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What is the Appropriate Role for State Antitrust Enforcement?
November 8, 2021
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In the U.S. system of dual federal and state sovereigns, a normative analysis reveals principles that could guide state antitrust-enforcement priorities, to promote complementarity in federal and state antitrust policy, and thereby advance consumer welfare.

Discussion

Positive analysis reveals that state antitrust enforcement is a firmly entrenched feature of American antitrust policy. The U.S. Supreme Court (1) has consistently held that federal antitrust law does not displace state antitrust law (see, for example, *California v. ARC America Corp.* (U.S., 1989) ("Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies")); and (2) has upheld state antitrust laws even when they have some impact on interstate commerce (see, for example, *Exxon Corp. v. Governor of Maryland* (U.S., 1978)).

The normative question remains, however, as to what the appropriate relationship between federal and state antitrust enforcement should be. Should federal and state antitrust regimes be complementary, with state law enforcement enhancing the effectiveness of federal enforcement? Or should state antitrust enforcement compete with federal enforcement, providing an alternative "vision" of appropriate antitrust standards?

The generally accepted (until very recently) modern American consumer-welfare-centric antitrust paradigm (see here) points to the complementary approach as most appropriate. In other words, if antitrust is indeed the "magna carta" of American free enterprise (see *United States v. Topco Associates, Inc.*, U.S. (U.S. 1972), and if consumer welfare is the paramount goal of antitrust (a position consistently held by the Supreme Court since *Reiter v. Sonotone Corp.*, (U.S., 1979)), it follows that federal and state antitrust enforcement coexist best as complements, directed jointly at maximizing consumer-welfare enhancement. In recent decades it also generally has made sense for state enforcers to defer to U.S. Justice Department (DOJ) and Federal Trade Commission (FTC) matter-specific consumer-welfare assessments. This conclusion follows from the federal agencies' specialized resource advantage, reflected in large staffs of economic experts and attorneys with substantial industry knowledge.

The reality, nevertheless, is that while state enforcers often have cooperated with their federal colleagues on joint enforcement, state enforcement approaches historically have

been imperfectly aligned with federal policy. That imperfect alignment has been at odds with consumer welfare in key instances. Certain state antitrust schemes, for example, continue to treat resale price maintenance (RPM) as *per se* illegal (see, for example, here), a position inconsistent with the federal consumer welfare-centric rule of reason approach (see Leegin Creative Leather Products, Inc. v. PSKS, Inc. (U.S., 2007)). The disparate treatment of RPM has a substantial national impact on business conduct, because commercially important states such as California and New York are among those that continue to flatly condemn RPM.

State enforcers also have from time to time sought to oppose major transactions that received federal antitrust clearance, such as several states' unsuccessful opposition to the merger of Sprint and T-Mobile merger (see here). Although the states failed to block the merger, they did extract settlement concessions that imposed burdens on the merging parties, in addition to the divestiture requirements impose by the DOJ in settling the matter (see here). Inconsistencies between federal and state antitrust-enforcement decisions on cases of nationwide significance generate litigation waste and may detract from final resolutions that optimize consumer welfare.

If consumer-welfare optimization is their goal (which I believe it should be in an ideal world), state attorneys general should seek to direct their limited antitrust resources to their highest valued uses, rather than seeking to second guess federal antitrust policy and enforcement decisions.

An optimal approach might focus *first* and foremost on allocating state resources to combat primarily intrastate competitive harms that are clear and unequivocal (such as intrastate bid rigging, hard core price fixing, and horizontal market division). This could free up federal resources to focus on matters that are primarily interstate in nature, consistent with federalism. (In this regard, see a thoughtful proposal by D. Bruce Johnsen and Moin A. Yaha.)

Second, state enforcers could also devote some resources to assist federal enforcers in developing state-specific evidence in support of major national cases. (This would allow state attorneys general to publicize their "big case" involvement in a productive manner.)

Third, but not least, competition advocacy directed at the removal of anticompetitive state laws and regulations could prove an effective means of seeking to improve the competitive climate within individual states (see, for example, here). State antitrust enforcers could advance advocacy through amicus curiae briefs, and (where politically feasible) through interventions (perhaps informal) with peer officials who oversee regulation. Subject to this general guidance, the nature of state antitrust resource allocations would depend upon the specific competitive problems particular to each state.

Of course, in the real world, public choice considerations and rent seeking may at times influence antitrust enforcement decision-making by state (and federal) officials. Nonetheless, the capsule idealized normative summary of a suggested ideal state antitrust-

enforcement protocol is useful in that it highlights how state enforcers could usefully complement (assumed) sound federal antitrust initiatives.

Great minds think alike. A well-crafted and much more detailed normative exploration of ideal state antitrust enforcement is found in a recently released Pelican Institute policy brief by Ted Bolema and Eric Peterson. Entitled *The Proper Role for States in Antitrust Lawsuits*, the brief concludes (in a manner consistent with my observations):

> This review of cases and leading commentaries shows that states should focus their involvement in antitrust cases on instances where:
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> · they have unique interests, such as local price-fixing
>
> · play a unique role, such as where they can develop evidence about how alleged anticompetitive behavior uniquely affects local markets
>
> · they can bring additional resources to bear on existing federal litigation.
>
> States can also provide a useful check on overly aggressive federal enforcement by providing courts with a traditional perspective on antitrust law — a role that could become even more important as federal agencies aggressively seek to expand their powers. All of these are important roles for states to play in antitrust enforcement, and translate into positive outcomes that directly benefit consumers.
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> Conversely, when states bring significant, novel antitrust lawsuits on their own, they don't tend to benefit either consumers or constituents. These novel cases often move resources away from where they might be used more effectively, and states usually lose (as with the recent dismissal with prejudice of a state case against Facebook). Through more strategic antitrust engagement, with a focus on what states can do well and where they can make a positive difference antitrust enforcement, states would best serve the interests of their consumers, constituents, and taxpayers.

Conclusion

Under a consumer-welfare-centric regime, an appropriate role can be identified for state antitrust enforcement that would helpfully complement federal efforts in an optimal fashion. Unfortunately, in this tumultuous period of federal antitrust policy shifts, in which the central role of the consumer welfare standard has been called into question, it might appear fatuous to speculate on the ideal melding of federal and state approaches to antitrust administration. One should, however, prepare for the time when a more enlightened, economically informed approach will be reinstituted. In anticipation of that day, serious thinking about antitrust federalism should not be neglected.

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