

# State attorneys general: old cops walking a wider beat

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Antitrust enforcement by state attorneys general has become an increasingly important part of the antitrust enforcement landscape. While, historically, the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) have been viewed as the primary governmental enforcers of antitrust laws, today's reality is that state attorneys general must be considered with equal regard.

Over the past two decades, state attorneys general have increased their enforcement efforts, broadened the scope of their interests, and fully coordinated their efforts among themselves and with federal enforcement authorities. This increased state enforcement creates a counselling challenge since state antitrust enforcement policies are not always congruent with their federal counterparts. Antitrust planning, thus, has increased in complexity. A simple review of current state enforcement activity demonstrates that state antitrust enforcement policy must be considered in structuring any transaction in the United States.

## State enforcement authority

States have wide authority to enforce antitrust laws. At least since *Georgia v Pennsylvania RR*, states have had the authority to sue under federal antitrust laws for injunctive relief as *parens patriae* for threatened harm to their economies. In *California v American Stores*, the US Supreme Court unequivocally extended this authority to allow state attorneys general to achieve divestiture to remedy anti-competitive mergers. Coupled with the public interest mantle with which state attorneys general come to court, the availability of injunctive relief is a powerful tool in their hands. The US Congress has also granted them special status to obtain damages for their residents for violations of the Sherman Act, 15 USC Section 15c. This authority is not granted to their federal enforcement counterparts and leaves state attorneys general as the only governmental officials with direct responsibility for seeking damages on behalf of injured consumers.

Additionally, virtually all states have state antitrust laws that significantly, but not always, parallel federal antitrust law. However, state antitrust laws can reach more broadly than federal antitrust law and may provide a wider range of remedies. For example, the rule of *Illinois Brick v Illinois*, barring damage actions by indirect purchasers, does not apply under several state antitrust laws. The US Supreme Court, in *California v ARC America*, made it clear that state antitrust law may provide such broader remedial provisions. Thus, state attorneys general can seek indirect damages not otherwise available under federal law. Likewise, many state antitrust laws have different exemption schemes and may reach conduct not actionable under federal laws.

Significantly, state statutes imbue state attorneys general with broad investigatory and enforcement authority. Most have expansive compulsory process authority allowing them to demand the production of documents, propound interrogatories, and compel testimony at the investigatory phase. In litigation they may seek injunctive relief, damages, civil penalties, attorneys' fees and costs, as well as prosecute

violations criminally. The arsenal provided under state law alone makes state attorneys general potent antitrust enforcers.

## Coordinated enforcement among states

While this enforcement authority has long existed, events in the 1980s reawakened the states' interest in having a primary role in antitrust enforcement. At the outset of the Reagan administration, federal antitrust authorities re-evaluated economic principles and altered their enforcement priorities. This caused a retrenchment in federal antitrust enforcement in two areas: vertical restraints, and mergers and acquisitions. In fact, during the 1980s the number of corporate mergers increased sharply, while the number of merger cases brought by the DoJ diminished sharply in absolute terms. Vertical restraint enforcement activity dried up completely.

Drawn into a perceived enforcement vacuum and armed with clear remedial authority, states quickly shifted resources into antitrust enforcement. States, however, found that the scarcity of state resources limited them in individually attacking anti-competitive conduct occurring on a national scale. The challenge for the states was to find a way to function on a national basis with both sovereign and fiscal limitations that favoured a more parochial focus. States solved this resource problem by taking a coordinated approach to common enforcement goals. In the 1980s, the National Association of Attorneys General (NAAG) formed the Multistate Antitrust Task Force (the NAAG Task Force) to serve as the coordinating body for member states.

Under the auspices of the NAAG Task Force, states met to share enforcement objectives, develop enforcement policies and jointly investigate and prosecute antitrust violations. Among the early multistate litigations coordinated through the NAAG Task Force was the 19-state prosecution of 32 members of the insurance and reinsurance industries. That action eventually found its way to the United States Supreme Court under the name *Hartford Fire Insurance v California*. It remains among the leading cases regarding antitrust jurisdiction over foreign entities. The states had found an effective way of expanding their limited resources to reach national conduct – collaboration and coordination on a multistate basis.

The NAAG Task Force not only coordinates investigations and litigations, but it facilitates a consistent enforcement policy among the various states. The NAAG Task Force has issued enforcement guidelines in two critical areas: vertical restraints and mergers and acquisitions. The NAAG *Vertical Restraints Guidelines* were originally issued in 1985 and amended in 1995 (4 *Trade Reg Rep* (CCH) ¶13,400). They set forth the enforcement goals and policies of state attorneys general and generally take a more expansive enforcement view in this area than had been taken by the DoJ's vertical restraint guidelines, which have since been withdrawn. Pursuant to the NAAG *Vertical Restraints Guidelines*, states have been vigorous enforcers in this area, recovering millions of dollars for consumers in a wide range of industries.

The NAAG *Horizontal Merger Guidelines* were issued in 1987 and revised in 1993 and set forth the states' analytical framework for assessing the likely competitive impact of mergers (4 *Trade Reg Rep* (CCH) ¶13,406). While the 1993 revisions brought these guidelines into greater harmony with the federal agencies' merger guidelines, significant policy distinctions remain. For example, the NAAG guidelines take a more resistant stance in evaluating the extent to which a merger's efficiencies may counteract other anti-competitive potential of the transaction. Likewise, they provide for special scrutiny of transactions involving leading firms or marketplace innovators.

### Coordinated state and federal enforcement

Just as coordination among the states has enhanced their enforcement efforts, so has a concomitant coordination between state and federal antitrust authorities. As the NAAG Task Force was solidifying the coordination among states, the Executive Working Group on Antitrust was created. The group comprised a NAAG representative, the chairman of the FTC and the Assistant Attorney General of the antitrust division of the DoJ. This executive working group was designed as an informal mechanism of communication among state and federal antitrust enforcers, and has served as the springboard for coordination and cooperation in antitrust enforcement matters.

As a direct result of this close communication at the highest levels between state and federal antitrust enforcers, formal coordination of antitrust investigations began. In 1992, both the FTC and DoJ adopted formal protocols for sharing information during pre-merger investigations pursuant to the *Hart-Scott-Rodino* pre-merger filing procedures. These protocols turned out to be extremely significant in the evolution of federal and state coordination. The sharing of information turned quickly into the sharing of ideas and enforcement philosophies. The dialogue between federal and state enforcers took on new proportions as it occurred, not through creating duelling and separate abstract enforcement guidelines, but within the context of applying policy to real cases.

A cross-pollination of ideas created a growing mutual respect for those ideas. In that environment, information-sharing turned quickly into joint investigation, and ultimately into joint prosecution by federal and state authorities. The formalisation of this process occurred this year. The NAAG Task Force, the DoJ and the FTC recently announced the Protocol for Coordination in Merger Investigations between the Federal Enforcement Agencies and State Attorneys General – an agreement governing the coordination of merger reviews from the investigation right through the resolution (4 *Trade Reg Rep* (CCH) ¶13,420).

The protocol is comprehensive and governs:

- the confidentiality of investigatory material;
- joint strategic planning with regard to legal and economic theories;
- coordinating the request for and review of documentary materials;
- the development of witnesses;
- the coordination of experts; and
- collaboration in settlement negotiations.

As a result, state and federal authorities are conducting a record number of joint investigations and the trend is sharply upward.

### Recent state enforcement activity

The close coordination between the state attorneys general and federal agencies does not, however, mean a uniformity of ultimate enforcement actions. Recent history has produced mixed results in this regard. The states and the federal authorities do investigate, litigate, and resolve many matters together, but disagreements remain – at times, the states and the federal agencies take different enforcement views.

A state attorney general may decide an enforcement action is warranted while the federal agencies do not, or vice versa. Although

often this can be just an efficient allocation of resources between the sovereigns, it sometimes reflects differences in enforcement policy. Also, there may be agreement that enforcement is warranted, but disagreement over the remedy. It even happens that state attorneys general and the federal agencies end up on opposite sides in the same matter. Each of these things has occurred in the past year.

On the merger front, state attorneys general have been more active than ever before, investigating side by side with the DoJ or FTC. Most of these joint investigations have concluded with joint resolutions with the federal agencies, either in the form of joint consent decrees in the case of DoJ or, in the case of the FTC, with the states entering separate consent decrees paralleling the FTC administrative consent orders. Among the transactions jointly resolved by state attorneys general and the federal agencies over the past year were:

- the Cineplex Odeon/Sony Corp acquisition in the movie theatre industry (New York and Illinois);
- the Shell Oil/Texaco joint venture involving gasoline refining and distribution (California and Washington);
- the First Union/CoreStates merger in the banking industry (Pennsylvania); and
- the USA Waste Services/Waste Management involving trash hauling and disposal markets (14 states).

State attorneys general have also sided with federal agencies on merger enforcement by filing amicus briefs in support of the federal agencies. The most recent example occurred in the FTC's challenge to the proposed drug wholesaler mergers of Cardinal Health/Bergen Brunswick and McKesson/Americorp. Thirty state attorneys general joined in an amicus brief presenting their views of the anti-competitive consequences of the proposed mergers. The US District Court eventually preliminarily enjoined the mergers (*FTC v Cardinal Health*).

The states and the federal agencies have, however, gone their separate ways on some mergers. For example, the state of Washington obtained divestiture of a gasoline terminal and several retail gasoline stations in its challenge to the Tosco Corp/76 Products asset acquisition (1997-2 *Trade Cas* (CCH) ¶71,988 (WD Wash 1997)). The acquisition was not challenged by federal enforcement authorities. Beyond any possible federal and state substantive differences, there is another feature of this resolution that distinguishes state enforcement from prevailing federal enforcement policy. The Washington Attorney General's Office did not seek to enjoin the transaction. Rather, it continued its negotiations for resolution after the transaction closed and obtained its divestiture order several months later. The federal enforcement policy is generally to seek an injunction preventing consummation of the transaction if an agreed resolution is not in place.

Another recent disagreement between state and federal authorities in a merger matter occurred in the hospital merger of North Shore Health Systems and Long Island Jewish Medical Center in New York. The New York Attorney General believed that anti-competitive concerns of the merger could be alleviated by an agreement regulating the conduct of the merged entity. On the other hand, the DoJ determined that the merger should be enjoined outright. New York entered into its regulatory agreement with the parties and the DoJ commenced litigation to enjoin the transaction. Ultimately, the court denied DoJ's request for a preliminary injunction. The New York regulatory agreement remains in effect.

Beyond merger enforcement, state attorneys general remain vigorous enforcers in a wide range of antitrust cases. Here too, in some instances the states have proceeding collectively with sister states and in some instances jointly with federal authorities. Again, in some instances state attorneys general have diverged from federal authorities in their enforcement views.

States have proceeded on a multistate enforcement basis in several

*Georgia v Pennsylvania RR*, 324 US 439 (1945)  
*California v American Stores, Inc*, 495 US 271 (1990)  
*Illinois Brick Co v Illinois*, 431 US 720 (1977)  
*California v ARC America Corp*, 490 US 93 (1989)  
*Hartford Fire Insurance Co v California*, 509 US 764 (1993)  
*FTC v Cardinal Health, Inc*, 1998-2 Trade Cas (CCH) ¶72,226 (DDC 1998)  
*United States v Long Island Jewish Med Center*, 983 F Supp 121 (EDNY 1997)  
*State Oil Co v Khan*, 118 S Ct 275 (1997)  
*Midwestern Mach Co v Northwest Airlines, Inc*, 990 F Supp 1128 (D Minn 1998)

matters. In the past year, 44 states plus the District of Columbia and the Commonwealth of Puerto Rico filed a joint complaint against Toys 'R' Us and four major toy manufacturers alleging vertical and horizontal agreements to limit supplies to discounting retailers. That litigation remains pending. Similarly, the 23-state complaint against major manufacturers of contact lenses and various trade associations filed the year before continues to be litigated.

Perhaps the most significant case filed by the states this year is the 20-state complaint against Microsoft Corporation alleging monopolisation claims. This action has been consolidated with the similar complaint simultaneously filed by the DoJ. Aside from the substantive significance of the case, it is important because it represents the full melding of state and federal antitrust enforcement. The matter is being tried jointly by state attorneys general and the DoJ acting as full partners in the effort. This experience can only lead to a further cementing of the state/federal relationship, and a strengthening of communication and coordination between them.

There still, however, remain philosophical differences on antitrust issues between the states and federal agencies. Some of these differences were highlighted in *State Oil v Khan*. Thirty-three states filed an amicus brief in the Supreme Court arguing for the retention of the *per se* rule against the setting of maximum resale prices; the DoJ and the FTC filed an amicus brief taking the opposite position. The duelling briefs clashed over the economic consequences of tolerating maximum resale price agreements and the enforcement difficulties engendered by loosening *per se* rules.

While the Supreme Court ultimately unanimously rejected the states' position, the amicus effort was significant. First, it articulated a doctrinal split of enforcement philosophy between the states and the

federal enforcement authorities. Second, the states' stature was elevated somewhat by this effort. While the federal authorities are regularly granted permission to argue orally as an amicus in antitrust cases, it is rare for state enforcement authorities to be granted argument time. In this case, the Supreme Court apparently believed that the views of the states were of sufficient importance to allow them oral argument.

The states continue to pursue opportunities to provide their antitrust views to courts through amicus participation and to administrative agencies by filing formal comments. Most recently, 11 states filed an amicus brief in the Eighth Circuit Court of Appeals in *Midwestern v Northwest Airlines*, in support of private plaintiffs seeking to recover damages for the lessening of competition allegedly occasioned by the merger of Northwest and Republic airlines. Similarly, 25 filed comments before the US Department of Transportation urging the adoption of enforcement policy guidelines governing unfair and exclusionary conduct in the airline industry.

Of course, states continue to individually investigate and prosecute a wide variety of cases with purely local impact. For example, New York has sued 10 major grocery manufacturers and a grocery store chain charging a conspiracy to eliminate coupons in upstate New York. It also has charged two hospitals with price-fixing. The hospitals had formed a joint venture; the complaint alleges that the restrictions agreed to by the hospitals go far beyond that for which they are authorised to act jointly. Bid-rigging cases, involving everything from electrical fixtures to dairy products, continue to be prosecuted vigorously by individual states.

### The future for state enforcement activity

There has been a steady increase in state antitrust enforcement since the 1980s, culminating in the current ubiquitous involvement of state attorneys general in all facets of antitrust enforcement. State attorneys general are no longer the stepchildren of the federal antitrust authorities, piggybacking on federal action. Rather, today, state attorneys general have arrived as full, independent antitrust enforcers. They have been accepted as full enforcement participants by courts, administrative agencies and the federal enforcement authorities.

What this means, of course, is that it is more important than ever to consider state antitrust enforcement policies and objectives when structuring transactions and determining marketplace behaviour. Understanding the doctrinal differences between state and federal authorities and the enforcement priorities of each is essential. The task is complex, but, in the current enforcement environment, is essential.

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