# STATE ANTITRUST ENFORCEMENT

## I. Introduction

Questions arise from time to time as to the role of the state attorneys general in enforcing the antitrust laws, compared to that of their federal counterparts at the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). For many, the *Microsoft* case[1] brought these questions into sharp focus. *Microsoft* raised not only many substantive antitrust and procedural litigation issues, but also questions concerning the appropriate functions of both federal and state officials in national antitrust enforcement.

We will leave to others the formidable task of analyzing *Microsoft*. Instead, recognizing the effect of that case in sensitizing the antitrust community to concerns of federal and state enforcement tensions, our report addresses the role of the states in antitrust enforcement today from a more global perspective. More particularly, we discuss the factors that lead states to bring antitrust actions, the relationship of state enforcers to the federal agencies and private parties, and the nature of enforcement actions by the states in recent years. Much of the information in this report is based upon interviews with the key antitrust enforcers in the offices of the attorneys general of California, Connecticut, Florida, Maryland, New York, Texas and Wisconsin.[2] In talking with these enforcement officials, the authors and other members of their committee believe they interviewed a representative cross section of individuals from states in the forefront of antitrust enforcement. After discussing major themes that emerged from these

---

[1] *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (C.K.K.) (D.D.C.), and *New York v. Microsoft Corp.*, Civil Action No. 98-1233 (C.K.K.) (D.D.C).

[2] We would like to thank Kathleen Foote and Tom Greene (California), Steve Rutstein (Connecticut), Trish Conners (Florida), Ellen Cooper (Maryland), Jay Himes, Robert Hubbard and Richard Schwartz (New York), Mark Tobey (Texas) and Kevin O'Connor (Wisconsin), for their time and assistance in providing helpful information necessary for this article. Mr. O'Connor is now in private practice.

interviews, several of the leading cases involving the states are discussed (it would be impossible in a paper of this length to recite all of them) – including those in which federal and state authorities have worked together and those in which the states have proceeded independently.

As is well known, the states have the authority to act under both federal and state antitrust statutes. The Supreme Court in *California v. American Stores Co.*,[3] and lower federal courts, have also recognized that antitrust enforcement decisions by federal officials do not preclude state enforcers from taking a entirely different course of action.[4] This case law suggests that, generally, there is no issue of supremacy of authority of federal antitrust authorities over the states' officials. The federal courts are the ultimate arbiters of antitrust policy, and both sets of enforcers may present cases to them and to advocate for the competition policies that they support. The states have, and should have, a role in protecting the interests of their citizens. The states have better knowledge of local conditions and are more sensitive to local issues.

States have availed themselves of their enforcement authority, invoking the antitrust laws sometimes in conjunction with the federal government, and sometimes not. While this may create concerns for litigants because they may face antitrust officials with diverse views, the states have cooperated with federal authorities and each other to facilitate resolution of alleged antitrust violations.

States are most active in investigations and litigations where local consumer interests may be affected. Thus, it should be no surprise that the bulk of state enforcement involves local price-fixing, resale price maintenance, and mergers of entities directly interfacing with the public such as retail establishments, and the enforcement of state indirect purchaser statutes.

---

[3] 495 U.S. 271 (1990).

[4] *See also New York v. Microsoft Corp.*, 209 F. Supp. 2d 132 (D.D.C. 2002); *In re In Multidistrict Private Civil Treble Damage Antitrust Litigation*, 52 F.R.D. 398 (C.D. Cal. 1970).

Sometimes, however, local and national interests coincide. And when they do – as in cases such as *Microsoft*, *Primestar*[5] and *Hartford Insurance*[6] – the states do not hesitate to sue.

## II. Views From State Enforcers

While there were different points of emphasis among the interviewed state enforcement officials, overall the interviews showed that the states are generally aligned in their approach to the factors that persuade them to become involved in an antitrust enforcement action. To reiterate, all of the states surveyed are particularly interested in matters that affect individual consumers within their state. Additional interests include those related to state agencies, *e.g.*, Medicaid, state hospitals, state mental health facilities and state procurement entities. Therefore, restraints affecting health-care services, pharmaceutical prices, consumer-oriented products and retail sales generally, and the like, will draw the attention of state enforcers.

Generally, if there is not an identifiable effect on local consumers (either public purchasing entities or individuals), the states probably will not get involved. To refine their analysis further, states try to determine how many consumers are affected and how significantly adverse the effect is on those consumers. Further, in deciding whether to take action, states also will consider the egregiousness of the violation, the duration of the restraint, and the nature and severity of the harm. Because of their concern for consumers, states are more likely to be interested in retail level mergers than in mergers of suppliers or manufacturers.

As might be expected, in deciding whether to pursue a case, the states consider the available resources within their office and whether other government enforcers or private parties

---

[5] *New York ex rel. Abrams v. Primestar Partners, L.P.*, 1993-2 Trade Cas. (CCH) ¶70,403 (S.D.N.Y. 1993)(consent decree in action challenging partnership by cable operators to provide satellite broadcasts). *See also New York v. Visa, U.S.A., Inc.*, 1990 –1 Trade Cas. (CCH) ¶69,016 (S.D.N.Y. 1990)(action challenging joint venture by Visa and MasterCard to develop the Entrée debit card).

may be prosecuting an action involving the conduct in question. Some states are less inclined to get involved in "business-to-business" disputes, particularly when private counsel is already involved. However, even if a business could privately vindicate its rights, the states at times also attempt to determine whether there is consumer harm that may not be addressed by the private business plaintiff. In some cases in which private plaintiffs are involved, the states have participated by filing an amicus brief in support of the position of the private plaintiff.[7]

Of course, the more states challenging a particular conduct or merger, the less costly pursuing the matter is for any individual state.[8] Further, to the extent that the federal authorities are involved, the state can conserve its resources by leaving some of the investigation and prosecution to the federal enforcers. Therefore, before deciding to proceed, states look carefully at the role being played, or that could be played, by the federal agencies and other states. The situation with federal enforcers today is rather different than that which prevailed in the 1980s. Then, in the eyes of many antitrust practitioners, there was a tense relationship between the federal agencies and various state attorneys general.[9] This relationship is now viewed positively

---

*( … continued)*

[6] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

[7] *See, e.g.*, *Covad Communications Co. v. Bell Atlantic Corp.*, Docket No. 02-7057 (D.C. Cir.); *Servais v. Kraft Foods, Inc.*, Case No. 99-3199, Supreme Court of Wisconsin, 2002 WI 42 (April 30, 2002), *cert. denied*, 2002 U.S. Lexis 8727 (U.S. Dec. 2, 2002); *Levine, et al. v. Abbott Laboratories, et al.*, Index No. 95-117320 (Sup. Ct., N.Y. Co. Nov. 25, 1996), *appeal withdrawn*, 257 A.D.2d 978 (1st Dep't 1999).

[8] In 1983, the states formed the Multistate Task Force of the National Association of Attorneys General to coordinate efforts of various states in the investigation and prosecution of antitrust cases. Over the years the states have formed various task forces to study areas of interest. *See* Jay L. Himes and Patricia A. Conners, Antitrust Federalism and Multistate Antitrust Enforcement in ABA Antitrust Section 2002 Annual Meeting Course Materials 593 (2002). A recent illustration is the Pharmaceutical Pricing Task Force, set up in 2002, to address state enforcement of antitrust and consumer laws affecting the pharmaceutical industry.

[9] Jay L. Himes, Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case. 11 Geo. Mas. L. Rev. 1 (2003).

by the states even though there have been occasions of disagreement about whether certain claims should be prosecuted.[10]

State antitrust authorities recognize that both the FTC and DOJ have significant resources from which to draw. The federal agencies have far more economists than do the state enforcers, and also have attorneys with significant experience in particular product market areas.[11] However, this complementary relationship can run the other way as well. The federal agencies recognize that people "on the ground" at the state level can be very helpful in certain types of cases. In connection with the recent action challenging the EchoStar/DirecTV satellite television merger,[12] for instance, the DOJ staff encouraged the states to identify witnesses to testify concerning local market conditions. Moreover, in some cases, the states have added value through expert witnesses. For example, during the liability phase in *Microsoft*, the trial attorney representing the United States selected the states' retained economic expert, rather than the economic expert engaged by the DOJ, to testify on behalf of the governments' case. Also, during the first remedies phase of *Microsoft*, another economist retained by the states was a key witness-affiant.

The states have also complemented federal enforcement by filing amicus briefs to support the position of a federal agency, much as they have done with private parties. For example, in *FTC v. Staples*,[13] several states investigated a proposed merger between two office supply

---

[10] Roundtable Discussion, ABA 2002 Conference; 70 Antitrust L.J. 261, 266 (2002), Testimony of Hewitt Pate, Hearing of the Senate Judiciary Committee, May 21, 2003.

[11] Less visible examples can also be given. For instance, the DOJ Health Care Task Force (which has now been disbanded) went to Texas several years ago to help sensitize that Attorney General's office to issues arising in the analysis of hospital mergers.

[12] *United States v. Echo Star Communications, Inc.*, Docket No. 1:02 CV02138 (E.S.H.) (D.D.C.).

[13] 970 F. Supp. 1066 (D.D.C. 1997).

companies, Staples and Office Depot. When the states were denied leave to intervene in the FTC's challenge to the merger, they submitted an amicus brief.[14]

Private counsel similarly can form a good synergistic relationship with state antitrust authorities. Private counsel frequently represent consumer interests, often in class actions, thereby suggesting the potential for a natural alliance with state enforcers. Private counsel (and their clients) can bring economic knowledge of the industry to a case, whereas the states can bring a public purpose element that the private party cannot make as easily.[15]

## III. Major State Cases

The states have been active on several fronts in recent years, including cases in which damages have been sought on behalf of consumers, and numerous cases involving potential mergers. In some of these matters, the states have acted with the federal authorities, and in other cases, states have been at the forefront by taking action independently or when the federal authorities have passed on a matter or transaction. In the material that follows, some of these major cases are discussed.

### A. Consumer damages cases

Since 1976, states have had the statutory authority to bring damage claims for violation of the federal antitrust laws as *parens patriae* on behalf of consumers under the Hart-Scott-Rodino Antitrust Improvements Act.[16] Armed with this authority, in many cases the states have

---

[14] *See also* Brief of *amici* states in *United States v. Visa USA, Inc.*, Docket Nos. 02-6076, 6078 (2d Cir.) (filed July 3, 2002).

[15] That of course could be the subject of a whole other report. The relationship between states and private counsel worked particularly well in *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369 (D.D.C. 2000), and appears currently effective in *In re: Cardizem CD Antitrust Litigation*, Master File No. 99-Md-1278, MDL No. 1278 (E.D. Mich.); *In re Buspirone Antitrust Litigation*, MDL No. 1413 (JGK) (S.D. N.Y.); and *Ohio v. Bristol-Myers Squibb Co.*, 1:02 CV 01080(EGS) (D.D.C.) In these latter three cases, settlement approval proceedings are underway.

[16] 15 U.S.C. § 15c.

sought monetary relief on behalf of consumers under federal law. This is an important state role, as the DOJ has no authority to secure such recovery on behalf of consumers. Moreover, until *FTC v. Mylan Laboratories, Inc.* ("*Mylan*"),[17] the FTC had only sought monetary recovery (disgorgement) in one case.[18] In *Mylan*, 31 states (including New York), the District of Columbia and the FTC cooperated to bring suit in federal court, alleging that Mylan Laboratories, Inc. sought to restrain trade by cornering the supply of the active pharmaceutical ingredients in two drugs. This conduct inflated the drugs' prices by large amounts at the retail level. The states, together with the FTC, negotiated a $100 million settlement that was distributed to consumers and state agencies.

As reflected in cases such as *Mylan*, the states have worked with the federal authorities in enforcing the antitrust laws. One of the most recent examples of such cooperation occurred early this year when the DOJ, Ohio and California announced three consent decrees addressing a market allocation agreement in California and Ohio, which involved the *Village Voice*.[19]

More commonly, in recent years the states have independently initiated consumer damages cases. In *In re Disposable Contact Lens*,[20] 32 states (including New York) brought suits on behalf of consumers alleging that a conspiracy to limit the sales of replacement contact lenses to eye care professionals, and retail optical and mass merchandisers inflated retail prices. In 2001, after years of tenaciously litigated pretrial proceedings and settlements with various

---

[17] 62 F. Supp. 2d 25, *modified*, 99 F. Supp. 2d 1 (D.D.C. 1999) (dismissal); *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369 (D.D.C. 2000) (settlement approval).

[18] *FTC v. Abbott Labs*, 1992-2 Trade Cas. (CCH) ¶69,996 (D.D.C. 1992).

[19] *Ohio v. Village Voice Media,* LLC, No. CV 03492804 (Ct. Com. Pl. Jan. 27, 2003); *California v. Village Voice Media,* LLC, No. BC289225 (Calif. Superior Feb. 18, 2003); United *States v. Village Voice Media, LLC*, Civil Action No. 1:03:CV0164 (N.D. Ohio) (United States, Ohio and California filed a civil antitrust complaint against nation's two largest chains of alternative newsweeklies alleging a conspiracy to suppress and eliminate advertising in, and readers of, alternative newsweeklies in Ohio and California).

[20] Docket No. 3:94 MDL-1030-J-20A (M.D. Fla.).

defendants, the case went to trial against the remaining defendant, Johnson & Johnson. The states tried the case with counsel for private plaintiffs before a jury, and after two months of trial, the parties reached a settlement. Overall, the case produced approximately $90 million in cash and consumer product coupons, as well as injunctive relief. In *Toys' R Us Antitrust Litigation*,[21] 44 states (including New York), the District of Columbia and Puerto Rico brought suit against Toys' R Us and four other toy manufacturers to recover damages for buyer-imposed vertical restraints. The case settled for $57 million in cash and consumer product coupons, $37 million of which was used for toy distributions to underprivileged children.

States also have been active in areas such as resale price maintenance. Beginning in the Reagan era, the DOJ largely abandoned the area of vertical price fixing, and the FTC tended to be reluctant to act as well. Thus, the states have taken the lead on resale price maintenance cases, such as those brought against Minolta[22] in 1988, Panasonic[23] in 1989, Mitsubishi[24] in 1991 and Nintendo[25] in 1992. More recently, in *New York v. Reebok International, Inc.*,[26] all 50 states filed suit alleging conspiracy to fix resale prices relating to Reebok shoes.[27] Similarly, in *Nine West*, all 50 states and the District of Columbia sued Nine West Shoe Company alleging resale price maintenance. The case was settled on behalf of consumers for $34 million.[28] The states' most recent vertical restraints cases involved cooking grills and compact discs. The states

---

[21] 191 F.R.D. 347 (S.D.N.Y.2000).

[22] *In re Minolta Camera Products Antitrust Litigation*, 668 F. Supp. 456 (D. Md. 1987).

[23] *In re Panasonic Consumer Electronics Antitrust Litigation*, 1989 U.S. Dist. LEXIS 6274 (S.D.N.Y. 1989).

[24] *State of Ohio v. Mitsubishi Electronics of America, Inc.*, 1992 U.S. Dist. LEXIS 17470 (D. Md. 1992).

[25] *State v. Nintendo of America*, 775 F. Supp. 676 (S.D.N.Y. 1991).

[26] 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F. 3d 44 (2d Cir. 1996).

[27] The states negotiated a $9.5 million settlement, $8 million of which was distributed *cy pres* on behalf of consumers.

[28] *Matter of Nine West Group Inc.*, file 981-0386 settlement agreement (FTC March 6, 2000).

brought suit against Salton, Inc. for conduct relating to the George Foreman grill.[29] In late May 2003, the court approved a settlement of roughly $7.7 million and significant injunctive relief.[30] Similarly, various state antitrust enforcement authorities recently settled the litigation involving compact discs in which the states had challenged policies involving minimum advertised price restrictions ("MAP") of CD distributors on the basis that retailers would have discounted CDs more had it not been for the MAP policy. (As such, the MAP essentially served as a form of resale price maintenance.)[31] On June 13, 2003, the court approved a settlement of $143 million in cash and products.[32]

### B. Merger cases

In addition to restraint of trade cases leading to claims for damages, the states are active in the area of merger enforcement. Most often, this has involved working with the federal authorities. However, there have been particular areas (such as hospital mergers) where states have acted alone in recent years, and there have been some cases in which states have acted because their view of the relevant market was different from that of the federal authorities.

#### 1. Examples of joint state-federal action

State merger enforcement in the modern era goes back almost 15 years to the leading case of *California v. American Stores Co.*[33] in which California successfully brought suit seeking divestiture of a supermarket merger after the FTC had negotiated a more limited remedy as a condition to permitting the transaction to proceed. Joint merger enforcement by federal and state

---

[29] *State of New York, et al. v. Salton, Inc.*, Civ. Action No. 02-CV-7096 (LTS) (S.D.N.Y. 2002).

[30] *State of New York, et al. v. Salton, Inc.*, Civ. Action No. 02-CV-7096 (LTS), Slip Op. (S.D.N.Y. May 30, 2003).

[31] *In Re Compact Disc Minimum Advertised Price Antitrust Litigation*, MDL No. 1361.

[32] *In Re Compact Disc Minimum Advertised Price Antitrust Litigation*, MDL No. 1361, Slip. Op. (D.Me. June 13, 2003).

[33] 495 U.S. 271 (1990).

authorities started with the challenge to the merger of two Florida hospitals that resulted in a 1994 consent decree.[34]

There are several prominent recent merger cases in which the federal and state authorities worked together. In *California v. Chevron Corp.*[35] and *In the Matter of Chevron Corp.*,[36] 12 states and the FTC investigated the proposed merger of Chevron and Texaco. Both the state and federal agencies reached consent decrees with the merging companies, which included significant divestiture relief. In *New Jersey v. Exxon Corp.*[37] and *In the Matter of Exxon Corp.*,[38] numerous states (including New York) and the FTC filed suit to challenge a proposed merger of Exxon and Mobil which the governments alleged would significantly injure competition and allow Exxon/Mobil to raise gasoline prices for consumers. The parties reached a settlement, which included substantial divestiture relief including over 1,700 Exxon and Mobil gas stations on the East Coast, 360 stations in California and 319 stations in Texas. More recently, in *United States v. Echo Star Communications, Inc.*,[39] suit was filed by 23 states (including New York), the District of Columbia, Puerto Rico, and the DOJ to block a proposed merger between the nation's two satellite television services, EchoStar and DirecTV. The parties abandoned their proposed merger several weeks after the states and the DOJ filed suit.

Questions have been raised whether both federal and state involvement is needed when a merger has national implications. Apart from the general benefits that federal and state authorities can provide to each other in enforcing the antitrust laws, in merger cases the states

---

[34] *United States and State of Florida v. Morton Plant Health System*, 1994-2 Trade Cas. (CCH) ¶70,769 (M.D. Fla. 1994).

[35] Case No. 01-07746 (C.D. Cal. Sept. 7, 2001).

[36] 2001 FTC LEXIS 135 (Sept. 7, 2001).

[37] 99 CV 03183 (RMU) (D.D.C. Nov. 30, 1999).

[38] 201 FTC LEXIS 18 (Nov. 30, 1999).

[39] Docket No. 1:02CV02138(ESH) (D.D.C.).

often can focus on regional issues, which might not be that significant to the federal authorities, while the federal agencies focus on national issues. In two waste disposal merger cases, *United States v. USA Waste Serv., Inc.*[40] and *United States v. Waste Management, Inc.*,[41] 13 states (including New York) and the DOJ challenged, in two separate venues, proposed mergers between Waste Management and other major national waste disposal companies. There was concern among various states that the federal agencies would only look for divestitures in certain areas of the country. For example, because the DOJ said that it would require divestitures only in the top 15 markets, and because Milwaukee was the 18th largest market, Wisconsin decided to become involved so that it could seek divestiture in the Milwaukee market. Ultimately, both cases were resolved through consent decrees requiring divestiture in several local markets. Similarly, in the Wells Fargo/Interstate bank merger, California looked at the impact on agricultural lending in the Central Valley of California, an issue that might well not have been of concern to the federal authorities.

### 2. State action in absence of federal action

After a series of FTC and DOJ losses in the 1990s in cases challenging hospital mergers,[42] federal authorities seem less inclined to proceed with such challenges, and the attention of states has picked up with respect to these mergers. Some of the federal defeats may have been influenced, at least in part, by the absence of opposition by local and state constituencies who would, presumably, be the victims of the diminished competition. In

---

[40] 1999-2 Trade Cas. (CCH) ¶ 72,678 (N.D. Ohio 1999).

[41] 2000-1 Trade Cas. (CCH) ¶ 72,791 (E.D.N.Y. 1999).

[42] *See*, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Long Island Jewish Med. Ctr.* ("*Long Island Jewish*"), 983 F. Supp. 121 (E.D.N.Y. 1997); *FTC v. Butterworth Health Corp.* ("*Butterworth*"), 946 F. Supp. 1285 W.D. Mich. 1996); *aff'd*, 121 F.3d 708 (6th Cir. 1997); *FTC v. Freeman Hosp.* ("*Freeman*"), 911 F. Supp. 1213 (W.D. Mo.), *aff'd*, 69 F.3d 260 (8th Cir. 1995); and *United States v. Mercy Health Servs.*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated as moot*, 107 F. 3d 632 (8th Cir. 1997).

*Freeman*, for example, the district court denied the FTC's request for a preliminary injunction. The court not only found that competition was unlikely to be reduced by eliminating one hospital, but also commented that "[i]t looks to me like Washington, D.C. once again thinks they know better what's going on in southwest Missouri. I think they ought to stay in D.C."[43] Before the Eighth Circuit, the FTC urged reversal based upon alleged bias by the district court judge. While the Eighth Circuit did not condone this and other allegedly biased remarks, it concluded that the comments did not warrant reversal. Although these comments were extreme, many believe that in the absence of opposition to a merger from local authorities, the federal authorities have a heavier burden in challenging hospital mergers.[44]

Reflecting the reduced federal enforcement role in hospital merger cases, in *California v. Sutter Health Sys.*,[45] California challenged a proposed hospital merger even though the FTC had decided not to proceed. California antitrust officials emphasized to us, however, that the FTC and the California Attorney General's office worked closely during the investigation leading to the state challenge. The two enforcers simply reached different conclusions at the investigation's end. Similarly, when the two dominant hospitals in the Dallas/Fort Worth area decided to merge, the federal agencies declined to challenge the merger. The state continued its investigation, and the hospitals eventually abandoned the proposed transaction.[46] Further, when two hospitals in

---

[43] *Freeman* at 263.

[44] *Butterworth* at 1296. (Court referred to the fact that hospital boards were comprised of community business leaders who had a stake in maintaining high quality and low cost hospital services). *See* Kevin J. Arquit and Richard Wolfram, Mergers and Acquisitions "United States Government Antitrust Analysis and Enforcement', 116 PLI/Corp. 425, *539 (1999) (The authors concluded that in *Long Island Jewish* an additional factor in the court's decision was the fact that the New York State attorney general did not join the federal authorities' opposition to the proposed merger. In that case, the Court did note that the New York Attorney General had declined to join in prosecution of the suit. *Long Island Jewish,* 983 F.Supp. at 135.)

[45] 84 F. Supp. 2d 1057 (N.D. Cal. 2000), *aff'd*, 217 F.3d 846 (9th Cir. 2000).

[46] Charles Ornstein, Failure Trends Nip Baylor, Texas Health Merger, Dallas Morning News, Nov. 2, 1999, at 1D; Charles Ornstein, Doctors Air Concerns About Hospital Merger, Dallas Morning News, Sep. 11, 1999, at 3F;

*(continued ... )*

Kenosha, Wisconsin decided to merge, the FTC, which was heavily involved in *Butterworth* at the time, decided not to proceed. Therefore, Wisconsin took the lead in the investigation, which resulted in a consent decree[47]

Even though the Department of Justice's Antitrust Division had reviewed and decided not to challenge merger plans of two New York hospitals in the Poughkeepsie area, the State of New York successfully brought suit against the two hospitals, claiming that they were colluding to fix prices. Ultimately, the court granted summary judgment in favor of the State.[48] Thereafter, a consent decree designed to unwind the arrangement was entered into.[49]

Hospital mergers are not the only areas in which state enforcers have acted in the absence of federal enforcement. States have challenged mergers in other industries after reaching different conclusions on the relevant product market than that of their federal counterpart. Two cases from New York, with different results, are illustrative.

In *New York v. Kraft General Foods, Inc.*,[50] New York, disagreed with the FTC's conclusion about the relevant product market, and thus sued to challenge Nabisco's 1993 sale of its ready-to-eat cereal assets to Kraft. After a trial on liability, the court dismissed the action based on a failure to show a substantial lessening of competition in the relevant market. The second case – *Bon-Ton Stores, Inc. v. May Dep't Stores Co.* ("*Bon-Ton*")[51] – involved a retail merger in which May Company sought to acquire a Rochester, New York department store

---

*( ... continued)*
Charles Ornstein, Texas Hospital Firms' Merger Approved by Justice Department, Dallas Morning News, Mar. 27, 1999.

[47] *Wisconsin v. Kenosha Hospital and Medical Center*, 1997-1 Trade Cas. ¶ 71,669 (E.D. Wis. 1996).

[48] *New York v. St. Francis Hospital*, 94 F.Supp.2d 399 (S.D.N.Y. 2000).

[49] *New York v. St. Francis Hospital*, Civil Action No. 98CV939(WCC)(June 30, 2000).

[50] 862 F. Supp. 1030 (S.D.N.Y.) (denying preliminary injunction), *aff'd without published opinion*, 14 F.3d 590 (2d Cir. 1993), *denied on renewal*, 862 F. Supp. 1035 (S.D.N.Y. 1994), *decision after liability trial*, 926 F. Supp. 321 (S.D.N.Y. 1995).

chain. The FTC defined the product market more broadly than did the Attorney General, and after the FTC declined to act, New York challenged the acquisition. The state's action was consolidated with a case brought by a private party who also challenged the proposed merger. After the court granted a preliminary injunction restraining the acquisition, the matter settled.[52]

There are numerous other examples of merger cases in which states have acted after federal authorities have not. For example, Connecticut commenced an investigation after a merger of oil terminals was completed and federal enforcers had indicated that no federal enforcement challenge would occur.[53] Massachusetts has been particularly active in this area in these kinds of situations, sometimes challenging mergers after no action was taken by the federal authorities and in other cases taking action after the FTC and the Department of Justice sought and obtained either no relief or lesser relief.[54]

Other states also have pursued matters in the absence of federal action. These have ranged in businesses as diverse as department stores[55] and banks.[56]

**C. Other cases in which states have been at the forefront.**

There also have been cases outside the merger area in which states have moved forward even after the federal government decided not to act. An older case, and one of the most prominent, is *Hartford Fire Ins. Co. v. California*,[57] brought by 19 states and private parties alleging an antitrust conspiracy among insurers, reinsurers, and their trade association affecting

---

*( ... continued)*

[51] 881 F. Supp. 860 (W.D.N.Y. 1994).

[52] 1995-1 Trade Cas. (CCH) ¶ 70,917 (W.D.N.Y. 1995).

[53] *Connecticut v. Wyco New Haven, Inc.*, 1990-1 Trade Cas. (CCH) ¶69,024 (D.Conn. 1990).

[54] *Massachusetts v. Campeau Corp.*, 1988-1 Trade Cas. (CCH) ¶68,093 (1988); *Massachusetts v. J. Sainsbury, PLC,* No. 99-3574A (Mass. Super. Ct. Nov. 16, 2000); (*Massachusetts v. Suiza Foods Corp.*, No. 01-11097 (D. Mass. July 6, 2001); *In re Stericycle, Inc.*, No. 03-124 (Mass. Super. Ct. Jan. 7, 2003).

[55] *City of Pittsburgh v. May Dep't Stores*, 1986-2 Trade Cas. (CCH) 67,340 (W.D. Pa. 1986).

[56] *Maine v. Key Bank of Maine, Inc.*, 1991-2 Trade Cas. (CCH) ¶69,649 (D.Me. 1991).

nationwide commercial liability insurance industry practices. "The Justice Department declined even to investigate this industry, purportedly because the Federal Trade Commission, during a brief investigation, failed to uncover any evidence of collusion and because 'collusion is highly unlikely in unconcentrated industries like the property and casualty industry.'"[58] This case exemplifies of the use of *parens patriae* when a case is national in scope. The Ninth Circuit expressly upheld *parens* standing:

> Each state here asserts its quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general . . .. The State's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction.[59]

After the Supreme Court's 1993 decision upholding the case, the litigation settled with the defendants agreeing to pay $36 million and to make three major industry changes: (1) restructuring the Insurance Services Office, an industry body that develops insurance forms and ratings, to increase involvement and control by those outside the industry; (2) creating a public risk service institute to provide risk-management services to state and local governments; and (3) developing a database to provide insurance risk information to government bodies.[60]

A variation on the theme of state action in the absence of federal action is found in situations in which states have initiated legal action with the federal authorities taking follow-up action. One of the most dramatic examples involves the bid rigging among dairy companies that supplied milk and other dairy products to public school districts and other public institutions in

---

*( ... continued)*

[57] 509 U.S. 764 (1993).

[58] Michael F. Brockmeyer, State Antitrust Enforcement, 57 Antitrust L.J. 169, 170 (1988) (fn. omitted), quoting letter from the Assistant Attorney General Douglas H. Ginsburg to Jay Angoff (Apr. 22, 1986).

[59] *In re Insurance Antitrust Litigation*, 938 F.2d 919, 927 (9th Cir. 1991) (internal quotations and citations omitted).

several states. The Florida Attorney General's office brought information about such bid rigging to the Atlanta Field Office of the Antitrust Division in 1986, after which the Division began a grand jury investigation. Since May 3, 1988, the Division has filed 134 milk bid rigging cases involving 81 corporations and 81 individuals There have been criminal fines totaling more than $69.8 million that have been imposed on corporations and individuals, and 29 individuals have been sentenced to jail. Further, the Division reached civil damage settlements with the defendants in excess of $8 million.[61] Additionally, Florida itself made a $34 million settlement that returned damages to 66 of its 67 school boards.[62]

New York's role in a recent case also illustrates a situation in which the State instituted legal action with follow-up action taken by the federal authorities. The situation involved alleged bid rigging by buyers of collectible postage stamps sold at public auctions, which came to the attention of the DOJ and the New York Attorney General at about the same time. After New York investigated the matter and filed a civil suit,[63] one of the significant participants settled the civil case with New York, while working out a resolution with the DOJ concerning possible criminal exposure.[64] Having thus obtained a cooperating witness, the DOJ pushed

---

*( … continued)*

[60] In re Insurance Antitrust Litigation MDL No. 767 (N.D. Cal. 1995).

[61] Joel I. Klein, Antitrust Enforcement and the Consumer, http://www.usdoj.gov/atr/public/div-stats/1638.htm (July 2, 2003).

[62] *Florida v. Borden, Inc.*, Case No. 88-0273-CIV-Scott (S.D. Fla.); *Florida v. Barber Dairies, Inc.*, Case No. 89-40019 (N.D. Fla.).

[63] *See New York v. Feldman*, 210 F. Supp. 2d 294 (S.D.N.Y. 2002) (denying motion to dismiss).

[64] *See United States v. Earl P.L. Apfelbaum, Inc.*, Criminal No. 02 CR 106 (S.D.N.Y 2002).

forward with an investigation, filed suit[65] and eventually obtained guilty pleas to criminal violations from other participants in the scheme.[66]

## IV. Conclusion

As reflected by this paper, states play a vital role in antitrust enforcement in the United States. While in some cases they supplement the activities of the federal enforcers, in many cases states have acted on their own. Whether working alone or with the federal authorities, state enforcement officials have an understanding of the local markets and the needs of local consumers and state governmental entities that the federal authorities cannot match.

By the legal actions they have instituted, state enforcers have brought significant economic recovery to local consumers who have been injured by anticompetitive acts. The awards on behalf of such consumers in recent years are significant and demonstrate the very real benefits to state consumers from antitrust enforcement by local authorities.

There are no supremacy issues with respect to state antitrust enforcement, and it is clear that both federal and state regulators have the right to advocate for the policies they support. Because the federal authorities generally look at issues that have a national scope, the states play a vital role in many areas of antitrust enforcement. While there is always the risk that defendants may face regulators with diverse views, the federal and state authorities have cooperated significantly in recent years to try to achieve a consistent approach that does not place the

---

[65] *United States v. Feldman*, Criminal Case No. CR 02-708 (S.D.N.Y. 2002) (indictment charged two British stamp dealers and a British stamp company for conspiring to rig bids for stamps purchased at public auctions in the United States).

[66] *United States v. Davitt Felder, Inc.*, Criminal No. 02 CR 461 (S.D.N.Y. 2002); *United States v. Mark Morrow Stamps*, Criminal No. 02 CR 795 (S.D.N.Y. 2002); *United States v. Okey*, Criminal No. 02 CR 865 (S.D.N.Y. 2002). *See generally* "British Stamp Dealers and British Company Indicted on Bid-Rigging Charges" United States Department of Justice, Antitrust Division Press Release, dated May 29, 2002.

defendant in a particularly disadvantageous position just because two governmental enforcers are involved.

Because states are most likely to become involved when local consumer interests are most affected, it is not surprising that the bulk of state enforcement involves local price fixing, resale price maintenance, and mergers of entities like retail establishments that sell to the public. In these, as well as in many other areas, the states have served, and will continue to serve, a vital role in antitrust enforcement.