STATE ANTITRUST ENFORCEMENT: THE SAME AND NOT THE SAME

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I. INTRODUCTION

There has been much discussion in the past two years about the role of the states — that is, State Attorneys General — in antitrust enforcement. Some aspects are not controversial — for example, the right of a state to address a merger between two health care providers within a state.[2] And no one (save the defendant) questioned before the court the New York Attorney General's authority to seek a nationwide injunction under Section 2 of the Sherman Act to stop a monopoly maintenance scheme with national effects.[3] Views on the states' exercise of their independent authority under federal law are most sharply presented in cases where both federal and state authorities investigate the same matter, under federal law, and reach different conclusions.

Challenges to the states' authority to enforce the federal antitrust laws are rare because that authority is deeply rooted in the federal statutory scheme and in common law. But recently, some have asked: (1) whether the states should exercise that authority to make prosecutorial determinations that differ, in whole or in part, from those of the federal enforcement authorities; and (2) what deference should a federal court give to a federal agency's enforcement decision when considering a state claim relating to the same set of facts?

II. STATE ENFORCEMENT AUTHORITY: A BRIEF REVIEW

States have independent enforcement authority, and may seek equitable relief, as well as damages, pursuant to a comprehensive congressional scheme to strengthen antitrust enforcement. As to equitable relief, a State may bring suit under Section 16 of the Clayton Act (26 U.S.C. § 26) as a "person," either in its proprietary capacity or in its quasi sovereign *(parens patriae)* capacity to protect the economic interests of its citizens.[4] In a similar vein, Congress specifically gave states the right to sue as "parens patriae on behalf of natural persons residing in [their] State" for treble damages resulting from antitrust violations. 15 U.S.C. § 15c. To "reiterate congressional encouragement" for state enforcement, Congress included provisions that enable the states to recover attorneys' fees if they prevail. See H.R. Rep. No. 94-499 at 20 (1976); reprinted in 1976 U.S.C.C.A.N. 3572, 2589-90.

2 https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-chi-franciscan-will-pay-25-million-over-anti.

3 *New York v. Actavis PLC*, 787 F.3d 638 (2nd Cir. 2015).

4 See *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 447 (1945). Justice Douglas explained: "Georgia, suing for her own injuries, is a "person" within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. . . . But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. Those rights are of course based on federal laws." *Georgia v. Pennsylvania Railroad*, 324 U.S. at 447. (Citation omitted). He also observed that while Congress reserved criminal federal enforcement authority to the federal authority, it did not choose to limit civil enforcement authority in the same way.

In a recent essay, Colorado's Attorney General Phil Weiser characterized the 1976 statute, included in the Hart Scott Rodino Antitrust Improvements Act, as part of Congress's program of "cooperative federalism."[5] According to Attorney General Weiser, Congress's aim was to set a "floor" for enforcement, but permit the states to tailor standards or apply the laws more rigorously as they deemed appropriate. The states have a history of doing exactly that, both in litigated cases and in statutes.

- In *California v. American Stores*, for example, the State of California sued to enjoin a merger after the federal government (the Federal Trade Commission in that case) had reached a settlement permitting the merger to go forward conditioned on certain relief.[6] Acknowledging the independent authority of California, the Court emphasized that state antitrust enforcement "was an integral part of the congressional plan for protecting competition" and it "was in no sense an afterthought."[7]

- In the *Microsoft* litigation, 20 states sued Microsoft in a separate complaint on the same day that the U.S. Department of Justice sued. The cases were consolidated, tried together and appealed together. After the expiration of the Final Judgment settling that case for the DOJ and nine states (9 non-settling states plus the District of Columbia continued litigating), parts of the Final Judgment expired. The states moved for an extension of the Final Judgment; the DOJ and Microsoft opposed. The court granted the states' request for an 18-month extension.

- In 2014, New York brought suit seeking a preliminary injunction against Actavis (now Allergan), alleging that Actavis had violated Section 2 of the Sherman Act by engaging in conduct with the purpose and imminent effect of impeding lower cost competition in the market for an Alzheimer's drug. The district court granted the request for a nationwide preliminary injunction, and the Court of Appeals affirmed.[8]

- In 2017, California pursued a preliminary injunction to halt Valero Energy's acquisition of an independent petroleum distribution terminal after the FTC had dropped its challenge. California's request for preliminary injunction was unsuccessful, but only because in the court's view, California had not been able to show irreparable harm. The parties abandoned the merger.[9]

In a related vein, a number of states in the late 1970s and early 1980s enacted *Illinois Brick* "repealers," enabling indirect purchasers to recover damages under state antitrust laws, despite the inability of plaintiffs to do so under the federal antitrust laws as a result of the Supreme Court's ruling in *Illinois Brick Co. v. Illinois*.[10] At least since *California v. Arc America*,[11] it has been clear that state antitrust laws that permit more stringent enforcement are not pre-empted by federal law. While not raising the same issues as independent state enforcement of federal law, the long history of state antitrust enforcement under state law underscores the critical role that the states play in enforcing our competition policy.[12]

5 Prepared remarks: The Enduring Promise of Antitrust, available at https://coag.gov/blog-post/prepared-remarks-the-enduring-promise-of-antitrust/.

6 495 U.S. 271 (1990).

7 *Id.* at 284.

8 *New York v. Actavis PLC*, 787 F.3d 638 (2nd Cir. 2015).

9 https://oag.ca.gov/news/press-releases/attorney-general-becerra-valero%E2%80%99s-abandoned-takeover-independent-petroleum.

10 431 U.S. 720 (1977).

11 490 U.S. 93 (1989).

12 See generally, J. Mark, *States and the Development of the Antitrust Laws*, CPI Chronicle, August 2019; H. First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Washington L. Rev. 1004 (2001).

III. STATES HAVE THE RIGHT TO INDEPENDENTLY ENFORCE THE FEDERAL ANTITRUST LAWS: SHOULD THEY?

The answer, most state enforcers will tell you, is "it depends on the facts and circumstances." Consider, for example, two recent cases that starkly illustrate when and under what circumstances states might take action that differs from the action pursued by the federal enforcement authorities based on the same facts.

A. United/DaVita

UnitedHealth Group sought to acquire the clinical network operated by DaVita; the acquisition raised both horizontal concerns (the consolidation of UHG's clinical services with DaVita's clinical services in Nevada) and vertical concerns (the consolidation of UHG's Medicare Advantage insurance product with DaVita's clinical services in Colorado Springs, Colorado). The Federal Trade Commission and the Colorado Attorney General's office investigated. The FTC allowed the merger to go through, conditioned on a divestiture of certain assets in Nevada. Although recognizing the possibility that a vertical merger could have anticompetitive effects, the FTC declined to require a remedy in Colorado, which would have been predicated on a purely vertical theory, in light of litigation risk. As Commissioners Wilson and Phillips explained:

> a lawsuit based upon this evidence posed significant litigation risk. Among other things, the law on vertical mergers is relatively underdeveloped, and an adverse decision can impact enforcement in later cases that present clearer harm. Of course, all litigation presents risks, and sometimes the risks are worth taking. But, faced with a body of evidence of harm that was ambiguous in the first place, we cannot agree with our colleagues that this was a case on which to roll the dice.

The Colorado Attorney General's Office came to a different conclusion. That office decided to take the litigation risk and pursue an independent remedy that would benefit Coloradans, specifically Medicare Advantage patients in the Colorado Springs Area. The office filed suit in state court together with a consent judgment that increased the numbers of provider choices for Medicare Advantage patients, and ensured that Medicare Advantage patients could continue to access DaVita's providers even if insured by Humana, UHG's main competitor in the market. Two FTC Commissioners, Slaughter and Chopra, while expressing support for the Commission's decision on Nevada, wrote separately to outline why they also would have sought a remedy to help Colorado consumers, and to strongly endorse the efforts of the Colorado AG and state enforcement generally:

> Fortunately, the Attorney General of Colorado has taken action in an effort to address some of the harmful effects of the merger in a separate action. We hope all state attorneys general actively enforce the antitrust laws to protect their residents from harmful mergers and anticompetitive practices.[13]

B. T-Mobile/Sprint

In late April, 2018, the third and fourth largest mobile network operators ("MNOs"), T-Mobile and Sprint, announced a proposed merger that would reduce the number of MNOs in the United States from four to three. A group of states, led by New York and California, as well as the Department of Justice Antitrust Division, thoroughly investigated for over a year to determine whether the merger would be anticompetitive and thereby violate Section 7 of the Clayton Act. By the time the investigation had concluded, both the DOJ and the investigating states had determined that the merger, as originally proposed, would substantially reduce competition in mobile network operations. The DOJ and the states also agreed that neither the parties' predicted procompetitive benefits nor Sprint's alleged status as a "weakened competitor" would offset or justify the harms that were likely to flow from the merger.[14] But at that point, the DOJ's analysis and the states' analyses diverged. Specifically, the DOJ was persuaded that a package of remedies proposed by the parties would enable DISH Networks, a satellite company, to step into Sprint's shoes within a foreseeable period and restore the competition lost as a result of the merger. The states, after reviewing the parties' and Dish's submissions on the issue, disagreed. A group of states prepared to sue to stop the merger. The DOJ reached a compromise with the parties, agreeing to let the merger to proceed subject to a mix of structural and behavioral remedies.

13 The FTC's press release, linking the Wilson/Phillips and Chopra/Slaughter statements, can be found at https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition. FTC Chair Joseph Simons was recused. The Colorado AG's press release may be found at: https://coag.gov/press-releases/06-19-19/.

14 *New York v. Deutsche Telekom AG*, 1:19-cv-05434-VM-RWL (Amended Complaint) ECF Doc. 65, filed 06/25/19; *United States of America v. Deutsche Telekom AG*, Case 1:19-cv-02232-TJK (Complaint) ECF Doc. 1, filed 7/26/2019.

The litigating states (the "States") filed a lawsuit on June 11, 2019, in federal district court in New York, seeking to enjoin the merger. The DOJ proceeded to seek approval of its settlement, filing a Complaint and Final Proposed Judgement to initiate a Tunney Act proceeding in federal district court in Washington. The States' case went to trial in December 2019 before Judge Victor Marrero, who issued a decision in favor of defendants in February 2020.

On the last day of trial, the DOJ filed a Statement of Interest, urging Judge Marrerro to give "due weight and consideration" to the DOJ's decision not to challenge the merger in light of the remedy that DOJ had accepted. The DOJ explained that in its view, the litigating States' "strong interest in this merger [did] not justify their attempt to substitute their judgment" for that of the DOJ and the injunction barring the merger that the States sought therefore was not in the public interest.[15] The States responded, describing the established authority of the States to independently challenge anticompetitive conduct even when federal enforcement authorities and relevant regulatory agencies had declined to do so. They pointed out that a natural consequence of Congress's scheme of multiple antitrust enforcers is that "at times, different enforcers will reach different conclusions about competitive effects."[16]

Importantly, as the States emphasized, and as the earlier discussion of the *United/DaVita* matter illustrates, a prosecutorial decision not to challenge a merger is not the same as a decision that the merger is lawful. (State Response to DOJSOI at 7). Finding the DOJ- approved remedy to be seriously flawed, the States concluded that in the case of *T-Mobile/Sprint*, the likely anticompetitive effects of the merger would outweigh any potential benefits that the merging parties could achieve, and the federal government's conditions for approving the merger were not likely to mitigate those harms. Although the court ultimately denied the litigating States request for an injunction, Judge Marrero declined to simply defer to the DOJ's analysis and resolution. As he explained, "The deference that the Court accords to the DOJ and FCC turns on their familiarity with the telecommunications industry and their extensive conditioning of this particular transaction, rather than on any notion that they represent the national public interest more so than any state. . . . allowing states to bring *Section 7* actions is clearly "an integral part of the congressional plan for protecting competition." *Cal. v. Am.Stores, 495 U.S. 271, 284, 110 S. Ct. 1853, 109 L. Ed. 2d 240(1990)*; . . . What deference the Court accords to the federal regulators should not be taken as a denigration of Plaintiff States' . . . relative ability to vindicate the public interest they represent more generally."[17]

IV. CONCLUSION

It makes sense that after firms have evaluated the benefits and disadvantages of a merger or consolidation, and have taken the decision to move forward, they would like to do so as quickly and efficiently as possible. Yet there is acknowledgement in the business community that there are regulatory requirements and inquiries that are part of the process and that may impact the timeline. State enforcement, like federal enforcement (and in many cases, like foreign enforcement), is one factor that has to be taken into account. Concurrent state investigations need not delay a timetable, so long as the parties work cooperatively to get requested information to all agencies promptly. Joint or cooperative investigations among agencies will result in enforcement alignment far more often than they will result in divergence. In cases where there is divergence — when a federal agency decides to prosecute and the state does not (e.g. *United States v. Long Island Jewish Medical Center*,[18] or when a state decides to prosecute and the federal agency does not (as in the *Sprint/T-Mobile* situation), it will take longer than if both agencies had decided to take a pass. But that is the tradeoff inherent in the strong enforcement regime designed by Congress.

We have a national policy that favors competition over other types of economic arrangements. Like other aspects of our federalist system, there are times when states determine that the best interests of their citizens require a stronger enforcement approach than that taken by the federal authorities, or vice versa. As Congress anticipated, many factors — legal precedents, resources, litigation risk, policy — may influence a federal or state enforcement decision. A regime of multiple enforcers reduces the likelihood that problematic mergers or anticompetitive conduct will avoid close scrutiny and increases the likelihood that truly procompetitive mergers or conduct will be viewed positively across the board. The congressional goal was to strengthen antitrust enforcement, not weaken it.

15 *New York v. Deutsche Telekom AG*, Case 1:19-cv-05434-VM-RWL Document 348 at 29, filed 12/19/2019. DOJSOI at 29.

16 *New York v. Deutsche Telekom AG*, Case 1:19-cv-05434-VM-RWL Document 356 at 21, filed 1/8/2020.

17 *New York v. Deutsche Telekom AG*, 2020 U.S. Dist. LEXIS 23716*113, n.21 (S.D.N.Y. Feb. 10, 2020).

18 983 F.Supp. 121 (E.D.N.Y. 1997).

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