by Winston I. Smart

Antitrust Enforcement

The States Can Do It, Even if the Feds Won't

➢ **The federal government's stance in enforcing antitrust laws during the eighties was relatively benign. Many people, including state officials, criticized the Feds for this attitude. But, they overlook the power of state governments to deal with and prosecute anti-trust misconduct. The record, to date, suggests that with limited exceptions, state governments are not likely to be a major force in antitrust enforcement. Lack of state and federal funding, political realities, and the fear of business and investment flight all work against greater state involvement.**

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Many people, including state government officials, castigate the federal government for its attitude towards mergers, vertical price fixing, and related antitrust matters. Most of these commentators ignore the fact that we live in a federal system in which there are two sovereigns, one federal and one state. Admittedly, there has been substantial growth of federal power in regulating interstate and foreign commerce, taxation and spending. However, states' rights are by no means an endangered species.

Under the Tenth Amendment of the United States Constitution, the individual states have a substantial reserve of power to deal with, among other things, monopolies and monopolistic practices. Generally, state governments have the power to regulate their economies and protect their residents from the effects of intra-state economic activities forbidden by state law. Also, no one doubts the right of an individual state to join with other states to better enforce their laws and to protect their residents.

Generally, all states have the power to enforce certain federal laws. The major federal antitrust statute, the Sherman Act, is particularly relevant. It prohibits contracts, combinations and conspiracies in restraint of trade, monopolization, attempts to monopolize and conspiracies to monopolize. In addition, federal law allows state attorneys general to file a Sherman Act suit for money damages or equitable relief as *parens patriae* on behalf of their residents.

Similarly, the Clayton Act prohibits mergers and acquisitions which might reduce competition in any market in any part of the country. In addition, it authorizes the Federal Trade Commission and the Department of Justice to seek divestiture of anti-competitive acquisitions. The United States Supreme Court's decision involving a supermarket merger in California further increased the power held by states. In *California v. American Stores Co.*, the Court unanimously held that states also have the power to seek a divestiture of acquisitions which violate the Clayton Act. The defendants had argued that only the Feds had this power. Thus, state governments already have substantial power to enforce laws important in responding to mergers and increasing concentration in the food industry.

Each state also has its own antitrust statutes. These statutes also prohibit, at the very least, contracts, combinations or conspiracies in restraint of trade, and monopolization. In some states there is a "little FTC Act" which, like the Federal Trade Commission Act, outlaws deceptive practices and unfair methods of competition. Antitrust activity may fall under the umbrella of unfair methods of competition.

There is an explicit exemption in federal and state law for cooperative organizations to engage in some anti-competitive behavior. There is no such

exemption for the non-cooperative corporate food industry which, of course, exists in every state. Given the importance of the food industry to consumers and producers, the need to aggressively monitor the food industry and to vigorously prosecute firms engaged in prohibited activities is obvious. The ability of the industry to injure producers and consumers by antitrust conduct is too great to do otherwise.

State Antitrust Statutes

Every State has at least one antitrust statute on its books. Indeed, when the Sherman Act was passed in 1890, it was intended to supplement the enforcement of state laws which generally have a limited reach.

State laws against contracts, conspiracies and combinations in restraint of trade originate in English common (judge-made) law. Codifying statutes were passed as early as 1624, almost three hundred years before the Sherman Act, and several of the colonies had statutes which forbade such practices. Like the state laws which regulate securities, they are independent of and supplement their federal counterparts.

Cooperative Enforcement by the States

The administrative and legal machinery is already in place for increased cooperation among state antitrust enforcers. The National Association of Attorneys General (NAAG) has been a moving force behind the trend towards multi-state declarations of antitrust enforcement policy, investigations and prosecutions. NAAG has adopted Vertical Restraints Guidelines (1985) and Horizontal Merger Guidelines (1987). These were designed to counteract the relatively permissive federal guidelines issued by the Antitrust Division of the U.S. Department of Justice. In addition, NAAG has created a Multistate Antitrust Task Force which spearheaded several joint investigations and prosecutions, including the Panasonic, Minolta and insurance conspiracy cases.

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In the insurance case, some state attorneys general allege that insurance firms and executives conspired to eliminate coverage and artificially drive up rates for consumers, local government bodies and businesses. The aggressiveness of the state attorneys general contrasts with the attitude of the U.S. Justice Department which declined to participate in the investigation. Another significant event was the signing by 44 states of the NAAG General Voluntary Pre-Merger Disclosure Compact. Under this agreement, pre-merger filings received by one state are shared with other states which might be adversely affected by the anti-competitive effects of a proposed merger.

Antitrust Enforcement by the Individual States

Enforcement efforts of the states vary widely. Almost one half of the states either do not engage in enforcement or do so only minimally (Table 1).

Food Antitrust Enforcement by the States

Concentration levels in the food industry make it a prime candidate for antitrust surveillance and enforcement. However, relatively few states have actually done so. In a significant supermarket antitrust case, California successfully blocked the acquisition of Lucky Stores by American Stores Co., the parent corporation of the Alpha Beta grocery chain. It received the unanimous support of the usually divided United States Supreme Court.

Connecticut has successfully challenged a conspiracy by three supermarket chains to jointly eliminate the redemption of coupons at double their face value. As part of the settlement, the firms agreed to issue several million dollars in new coupons and to allow cross-redemption of coupons. This includes redemption at the stores of non-members of the conspiracy.

Florida has obtained a $34 million settlement of its price fixing complaint against milk producers but the terms of the settlement

Table 1 – Antitrust Enforcement Activity of Individual States

Zero to Minimal	*Moderate*	*Significant*
Alaska	Arizona	California
Arkansas	Colorado	Connecticut
Delaware	Hawaii	Florida
Georgia	Louisiana	Illinois
Idaho	Maine	Maryland
Indiana	Mississippi	Massachusetts
Iowa	New Jersey	Minnesota
Kentucky	New Mexico	New York
Nebraska	North Carolina	Ohio
Nevada	Tennessee	Pennsylvania
New Hampshire	Utah	Texas
Kansas	Wisconsin	Washington
Michigan	West Virginia	
Missouri		
Montana		
North Dakota		
Oklahoma		
Oregon		
Rhode Island		
South Carolina		
South Dakota		
Vermont		
Virginia		
Wyoming		

Note: Groupings made by author based on published reports of attorneys general and telephone interviews with assistant attorneys general responsible for antitrust enforcement. Important indicators of activity include the number of attorneys devoted to antitrust matters, the number of investigations, settlements, prosecutions, settlements and convictions, the amount of money recovered from antitrust defendants and participation in multistate enforcement activities.

Lack of space does not permit us to describe the efforts or the accomplishments of the individual fifty states. Interested readers are advised to call their attorneys general's office which will provide particulars about its enforcement efforts.

remain "confidential" and hidden from the people by the people's lawyer, also called the attorney general. Georgia has also prosecuted bid-rigging in the sale of milk to school districts.

Massachusetts brought price fixing charges against seven liquor and convenience stores who jointly advertised the prices of alcoholic and grocery products. Mississippi has prosecuted bid-rigging by milk firms selling to school districts and correctional institutions.

New York's Antitrust Bureau collected a total of $6.7 million in damages in the Dairylea milk price-fixing case and it has challenged the exclusive distribution system used by brewers. North Carolina has challenged and prosecuted price fixing in the milk and bread industries.

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Utah has obtained a substantial settlement in a milk price fixing case. The defendant has paid $500,000 in fines and is subject to a permanent injunction against certain anti-trust conduct.

Vermont has challenged the acquisition of one grocery chain by another. As part of a settlement, the state obtained an assurance from the parties that they would divest certain stores within nine months of the acquisition.

West Virginia has sued price-fixing firms in its soft drink industry and has obtained a total of $291,000 in consumer restitution and penalties from them.

Wisconsin accepted a plea bargain offer by several farm cattle buyers who rigged an auction market, kept the prices low and then re-auctioned the cattle among themselves.

In sum, relatively few of the fifty states have taken any significant action to enforce the antitrust laws in the food industry within their jurisdiction.

Some Reasons for Non-enforcement

Many and varied are the reasons why states do not enforce antitrust laws. Included are the following:

a. Legislative refusal to fund antitrust enforcement. Some state legislators do not feel particularly motivated to fund an antitrust bureau within the attorney general's office. Their lack of enthusiasm may be due to the relative strength of anti-enforcement business lobbies, the relative weakness of the pro-enforcement business and consumer lobbies and the individual legislator's fear of electoral retribution.

b. Cutbacks in federal funding. Consistent with its own retrenchment in antitrust enforcement, the federal government has slashed Law Enforcement Administration grants to state attorneys general for antitrust enforcement. Also, the same people who pressed for retrenchment in federal enforcement are unlikely to look favorably on the funding of state enforcement efforts.

Excellent and up-to-date surveys of state antitrust laws have been prepared by the American Bar Association's Section of Antitrust Law (1988) and by William J. Haines, Jr. (1989). The first has been published by the American Bar Association and can be obtained from its Chicago headquarters. The second has been published by the Bureau of National Affairs, Inc., Washington, D.C.

c. Fear of business and investment flight. A state which enforces any law which offends business interests can expect them to move, or at least threaten to move, their operations to a neighboring state that does not. The threat of such a move, and the associated loss of jobs, income and revenue, can act as an 'incentive' to all but the most zealous legislators and attorneys general to cease and desist from enforcement activity.

d. Fear of political or electoral retaliation. Legally, the state attorneys general are supposed to be the people's lawyers and the chief law enforcement officers of the individual states. However, in the real world of politics, the office is a stepping stone to greater heights, including the Governor's mansion and the U.S. Senate. These positions, as well as the office of attorney general itself, are difficult to win without substantial financial backing from business interests, the very people who object to antitrust enforcement. It therefore becomes the equivalent of political suicide in some states to enforce or to promise to enforce the antitrust laws. It is much safer to champion the death penalty, an abortion stance or and even corporal punishment, and to ignore antitrust enforcement. If it has to be mentioned, most state politicians are prone to blame it on the feds. Keep in mind that we live in a federal system. One of the benefits of federalism is the opportunity to blame the other sovereign.

e. Staffing arrangements. In some states, the office of head of the antitrust division is a classified civil service position and the incumbent is relatively free from political pressure. He therefore tends to be more devoted to the task of enforcement. Conversely, in states where the holder is a political appointee, he is subject to indirect political pressure and hence unlikely to be enthusiastic about antitrust enforcement.

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f. Intra office jealousy. In some states, the involvement in antitrust enforcement produces substantial publicity for the prosecuting attorney, especially if he is successful. Such publicity enhances his political career but draws the envy of his boss.

g. Reduced sales tax revenue. Effective antitrust enforcement keeps prices down. Lower prices means lower sales tax revenue. Insofar as sales tax revenue are a significant part of a state's total revenues, then effective enforcement could result in lower state revenues. A small example will illustrate. The state of Wisconsin collected $1.983 billion dollars in sales taxes in fiscal '90. Its sales tax rate is 5 percent of the price of items sold. The total value of sales was therefore $39.886 billion. A price reduction of 5 percent would have lowered the total value of sales by $1.983 billion to $37.903 billion. The sales tax revenue on that amount would have been $1.895 billion, or a decrease of about $88 million dollars. Admittedly, this figure represents only an upper limit and is based on specific assumptions. However, such a potential loss of revenue will not produce many supporters for antitrust enforcement in Wisconsin. A similar calculation can be done for other states. The important question is, how many states can afford to have their revenue reduced by millions of dollars? While the loss of state revenue may not be an articulated motivating factor, it cannot be ignored.

h. Reduced corporate income tax revenue. Insofar as lax antitrust enforcement produces higher prices, higher corporate

The U.S. farm and food industry may be divided into production, manufacturing and distribution segments. All of them are characterized by increasing concentration. Since space does not permit a discussion of the methodology and the levels of concentration ratios in different segments, the reader is referred to Bruce Marion et al., *The Organization and Performance of the U.S. Food System*, Lexington Books, Lexington, Mass., 1986; Kenneth Robinson, *Farm and Food Policies and their Consequences*, Prentice-Hall, 1989; and Leonard Weiss, *Concentration and Prices*, Cambridge Press, Cambridge, Mass., 1989.

earnings and higher corporate income tax revenue, effective antitrust enforcement could mean lower corporate incomes and lower corporate tax revenue for the state.

i. Budget difficulties. In these days when states are facing budget deficits and are resorting to lotteries and court costs as means of raising general revenues, any enforcement activity which both reduces tax revenue and increases government expenditures is unlikely to be well received.

j. Inadequate data collection. Data collection and sharing is a major cooperative activity among the separate states. While the states are diligent in collecting and sharing information on such topics as driver's license and auto registration, most are a somewhat remiss in creating and maintaining an antitrust data base. Efficient antitrust enforcement requires adequate data collection and proper investigation. Most states lack even the must rudimentary structures for antitrust data collection. This deficiency is not unrelated to the foregoing reasons.

The Future

Two years ago when the NAAG formed its Multistate Antitrust Task Force, it promised a new era of aggressive state antitrust enforcement. However, as long as the attorney general's office and/or its antitrust division is headed by upwardly mobile politicians, as opposed to career civil servants, dependent on or fearful of the political strength of anti-enforcement business interests, and as long as consumers have no impact on enforcement policy, the pattern of non-enforcement by most state governments is likely to continue.

It must also be mentioned that there has been a trend of increasing communication and cooperation between the Feds and the state antitrust enforcers over the last eighteen months. Some skeptics may say that the *American Stores Co.* opinion has forced the Feds to think twice about ignoring federal law since the federal court is likely to unravel an anticompetitive merger approved by them. One could also ask whether the stable door is being closed after the horse has bolted. In 1988, University of Wisconsin-Madison economist Bruce Marion noted that it was extremely difficult to reverse structural change, i.e., a change in concentration, once it had occurred. He predicted that the high and increasing levels of concentration of supermarket sales and the growing concentration in grocery wholesaling were likely to persist. One should note, however, that Marion did not take into account the power available to state antitrust enforcers.

Some Recommendations

Even though prospects are bleak, there are four recommendations which, if embraced, would lead to significant antitrust efforts even if the attitudes identified earlier are not significantly changed.

Allow consumers to be heard. Where they have not already done so, states should allow consumer and consumer group enforcement of antitrust laws. Some states have passed "Illinois Brick repealers," statutes which nullify the Illinois Brick rule. This federal rule allows, with three exceptions, only direct purchasers to sue for antitrust injury. Hence, the final consumer, the person who has the greatest incentive to move against the price fixers, is usually excluded. "Illinois Brick repealers" seek to correct this situation. The United States Supreme Court has ruled that "Illinois Brick repealers" are not unconstitutional.

Another major step would be to allow consumers access to data collected by the State or received from other attorneys general.

Allow the creation of revolving funds to support enforcement. The office of the attorney general is capable of producing a substantial amount of money for the State in the form of fines, attorneys' fees and unclaimed restitution from antitrust defendants. If these amounts were retained in the antitrust division, they could be used to fund greater antitrust enforcement.

Increased sharing of information. Under the auspices of the NAAG, there should be greater coordination in the collection of data required for antitrust investigation and prosecution. Additionally, there should be greater communication, collaboration and data sharing among states. The machinery for data sharing already exists. The formal and informal contacts and resources made possible by membership in the NAAG, such as the Premerger Notification Compact, are major tools that need to be used.

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Use of the jurisprudence of conspiracy. Finally, antitrust statutes outlaw conspiracies and combinations. Prosecutors must make greater use of the jurisprudence of conspiracy and aiding and abetting against antitrust offenders. Antitrust prosecutors could easily learn about the theory, tactics and strategies of conspiracy prosecution, if they are not already familiar with them, from the successes of narcotics prosecutors. For example, persons who willingly discuss, plan, organize, and facilitate the sale and distribution of narcotics are criminally liable for conspiracy to sell and distribute narcotics even if, for one reason or another, they are not tried for selling and distributing the substance. Conspiracy jurisprudence should apply with equal force to persons who plan, discuss and lay the groundwork for antitrust misconduct. C

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