The mission and agenda for state antitrust enforcement

BY LLOYD CONSTANTINE*

The New England Antitrust Conference, now in its 24th year, has traditionally been addressed by the Chairman of the Federal Trade Commission (FTC) and the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice (DOJ), who present the government antitrust enforcement agenda from the perspective of these federal agencies.

Recognizing the increasingly important role of the state attorneys general in antitrust enforcement and the emerging trend of multistate enforcement, the Conference amended its format in 1987 to include the states chief enforcer. This is the third time that I write and speak in that capacity. On those previous occasions I described the period 1981 to 1987 as a "dark age" for antitrust when favored economic theory was elevated above marketplace reality and the rule of law, but predicted that the states

ascendancy foreshadowed an antitrust renaissance,1 in 1988, as the Reagan enforcers left office I called for the establishment of a regime of collective and coordinated enforcement among the federal and state antitrust agencies.2 That idea was embraced by James Rill, first in his capacity as co-anchor of the ABA's Kirk-Patrick II Commission,3 which reported on the performance of the FTC, and later when Rill was appointed Assistant Attorney General.

On November 12, 1990, the fifth formal meeting of what the three agencies call the Executive Working Group for Antitrust Enforcement (EWG-A) will convene in Boston. More important than these formal meetings is the daily interchange among these agencies. They now share information, cross deputize staff, provide each other with briefs amicus curiae, and other forms of support, and even jointly investigate under uniform civil investigative demands. Joint litigation is a logical and likely next step, which I predict will occur in 1991.

There are still serious and principled disagreements among state and federal enforcers, but these are discussed in an atmosphere of mutual respect and recognition that the divergences are balanced by broad areas of consensus.

Rather than describe the many developments that daily add definition to the new order, one example from merger enforcement will suffice.

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In March 1987 when the states unanimously adopted their own Horizontal Merger Guidelines, the Wall Street Journal reported the initiative as "an attack on the Reagan administration's..."


antitrust enforcement policies..."2 In fact the differences in the state and federal guidelines were modest, the most important apparently being the states insistence that claims of imminent entry, production substitution, contestability, efficiencies and the like be demonstrated with what we called "hard evidence." But in recent speeches, FTC Chairman Steiger, Assistant Attorney General Rill, FTC Competition Director Kevin Arquit and Deputy Assistant Attorney General Judith Whaley have clarified and amplified the federal guidelines. It is now clear that the apparent divergence in the type of proof required by the agencies to rebut a prima facie case, no longer exists. I predict the DOJ will formalize these changes in its merger enforcement methodology in 1991, by amending the merger guidelines.

As part of the EWG-A process, the agencies are attempting to further harmonize their separate merger guidelines, coordinate premerger disclosure and waiting periods, and ultimately allocate merger enforcement according to nonbinding areas of primary responsibility.

Now that the states have secured their position of equality in the government enforcement hierarchy and realized the goal of antitrust federalism, which in 1890 motivated Congress to supplement state antitrust, both common law and codified, the states must define their mission and enforcement agenda. My job is to set forth that agenda. By necessity it will be my personal vision of these matters, because the views I express are my own and are not necessarily those of the attorney general of any state.

With the unfair advantage of an intimate knowledge of sufficient work in the states pipeline to last for the next 2 or 3 years, it is not difficult for me to predict their enforcement agenda in terms of the major substantive areas and priority industries. But before


doing that, I should define the mission of state antitrust enforcement in the second year of its second century.6

The mission of state antitrust enforcement
The states mission can be defined in terms of six factors. First is the unique array of powers that state attorneys general have at their disposal. In pursuing a single course of illegal conduct, the attorney general often acts as criminal prosecutor, the state's proprietary counsel, parens patriae at common law and the statutory parens patriae for millions of consumers. No other antitrust enforcer, governmental or private, has such power or bears such burden. The statutory parens patriae power of the state attorney general, in particular, adds a dimension not fully appreciated by those who are infrequently cast in the role of the plaintiff's lawyer.

A second factor shaping the states mission is their basic orientation as law enforcers. In the recent past, the states have understood better than the federal agencies that within the bounds of prosecutorial discretion, they must enforce the law given to them by the legislature, like it or not. It is one thing to recognize that antitrust laws are constitution-like in the latitude permitted for evolution. State attorneys general, similar to all antitrust lawyers, delight in the room for creativity that this area of the law uniquely affords. But neither this joy nor supposed wisdom greater than that of the legislature are license for the enforcer to discard laws they do not like. A government antitrust agency is the wrong place to engage in civil disobedience.

A third factor defining the states mission is the role explicitly recognized for them by the Congress. Congress wanted to supplement state enforcement with the Sherman Act not supplant it. In our system of American federalism this means more than fungible or redundant state and federal law enforcement resources. It implies a system of vertical checks and balances as important to


the vitality of our nation as the horizontal checks among the three branches of the federal government. The disagreements between state and federal enforcers are part of the constitutional design. In that sense, some level of contrast and competition should be welcomed. The agencies manifest desire to get along should not impede the right to respectfully disagree and offer the people an alternative.

The fourth factor that shapes and circumscribes the states mission is their limited resources. The states are always involved in triage. With the federal agencies still barely above half their 1980 size, the states must help fill this gap, which is not likely to be restored in this century.

A fifth factor shaping the states mission is their proximity and direct accountability to the people. Most attorneys general are popularly elected, and it is disconcerting that this obvious source of power is treated by many as a handicap. Many have heard the joke that NAAG7 is actually an acronym for the "National Association of Aspiring Governors." But the real joke is on anyone who believes that either federal or state officials can be shielded from political pressure or that we would be better off if they were.

The attorneys general’s proximity to the people and to the businesses located within their states, whether they be local or
NAAG, founded in 1907, is comprised of the 55 state and territorial attorneys general and the Corporation Counsel of the District of Columbia. NAAG’s standing Antitrust Committee is comprised of seven attorneys general. NAAG’s Antitrust Task force is comprised of the chief antitrust attorney for each of the state attorneys general. The Task Force coordinates multistate antitrust investigation, litigation and briefs amicus curiae. The Task Force formulates proposed legislation, legislative commentary and policy positions for the Antitrust Committee and NAAG as a whole. During the period 1985-1988, the Task Force and its chair drafted the NAAG Vertical Restraints Guidelines, State Attorney General Antitrust Improvements Act and the NAAG Voluntary Pre-Merger Disclosure Compact which are the basis for the coordinated national enforcement of antitrust law by state attorneys general. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT (1989); NAAG, THE OFFICE OF ATTORNEY GENERAL: POWERS & DUTIES

national firms, gives them a unique vantage point to assess the actual workings of the marketplace. It also allows enforcement decisions, primarily dictated by narrowly defined competition concerns, to be assessed in the light of the broader social and political goals of the antitrust laws.

The final factor defining the states mission is their need and demonstrated ability to agree upon a uniform enforcement methodology and to apply it collectively. It is now commonplace to view the states and NAAG’s Antitrust Task Force as de facto a third national antitrust agency. When the states decided to enter the national enforcement market, and make no mistake it was a conscious and deliberate decision reached in March of 1985, we committed to act together to the maximum extent possible. We understood that our power would be far greater that way. We also recognized that substituting disjointed or balkanized enforcement for inadequate and lax enforcement might be no improvement at all. The NAAG Merger Guidelines adopted by 49 states,8 the Vertical Guidelines adopted by 50 states? the Pre-Merger Compact adopted by 45 states, the States’ Model Antitrust Act adopted without dissent, the fact that 14 states filed a single complaint in the 1989 case against Visa and MasterCard,10 that 19 states filed in the insurance litigation in the 9th Circuit,3 that 37 states filed in the 1986 Minolta4 case and that 50 jurisdictions participated in

the 1989 case against Matsushita 5are merely a few examples of the phenomenon. On the rare occasion when the subject of an investigation is served with civil investigative demands from more than one sovereign state, they know to complain to NAAG’s Antitrust Task Force, who will usually be able to arrange for coordination. The private bar now expects the states to act together and they almost always do. In 1989, the editor in chief of the Harvard Law Review wrote that the states collective approach to antitrust enforcement was unique in the annals of

American federalism, and had provided a model for collective activity in other areas of law, such as consumer and environmental protection. For all the foregoing reasons the states must continue to work together.

In sum, the states mission is to enforce antitrust law in a collective and coordinated manner responsive to the legislative will; in a manner that takes advantage of their close proximity and direct accountability to the electorate; in a manner that reflects the broader range of powers uniquely committed to their offices; in a manner that fulfills the design of federalism, including principled and meaningful disagreement between state and federal enforcers; and in a manner that allows them to work with federal counterparts to do a job that is now too large for any agency to do alone. The states mission is to enforce antitrust law and never fall into the trap of making their mission an explanation of why the law should not be enforced. That is the mission of the private defense bar and during the period 1981 to 1988 also inappropriately became the mission of the federal agencies.

With their mission in mind, the state enforcement agenda in the major substantive areas of antitrust for the decade ahead will be as follows.

The merger enforcement agenda

The states have invested heavily in merger enforcement. They went from nowhere to a position where they are competent to handle any merger case. However, the states are neither capable nor desirous of dealing with the number of merger investigations that either of the federal agencies currently handle. Quality yes, quantity no.

One might say that such cherry picking in the merger area diminishes the states claim to equality in the enforcement hierarchy. To the contrary, the states limited role in this substantive area is responsive to congressional will. Congress clearly permitted the states to enforce section 7 of the Clayton Act, and when appropriate, obtain the remedy of divestiture. But just as clearly, section 7A evidences the congressional desire that primary responsibility for merger review reside with the federal agencies. Why else would the federal agencies be provided with the reams of Hart-Scott-Rodino disclosures, which the states also receive when filings are made under the provisions of the NAAG Pre-Merger Disclosure Compact.

The states recent and current merger initiatives involving supermarkets, department stores, airlines, and fuel companies concern finns that sell directly to consumers and cases where the federal agencies do not act, or in the states estimation, act inadequately.

In the American Stores case, California's proximity to its consumers led it to conclude that an FTC consent decree requiring the divestiture of 37 stores was insufficient. It brought suit, and after the Supreme Court unanimously confirmed its authority, secured the divestiture of 174
additional stores. The consent decrees obtained by Massachusetts, Maine, New Hampshire and New York with Campeau and Macy's in 1988 followed a similar pattern,17 as does a current initiative by a number of states involving mergers of airline computer reservation systems. The bulk of the states future merger cases will involve retail industries, such as payment systems, banking, transportation, cable television, mass merchandisers and telecommunications.

Current efforts to further harmonize state and federal merger guidelines and coordinate premerger procedures can only enhance the states ability to fulfill their important although limited role in merger enforcement.

The horizontal restraints agenda

The states agenda in the area of horizontal restraints is straightforward and unsurprising. It differs little from the federal agencies' agenda in this area. We must respond to cartelization with all sanctions at our disposal, including criminal prosecution. But the states must husband their scarce resources for horizontal cases with the broadest impact, in terms of deterrence and relief to injured purchasers. A well placed prosecution of a national firm deters similar conduct for a long time in that industry and others like it.

It was unlikely after Bill Baxter's innovative Sherman Act section 2 case against American Airlines in 1983,18 that any other airline executives would dare run the risk that American's president Robert Crandall did when he implored Braniff's president to fix prices. However, I believe that I could assign an infinite number of attorneys to prosecute local cartels in certain industries, such as garbage carting and heavy construction, and they would produce an infinite number of cases and like the monkeys chained to the typewriters, also probably replicate the works of Shakespeare. I believe that we must do some of this work and creatively seek to join with district attorneys and U.S. attorneys to add the antitrust laws to their arsenal. New York State has done this in a series of cases. Joining antitrust with the Racketeering Influence and Corrupt Organizations Act (RICO) and

16 Id.
other criminal laws seems to raise the stakes sufficiently to have the long-term deterrent effect in these industries, which I fear the antitrust laws alone do not have.

Therefore, national firm cartel prosecution is a top priority. However, local cartel prosecution must not consume an inordinate amount of resources and preclude the states from executing the full agenda of government antitrust enforcement.

The vertical restraints agenda

The state agenda in the area of vertical restraints is to continue to be the primary enforcer of the law. Here the states' disagreements with the federal agencies are clearly and politely stated. Here they are on the firmest ground in terms of executing the clear congressional intention that vertical price fixing be vigorously pursued. The states have prosecuted many vertical price-fixing cases both civilly and criminally. The next in this series of national vertical price-fixing cases will become public in early 1991.

The states alone among government enforcers accept and attempt to enforce the Supreme Court's command in Sylvania,19 that in analyzing the competitive effects of a nonprice vertical restraint one must balance the elimination or diminution of intra-brand competition with any procompetitive effect in the inter-brand market. In 1991 New York State will go to trial against Anheuser Busch and Miller Brewing on this very issue, in a challenge to their national systems of exclusive distribution territories. The states pursue such vertical cases, despite the current hostility to such claims in the lower federal courts, because they


believe that retail price fixing is almost always anticompetitive and reject the highly flawed economic theories used to make the argument that all vertical restraints should be treated as per se lawful and that intrabrand competition is worthless. I invite the reader to listen to a description of the most recent sittings of the free-rider effect and of the Loch Ness Monster. Dispassionately assess which strains your credulity more. The states will enforce the law in this area because it provides a mechanism for reimbursing consumers damaged by price and nonprice restraints. And because the states will enforce the law against vertical price fixing as Congress clearly desires, they have asked Congress to strengthen the law. The attorneys general of 49 states recently joined in a single statement supporting the vertical price-fixing bill which passed the House and which will be considered by the Senate in 1991.

The states agenda in the vertical area also includes a continuing effort to persuade the Antitrust Division to accept the states 5-year-old unanimous request that the Department of Justices' Vertical Restraints Guidelines be withdrawn. In this request the states are joined by the Congress20 and the ABA Special Task Force of 1989. The states want the Guidelines withdrawn for many reasons, but foremost because they are an impediment to the states efforts to enforce the law and are not necessary to the Division in its minimal vertical enforcement efforts.

The states will continue to do national vertical price-fixing cases until their efforts have had the same deterring effect as the national horizontal cases of the 1960's and 1970's may have had on national cartel activity.
The states view certain species of cooperative advertising, designed to fix, stabilize and raise the price at which consumer goods are advertised, as anticompetitive. They will challenge this conduct in appropriate cases. In the last year one national firm abandoned a cooperative advertising program after receiving an intent to sue letter from the states. A challenge to such a program


will in all probability be made against a firm that is restricting actual retail prices in conjunction with cooperative advertising, although the states view both practices as price fixing. The states view is supported by the Supreme Court decision in Parke Davis.21 The federal agencies, especially the FTC view such "coop" programs, where retailers agree to advertise at or above specified prices in return for funds from the manufacturers, as a specie of nonprice restraint. However, since the teaching of Sharp Electronics22 is that even a nonprice restraint will be treated as per se unlawful when used in conjunction with and for the purpose of facilitating vertical price fixing, the divergence of opinion on this issue would be academic, at least in the context of the type of case most likely to be instituted by the states.

The monopolization offenses agenda

The last major substantive areas is monopolization offenses, actionable under section 2 of the Sherman Act.

The question of how state enforcers will use section 2 implicates every other major question confronting them.

For one thing most, and some would say all, antitrust derives from the theory of monopoly. Whether you subscribe to the wealth transfer model or the consumer welfare model, or a hybrid as the states generally do, it is agreed that willfully acquired or maintained monopoly is bad, leading to the extortion of monopoly profits, reductions in output and a misallocation of resources. We condemn cartel behavior because it permits groups of firms to collectively exercise market or monopoly power. Today, the states look to the potential of section 2 to deal with previously unfiled Sherman Act section 1 and Clayton Act section 7 cases that may have grown into monopolization cases. Those readers who frequently travel by airplane might agree.


One count in the now discredited indictment of antitrust was a specific charge against government enforcement of section 2. Cases such as the Justice Department’s IBM case23 and the FTC’s breakfast cereal shared monopoly inquiry24 were cited for the proposition that government section 2 cases were too costly, lengthy and risky to justify the significant resource commitment. The states view the problem more as an issue of refining case selection and litigation technique. They will approach section 2 primarily as pragmatic law enforcers, not as
ideologues. They will neither look for section 2 cases, because of some notion that there are section 2 cases waiting to be brought, nor shy away from section 2 because of a perception that such cases are unwieldy. The question will be, What is the problem and how can section 2 alone or in conjunction with other provisions of law point to the quickest and cheapest solution consistent with the public interest? Although one might say that this approach is obvious, I recently heard a government official say that "we are looking for a good non-price predation case." There is nothing wrong with this, but it is not how the states approach their jobs. A good illustration of pragmatic section 2 enforcement was Bill Baxter's prosecution of American Airlines in 1983.

I previously referred to the 14-state effort in New York et al. v. Visa and MasterCard. That case was settled in May of 1990, with the requirement that the defendants abandon their "Entree" joint debit card venture formed in 1987. At the time of suit, "Entree" had already enlisted several hundred banks and several million cardholders. The states alleged that "Entree" constituted an attempt and conspiracy to monopolize. However, the manner in which we selected our target and avoided others says a lot about the way the states will approach section 2 in the future.

Our investigation began when the president of Visa telegrammed 5,500 banks and invited them to boycott American Express because it had offered its "Optima" credit card at an ini-

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tial annual percentage rate of 13.5%, as compared to the 19.8% rate charged by most banks on their Visa and MasterCard lines in 1987. The legal meaning of the telegram and the actions that banks took in response to it were less important to the states than Visa's perception that 5,500 banks, all supposedly competing with each other, had a common interest in preventing American Express from entering the revolving credit-card market, and that it could expect parallel action in response to the telegram. The uniformity and rigidity of the banks' credit-card interest charges confirmed the public perception that monopoly pricing was prevailing in a market with thousands of competitors. What to do? The approach typified by the IBM or Cereal cases would have been to challenge the existing monopolistic structure. Instead we focused our efforts on making sure that new firms could enter the market. More important, we ascertained the long-term design of the bankcard associations, which was to retard the development of and eventually dominate the point-of-sale debit-card market. The states believed that debit cards would be a major future market and the one most likely to erode the monopolistic performance of the credit-card market. We targeted and terminated "Entree." In the months that have followed many regional and super regional point-of-sale debit-card programs have been announced or become operational. Visa and MasterCard are planning separate and competing systems. A consortium of regional networks is planning a third national system. The industry generally credits the states lawsuit for these recent developments. I believe that when the cashless society is a reality and consumers have a wide choice of payment systems that are competitively priced, the wisdom of the states action will be fully appreciated. The lesson of the IBM and Visa cases is to look where the alleged monopolist is going. The monopolist wants to retard the growth of a product or service that will substitute for its product. It will try to prevent the entry of others into the market for the substitute, and appreciating the inevitability of market
forces, it will try to dominate the market for the substitute. The states have turned their attention
to the cable television industry, which seems to conform to this model.

A consensus outside the cable industry now exists that the industry performs like a monopoly. The debate is not really whether this is so, but what to do about it. The states believe that competition rather than regulation is the answer. Competition within traditional wire line cable can occur. The most likely source of competition would come from the entry of the Bell operating companies. Multipoint, multichannel distribution systems and Direct Broadcast Satellite Systems offer the best hope for competition from alternative technologies. The states are investigating whether and how the cable companies would seek to retard the growth of these new technologies, prevent the entry of others into these markets and move to dominate these technologies when they come on line. In two of these inquiries the states are working closely with the Antitrust Division and the FTC.

Another likely focus of section 2 enforcement by the states is the airline industry. Here again there is a consensus outside the industry that certain carriers occupy dominant positions at certain hubs. The question for the states will be how to use section 2? Should they directly attack these dominant carriers, since the monopolies were consciously acquired through acquisition and are not the fruits of accident, or superior products or business acumen? Should they wait for an act which constitutes the abuse or willful maintenance of a dominant position? One recognized anticompetitive effect of currently configured computer reservation systems (CRS) is to bias flight bookings in favor of the owner of the system. Therefore, the use of a CRS by its owner in a monopolized hub can be approached as a potential section 2 violation. A third approach would be to investigate the pricing activities of the airlines as the Justice Department is currently doing. In coming years the state and federal enforcers will employ each of these approaches to the problem of monopolistic practices in the airline industry.

Conclusion

Now that I have set forth the state antitrust agenda for the next year, decade, century and millennium, I have to figure out what I am going to do when I leave state service in 1991. The state attorneys general and their antitrust staffs are an extraordinarily talented and dedicated group of professionals who are just now beginning to receive the respect and appreciation that they so richly deserve. I know and have worked with nearly every state antitrust lawyer in the United States. They are my friends and are a second family to me. I want to thank them for the countless wonderful moments we have shared in the service of our states and our nation.