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State Merger Enforcement

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STATE MERGER ENFORCEMENT

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State attorneys general have merger enforcement authority under their state antitrust statutes and under the Clayton Act.[2] Working individually, with other attorneys general, or with federal antitrust authorities, an attorney general can use this authority to investigate and challenge mergers and acquisitions. With this authority, states have secured divestitures or other remedies for those represented by the states.[3]

Despite or maybe because of these results, state merger enforcement has generated significant commentary. The commentary focuses on whether the costs of state merger review outweigh the benefits.[4] In addition, state merger review poses the question of whether the process under which states and others review mergers can be improved. In comments suggesting topics to the Antitrust Modernization Commission, for example, the Antitrust Section of the American Bar Association suggested studying the impact of state merger enforcement.[5] Indeed, 41 states suggested that the Antitrust Modernization Commission study ways to improve the way that state merger review interacts with merger review generally.[6]

Before analyzing how and whether the system can be improved, one needs to understand the themes of state antitrust enforcement and how those themes play out in the context of merger review. State antitrust merger enforcement generally focuses on the interests of consumers and the proprietary interests of the states. Merger review is far more regulatory than other aspects of antitrust practice. Thus, state interests within the context of merger review provide a useful framework for discussing state merger enforcement and responding to the critiques of state merger enforcement.

THE THEMES OF STATE MERGER ENFORCEMENT

Generally, state attorneys general have authority to protect the state's consumers,[7] the state's proprietary interests,[8] and the general welfare and economy of the state.[9] These areas of state authority provide the context in which states will investigate or challenge potential anticompetitive activities, including mergers.

To protect the interests of consumers, states may investigate mergers between companies selling significant amounts of retail goods or services. Retail markets in which states have investigated

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2 States can file antitrust suits under state statutes, *e.g.,* N.Y. Gen. Bus. Law Section 342, and federal statutes because states and their political subdivisions are considered "persons" under Section 4 of the Clayton Act, 15 U.S.C. Section 15. *Georgia v. Pennsylvania R.R. Co.,* 324 U.S. 439 (1945). States can also file for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. Section 26, or as *parens patriae* for actual or threatened harm to their general economy. *Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972).

3 *See generally State Antitrust Merger Enforcement, in* ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST ENFORCEMENT HANDBOOK 70-94 (2004).

4 *See generally* Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics,* 47 WAYNE L. REV. 71 (1994); David Zimmerman, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers,* 48 EMORY L. REV. 337 (1999); Robert Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance,* 35 N.Y. L. SCH. L. REV. 1047 (1990). In addition, merger enforcement is part of the commentary on state antitrust enforcement generally. *E.g.,* Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal in* COMPETITION LAWS IN CONFLICT 267, 276-77 (ed. Richard Epstein and Michael Greve, American Enterprise Institute 2004).

5 Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission at 4, 12-13 (Sep. 30, 2004), available at www.abanet.org/antitrust/comments/2004/CommentsModernizationCommission.pdf.

6 Comments Regarding Commission Issues for Study submitted by 42 Attorneys General to the Antitrust Modernization Commission at 6-7, Oct. 1, 2004, available at www.naag.org/issues/pdf/2004-10-01_Antitrust_Modernization_Commission_Final.pdf

7 15 U.S.C. Section 15C.

8 15 U.S.C. Sections 15, 26; *see Georgia v. Pacific R.R. Co.,* 324 U.S. 439 (1945).

9 *Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972).

and litigated allegedly anticompetitive mergers include supermarkets,[10] drug stores,[11] department stores,[12] hospitals,[13] HMOs,[14] gasoline stations,[15] and direct broadcast television.[16]

Second, a state is likely to be interested in a transaction if the merger will affect the proprietary interests of the state. The state and other public entities may be significant purchasers of the merging companies. Health care markets also fit into this category, which also extends to rock salt markets[17] and business enterprise software.[18]

CONTEXT OF STATE MERGER REVIEW UNDER FEDERAL ANTITRUST LAW

Unlike other antitrust matters, merger review is very regulatory. Although the approval of federal antitrust enforcers is not required before a transaction can be completed, the process includes mandatory waiting periods after forms are filed and an obligation to comply with requests for additional information from federal enforcers.[19] Based on the reasoning that consummated anticompetitive transactions are difficult to remedy, the system provides and the federal enforcers use significant opportunities to analyze the competitive consequences of specific transactions before those transactions are consummated.

In addition to the general antitrust system for reviewing mergers requiring notice and waiting periods, other governmental agencies must approve various transactions. This regulatory framework, particularly in energy, utilities, or health care markets, can create significant periods of time between when a transaction is announced and when the transaction can be consummated.

Although they have investigatory powers, states are not statutory participants in the federal merger review process[20] and usually not formally part of the various regulatory review procedures. Attorneys general do not have specific antitrust rights to notice, with opportunities to investigate, potentially anticompetitive mergers under state law. Thus, with their investigatory powers states generally use the period between when a transaction is announced and when the transaction can be consummated because of the rights given to others to conduct their merger reviews.

Merger review is dependent on prompt access to the appropriate information about the transaction. Because states do not get federal premerger filings from either the federal agencies or the parties as a matter of course, the states created the National Association of Attorneys General Voluntary Pre-Merger Disclosure Compact.[21] Forty-five states executed the Compact, which was designed to provide an incentive for merging parties to provide the States with copies of premerger filings voluntarily. Originally and in exchange, states agreed to waive the right to use compulsory process to investigate the transaction until the transaction could be consummated under the federal merger review system. The Compact was rarely used until *California v. American Stores Co.*,[22] made clear that states could secure divestiture as a remedy for a violation of Section 7 of the Clayton Act.[23] The states revised the Compact in March 1994. The revisions addressed the difficulty that states

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10 *California v. American Stores Co.,* 495 U.S. 271 (1990); *Wal-Mart Stores, Inc. v. Rodriguez, Secretary of Justice of Puerto Rico,* 322 F.3d 747 (1st Cir. 2003); Press Release, State of Alaska Office of Governor, Consent Decree Proposed for Carrs-Safeway Merger (Feb. 9, 1999), available at www.law.state.ak.us/pressreleases/99025.html; New York Attorney General Announces Divestitures by A&P, 55 Antitrust & Trade Reg. Rep. (BNA) 1073 (Dec. 22, 1988).

11 For example, along with the FTC, various states investigated the proposed acquisition by RiteAid of Revco in early 1996. RiteAid abandoned the transaction when the FTC and the states announced that they would challenge the acquisition.

12 *The Bon-Ton Stores, Inc. (and New York) v. The May Dep't Stores Co.,* 881 F. Supp. 860 (W.D.N.Y. 1994).

13 *Wisconsin v. Kenosha Hospital & Medical Center,* 1996-1 Trade Cas. (CCH) Paragraph 71,669 (E.D. Wis. 1996); *California v. Sutter Health Sys.,* 130 F. Supp. 2d 1109 (N.D. Cal. 2001).

14 *See States Review Aetna-Prudential Deal, Set Conditions on Top of DOJ Decree,* 77 ANTITRUST & TRADE REG. REP. 68 (BNA) (July 15, 1999); *Texas Settlement with Columbia/HCA Requires Continued HMO Competition,* 68 ANTITRUST & TRADE REG. REP. (BNA) 135 (Aug. 8, 1996).

15 *California v. Chevron Corp.*, Case No. 01-07746 NM (C.D. Cal. Sept. 7, 2001); *Washington v. Tosco Corp.*, No. C97-1773 (W.D. Wash. Nov. 12, 1997); *Washington v. Texaco Refining & Marketing, Inc.*, 1991-1 Trade Cas. (CCH) Paragraph 69,346 (W.D. Wash. 1991).

16 The Department of Justice, 23 state attorneys general, the District of Columbia and Puerto Rico sued to block the merger of Echostar Communications Corp. and Hughes Electronic Corp., the two largest providers of direct broadcast satellite television in the United States. *United States v. Echostar Communications Corp.,* No. 1:02CV02138 (D. D.C. filed Oct. 31, 2002). The parties ultimately abandoned the proposed transaction.

17 *United States (and New York, Pennsylvania, and Ohio) v. Cargill Inc.,* 1997-2 Trade Cas. (CCH) Paragraph 71,893 (W.D.N.Y. 1997).

18 *United States v. Oracle Corp.,* No. C-04-0807, 2004 U.S. Dist. LEXIS 18063 (Sept. 9, 2004).

19 18 U.S.C. Section 18A.

20 *Mattox v. FTC,* 752 F.2d 116, 124 (5th Cir. 1985) (applying pre-merger review confidentiality provisions to state requests for access); *Lieberman v. FTC,* 771 F.2d 32, 37-40 (2d Cir. 1985) (same).

21 4 TRADE REG. REP. (CCH) Paragraph 13,410.

22 495 U.S. 271 (1990).

23 15 U.S.C. Section 18.

encountered trying to obtain information during the merger review process. The revision eliminated the waiver of all resort to compulsory process during the review period. Rather, states now only agree to seek the voluntary production of supplemental materials prior to using compulsory process. The states' comments to the Antitrust Modernization Commission on mergers suggest that this procedure become part of the formal federal merger review process.[24]

COORDINATING WITH OTHERS

Given the scope of transactions in our global economy, states usually conduct a merger review in conjunction with others. A transaction that raises antitrust concerns for one state is likely to raise antitrust concerns for federal antitrust enforcers and for other states. Usually, a state's participation helps achieve better results for state purchasers and consumers affected by the merger.

In merger challenges in which states are not the lead or first-named plaintiff, states add to the litigation. Such efforts are not "needless duplication" or "piling on." Rather, states coordinate and cooperate to ensure a fuller analysis. When interacting with federal enforcers, states can add their knowledge of the local markets and familiarity with the local geography. States help navigate through and explain state agency and regulatory overlays as in banking, health care, and insurance markets. This assistance can ensure that federal enforcers understand this regulatory process, particularly when the states and the merging parties have different takes on the regulatory process. States also can act as local counsel for their federal counterparts and share the work.

From the perspective of the state, committing resources to a joint investigation with federal enforcers is eminently reasonable. The marginal benefit is often worth the marginal cost. Within the investigation or litigation, the state can push to accomplish state goals. An attorney general can bring specific attorney general tools and experience to bear for the investigation or litigation as a whole.

FEDERAL-STATE PROTOCOL

These overlapping interests in 1998, led the Department of Justice Antitrust Division, the FTC, and the states to adopt a framework for joint merger investigations "with the goals of maximizing cooperation between the federal and state enforcement agencies and minimizing the burden on the parties."[25] The Protocol for Coordination in Merger Investigations ("Merger Protocol") provides guidelines for sharing confidential documents among the agencies, dividing work among federal and state personnel, coordinating the collection of information and evidence, and collaborating on strategy or settlement negotiations.

Under the Merger Protocol, the investigating federal agency will provide, with the consent of the merging parties, copies of HSR materials and other party documents to a state or a multistate coordinating state. Before the states may receive the documents, the parties must submit a letter to the federal agency waiving their HSR confidentiality rights that would otherwise prevent access by the states. The procedure often is used in merger investigations because parties want to avoid receiving separate subpoenas from the states.

The Merger Protocol urges state and federal enforcers to have a conference call early in an investigation to assign responsibilities to attorneys, exchange potential legal and economic theories, and identify evidence that needs to be collected and potential experts to be consulted. The Merger Protocol calls for the agencies to coordinate the collection of evidence, including working jointly on document requests and review and gathering information from witnesses through declarations, interviews and depositions. State and federal enforcers also should decide early on whether to employ experts jointly. If experts are to be hired separately, the agencies should develop a method to exchange their experts' theories.

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24 *See* note 6 *supra* and accompanying text.

25 Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, available on the American Bar Association, Antitrust Section website at http://www.abanet.org/antitrust/committees/state-antitrust/mrgrprotocol.pdf

Settlement negotiations also are addressed in the Merger Protocol, with an admonition that "it is imperative that federal and state antitrust enforcement agencies collaborate closely with respect to the settlement process." Recognizing that each governmental entity is "fully sovereign and independent," the Protocol emphasizes that the states and federal agencies should conduct joint settlement meetings with the parties, or at least, consult with each other about the terms being proposed. The Merger Protocol provides that if either the state or federal agency "pursue[s] a negotiation or settlement strategy different from that of the other investigating agencies, or decides to close its investigation, it should disclose that fact immediately."

The Merger Protocol takes advantage of the different focus and approach to merger review that states and federal enforcers have. States can focus on state concerns, while federal authorities focus on other areas of a transaction. State attorneys general can work individually, with other state attorneys general, or with the federal agencies to ensure that state interests are protected. In a joint investigation, states assist the overall merger review by contributing resources and useful analysis.

Most antitrust enforcers from different states take a similar approach to merger enforcement. State attorneys general largely have congruent interests because they typically focus on their states' proprietary interests and the impact of the merger on retail consumers and their state's economy. The multistate process allows the states to share resources in an investigation. In a merger investigation, states can jointly conduct research and interviews, share information or theories, and develop a unified strategic approach to reviewing or challenging the merger. Yet, proprietary interests will differ from state to state, and state law remedies vary. Therefore, each individual state's enforcers must determine how the merger will specifically impact their state's purchasers, consumers and businesses, and determine what remedies will best mitigate the impact in their state.

Federal authorities often have a broader or different focus than the states. In the merger context, the federal agencies are less likely than states to focus on retail consumer issues. Conversely, federal agencies would be more interested than the states in combinations involving non-retail goods. Sometimes this different focus results in interesting allocations of responsibility in joint investigations. In many of the oil company mergers, the Federal Trade Commission focused more on national issues like refineries and pipelines, while the states focused more on retail/local issues like gasoline stations. Similarly, in drug store mergers, the Federal Trade Commission focused on the competitive effect on third party payers, while the states focused on the competitive effect on cash payers.

Federal authorities also do not always take into account the proprietary interests of states. Thus, where a merger may impact state purchasers, state attorneys general represent those purchasers, using state data and witnesses. The recent federal and state litigation against Oracle Corp. to stop its acquisition of PeopleSoft provides an example. The Department of Justice concluded that the merger would have anticompetitive effects for large companies that purchase the complex business software sold by both companies. The states joined the suit primarily to represent the interests of their state and local agencies that also purchase those systems.[26]

GOING IT ALONE

At the same time, a state's interest need not be protected only through joint action. Through litigation and consent decrees, states take action when federal enforcers decline to do so. For example, Wisconsin challenged the merger of two hospitals that the Federal Trade Commission had cleared and obtained a consent decree requiring the hospitals to create a state supervised fund for

26 *See United States et al. v. Oracle Corp.,* No. C-331 F. Supp. 2d 1098 (N.D. Cal. 2004).

indigent care.[27] California,[28] Connecticut,[29] Maine,[30] New York,[31] and Washington[32] also have challenged mergers + sometime successfully and sometimes not + when the Federal Trade Commission or the Antitrust Division declined to act. Harm to the interests protected by the state can still occur if no other enforcer takes action. The federal antitrust laws give the attorney general the right to vindicate those interests. Indeed, deciding whether to take action can involve probing whether the harm to those represented by the state can be "fixed," even if the transaction or restraint benefits (or is neutral) the rest of the country. If parties refuse to "fix" the state's concern, that might illustrate that the transaction or restraint may be more about harming those represented by the state, as opposed to securing national or other benefits.

The varying approaches to antitrust enforcement make clear that states simply cannot rely on the federal agencies or private parties to address the needs of their constituents. Moreover, by working with the federal agencies, state enforcers can push a merger investigation to achieve better results. Still, state enforcers should always carefully weigh their options and should not commit resources lightly to a merger. States should always consider doing nothing.

IS STATE MERGER ENFORCEMENT POLITICALLY MOTIVATED?

Despite or maybe because of this record, state merger enforcement, like state antitrust enforcement generally, has its critics.[33] Most of those criticisms have already been addressed above. States are not "free riders." States add to antitrust jurisdiction, including in merger review. The most prominent example of that, of course, is *California v. American Stores Co.,*[34] which held that a private party can secure divestiture as a remedy for an anticompetitive merger review.

The most significant remaining criticism is that states make political, not enforcement, decisions when resolving merger investigations. Usually this criticism equates "political" decisions with "parochial" decisions by the attorney general, favoring in state business over out of state businesses.[35] Yet, state attorneys general have the obligation and right to protect the state's economy, including from harm inflicted by out-of-state businesses. An attorney general is supposed to focus on and advocate for the interests of the state.[36]

Beyond being parochial, critics also argue that state attorneys general abuse antitrust law to further non-competitive concerns. For example, critics argue that states worry too much about jobs, and not enough about the competitive process.[37] This criticism can be met substantively. Preserving the competitive process requires preserving separate competitors,[38] and jobs are part of preserving that separate decision maker. For example, the critic identifies the obligation in *Maine v. Connors Brothers Ltd.* to maintain workably competitive assets in Maine as "parochial," while Maine's decree can be defended easily as a means to maintain competition in the Gulf of Maine, a separate geographic

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27 *Wisconsin v. Kenosha Hosp. & Med. Ctr.,* 1997 Trade Cas. (CCH) Paragraph 71,669 (E.D. Wis. 1996).
28 *California v. American Stores Co.,* 495 U.S. 271 (1990); *California v. Quality Food Centers,* 98 CV 01 010 (C.D. Cal. Feb 19, 1998) (*see Grocery Store Merger is Cleared After State Gets Divestiture Agreement,* 74 ANTITRUST & TRADE REG. REP. (BNA) 167 (1998)); *California v. Columbia/HCA,* (N.D. Cal. Dec. 23, 1998) (*see State Obtains Settlement to Permit Consolidation of Hospitals to Proceed,* 76 ANTITRUST & TRADE REG. REP. 48 (BNA) (Jan. 21, 1999)); *California v. Sutter Health Sys.,* 84 F. Supp. 2d 1057 (N.D. Cal.) (Preliminary injunction denied), *aff'd mem.,* 217 F.2d 846 (9th Cir. 2000), *opinion after remand,* 130 F. Supp. 2d 1109 (N.D. Cal. 2001).
29 *Stanley Works (and Connecticut) v. Newell Co.,* 1992-2 Trade Cas. (CCH) Paragraph 70,008 (D. Conn. 1992).
30 Consent Order, *Maine v. Maine Heart Surgical Assocs.,* CV96-336 (Me. Super. Ct. Kennebec, July 22, 1996) (merger of the practices of nine heart surgeons); *Maine, ASC Settle Pricing Concerns Over Ski Resort Industry Acquisition,* 71 ANTITRUST & TRADE REG. REP. 63 (BNA) (July 18, 1996); .
31 *New York v. May Department Stores,* 881 F. Supp. 860 (W.D.N.Y. 1994) (preliminary injunction granted); *New York v. Kraft Gen. Foods Inc.,* 862 F. Supp. 1035 (S.D.N.Y. 1994) (preliminary injunction denied); New York Attorney General Announces Divestiture by A&P, 55 Antitrust & Trade Reg. Rep. (BNA) 1073 (Dec. 22, 1988).
32 *Washington v. Texaco Inc.,* 1997-2 Trade Cas. (CCH) Paragraph 72,019 (W.D. Wash. 1997).
33 *See generally* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General, in* COMPETITION LAWS IN CONFLICT 252 (ed. Richard Epstein and Michael Greve, American Enterprise Institute 2004). This chapter was based on Richard Posner, Is Federalism Overrated?, before the American Enterprise Institute for Policy Research, Washington, D.C. (Apr. 21, 2003) at http://www.federalismproject.org/masterpages/Antitrust/Posner.pdf. That speech elicited a response: Jay Himes, "Federal 'Unemption' of State Antitrust Enforcement' at 9-14," prepared for the Antitrust, Competition and Trade Committee of LEX MUNDI (Boston, MA May 14, 2004)" available on the publications portion of the ABA Antitrust Section State Enforcement Committee's website: http://www.abanet.org/antitrust/committees/state-antitrust/publications.html.
34 495 U.S. 271 (1990).
35 Posner, *supra* note 33, at 257-58.
36 For example, under New York law "the attorney general shall . . . protect the interests of the state." N.Y. Exec. Law Section 63.1.
37 *E.g.,* Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal in* COMPETITION LAWS IN CONFLICT 267, 275-77 (ed. Richard Epstein and Michael Greve, American Enterprise Institute 2004)
38 *Consolidated Gold Fields PLC v. Minorco, S.A.,* 871 F.2d 252 (2d Cir. 1989).

market delimited by the international frontier.[39] In short, reasonable minds can differ about when a merger is anticompetitive. The only other example of "parochialism" given is Pennsylvania's effort to "undo Russell Stover Candies' acquisition of the Whitman Chocolates assets from Pet, Inc., [which] seems to have derived almost entirely" from the desire to protect Pennsylvania jobs.[40] Here, too reasonable minds can differ about what mergers are anticompetitive and what is needed to protect competition. But this matter illustrates an even more fundamental point. Russell Stover could and did contest Pennsylvania's argument, and Russell Stover prevailed. That is, the criticism overlooks how antitrust disputes are decided when reasonable minds might differ. Judges, not state attorneys general, decide whether an antitrust claim exists and whether an antitrust remedy is appropriate.

The most significant response to the critics is to specify the benefits of state merger enforcement, which is what this article has tried to do. Two allegedly "parochial" efforts, do not outweigh the many other benefits brought by state merger enforcement.

39 DeBow, *supra* note 37, at 276. Maine recently responded to this critcism in comments to the Antitrust Modernization Commission. Comments of the Maine Attorney General on the Role of States in Enforcing Federal Antitrust Laws Outside the Merger Area, at 12-14, available at http://amc.gov/public_studies_fr28902/enforcement_pdf/050715_Rowe-Maine_AG-Enforce_Inst.pdf.

40 DeBow, *supra* note 37, at 276.