

ANTITRUST REVIEW OF MERGERS  
BY STATE ATTORNEYS GENERAL:  
THE NEW COPS ON THE BEAT

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Connecticut's Attorney General recently achieved a major victory in an antitrust challenge to the Newell Company's ("Newell") attempted takeover of The Stanley Works ("Stanley"). Under the Stipulation and Order entered in the United States District Court, Newell must divest all Stanley stock it currently owns and is prohibited from acquiring any Stanley stock and from attempting to influence Stanley in any way for ten years.<sup>1</sup>

*Connecticut v. Newell* involved Illinois-based Newell's takeover attempt of Connecticut-based Stanley. In May of 1991, Newell heralded its intent to acquire an interest in Stanley by filing a pre-merger notification under the Hart-Scott-Rodino Antitrust Improvements Act.<sup>2</sup> Stanley responded by filing an antitrust suit, alleging that Newell's acquisition of Stanley's stock violated Section 7 of the Clayton Act.

While Stanley did all it could do to use the antitrust laws to protect itself, antitrust suits by targets of hostile takeover attempts most often end when they are dismissed for lack of standing, when the target is acquired by a white knight, or when the target is no longer able to resist the ever sweeter offer. Initially, both Stanley and Newell approached the Connecticut Attorney General with pleas for help. Stanley also sought assistance from the Antitrust Division of the United States Justice Department. The Justice Department investigated but allowed the Hart-Scott-Rodino waiting period to pass without taking action. Connecticut's Attorney General decided that Stanley had the better legal as well as public policy arguments, and filed suit to prevent Newell's acquisition of Stanley's stock.

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<sup>1</sup> Connecticut v. Newell Co., 1992-2 Trade Cas. (CCH) § 70,908 (D. Conn. 1992).

<sup>2</sup> 15 U.S.C. § 18a. Firms required to file pre-merger notification with the United States Justice Department and the Federal Trade Commission pursuant to Section 18a are prohibited from consummating the proposed transaction until the expiration of a statutory waiting period.

The case, however, is significant for more than its procompetitive result. It reaffirms the increasingly significant role played by state attorneys general in merger enforcement and highlights the factors which impel a state attorney general to challenge a particular merger. The important new role played by state attorneys general in merger enforcement has been shaped by several historical factors and has now created an antitrust enforcement environment in which the views of state attorneys general must be considered whenever a merger is contemplated.

It has been well-settled law for nearly fifty years that a State may sue under federal antitrust law for injunctive relief as *parens patriae* for threatened harm to its general economy and welfare.<sup>3</sup> Antitrust laws, which seek to prevent anticompetitive conduct, are "the Magna Carta of free enterprise."<sup>4</sup> And free enterprise is the *sine qua non* of a healthy state economy. Harm to the general economy of the State encompasses harm felt by all classes of citizens resulting from anticompetitive conduct. As explained by the Supreme Court, when anticompetitive effects are felt in a State, they "may stifle, impede, or cripple old industries and prevent the establishment of new ones" and "limit the opportunities of her people, shackle her industries [and] retard her development."<sup>5</sup> Those types of harms "are matters of grave public concern in which [a state] has an interest apart from that of particular individuals who may be affected."<sup>6</sup>

<sup>3</sup> E.g., *Georgia v. Pennsylvania R. R.*, 324 U.S. 439 (1945); *Burch v. Goodyear Tire & Rubber Co.*, 554 F.2d 633 (4th Cir. 1977), *affirming for the reasons stated below*, 420 F. Supp. 82 (D. Md. 1976). See *California v. American Stores Co.*, 495 U.S. 271, 275, 295-96 (1990); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259-61 (1972) (reaffirming states' *parens patriae* standing for injunctive relief under Section 16 of the Clayton Act, although denying recovery for treble damages under Section 4 of the Clayton Act). Cf. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) (California's interests in maintaining a "competitive system" of gas supply to its businesses and residents required granting intervention as of right in divestiture proceeding under Section 7 of the Clayton Act).

<sup>4</sup> *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

<sup>5</sup> *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. at 450-51. The general economy of a state suffers as a result of anticompetitive conduct regardless of whether the anticompetitive conduct is uniquely directed at the State. The Supreme Court made clear in *Georgia v. Pennsylvania R.R.* that discriminatory or unique impact on a state is not essential. The Court noted that harm to a state's economy may occur because a restraint of trade "may arrest the development of a State or put it at a decided disadvantage in competitive markets." 324 U.S. at 450. The very restraints at issue in *Georgia v. Pennsylvania R.R.* affected the entire Southern region of the country. Cf. *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 368 (D. Conn. 1979) ("Price-fixing in a region or a state is no less local because it may occur elsewhere.").

<sup>6</sup> *Georgia v. Pennsylvania R.R.*, 324 U.S. at 451.

Additionally, Connecticut, like virtually all states, has a state antitrust act<sup>7</sup> which in large measure parallels the federal antitrust laws and empowers the Attorney General to challenge anticompetitive practices that threaten Connecticut.<sup>8</sup> State antitrust laws have long been utilized to protect against anticompetitive conduct, wherever occurring, which have an adverse effect in the state. The Supreme Court in *California v. Arc America Corp.*<sup>9</sup> has recognized that antitrust is an area "traditionally regulated by the states"<sup>10</sup> and that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."<sup>11</sup> The Connecticut Antitrust Act demonstrates a clear intent that the Attorney General be imbued with full authority, in every conceivable capacity (including sovereign, proprietary and *parens patriae* capacities), to bring actions for all types of relief (including injunction, damages and civil penalties) under both federal and state antitrust laws.<sup>12</sup> Protecting the State's economy through federal and state antitrust law is, thus, a significant responsibility of the Attorney General.

<sup>7</sup>CONN. GEN. STAT. §§ 35-24 *et seq.*

<sup>8</sup>The Connecticut Antitrust Act ("CATA") does not have a provision which matches Section 7 of the Clayton Act, 15 U.S.C. § 18, the federal antitrust law section directed specifically at anticompetitive mergers. Nonetheless, CATA is applicable to anticompetitive mergers. Connecticut General Statutes Section 35-26 is substantially identical to Section 1 of the Sherman Act, 15 U.S.C. § 1.

Section 1 of the Sherman Act, has long been held to apply to acquisitions and mergers. *See, e.g., United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964). Indeed the standards for assessing a proposed acquisition under Section 7 of the Clayton Act and Section 1 of the Sherman Act are the same. *E.g., United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1281-83 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 295. *See generally* REED & TURNER, ANTITRUST LAW, 906. Moreover, Section 1 even reaches proposed mergers prior to their consummation. *See, e.g., United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir. 1990); *United States v. Carilion Health System*, 707 F. Supp. 840 (W.D. Va.), *aff'd*, 892 F.2d 1042 (4th Cir. 1989) (action to enjoin proposed acquisition under Section 1 of the Sherman Act). Since Section 1 reaches anticompetitive mergers, so does Section 35-26. The Second Circuit has recognized that Section 35-26 reaches unlawful mergers. *Lieberman v. FTC*, 771 F.2d 32, 33 (2d Cir. 1985) ("The state attorneys general, of course, may also seek to enjoin unlawful mergers under their respective state antitrust laws. *See Connecticut Antitrust Act*, 17 CONN. GEN. STAT. ANN. ch. 624, §§ 35-26, -32 (West 1981)").

<sup>9</sup>490 U.S. 93 (1989).

<sup>10</sup>*Id.* at 101 and n.4. State law is not relegated only to purely intrastate commerce. The Supreme Court many times has upheld state antitrust laws in their application to interstate commerce. *E.g., California v. Arc America Corp.*, 490 U.S. at 101-02; *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 555-56 (1944); *Watson v. Buck*, 313 U.S. 387, 403 (1941); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 259-60 (1937); *Standard Oil Co. v. Tennessee*, 217 U.S. 413 (1910). *See also Texas v. Coca Cola Bottling Co.*, 697 S.W. 2d 677, 681-82 (Tex. App. 1985), *appeal dismissed*, 478 U.S. 1029 (1986); *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231, 270-74 (N.M. Sup. Ct. 1980), *cert. denied*, 451 U.S. 901 (1981); *Hovenkamp, State Antitrust in the Federal Scheme*, 58 INDIANA L. J. 375, 385-90 (1983) ("[T]here are virtually no operative limits on the reach of state antitrust law under the Commerce Clause.").

<sup>11</sup>490 U.S. at 102.

<sup>12</sup>*See* CONN. GEN. STAT. §§ 35-32, 35-34, 35-35, 35-36a, 35-37, 35-38, 35-42 and 35-44a.

Although Connecticut's Attorney General has used both federal and state antitrust authority to prevent a wide variety of horizontal and vertical restraints of trade,<sup>13</sup> challenging mergers under the antitrust laws was not historically an area of great activity. Today, evaluation of mergers under the antitrust laws is a significant portion of Connecticut's antitrust enforcement activity.

### I. THE CHALLENGE

Events in the 1980s changed radically the states' interest in merger enforcement. From the outset of the Reagan Administration, federal oversight of mergers and acquisitions under Section 7 of the Clayton Act<sup>14</sup> declined precipitously. The new economic thinking that swept Washington meant that far more corporate mergers went unchallenged by the federal government.<sup>15</sup> This shift away from federal enforcement of the antitrust laws against mergers prompted unprecedented numbers of mergers — many theretofore unthinkable. With the withdrawal of the federal government from this important enforcement area, responsibility for protection of the competitive arena rested squarely upon the states.

Paradoxically, also during the 1980s, the states were cut off from access to important information necessary to effective merger enforcement: the pre-merger notification and market information mandated to be filed with the federal government under the Hart-Scott-Rodino Antitrust Improvements Act.<sup>16</sup> In *Lieberman v. FTC*<sup>17</sup> and *Mattox v. FTC*,<sup>18</sup> the courts ruled that State Attorneys General were no different than the general public in their ability to have access to Hart-Scott-Rodino pre-merger

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<sup>13</sup> E.g., *Connecticut v. Nintendo of America, Inc.*, 1991-2 Trade Cas. (CCH) § 69,614 (S.D.N.Y. 1991)(resale price maintenance); *Connecticut v. Radway's Dairy, Inc.*, 1991-2 Trade Cas. (CCH) § 69,658 (Conn. Super. Ct. 1991)(price discrimination); *Connecticut v. Scotty's Sanitation Services, Inc.*, 1990-2 Trade Cas. (CCH) § 69,197 (Conn. Super. Ct. 1989)(price fixing); *Connecticut v. Stop & Shop Co.*, 1989-2 Trade Cas. (CCH) § 68,796 (D. Conn. 1989)(price fixing); *Connecticut v. Dosch-King Co.*, 1988-1 Trade Cas. (CCH) § 68,087 (Conn. Super. Ct. 1988)(bid rigging); *Connecticut v. Auto-Tune, Inc.*, 1984-1 Trade Cas. § 65,788 (Conn. Super. Ct. 1983)(resale price maintenance); *Connecticut v. Hossan-Maxwell, Inc.*, 181 Conn. 655, 436 A.2d 284 (1980)(tying).

<sup>14</sup> 15 U.S.C. § 18.

<sup>15</sup> Significantly, during the 1980s, a period when the numbers of corporate mergers had increased sharply, the number of merger cases brought by the United States Department of Justice diminished sharply in absolute terms. See *Antitrust Division's Workload Statistics During the 1980s*, 58 ANTITRUST & TRADE REG. REP. (BNA) 109, 111 (January 18, 1990).

<sup>16</sup> 15 U.S.C. § 18a.

<sup>17</sup> 771 F.2d 32 (2d Cir. 1985).

<sup>18</sup> 752 F.2d 116 (5th Cir. 1985).

notification materials. Therefore, the states were denied access to such materials — the very materials on which the federal government relies in deciding whether to challenge a particular merger. Thus, the states were at once called upon to take a greater role in merger enforcement and stripped of one of the most useful tools for being able to do so.<sup>19</sup>

Without pre-merger notification, the states were often left to attempt to challenge mergers after their consummation. In effect, they were assigned the task of seeking to unscramble the egg. Incredibly, the 1980s heralded yet another obstacle to undoing the anticompetitive effects of a merger. The Circuit Courts of Appeals split over whether states could seek divestiture. Without such a remedy, mergers could not be undone. In 1989, the Supreme Court granted *certiorari* in *California v. American Stores, Inc.*<sup>20</sup> to decide whether divestiture was a remedy available to the States and other non-federal government litigants. In *American Stores*, the Supreme Court reversed the Ninth Circuit and squarely held that divestiture was an available and proper remedy.

Drawn into the enforcement vacuum and armed with clear remedial authority, states accepted their new role as combatants against anticompetitive mergers.<sup>21</sup> To meet this new role, however, new tools had to be forged. States moved creatively to solve the pre-merger notification problem that had been created by *Lieberman* and *Mattox* and to find efficient ways to enhance scarce resources that would be needed to challenge mergers.

## II. THE NEW ENFORCEMENT TOOLS

The National Association of Attorneys General (“NAAG”) for years served as a clearinghouse — exchanging information and ideas about antitrust enforcement policy and practice by the various state attorneys general. In the 1980s, NAAG formally created the Multistate Antitrust Task Force (the “NAAG Task Force”).<sup>22</sup> This NAAG Task Force, under the auspices of NAAG’s

<sup>19</sup> See Langer, *The Impact of Antitrust on Merger Activity in the 1980's: Suggestions for Change*, 29 WASHBURN L. REV. 290 (1990).

<sup>20</sup> 495 U.S. 271 (1990).

<sup>21</sup> See Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 25 N.Y. LAW SCHOOL LAW REV. 1047, 1055-60 (1990).

<sup>22</sup> For a fuller description of the NAAG Task Force, see *60 Minutes with Robert M. Langer, Chair, NAAG Multistate Antitrust Task Force*, 61 ANTITRUST L. J. 211 (1992); *60 Minutes with Robert M. Langer, Chair, NAAG Multistate Antitrust Task Force*, 60 ANTITRUST L. J. 197 (1991).

Antitrust Committee,<sup>23</sup> has served not only as a clearinghouse but more as the coordinating body of its member states.<sup>24</sup> NAAG also participates in the Executive Working Group on Antitrust ("EWG-A"), which is comprised of representatives from NAAG's Antitrust Committee,<sup>25</sup> the Chairman of the Federal Trade Commission and the Assistant Attorney General of the Antitrust Division of the United States Justice Department. EWG-A, created as an informal mechanism for communication among the state and federal antitrust enforcers, serves to facilitate coordination and cooperation in antitrust enforcement matters.

Through the NAAG, the state attorneys general have devised and implemented the weapons necessary to a leadership role in merger enforcement. In order to gain access to important pre-merger information, and blunt the effect of *Lieberman v. FTC*, NAAG developed the NAAG Voluntary Pre-Merger Disclosure Compact<sup>26</sup> and spearheaded new pre-merger information sharing protocols with the Federal Trade Commission and the United States Department of Justice.<sup>27</sup> NAAG has also fought for federal and state legislative initiatives designed to assure that the states have the necessary information and authority to challenge anticompetitive mergers.<sup>28</sup> Additionally, NAAG has developed detailed merger enforcement guidelines in order to advise business of the factors that state attorneys general utilize in determining whether to challenge a particular merger.<sup>29</sup>

#### A. NAAG Voluntary Pre-merger Disclosure Compact

The NAAG Voluntary Pre-Merger Compact<sup>30</sup> was created to encourage merging parties to notify state attorneys general of their merger plans prior to consummation. The Compact benefits both the business community and the states. In simple

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<sup>23</sup> NAAG's Antitrust Committee is currently chaired by Ohio Attorney General Lee Fisher. Maryland Attorney General J. Joseph Curran currently serves as Vice Chair.

<sup>24</sup> The work of the NAAG Task Force is accomplished by the antitrust staff of the various state attorneys general. The Chair of the NAAG Task Force reports directly to the Chair of the NAAG Antitrust Committee, and all NAAG Task Force activities are cleared through the NAAG Antitrust Committee. New Jersey Deputy Attorney General Laurel A. Price currently chairs the NAAG Task Force. Connecticut Assistant Attorney General Robert M. Langer served in that position from 1990 to 1992.

<sup>25</sup> NAAG's current representatives to EWG-A are Connecticut Attorney General Richard Blumenthal, who serves as EWG-A Chair, Arizona Attorney General Grant Woods, Maryland Attorney General J. Joseph Curran, New York Attorney General Robert Abrams and Ohio Attorney General Lee Fisher.

<sup>26</sup> See Section II-A, *infra*.

<sup>27</sup> See Section II-B, *infra*.

<sup>28</sup> See Section II-C, *infra*.

<sup>29</sup> See Section II-D, *infra*.

<sup>30</sup> Reprinted in 4 TRADE REC. REP. (CCH) § 13,410.

terms, it provides that, if merging parties file a notification with a single Compact signatory and provide copies of their federal filings under the pre-merger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act,<sup>31</sup> then no signatory state may make additional investigative compulsory discovery requests of the merging parties. Thus, states are provided with notification of contemplated mergers prior to their consummation and the merging parties are spared the burden of multiple discovery requests by the various states. To date, more than forty states plus the District of Columbia and Puerto Rico have signed the Compact.<sup>32</sup>

The Compact is an important document for all counsel advising clients through the merger process. As described in more detail below<sup>33</sup> state attorneys general are increasingly active in the merger enforcement area, even when federal authorities have made a decision not to challenge a particular merger.<sup>34</sup> By failing to notify attorneys general in affected states prior to consummation of a merger, merging parties run the risk that their merger plans will be upset after state enforcers have reviewed the transactions. Risk-averse merger parties would do well to advise affected state attorneys general of their plans prior to consummation.<sup>35</sup> The cost of ignoring state merger enforcement may be formidable.

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<sup>31</sup> 15 U.S.C. § 18a.

<sup>32</sup> The Compact signatories include: Alabama; Alaska; Arizona; Arkansas; California; Colorado; Connecticut; District of Columbia; Florida; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New York; North Carolina; North Dakota; Pennsylvania; Oklahoma; Oregon; Puerto Rico; Rhode Island; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; and Wyoming.

<sup>33</sup> See Section III-A, *infra*.

<sup>34</sup> E.g., *Connecticut v. Wyco New Haven, Inc.*, 1990-1 Trade Cas. (CCH) § 69,024 (D. Conn. 1990) (ordering divestiture of acquired assets); *Washington v. Texaco Refining & Marketing, Inc.*, 1991-12 Trade Cas. (CCH) § 69,345-346 (W.D. Wash 1991) (ordering post-acquisition divestiture).

<sup>35</sup> Providing pre-merger notification to state attorneys general does not increase the risk of a challenge to the transaction. Pre-merger notification allows merging parties to learn of and understand an attorney general's competitive concerns. Armed with such information, the parties can work to alleviate any such concerns. Often anticompetitive aspects of a merger can be alleviated by restructuring the transaction. See generally, Aronson & Keyte, *Cutting the Suit to Fit the Cloth: Innovative Solutions to Merger Challenges by the DOJ and FTC*, ANTITRUST, Vol.6, No.3, 26 (Summer 1992). Since attorneys general have demonstrated that they will challenge anticompetitive mergers even after consummation, failing to provide pre-merger notification does not alleviate any risk of challenge. Rather, such prior notification can serve to stimulate a frank and productive dialogue, facilitate planning and diminish the risk of challenge.

### B. *The Information Sharing Protocol*

In recognition of the states' new role in merger enforcement and the close working relationship with federal authorities developed through the NAAG, the Federal Trade Commission and the United States Department of Justice have recently developed protocols<sup>36</sup> to facilitate pre-merger information sharing with state attorneys general. These protocols are designed to complement the NAAG Voluntary Pre-Merger Disclosure Compact. Under the protocols, merging parties may make a limited waiver of usual Hart-Scott-Rodino pre-merger filing confidentiality provisions. Utilization of these protocols will allow federal enforcement authorities to confer and share analyses with state attorneys general.

The protocols are important in allowing for greater federal-state coordination of merger analysis. Although the federal enforcers and a state attorney general may not always agree as to the lawfulness of a particular merger, coordination of their investigations reduces duplicative activities by both government and merging parties. Better informed of the progress and pace of the each other's investigation, federal and state authorities may each better assess how particular available resources should be utilized in a particular merger review.

### C. *Legislative Initiatives*

While the NAAG Voluntary Pre-Merger Disclosure Compact and the federal information sharing protocols are useful, they are still dependent on the voluntary cooperation of the merging parties. Such cooperation, unfortunately, is not always forthcoming. Now that states have become equal enforcers of merger law, there is more of a need than ever for timely information with which to evaluate the lawfulness of proposed mergers. State attorneys general have recognized this need by calling for changes in both federal and state law in order to assure that necessary information is made available prior to the consummation of a merger.

On the federal level, NAAG has proposed amendments to the Hart-Scott-Rodino pre-merger notification statute to allow state attorneys general confidential access to pre-merger filings

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<sup>36</sup>The Federal Trade Commission protocol is reprinted in 62 ANTITRUST & TRADE REG. REP. (BNA) 697 (May 28, 1992). The Department of Justice protocol is reprinted in 62 ANTITRUST & TRADE REG. REP. (BNA) 338 (March 12, 1992).

as of right.<sup>37</sup> States likewise are moving to assure timely disclosure. The Connecticut Attorney General has proposed state legislation that would require merging parties to provide pre-merger notification to the Attorney General of any acquisition concerning a business with a substantial connection to the State of Connecticut.<sup>38</sup>

While these legislative initiatives have not been successful to date, it is only a matter of time before similar legislation is passed. The states have become too significant a force in merger enforcement to be ignored; and efficient enforcement policy demands that state attorneys general have the same tools available to them that their federal counterparts have.

#### D. *The NAAG Horizontal Merger Enforcement Guidelines*

NAAG has developed a detailed analytical framework for assessing whether a particular horizontal<sup>39</sup> merger should be challenged under the antitrust laws. This analytical framework is contained in a document entitled *Horizontal Merger Guidelines of the National Association of Attorneys General* ("NAAG Merger Guidelines").<sup>40</sup>

Promulgation of these guidelines was impelled by the new role of state attorneys general in merger enforcement. As merger transactions became increasingly reviewed by the states, it became essential to advise the business community of state antitrust enforcement policy. The NAAG Merger Guidelines serve as a business planning tool since they help business assess the lawfulness of potential mergers. The NAAG Merger Guidelines also underscore the seriousness with which state attorneys general take their new role in merger enforcement. These guidelines represent a carefully developed methodology for not only assessing the lawfulness of mergers but also for informing the exercise of prosecutorial discretion.

<sup>37</sup>The text proposing amendment to section 7a of the Clayton Act, 15 U.S.C. § 18a, is contained in S.432 which is printed in *Legislation to Amend the Hart-Scott-Rodino Act: Hearing Before the Subcommittee on Antitrust, Monopolies, and Business Rights of the Committee on the Judiciary on S.431 and S.432, 100th Cong., 1st Sess. 4* (1987).

<sup>38</sup>The Connecticut Attorney General's bill was the prototype for a NAAG sponsored model state act concerning pre-merger notification to state attorneys general. The text of the NAAG model statute is reprinted in 53 ANTITRUST & TRADE REG. REP. (BNA) 944 (December 17, 1987).

<sup>39</sup>A horizontal merger is one which involves firms that actually or potentially are in both the same product and geographic markets.

<sup>40</sup>The NAAG Merger Guidelines were revised on March 30, 1993. The current revision is reprinted in No. 256 TRADE REG. REP. (CCH) (Supp. March 30, 1993). The original NAAG Merger Guidelines were adopted in 1987 and are reprinted in 52 ANTITRUST & TRADE REG. REP. (BNA) Spec'l Supp. (March 12, 1987).

The promulgation of the NAAG Merger Guidelines has enhanced the antitrust enforcement arsenal available to state attorneys general. Along with the information gathering tools discussed earlier, this case selection tool makes state attorneys general more ready, willing and able to devote resources to evaluating and, if appropriate, challenging anticompetitive mergers.

### III. THE LESSONS IN CONNECTICUT

The Connecticut Attorney General has reviewed dozens of mergers in the past few years. The results of these reviews are varied. In some cases, review has revealed that no anticompetitive effects are likely. In other cases, the parties have made changes in the transactions to alleviate anticompetitive concerns raised by the Attorney General. In yet other cases, the Attorney General declined to prosecute because the federal enforcement authorities or other state attorneys general had undertaken that task. In still other cases, suit was filed to challenge the mergers.

While antitrust review of mergers often reveals anticompetitive aspects, states cannot expend their valuable resources challenging every anticompetitive merger. Local factors almost always influence an attorney general's decision to prosecute.<sup>42</sup> Two cases in which the Connecticut Attorney General filed suit, *Connecticut v. Wyco New Haven Inc.*<sup>43</sup> and *Connecticut v. Newell Co.*,<sup>44</sup> provide insight to the factors that lead a state attorney general to expend resources on a merger challenge.

#### A. *Connecticut v. Wyco New Haven, Inc.*

On May 14, 1990 the United States District Court for the District of Connecticut entered a Consent Decree in *Connecticut v. Wyco New Haven, Inc.* The transaction at issue involved the acquisition of heating oil terminals in New Haven harbor. After review of the transaction, the Connecticut Attorney General, utilizing the principles set out in the NAAG Merger Guidelines, challenged the acquisition. The Consent Decree ordered that a significant portion of the acquired heating oil terminals be divested.

*Wyco* was a case in which the Connecticut Attorney General learned of the merger after its consummation. Although pre-

<sup>42</sup>The NAAG Merger Guidelines recognize that local concerns are an appropriate enforcement selection criterion.

<sup>43</sup>1990-1 Trade Cas. (CCH) § 69,024 (D. Conn. 1990).

<sup>44</sup>1992-2 Trade Cas. (CCH) § 70,008 (D. Conn. 1992).

merger notification was provided to the federal enforcement agencies, they not only failed to challenge the merger but also granted a waiver of the normal waiting period before which mergers may occur." Thus, if there were to be a governmental antitrust challenge at all, it would have to come from a state attorney general.

The facts of *Wyco* made it also apparent that the Connecticut Attorney General must be the one to challenge the transaction. Heating oil is a product which is extremely important to all aspects of Connecticut and its economy and New Haven harbor is a vital entry point for heating oil into Connecticut. New Haven harbor has unique capabilities such as the ability to accept large tankers. Moreover, it is the only input point for the pipeline that serves the heart of the Connecticut market. Access to terminal facilities in New Haven is essential to anyone wishing to significantly and effectively compete as a wholesaler of heating oil in Connecticut. Thus, the transaction involved Connecticut assets and the competitive impact upon an essential commodity would be largely felt in Connecticut.

The need for the Connecticut Attorney General to challenge this transaction under federal and state antitrust law was clear due to the local nature of the competitive impact. Yet the task was not easy. Challenging a transaction after consummation presents more difficult enforcement problems because the remedy of divestiture is often difficult to implement. Despite the difficulties inherent in seeking divestiture, the strong local impact involved compelled the Connecticut Attorney General to challenge the merger even after its consummation.

Fortunately in this case, a viable divestiture remedy was achievable. But not without great cost to the divesting party. It undoubtedly would have been much better for *Wyco* to have notified Connecticut's Attorney General prior to consummation of the merger. In that way the Attorney General's views on the legality of the transaction could have been factored into the shaping of the ultimate transaction.

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<sup>4</sup>Pursuant to 15 U.S.C. § 18a(b)(2) and 16 C.F.R. § 803.11 the federal enforcement agencies can grant "early termination" of the statutory waiting periods. Under this procedure, the WYCO transaction was granted "early termination".

B. *Connecticut v. Newell*

On October 2, 1992, the United States District Court entered a Consent Decree in *Connecticut v. Newell Co.*<sup>45</sup> The case involved a proposed acquisition of The Stanley Works by the Newell Company. Connecticut's Attorney General challenged the proposed transaction under federal and state antitrust laws. Under the consent order, Newell is now prohibited from seeking to acquire stock or assets of The Stanley Works.

The Attorney General's decision to challenge the proposed acquisition followed an accelerated but meticulous and comprehensive factual review to assess the validity of the antitrust claims.<sup>46</sup> Connecticut's investigation revealed that the acquisition would indeed violate state and federal antitrust laws. Stanley and Newell had overlapping product lines in several highly concentrated national markets. The appropriate considerations under the NAAG Merger Guidelines demonstrated that the acquisition should be challenged.

Connecticut's determination that the acquisition would violate the antitrust laws did not compel the decision to file suit. Connecticut's Attorney General had to consider whether this case was one meriting an expenditure of Connecticut's valuable resources. After all, this merger would likely produce an anticompetitive result nationwide, not just, or primarily, in Connecticut.

The decision in this case was influenced by three additional significant factors. First, it appeared that the federal authorities were not inclined to challenge the acquisition. Therefore, as in *Wyco*, if a governmental voice were to be heard on this issue, it would be through the action of the states.

Second, Stanley is a Connecticut-based company with a 150 year commitment to the State. It is an important employer in Connecticut. Thousands of jobs potentially were at stake.

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<sup>45</sup> 1992-2 Trade Cas. (CCH) § 70,008 (D. Conn.).

<sup>46</sup> Due to the short period of time inherently available in a hostile takeover situation, it was necessary to conduct an investigation utilizing the quickest methods. This case presented an early opportunity to take advantage of the newly created federal-state merger cooperation protocol. See Section II-B, *supra*. That protocol worked well. Both Newell and Stanley authorized the Justice Department to share confidential information with Connecticut. Thus, there was swift access to information that otherwise would have only been available through the more cumbersome procedure of Connecticut's antitrust subpoena power. Significantly, Stanley provided maximum cooperation. Connecticut was provided complete and unfettered access to all of Stanley's relevant files and employees. Connecticut was also allowed complete access to Stanley's outside counsel and consultants.

Connecticut's investigation was concerned solely with the competitive effects of the acquisition. But the decision to expend resources on a challenge was aided by the fact that a successful challenge would not only maintain competitive markets, but also would preserve an independent Connecticut-based company. Since Connecticut would doubly benefit from the antitrust challenge, it seemed a particularly appropriate expenditure of Connecticut's resources.

Third, Stanley had committed itself to full and complete cooperation.<sup>47</sup> Connecticut was assured that it could litigate this case with greater efficiency and less expense.

This assurance was cemented by a unique arrangement. As part of its cooperation, Stanley's Board of Directors agreed in writing to provide Connecticut with complete access to its files and employees as well as to the work of its outside counsel and economic and other consultants, all at Stanley's expense. This agreement was structured to survive any change in ownership or control of Stanley. Thus, even if Stanley eventually succumbed to Newell's advances, Stanley was obligated to provide Connecticut full and tangible cooperation. While some have described this agreement as a new "poison pill", Connecticut's perspective is that it demonstrated the seriousness of Stanley's offer of cooperation. The availability of such cooperation was an important factor in Connecticut's decision to bring this lawsuit.

Although the anticompetitive impact of a Newell/Stanley transaction would not be felt uniquely or primarily in Connecticut, it would be felt very heavily in the State. The home improvement product markets at issue are important ones and stifled competition in those markets would disadvantage large numbers of Connecticut residents. The lack of other likely enforcers taking action, together with Connecticut's connection to the target company and the ability to litigate efficiently and with diminished expense, all combined to tip the scales in favor of challenging this proposed merger.

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<sup>47</sup>Connecticut v. Newell presented a paradigm example of the mutual benefits of corporate-governmental cooperation in antitrust enforcement. See generally Blumenthal, Langer and Rubenstein, *Connecticut Attorney General Joins with The Stanley Works to Thwart Hostile Takeover Attempt: Anatomy of a Government-Corporate Partnership in Enforcement*, 27 INTERNATIONAL MERGER LAW 11 (November 1992). Antitrust enforcement is both pro-consumer and pro-business and close cooperation between government enforcers and the business community achieves mutually beneficial results.

#### IV. CONCLUSION

State attorneys general have filled the void left by lax antitrust oversight by federal authorities throughout the 1980s. Antitrust review of mergers by state attorneys general is now a matter of routine enforcement policy. The states have actively created new enforcement tools to accompany their new enforcement role. These tools will continue to be refined and enhanced.

As firms contemplate their business options in the merger area, they ought to be cognizant of the importance of considering the views of state attorneys general concerning antitrust issues. Failing to take account of the antitrust concerns of state attorneys general puts merger transactions at unplanned risk of being undone, after valuable time, effort and money have been expended putting the deal together. Consulting state attorneys general in all instances allows firms to assess this risk and in many cases fully alleviate it. Identifying particular local impacts or local connections to a merger transaction is a useful guide as to which state attorneys general to consult.

Antitrust review of mergers by state attorneys general will be a constant. Cooperation and dialogue between state attorneys general and the business community concerning proposed mergers will serve both public and private interests.

