least in many cases, of explicit airtight confidentiality protections in state law. Similarly, although the system has evolved to provide for fairly streamlined review of transactions, at the end of the review it is important to understand that individual states may and often do demand relief or conditions not demanded by the federal agency or other state involved.

Second, the procedural template governing joint state-federal merger reviews does not provide a controlling template for non-merger conduct cases but, it is fair to say, it provides at least a persuasive model. Both federal agencies have worked closely on several large conduct matters with groups of states. But just as in the case of joint merger reviews, confidentiality issues and differing settlement postures (*e.g.*, most famously, the *Microsoft* case) can complicate resolution of these matters. Moreover, the availability of more expansive remedies to state enforcers (*e.g.*, indirect purchaser damages) makes the joint litigation environment far more complicated than the merger review arena.

II. STATE ATTORNEYS GENERAL MERGER REVIEW AUTHORITY

The authority of the state attorneys general to investigate and challenge mergers under federal law is not open to serious question. For example, like any other person, states may bring

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actions for damages, injunctive relief, and fees under Sections 4 and 16 of the Clayton Act.[2] In addition, a state may act as *parens patriae* and seek injunctive relief to prevent harm to its general economy.[3] Because of this *parens patriae* status, states do not face the standing and antitrust injury problems that have limited private challenges to proposed merger transactions.

Over the past few decades, this authority to review mergers has been used particularly, but by no means exclusively, with respect to mergers that have localized effects on the day-to-day lives of the state's citizens. It has become, in fact, relatively rare for the affected state attorneys general not to become involved in the review of mergers, for example, between competing hospitals,[4] school bus companies, funeral homes, or retail markets such as supermarkets, department stores, and gasoline stations. States will also give priority to mergers that are national in scope where their proprietary and regulatory interests are impacted in some fashion.

Although a complete history of state merger enforcement is beyond the scope of this short article, a bit of history illustrates why many state enforcers view their role in merger enforcement as encompassing both national and local mergers. Having been largely dormant for years, state enforcement efforts escalated in the 1980s, in part as a response to a perceived reduction in enforcement by the Reagan Administration.[5] Faced with decreasing federal enforcement at a time when mergers were increasing in number and size, the states, through the National Association of Attorneys General ("NAAG"), issued *Horizontal Merger Guidelines* (*NAAG Merger Guidelines*) to help provide a framework for states to challenge mergers on their own.[6] Most states also adopted NAAG's *Voluntary Pre-Merger Disclosure Compact* ("*NAAG Compact*") in 1987, which was revised in 1994, with the goal of encouraging parties to submit a copy of their federal premerger filings to the states.[7]

State merger investigations can take many forms, as is the case with non-merger antitrust litigation. States sometimes proceed individually to address matters of unique concern to a particular state. In addition, state attorneys general frequently conduct investigations jointly with other states, a federal agency, private plaintiffs' counsel, or any combination of these. This multidimensional antitrust enforcement environment presents major opportunities and major

[2] *See* 15 U.S.C. §§ 15, 26; *California v. Am. Stores Co.*, 495 U.S. 271 (1990); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945).

[3] *Standard Oil*, 405 U.S. at 251 (establishing right to seek injunctive relief to remedy injury to the general economy of the state).

[4] *See, e.g., California v. Sutter Health System*, 84 F. Supp. 2d 1057 (N.D. Cal. 2000), *aff'd*, 217 F.3d 846 (9th Cir. 2000), *amended by* 130 F. Supp. 2d 1109 (N.D. Cal. 2001).

[5] For example, then New York Attorney General Robert Abrams observed at the time, "We have been witnessing the watchdog put to sleep. The states have had to fill the breach." Daniel B. Moskowitz, *Why the States Are Ganging Up on Some Giant Companies*, BUS. WK., Apr. 11, 1988, at 62, 62.

[6] NAT'L ASS'N OF ATTORNEYS GENERAL, HORIZONTAL MERGER GUIDELINES (1993), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,406 *and* Appendix B to this *Handbook* [hereinafter NAAG MERGER GUIDELINES].

[7] NAT'L ASS'N OF ATTORNEYS GENERAL, VOLUNTARY PRE-MERGER DISCLOSURE COMPACT (1994), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,410 *and* Appendix C to this *Handbook* [hereinafter NAAG COMPACT]. A list of the parties to the *NAAG Compact*, the NAAG resolutions adopting the *NAAG Compact*, a background statement, and the *NAAG Compact* itself are available a www.naag.org/assets/files/pdf/ 200612-antitrust-voluntary-premerger-disclosure-compact.pdf, and in the State Practices, Guidelines/Protocols section of the Web site of the State Enforcement Committee of the ABA Section of Antitrust Law, http://www.abanet.org/antitrust/committees/state-antitrust [hereinafter State Enforcement Committee Web site].

challenges for business counselors and those handling merger reviews. The states active in antitrust enforcement regularly confer with each other about matters that may be of mutual interest. Where a group of states are interested in reviewing a proposed transaction, a "working group" of interested states will be formed.

Once the decision to proceed with a joint review for a merger or with possible non-merger conduct litigation is made, the states will usually coordinate by: (1) forming a working group of state assistant attorneys general; (2) often seeking to coordinate with the federal agency that is reviewing the transaction; (3) closely coordinating discovery, experts, and motion practice among the states; (4) sharing costs and recoveries; and (5) coordinating settlement discussions to facilitate national distributions of damages and resolution of any state litigation against the defendants.

III. FEDERAL - STATE MERGER REVIEW

It is fair to generalize the relationship between the states and federal agencies during the 1980s, at least regarding joint merger review and joint antitrust litigation, as uniformly frosty, at best. By the late 1980s and early 1990s, efforts were made on both sides of the state-federal divide to improve the relationship and to streamline the joint reviews. Still, during the early to mid-1990s, there was occasional friction between the federal and state enforcers regarding merger reviews and conduct investigations. Although both sides attempted at the highest levels of the their offices to coordinate, the desire for cooperation on occasion did not always permeate the staff level at the federal agencies—often resulting in friction between the state and federal agencies. This led the states to propose to the federal agencies what ultimately was adopted in 1998 as the *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General ("Merger Protocol")*.[8]

The *Merger Protocol* establishes a process to facilitate cooperation in joint enforcement efforts, including the sharing of confidential documents that are obtained through state or federal enforcement actions, as well as coordination on strategic planning, document production, expert witnesses, and settlement negotiations. Moreover, although the *Protocol* by its terms covered only merger reviews, it served as an informal template for joint federal-state conduct cases like the Microsoft investigation and litigation that were well underway in 1998.

The *Merger Protocol* states that, to the extent that cooperation is lawful, the Department of Justice Antitrust Division ("DOJ") or the Federal Trade Commission ("FTC") and the state attorneys general will cooperate in analyzing each merger. Under the *Merger Protocol*, the investigating federal agency, with the consent of the merging parties, will give the states certain investigatory materials, such as those provided in response to second requests or CIDs. The states that receive the materials must agree to take appropriate steps to protect the confidentiality of the

[8] 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 *and* Appendix D to this *Handbook* [hereinafter MERGER PROTOCOL]. The *Merger Protocol* is also available in the State Practices, Guidelines/Protocols section of the State Enforcement Committee Web site, *supra* note 6.

materials. The *Merger Protocol* also contemplates consultation among the federal agencies and the states about the investigation and potential settlements.[9]

The spirit of cooperation that appears from the *Compact*, the *Merger Protocol,* and related formal and informal structures, is also reflected in the actual history of joint merger investigations. In the last ten years, the FTC, the DOJ, and state attorneys general have participated in joint efforts to investigate and challenge mergers in industries as varied as banking, bulk de-icing salt, health care, legal publishing, movie theaters, office supplies, ski resorts, and waste management. The states have not as yet reacted formally to the issuance of the revised Horizontal Merger Guidelines issued by the FTC and DOJ in 2010, but it is expected that the states' approach to merger review will continue to converge with the methodology used by the federal agencies.

Even more recently, the states have cooperated closely on merger reviews in industries as diverse as airlines, internet companies, and health care entities. For example, in January 2011, the FTC and the Ohio Attorney General's office brought an action to challenge the proposed merger of the ProMedica Health System with Saint Luke's Hospital in the Lucas County, Ohio market.[10] The FTC and Ohio successfully moved for a preliminary injunction blocking the merger until the FTC could review the merger. Subsequently, the FTC affirmed the ruling of the Administrative Law Judge blocking the merger.[11] Similarly, the FTC and the Georgia Attorney General challenged the transfer of Palmyra Park Hospital in Albany, Georgia to its only competitor, Phoebe-Putney. The district court dismissed the action on state action grounds and the 11th Circuit affirmed in a ruling that is now scheduled to be heard by the U.S. Supreme Court.[12]

IV. NON-MERGER CONDUCT MATTERS

Similarly, in recent years, the states and federal agencies have cooperated on several conduct investigations and litigations, although the number of such joint undertakings is significantly less than the number of joint merger reviews. Most recently, for example, the DOJ and two separate groups of states filed civil actions against Apple and several e-book publishers alleging that they conspired to fix the price of e-Books.[13] According to lead counsel for the states, "the states took a leading role investigating the conduct at issue, independent from, but coordinated with the Department of Justice. The states' investigation began in Texas in March 2010, following news reports of a widespread change in the industry distribution model [for e-Books]."[14] Although the state and federal agencies cooperated to a great extent, it appears that Texas was the driving force behind the investigation. Although this and other joint litigations

[9] MERGER PROTOCOL, *supra* note 7, ¶¶ III-IV.

[10] *FTC v. ProMedica Health Sys.*, No. 11-47 (N.D. Ohio filed Jan. 7, 2011).

[11] *See* http://www.ftc.gov/opa/2012/02/promedica.shtm.

[12] *FTC v. Phoebe Putney Health Sys.*, 793 F. Supp. 2d 1356, 1374-75 (M.D. Ga. 2011), *aff'd,* 663 F.3d 1369 (11th Cir. 2011).

[13] *Texas v. Penguin Grp. (USA) Inc.*, No. 12-3394 (S.D.N.Y. filed Apr. 11, 2012); *United States v. Apple Inc.*, No. 12-2826 (S.D.N.Y. filed Apr. 11, 2012); *In re: Electronic Books Antitrust Litig.*, No. 11-2293(S.D.N.Y. filed Dec. 9, 2012).

[14] Gabriel Hervey, "E-Books: The State Attorneys General Case," State Enforcement Committee Newsletter, of the ABA Section of Antitrust Law (Fall 2012), http://www.americanbar.org/groups/antitrust_law/committees.html.

benefit from the procedural template created by the *Merger Protocol*, they are not directly governed by it.

V. ISSUES REMAIN

The details of triggering and operating under the *Merger Protocol* are beyond the scope of this article. However, it is important to understand that one of the most basic aspects of joint reviews is that the merging parties grant investigating states access to the Hart-Scott-Rodino ("HSR") information and documents provided to the federal agency. This requires that the parties waive their HSR confidentiality rights to facilitate sharing with the states.[15] If the parties to a merger do not consent to the states' participation, the federal agencies cannot share HSR materials, but they can still discuss strategy with the states and share information obtained from third parties that have consented to disclosure to the states. The states, of course, can subpoena or issue civil investigative demands to the parties to obtain the same material the parties submitted to the federal authorities. Once the states have copies of the documents, the federal agencies will discuss those documents with the states. Because a refusal to grant HSR waivers does not preclude the states from conducting joint investigations with the FTC and the DOJ, most practitioners often consent to the waiver.

The states are open to negotiation on production issues. At times, depending on the makeup of the state working group, these discussions can be quite contentious. Some states take the position that they should not be required to agree to HSR-like confidentiality provisions where state law gives them authority to obtain information even though it does not provide confidentiality protection comparable to that provided by the HSR Act. Although these issues are resolved over time, their resolution requires careful evaluation of each participating state's ability to protect confidentiality and careful negotiations about sharing documents.

VI. NEGOTIATING SETTLEMENT ORDERS WITH FEDERAL AND STATE ENFORCERS

The *Merger Protocol*, while recognizing the sovereignty of states, also calls for the maximum cooperation possible between states and the federal government in settlements of merger cases.[16] However, the likelihood that state and federal enforcers will adopt divergent settlement postures is probably more likely than the likelihood that the states and federal agency will disagree on the conduct of the investigation itself.

Issues can sometimes arise when the federal agency commences settlement discussions without involving the states in the negotiating process, at least at the early stages, because of concerns with possible disclosure of settlement strategies. In other cases, an agreement by a state(s) to a resolution of a review that results in less relief than the federal agency might demand can undercut the federal agency's bargaining position. Indeed, a state settlement can hinder the federal agency's effort to seek a preliminary injunction against consummation. For example, when the DOJ challenged a Long Island, New York, hospital merger, the court cited New York's

[15] 15 U.S.C. § 18a(h); *see Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985) (applying confidentiality provisions to state requests for access); *Lieberman v. FTC*, 771 F.2d 32, 37-40 (2d Cir. 1985) (same).

[16] MERGER PROTOCOL, *supra* note 7, ¶ IV.

settlement with the hospitals when the court denied the DOJ's motion for a preliminary injunction.[17]

The opposite can also occur: States might seek more or different relief from the relief sought by the federal agencies. This was the case in *Wal-Mart Stores v. Rodriguez*,[18] in which Puerto Rico secured divestitures greater than those secured in an earlier settlement by the FTC. Similarly, although DOJ sought only minimal relief from the parties in the FirstGroup-Laidlaw school bus merger, eleven states obtained state-specific relief tailored to what they perceived to be the competitive problems in their particular states.

In addition, there have also been cases in recent years where the states have been somewhat passive in the negotiation process only to emerge at the end of the negotiation to insist on notice or enforcement rights. For example, in the Ticketmaster/LiveNation transaction, the states were provided limited notice rights but DOJ reserved most enforcement rights to itself. A more nuanced result was obtained by five states in DOJ's resolution of the Comcast/NBCU transaction where the settling states obtained some enforcement authority over the conduct of the parties but DOJ reserved exclusive authority over key divestiture and net neutrality provisions.

Given this varied settlement landscape, it is imperative that the merging parties have a clear understanding of the priorities and capabilities of the specific states involved in reviewing a transaction. First, it is not advisable for the parties to rely on apparent state acquiescence or non-involvement in negotiations between the parties and the federal agency reviewing the transaction. The states may have particularized concerns that they, rightly or wrongly, assume will be dealt with by the federal agency involved. Allowing these concerns to emerge at the eleventh hour can present a difficult and awkward challenge.

Second, as a matter of competent negotiation strategy, the parties should make a thorough assessment of the states' ability and intention to litigate as soon as possible. An accurate assessment enables the parties to calibrate how the states should be engaged in the settlement process. The degree to which the states appear able and willing to litigate to block a transaction will often affect the advisability of engaging them directly, with the federal agency involved, even if the federal agency is not enthusiastic about having that happen.

VII. CONCLUSION

The relationship of the states and federal antitrust agencies has evolved in a productive manner. Much of the inefficiency and posturing that characterized the 1980s and, to some extent, the 1990s, are history. However, joint federal-state merger reviews and litigations still pose

[17] *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 126 (E.D.N.Y. 1997). There, the DOJ challenged the merger of two hospital systems that had received the approval of New York's Attorney General after the hospitals agreed to cap prices that they charged for patient services and to return $100 million in savings to the community over a five-year period. The court denied the DOJ's request for a permanent injunction and directed judgment for the defendant hospitals. *See id.*

[18] 238 F. Supp. 2d 395 (D.P.R. 2002), *vacated*, 322 F.3d 747 (1st Cir. 2003). On appeal, Puerto Rico was supported by a 20-state amicus brief. Brief of Amici Curiae States in Support of Puerto Rico, *Wal-Mart Stores v. Rodriguez*, 322 F.3d 747 (1st Cir. 2003) (No. 02-2710), *available at* the Advocacy, Amici section of the State Enforcement Committee Web site, *supra* note 6.

significant challenges to practitioners ranging from confidentiality concerns to managing the negotiation process.