Texas Public Policy Foundation

Protecting Innovation

The Role of State Attorneys General in Antitrust Enforcement

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Table of Contents

Executive Summary 3

Part I: Overview of U.S. Antitrust Laws 4

Part II: Antitrust Enforcement 5

Part III: The Role of the States—The Rise of *Parens Patriae* Suits 6

Part IV: The Major Types of Antitrust Cases and the Impact of State Involvement 11

Part V: Antitrust and Technology 17

Part VI: Policy Recommendations 20

Conclusion 21

About the Authors 21

Endnotes 22

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Executive Summary*

Antitrust law was devised at the end of the 19th century. Since then, courts and regulators applying antitrust laws have developed a wide range of appallingly anticompetitive doctrines. Many of those doctrines tended to protect businesses from competitive forces, rather than the other way around. Nor were the stakes trivial: As Robert Bork insisted in his seminal work, the *Antitrust Paradox* (1978), many of these doctrines were "ultimately incompatible with the preservation of a liberal capitalist social order."[1]

In recent years, antitrust enforcement by state attorneys general has seen a dramatic rise. This raises several concerns: first, the potential of geographic bias that comes from state attorneys general protecting the interests of business or consumers in their states from competition; second, the potential for increased litigation and harsher penalties; and third, the duplicative nature of state antitrust enforcement, particularly in the context of *parens patriae* suits and pre-merger reviews. These concerns suggest that increased state involvement in antitrust enforcement could have significant negative consequences for competition and innovation.

This danger is particularly acute in high-technology markets, where antitrust enforcement is already problematic in several ways. Consumers benefit from increased efficiency, but efficiency can increase market share, which in turn can trigger ill-advised antitrust enforcement. The complexity and rapid innovation of high-tech markets increase the danger of erroneous and damaging antitrust enforcement. These challenges are exacerbated by state involvement in antitrust.

While we see a clear role for the states in enforcing antitrust law in local commerce, it is much more difficult to discern a role for the states in transactions that are in many cases not only national, but international. Instead, the involvement of the states in these markets is more likely to lead to an expansive regulatory regime that inhibits—rather than enhances—competition and innovation. This is particularly true in the case of e-commerce.

This paper examines the role of states in antitrust enforcement and the impact this role can have on competition, particularly in high-tech markets. Part I provides a short summary of major antitrust laws. Part II looks at the different ways in which antitrust law is enforced. Part III provides a closer look at the role of the states in antitrust enforcement, focusing on Texas. Part IV sets forth a law-and-economics analysis of the main types of cases that are typically the subject of antitrust enforcement, with a special focus on the activity of state attorneys general. Part V provides a close look at antitrust enforcement in high-tech markets. Part VI makes recommendations for improvement.

This paper argues for a continued effort to understand how markets work, and for revision of antitrust laws and judicial doctrines in light of those insights. We argue that the scope of state antitrust enforcement should be reduced, particularly with respect to interstate and high technology markets. Specifically, we recommend that states' ability to bring *parens patriae* suits under the federal antitrust laws should be repealed, and that state involvement in premerger review should be curtailed. We also find that where the federal government has settled an antitrust matter under investigation, continued state involvement makes little sense, and in fact may stifle product development, investment and innovation.

Recommendations

- The scope of state antitrust enforcement should be reduced with respect to interstate and high technology markets; states should focus on intrastate, i.e., local, business activity.
- States' ability to bring *parens patriae* suits under the federal antitrust laws should be eliminated.
- Congress should work to eliminate other overlapping areas of federal and state antitrust jurisdiction; for instance, state involvement in premerger review should be curtailed.
- States should more closely examine the actions of other states for possible consumer harm from restrictions on commerce.

* The authors are grateful to the office of the Texas Attorney General for their help in providing information about the scope of their activities and in answering our questions.

Part I: Overview of U.S. Antitrust Laws

The industrial revolution produced large commercial enterprises in the latter half of the 19th century—along with a high degree of concentration in many industries. In response, Congress adopted the Sherman Antitrust Act in 1890. The law consisted of two somewhat vaguely worded sections. Section 1 focuses on contracts, combinations, and conspiracies in *restraints of trade*, while Section 2 focuses on *monopolies*:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

According to its principal author, Senator John Sherman, the purpose of the new law was "To protect the consumers by preventing arrangements designed, or which tend, to advance the cost of goods to the consumer." In the historic *Standard Oil* (1911) decision, the Supreme Court articulated the policy behind the law, namely to protect against practices that restrict economic output and thereby reduce consumer welfare.[2] In *Northern Pacific Railway v. United States* (1958), the Court made the point more explicit:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, at the lowest prices, of the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions. But even were that premise open to question the policy unequivocally laid down by the Act is competition.[3]

In *American Tobacco Co. v. United States*, handed down the same year as *Standard Oil*, the Court had also articulated a three-part "rule of reason" to guide the courts in applying Section 1: "The words 'restraint of trade' … only embraced acts or contracts or agreements or combinations … which, either because of their *inherent nature* or *effect* or because of the *evident purpose* of the acts, etc., injuriously restrained trade."[4] Here emerged the three-part analysis (the so-called "rule of reason") that has endured to the present day. Thus some practices (1) are inherently restraints of trade and never have a procompetitive effect—these are "per se" illegal; (2) others may have that effect depending on the facts; and (3) still others may be illegal because they are specifically intended as injurious restraints on trade.

Section 2, on monopolies, prohibits not monopolies themselves, but rather *monopolization*. Though the section was long interpreted as a rule against large market share, rational economic analysis has shown convincingly that high market share that results from efficiency poses no inherent threat to competition and by definition improves consumer welfare. What Section 2 clearly prohibits is exclusionary or predatory conduct aimed at establishing a monopoly (other than through efficiency) and abusive conduct by someone in a monopoly position.

By 1914 there was a movement to amend the Sherman Act in three areas. First, there was a desire to stop certain practices and arrangements perceived to be injurious *before* they could occur. Second, it was felt that certain categories of conduct should be prohibited with specificity. And third, in keeping with the Progressive Movement's desire to give scientific technical experts a greater role in making laws, Congress wanted an administrative body with the economic expertise that neither the legislature nor the courts might have.

The first two areas of concern produced the Clayton Act of 1914; and the third, the Federal Trade Commission. The Clayton Act prohibits conduct that "*may*" result in a violation of the Sherman Act. This rule of "incipiency" requires a reasonable probability that the conduct would result in a restraint of trade. But it was still a dramatic turn for the worse, because it put judges in the position of making economic predictions about the future of markets whose future nobody could predict. The Clayton Act also makes particular kinds of conduct illegal where the effect "may be" anticompetitive: price discrimination, exclusive dealing and tying arrangements, mergers and acquisitions (particularly among competitors), and other arrangements.

The Federal Trade Commission Act of 1914 created the Federal Trade Commission, and gives it enforcement power over the Clayton Act (and the later Robinson-Patman Act of 1936), leaving the Department of Justice to enforce the Sherman Act. Section 4 of the FTC Act also gave the FTC power to challenge "unfair competitive practices" and, after the Wheeler-Lea Amendments of 1938, also unfair or deceptive conduct, regardless of competitive effect, the basis of the FTC's consumer-protection regulations.

The Hart-Scott-Rodino Act of 1976 was the next major amendment to federal antitrust laws. It requires that parties contemplating most medium- and large mergers or acquisitions file a confidential disclosure with the FTC and Department of Justice, which then usually have 30 days to determine whether a violation of the antitrust laws might occur as a result of the transaction. Crucially, the Act also gave states the power to bring civil suits in federal court for money damages for violations of antitrust laws on behalf of their citizens, as *parens patriae.* *(See page 7.)*

Early federal antitrust laws were enacted during a period in which the federal commerce power was limited to transactions in interstate commerce, or which had a "direct effect" on interstate commerce. Because this left much commercial activity beyond federal reach, most states enacted their own antitrust laws, which typically mirrored federal law. After the Supreme Court's decision in *Wickard v. Filburn* (1942), however, the federal commerce power expanded to cover virtually all commerce. The jurisdiction of the federal antitrust laws expanded coterminously, but without pushing back the reach of state law. Ever since, commercial activity has been subject to overlapping federal and state jurisdiction in the area of antitrust law, as in most other areas of economic regulation.

As the modern revision of antitrust that is commonly associated with the Chicago School began to have an impact on the federal judiciary, the Reagan Administration brought that revision to the federal enforcement agencies. Federal power then pulled back from important transaction categories previously subject to antitrust enforcement. Given their new parens patriae authority, states saw a chance to fill the vacuum, leading to the creation, in 1983, of an antitrust task force at the National Association of Attorneys General (NAAG). The NAAG was then, and has to some extent remained, a bastion of the pre-Chicago School antitrust law, particularly with respect to conduct (such as resale price maintenance) that many authorities no longer consider proper areas of antitrust enforcement at all. The trend in the states' increasing role in antitrust enforcement was bolstered by the federal Crime Control Act of 1976, which provided funding support for state antitrust enforcement; indeed that funding helped launch and sustain the NAAG's antitrust task force.

Part II: Antitrust Enforcement

At the federal level, the antitrust laws are enforced through a division of labor between the Department of Justice and the Federal Trade Commission. The Department of Justice can bring criminal cases for violations of the Sherman Act, and civil cases seeking injunctions against injurious conduct. The FTC can bring civil cases and administrative proceedings for violations of the laws within its enforcement authority (chiefly the Clayton Act and FTC Act). Because the laws entrusted to the enforcement authority of each agency overlap, the agencies must coordinate their activities to avoid inefficiency and redundant regulation. Private parties can also sue in federal court for injunctions against injurious conduct, and for treble damages.

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States can also act to enforce their own antitrust laws, whether criminal or civil, depending on the jurisdiction. They can also sue in federal court, as *parens patriae*, for injunctions and treble damages. These capacities give states a prominent role in antitrust regulation. Because in the post-*Wickard* era the jurisdiction of states substantially overlaps with that of federal agencies, the states have extensively coordinated their antitrust activities with the federal agencies.

In recent decades, federal-state coordination has been increasingly formalized, particularly with respect to merger enforcement. The Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General of 1998[5] (the "Merger Coordination Protocol") provides a fairly comprehensive forum for coordinating merger review and litigation strategy.

In addition, private parties subject to Hart-Scott-Rodino premerger notification requirements are also usually subject to state merger review, often in multiple states. The Voluntary Pre-Merger Disclosure Compact of 1994[6] provides a way for such parties to provide their premerger disclosures to a single "liaison state" while other states with potential jurisdiction refrain from imposing their own investigative disclosure requirements. Coordination in non-merger cases is generally done on a case-by-case basis, with mixed results, as the Microsoft litigation shows. *(See sidebar: "Multistate Jurisdiction and the Microsoft Case," page 19)*

States also coordinate amongst themselves, and with the federal government, through the National Association of Attorneys General (NAAG) and particularly its Multi-State Antitrust Task Force, established in 1983. In particular cases (whether in the context of merger reviews under the Voluntary Pre-Merger Disclosures compact or otherwise, or in cases of multi-state litigation) interested state attorneys general often set up working groups under the task force. Such working groups coordinate through memoranda and discussions.

In addition to the authority that federal and state agencies have to bring cases in federal and state courts, agencies investigating possible violations of the antitrust laws can issue Civil Investigative Demands (CIDs) to relevant parties. CIDs can often be quite onerous, and can have the same effect as injunctions and cease-and-desist orders, by dissuading parties from engaging in particular conduct or contemplated transactions. At the state level, CIDs are sometimes used to dissuade commercial conduct that many authorities have come to view as categorically unproblematic from an antitrust point view. Likewise, consent decrees are often used to settle litigation before the merits are reached.

Part III: The Role of the States—The Rise of *Parens Patriae* Suits

The Texas antitrust experience is quite similar to the general experience of other states. Texas originally adopted antitrust legislation in 1889, before the Sherman Act was passed, and exercised its authority in a few major cases early on. After the passage of the Clayton Act, however, private parties brought most of the actions, because federal law allowed for treble damages in private actions. At this point, then, most antitrust enforcement was being handled by federal agencies and private parties under both state and federal law. Federal enforcement, in particular, was reliably vigorous.

As a result, state agencies tended to rely, in interstate cases at least, on federal enforcement, which could "provide a complete remedy for the state itself as well as private litigants."[7] "The inadequacy of state facilities, manpower, and experience, and the knowledge that referral of a complaint to the Justice Department will bring swift action deter most state attorneys general from committing their staffs to the prolonged investigation and litigation that effective enforcement requires."[8]

Florida v. Saul & Co., et al

One example of states playing an appropriate role in antitrust enforcement was a 2002 bid-rigging case in Florida. The state of Florida filed suit against 22 local asset management companies engaged in bid rigging.[9] As the state's attorney general explained, the case centered on financial instruments called tax certificates:

> Tax certificates are in effect liens placed on properties for which taxes have not been timely paid. Each year, such certificates are auctioned by tax collectors around the state to individuals willing to pay the outstanding taxes. A property owner who later wishes to reclaim a piece of property from a certificate holder must pay the amount of delinquent taxes, plus accrued interest. Under state law, the maximum annual interest a tax certificate holder may earn is 18 percent. A given certificate is awarded to the bidder who agrees to accept the lowest amount of interest if the certificate is redeemed by the property owner.[10]

During a 1998 auction in the defendants bid on available tax certificates over a series of several days. The bidding was "fierce," which caused the bidders to propose lower and lower interest rates. Interest rates offered for some tax certificates were as low as one-quarter of a percent.[11] Eventually, according to the attorney general, nearly two dozen bidders began meeting outside the auction hall. The state's petition alleged that "[d]uring these meetings, or otherwise in the course of their exchanges of information before or after such meetings, these bidders conspired and agreed to refine the scheme for the coordination of bids." Following this alleged collusion, the interest rates proposed by the bidders stopped declining; indeed, they stayed solidly at or near 18 percent.

Florida had filed a *parens patriae* suit under the federal antitrust laws. However, this proved unnecessary because it had also filed suit as "enforcing authority" under the state's Deceptive and Unfair Trade Practices Act. Florida settled the case against all of the defendants.

After *Wickard v. Filburn* (1942), the federal commerce power grew to encompass virtually all economic activity, creating a large area of commercial activity with concurrent state and federal jurisdiction over the same range of conduct. Two pieces of legislation—the Hart-Scott-Rodino Act of 1976 and the Crime Control Act of 1976—exacerbated the problems with overlapping jurisdiction and thus increased unnecessary and harmful state enforcement.

Hart-Scott-Rodino allowed state attorneys-general to sue under federal law for treble damages as *parens patriae* ("parent of the country") on behalf of state residents that had been harmed. It instructs the Department of Justice to share relevant information with state attorneys general.[12] In addition, Hart-Scott-Rodino allowed the states to sue for antitrust violations that affected the "general economy" of the state as a result of antitrust violations, as opposed to just suing on behalf of citizens seeking redress.[13] From 1976 to 2004, 66 *parens patriae* lawsuits were brought by state attorneys general under federal antitrust law, compared to 11 before 1976.

The Crime Control Act provided federal funds for state antitrust enforcement. Previously, state attorneys general had to fight for scarce state resources to operate their offices, and there were many priorities competing against antitrust enforcement. But if government subsidizes something, more of it will be produced, and so it was proved with the subsidies of state antitrust enforcement.

It was only after passage of Hart-Scott-Rodino and the Crime Control Act that states once again became major players in the enforcement of federal antitrust law.[14]

A few years after the passage of Hart-Scott-Rodino, Texas amended the Texas Business Code expanding antitrust powers and jurisdiction for the Texas attorney general, as well as private complainants.[15] As a result of these changes in federal and state law, there was a significant increase in antitrust enforcement by the Texas attorney general. Texas has brought twice as many antitrust actions in the last thirty years as it did in the preceding eighty. As we shall see, there is much evidence to suggest that this increased role in state enforcement was unwarranted.

The ability of states to file *parens patriae* suits under Hart-Scott-Rodino similarly stimulated enforcement activity in the states. "It is easy to see why antitrust *parens patriae* suits might be attractive to state attorneys general," writes Judge Richard Posner:

> Firms headquartered or operating within the state are likely to face competition from nonresidents, and they will be grateful if the state's attorney general incurs the expense of suing those competitors. (The attorney general may also have somewhat greater credibility with the courts than a competitor-plaintiff would have.) And, major antitrust violations are likely to have effects in multiple states, facilitating joint action and therefore resource pooling by state attorneys general. What is more, as shown by the *Microsoft* case, if the U.S. Department of Justice brings an antitrust suit, the state attorneys general may be able, by bringing parallel suits that are then consolidated with the Justice Department's suit, to take a free ride on the Department's investment in the litigation.

Advocates of an expanded state role take a different view. Susan Harriman suggests that granting states the ability to file *parens patriae* lawsuits under Hart-Scott-Rodino was an attempt to "alleviate the problems encountered in bringing class actions to enforce antitrust violations."[16] According to this view,

> [b]y the 1970s, problems with private enforcement of antitrust violations were evident. Although the cost of antitrust violations to ultimate consumers had been estimated to exceed 150 billion dollars per year, each individual consumer was injured in relatively small amounts and therefore had little incentive to sue. The stringent requirements governing class action suits in federal courts made the class action an ineffective device for antitrust violations.[17]

However, the concerns above about the ineffectiveness of private enforcement may be misplaced. In fact, it may be that, given the incentives individuals have to use antitrust laws against successful competitors, overuse of individual enforcement might be a larger problem. William Adkinson explains this:

> It is possible, under some circumstances, that private parties may be more efficient law enforcers than government officials, either because they face more efficient incentive structures or because they have advantages in identifying and attacking violations. … The central problem with private enforcement, though, lies in the difficulty of devising incentives that will direct private attorneys general into enforcement actions that maximize (or at least enhance) general social objectives, as distinct from private gains.[18]

The fact that the vast majority of antitrust enforcement today is private suggests that individuals have taken full advantage of the authority granted them under the Clayton Act.

Regardless of the role of private enforcement, many observers contend that the enhanced role of state enforcement has been beneficial. Stephen Calkins says that "three advantages stand out" for the states that support their ability to sue under federal antitrust law: "familiarity with local markets, familiarity with and representation of state and local institutions, and ability to send money to injured individuals."[19] The problem with this analysis, though, is that states have always had the right under state law to address violations concerning local markets. The question is whether states ought to be involved in lawsuits under federal law where the alleged violations are taking place across state lines.

The advantages listed by Calkins are indeed why few if any observers have suggested that federal antitrust enforcement preempt state enforcement in cases involving local markets. However, these advantages in local markets may actually handicap the states in the context of interstate and international markets. Local familiarity may often betray unfamiliarity with broader markets. Additionally, it may introduce local bias into the activities of state attorneys general, with the attendant externalities.

This problem has been described by Robert Hahn and Anne Layne-Farrar in conjunction with the Microsoft case:

> Indeed, the idea that it is the state government's job to serve its corporate constituents is so ingrained that elected officials do not try to conceal their complicity. Shortly after California and several other states decided to reject the settlement, a local newspaper reported that, California Attorney General Bill Lockyer said "his resolve was hardened after listening over the weekend to advice from technical experts and officials from Microsoft's competitors, such as IBM, AOL Time Warner Inc., Sun Microsystems Inc., and Novell Inc." The state of California subsequently took the lead in the continuing litigation—in particular, by providing funding. As one press account confirmed, "Microsoft's competitors lobbied California's lawmakers and Governor Gray Davis to approve the extra \$3.7 million for antitrust enforcement…."[20]

Richard Posner elaborates. He first notes that state attorneys general are not the states.[21] Rather, they are individual office holders elected separately from governors and state legislators. Thus the policy goals and priorities of the attorneys general may not always coincide with those of the states. He says that at times this has resulted in a state attorney general "bringing high-profile lawsuits that attract publicity to the attorney general and promote the interests of politically influential state residents (including corporations that have headquarters or extensive operations in the state) at the expense of non-residents, including non-resident competitors of resident enterprises."

New York vs. Intel

In 2009, New York State Attorney General Andrew Cuomo announced that Intel would be sued for violations of New York antitrust law. This announcement was made in the midst of a Federal Trade Commission investigation of Intel, just weeks before the federal government filed its own suit. As Professor Crane observed, "It is difficult to imagine what New York's citizens had to gain from a Quixotic—and surely enormously expensive—lawsuit about the global trade practices of one of the world's largest corporations that had already been investigated by European and Asian antitrust authorities and was about to be sued by the FTC." [22]

Nevertheless, the suit was filed, and over time, New York's legal strategy became increasingly aggressive. After two years in federal court, the federal judge in the case granted Intel several motions, limiting the scope of the proceedings and the amount of damages that New York could seek. As a result, New York requested a dismissal so that the case could be sent to New York's state court instead.[23] In effect, New York chose to forum shop.[24] Ordinarily, forum shopping occurs before a case begins, but the ability to sue under multiple laws—federal and state—allows for the situation described above, wherein a plaintiff can switch jurisdictions by having one set of actions dismissed, should sufficient damages prove unobtainable. By switching venues, the judge is switched as well, prolonging the case and forcing the defendant to re-argue their cause before a new judge.[25]

The case eventually settled out of court for a trivial amount that was estimated to equal five hours' worth of profit for Intel.[26]

Also critiquing the antitrust role of state attorneys general, Michael DeBow has pointed out that the tobacco litigation by the states "raises disturbing questions about state antitrust enforcement."[27] He provides three reasons:

> First, the tobacco litigation has emboldened state attorneys general to "reform" other national industries, such as investment banks and pharmaceutical producers. … These aggressive attempts by state attorneys general to set national policy through litigation may make it more likely that states will pursue more aggressive antitrust enforcement in the future. … Second, as it happens, many of the state tobacco lawsuits contained an antitrust claim. The manifest flimsiness of those claims shows that the attorneys general are not above reading the notoriously open-ended antitrust statutes in undisciplined and improper ways. Third, the tobacco litigation raises the ominous prospect of a close partnership between the state attorneys general and the private bar in antitrust enforcement. Such an arrangement would trump the resource constraints that have so far precluded a more aggressive and destructive pattern of state antitrust enforcement.[28]

These are not merely future possibilities. The states have already shown their willingness to make decisions in derogation of federal antitrust policy by adopting "*Illinois Brick* repealers,"[29] thereby granting the right of indirect purchasers to sue for treble damages under state law after the U.S. Supreme Court limited treble damages under federal antitrust law to direct purchasers in *Illinois Brick*.[30]

One motivation behind efforts to modify state and federal antitrust law in the 1970s was the 1972 U.S. Supreme Court decision, *Hawaii v Standard Oil*.[31] In a 5-2 decision, the Court ruled that states did not have the right to sue as *parens patriae* under Section 4 of the Clayton Act if the damages were to the "general economy" of the state. Traditionally, Justice Marshall explained, *parens patriae* has been invoked in the cases of people who are unable to protect themselves:

> the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as "the general guardian of all infants, idiots, and lunatics," and as the superintendent of "all charitable uses in the kingdom." In the United States, the "royal prerogative" and the "*parens patriae*" function of the King passed to the States.[32]

Texas Supreme Court Justice Scott Brister confirmed this approach in Texas when he wrote, "this Court has generally invoked *parens patriae* only with respect to persons unable to protect themselves, such as children or the mentally ill."[33]

However, as the Court noted in *Hawaii*:

> The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. This expansion was first evidenced in *Louisiana v. Texas*, a case in which the State of Louisiana brought suit to enjoin officials of the State of Texas from so administering the Texas quarantine regulations as to prevent Louisiana merchants from sending goods into Texas. This Court recognized that Louisiana was attempting to sue not because of any particular injury to a business of the State, but as *parens patriae* for all her citizens. While the Court found that *parens patriae* could not properly be invoked in that case, the propriety and utility of *parens patriae* suits were clearly recognized.[34]

The Supreme Court had placed significant restraints on *parens patriae* suits. Jay Himes writes that "early development of the *parens patriae* doctrine rejected its application where the suit, although 'in the name of the State,' was 'in reality for the benefit of particular individuals.'" In this instance, this would prohibit the misuse of the courts by attorneys general seeking to benefit firms in their states to the detriment of firms in other states—the geographic bias discussed earlier. Texas has similarly limited the application of *parens patriae*, declining "to import it into the insurance Code."[35]

However, while Texas courts have noted that "[w]e cannot authorize a broader role for the attorneys general than the Legislature has,"[36] state legislatures and indeed Congress can take such steps. And that is exactly what Congress did in the Hart-Scott-Rodino Act. While the courts recognized the problems with states, i.e., state attorneys general, in certain circumstances suing on behalf of its citizens, these concerns failed to stop Congress from granting states the ability to sue as *parens patriae* under federal antitrust law.

In the antitrust context, private parties are fully capable of taking care of themselves—especially given the umbrella of federal enforcement. And as the Court noted in *Hawaii*, "*Parens patriae* actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area."[37]

The federal rules for class actions suits allow citizens to combine their limited resources in a context where injury is rarely to a single individual. Moreover, the Court noted, the ability to recover not just treble damages but also attorneys' fees "should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits."[38]

It is not surprising that private actions continue to predominate in number over agency suits. It is difficult to escape the conclusion that harm caused by violations of the antitrust laws is adequately addressed through federal and private actions under federal antitrust law without the intervention of states as *parens patriae*.

State *parens patriae* lawsuits also present federalism problems. The competing enforcement authorities can actually provide "frequent opportunities for conflict between public enforcers, especially between federal enforcers and state attorneys general."[39] Adkinson notes, "the federal agencies have little power to prevent perceived intrusions by states into national matters. Federal-state conflicts, especially the increasingly aggressive posture of state attorneys general—as evidenced, for example, by some states' refusal to end the litigation against Microsoft even after the federal government had decided to settle the case—have become a source of considerable concern."[40]

Some advocates of state antitrust enforcement make a kind of "competitive federalism" argument in favor of the state *parens patriae* authority: state attorneys general can keep the federal agencies on their toes and offer alternatives to federal enforcement.[48] Posner dismisses this argument on several grounds:

> The first is its one-way character. The state attorneys general can only offer harsher antitrust enforcement than the Justice Department. They cannot, by not suing, offer the courts a gentler alternative to the department's enforcement policies, because their decision not to sue does not bind anyone. They can pile on but they cannot remove the department from the pile. …
>
> Second, even if the states could not bring parens patriae antitrust suits, private individuals and firms harmed by antitrust violations would be able to bring suits under federal antitrust law for redress of the injury. …
>
> Third, there is competition in antitrust enforcement at the federal level by virtue of the overlapping jurisdictions of the Justice Department and the Federal Trade Commission; increasingly there is competition at the international level as well.

Texas v. Memorial-Hermann

In 2005, Houston Town and Country Hospital, along with other physician-owned hospitals, attempted to enter the hospital market in the Houston area.[41] As the largest hospital system in the area, Memorial-Hermann had approximately a 20 percent market share of the Houston metropolitan statistical area.[42] Town and Country, however, was unable to procure any in-network contracts with any major health insurers. For example, when Memorial-Hermann learned that Aetna was prepared to enter into a contract with Town and Country, Memorial-Hermann informed Aetna they would increase Aetna's rate 25 percent.[43]

> "After an investigation, the [Texas] Attorney General filed a lawsuit and an agreed judgment against Memorial Hermann Healthcare System. The lawsuit alleged that Memorial Hermann systematically discouraged health insurers from adding a competing hospital to their insurance coverage networks and used its leverage to punish health insurers that established contracts with that competitor. Memorial Hermann agreed to an injunction and payment of $700,000 for attorney fees and investigative costs."[44]

Because the relevant market for the hospitals was "no larger than the Houston metropolitan statistical area,"[45] the business activities involved were a purely intrastate matter. Accordingly, this is the type of local case that is properly within the purview of the Texas Attorney General to enforce Texas' antitrust law.[46]

This case also shows why states don't need parens patriae authority. For while Texas Attorney General Greg Abbott filed this case *parens patriae*, he also filed it "in his capacity as the designated enforcer of the Constitution and the statutes of the State of Texas."[47] As is the case in most legitimate state antitrust cases, *parens patriae* authority was not needed to prosecute the alleged violations.

> Fourth, despite the potential bonanzas that parens patriae damages suits might seem to offer, the limited funding of state attorneys general has, perhaps in conjunction with other factors, resulted in an extraordinary paucity of antitrust parens patriae suits.[49]

William Kovacic adds that the Justice Department and FTC are not the only federal agencies involved in antitrust enforcement. Regulated industries are subject to antitrust enforcement by still other federal agencies, such as the Department of Transportation, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, the Office of Comptroller General, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Surface Transportation Board, and the Federal Communications Commission.[50]

Part IV: The Major Types of Antitrust Cases and the Impact of State Involvement

Since the 1970s, federal courts and federal enforcement agencies have largely accepted several interrelated ideas drawn from the systematic application of economics and price-theory to antitrust. The first is the idea that maximizing consumer welfare—not the protection of small businesses from larger competitors, or any other social value —is the only legitimate goal of antitrust enforcement. This idea has had several important corollaries. One is that consumer welfare is maximized when markets increase output and lower prices. Another is that the efficiencies which lead to increased output and lower prices are procompetitive, even when they result in market concentration or economic loss to less efficient competitors. Yet another is that many practices formerly thought to be "anti-competitive" are actually pro-competitive and pro-consumer even when they injure competitors.

These ideas shed a new light on the principal areas of commercial activity subject to the antitrust laws. This part of the paper summarizes the "received" free-market economics analysis in each major area of antitrust law, and carries that analysis to the state level in order to assess the impact of state involvement. The modern law and economics revision of antitrust doctrine has had a positive impact on state attorneys general. But that impact has often lagged behind the institutional and doctrinal reform at the federal level, which has the potential for significant mischief. This paper therefore examines the role of the states in each of these areas with a view not just to their empirical impact, but also to their potential future impact, and makes recommendations accordingly.

We begin with a closer look at the precepts of the free market law and economics approach which federal courts and federal enforcement agencies have come to embrace. We then go on to consider the major kinds of commercial activity that are subject to the antitrust laws:

1. monopolies and oligopolies;
2. mergers—horizontal, vertical, and conglomerate;
3. cartel behavior—horizontal price fixing and bid-rigging, and horizontal market division;
4. vertical "restraints"—vertical resale price maintenance, vertical market divisions, tying arrangements, exclusive dealing, price discrimination, and vertical refusals to deal; and
5. anticompetitive manipulations of government power.

In each of these areas, this part examines the proper role of antitrust enforcement generally and of state attorneys general in particular. We also try to give some sense of the work of the Texas state attorney general's office as representative of the work of attorneys general across the states.

A closer look at the major areas of antitrust law reveals that, in most areas, courts and enforcement agencies should refrain from interfering at all. In those areas where antitrust enforcement may be helpful, courts and enforcement agencies should continue to refine their understanding of market dynamics to ensure that their involvement actually benefits competition and consumer welfare.

Antitrust analysis and the role of competition, efficiency, and consumer welfare

Much of the tension between the modern free market economics analysis and the more traditional doctrines of antitrust law boils down to differing interpretations of "market power." Courts traditionally begin an antitrust analysis by defining the relevant market (both in terms of product and geography), and who the competitors are within that market. They must then assess whether those charged with violations of antitrust laws have (or could have) the necessary market power—usually in terms of sufficient market share—to carry out the anticompetitive injury charged.

What the law deems "anticompetitive conduct" usually entails a restriction of output or an increase in price or both. But in a normally-functioning market, restricting output or increasing prices almost always creates opportunities for competitors to jump in at a lower price or with additional

Absent government interference, monopolies are not normally sustainable because it is normally impossible to exclude competitors who will offer a lower price than the monopolist.

supply, and is therefore procompetitive—even if self-defeating. The difficulty of distinguishing between anticompetitive conduct (which can supposedly harm consumers) and commercially risky behavior (which cannot) has bedeviled the courts. In a properly-functioning market (i.e., one free of government interference), large market share is almost impossible to achieve except by efficiency and internal growth, which benefit both competition and the consumer. And yet courts often see anticompetitive injury (or the potential for it) in the mere fact of increased market share for one company, regardless whether the increased market share tends to benefit competition and consumers.

The modern application of free market economic principles to antitrust law has considerably clarified these problems. Higher output and lower prices arise from increased efficiency in the allocation of human and material resources—the essential means by which liberal capitalist societies create wealth. Cartels, monopolies, and other restraints on trade—when they are successful—decrease output and increase prices. However, it is difficult for entities to successfully decrease output and increase prices over time without being provided monopoly rights from the government.

For most of the 20th century, the problem in antitrust law was that courts all too often applied the law in a way that achieved anticompetitive outcomes, creating special advantages in the name of eliminating them, and hurting consumers in the name of helping of them. (Indeed, some judges even the cast the individual consumer by the wayside in their zeal to protect small companies from their larger competitors, never realizing that there is no way to justify treating a small company as the "little guy" when the individual consumer bears the cost of protecting it). The doctrines they developed were applied in an increasingly wide array of cases that soon began to show the absurdity of the doctrines—for example, blocking a merger between two companies, because of the probability that monopoly would result, where the resulting company would have less than 5 percent market share in a market with over 100 competitors.

In recent decades, courts have retreated from many of these excesses. They have been increasingly wary of interfering in the freedom of contract where conduct and structures once thought to run afoul of the antitrust laws may, on further economic analysis, or empirically in hindsight, prove to be procompetitive. Hence, the federal courts and the federal enforcement agencies have pulled back from interfering with commercial arrangements they had long viewed with suspicion, where it is clear that such arrangements are driven by efficiency and increase consumer welfare. There has been an increasing realization that interfering with such transactions turns antitrust law on its head and achieves exactly the opposite of what antitrust law was designed to achieve. In this respect, the modern understanding of antitrust reflects the insight that the best way to protect the public from the dangers of monopoly and restraints on trade is by preserving free competition.

Monopolies and Oligopolies

It is a basic tenet of antitrust law that a monopoly position attained by efficiency and internal growth, "as a consequence of a superior product, business acumen, or historic accident,"[51] does not violate the antitrust laws. What the antitrust laws prohibit is not monopoly per se, but *monopolization*. In particularly, Section 2 of the Sherman Act prohibits (1) the use of improper tactics to achieve a monopoly position (i.e., attempted monopolization), and (2) the use of improper tactics to maintain or strengthen a monopoly position (i.e., monopolization). In applying this principle, courts have increasingly looked for conduct that seemed to have no lawful business rationale and instead seemed to rely on an anticompetitive effect in order to be profitable. The problem that has dogged the courts and enforcement agencies should be obvious: all that is required for a court to judge that some conduct has no business rationale is for the court to lack enough understanding of economics and the market to see one.

Absent government interference, monopolies are not normally sustainable because it is normally impossible to exclude competitors who will offer a lower price than the monopolist. Governments, however, may grant a legal monopoly to a telephone company to operate the local network. But that company will violate antitrust laws if it

uses its position to require customers to purchase their all their telephones from it, thereby monopolizing the local telephone market. Even without the government's sanction, it is not the monopoly of the local network that is illegal, but rather the *monopolization* of the telephone market.

An oligopoly resembles a monopoly in that barriers to entry for new competitors are high, but the market is dominated by a few firms rather than a single firm. Courts and enforcement agencies sometimes confuse oligopolies and cartels, but the two are very different. Oligopoly describes a *legal market structure* in which entry to competitors is limited by barriers to entry, whereas a cartel describes an *illegal agreement* among competitors (usually in an oligopoly) to restrict output or raise prices or both.* The main forms of cartel behavior—horizontal price-fixing and horizontal market division—are examined in a separate section below.

A natural barrier to entry is most often simply the barrier to achieving a competitive economy of scale. A college graduate trying to decide between launching a food cart and launching an airline carrier will no doubt be discouraged by the barriers to entry into the airline industry, but that doesn't make the airline oligopoly illegal or even undesirable. Where the entry of competitors is simply a matter of the time it takes to launch a firm with the scale and resources necessary to be competitive, there is no violation of the antitrust laws. But where existing firms take advantage of such natural barriers to entry in order to cartelize a given market, most courts agree that enforcement is appropriate.

Where firms achieve monopoly or oligopoly through efficiency and growth, any antitrust enforcement designed to "deconcentrate" the market can only hurt competition and consumers. A monopoly based on efficiency has very little room to restrict output and raise prices before new entrants appear. This can be seen in an example given by Judge Bork:

> If the law dissolved a firm having a 100 percent monopoly [as a result of efficiency] into five approximately equal parts, the economic forces that led to monopoly would still be operative and would lead in that direction again.
>
> Let us suppose, however, that the law announced a policy of dissolution of any firm that exceeded 50 percent of the market. When one of the new firms approached that size once more, it would have every incentive to restrict its output in order avoid the penalties of the law, and so the law would produce the evil of resource misallocation in the attempt to avert it.[52]

In other words, antitrust enforcement can create an artificial cartel that injures the public in the place of a natural monopoly that benefits the public. Such effects were once more common in antitrust enforcement than they are today, but policy proposals such as the those of the infamous Neal Task Force (which would have restricted market concentration *per se*) are still heard, and must be guarded against. Institutionally, the overlapping jurisdiction of state and federal enforcers raises an obvious risk of erroneous enforcement: where federal agencies have declined to act, there may still be dozens of state attorneys general with jurisdiction over the company. The risk that one of them will see potential antitrust injury where there is only a perfectly innocuous and beneficial market concentration is a significant concern here, and in other areas of antitrust.

In Texas, the preponderance of the attorney general's antitrust cases are monopolization cases. Most involve high tech companies—health care, pharmaceuticals, and Internet. Interestingly, most of those involve allegations of patent misuse. (*See sidebar: Patents v. Antitrust, page 18*) In one typical scenario, Texas joins a multistate litigation against a drug company accused of fraudulently maintaining or misusing patents to prevent generic manufacturers from competing with its products. Roughly half (about 15) of the state's litigated antitrust cases since 2003 fall into this category.

The involvement of state attorneys general in antitrust enforcement is often justified by their greater knowledge of local industry conditions. The vast majority of the Texas attorney general's antitrust cases, however, are multi-state cases in out-of-state courts. The lead enforcer in these cases is almost invariably the Department of Justice or, in rare cases, the Federal Trade Commission. It is hard to make the case that the Texas attorney general's involvement in these cases is indispensable.

* Mainstream price theory today predicts that because competitive pressure is slightly less in an oligopoly than in an open market with many competitors, prices may be slightly higher or output slightly lower. But even in an oligopoly, competition usually drives prices in line with marginal cost, thereby achieving a proper market price. This competitive baseline can only be undone by an illegal agreement to *cartelize* the market. That is why it is crucial that courts and enforcement agencies not automatically treat oligopolies as cartels. The distinction between oligopolies and cartels is the same as that between monopolies and *monopolization*.

As a general principle, a state's attorney general should only get involved in antitrust enforcement when the state is in the lead—that is, in matters that are purely local, where the private parties are local. The agreements that govern division of labor between the states and the federal enforcement agencies should be modified so as to eliminate overlapping enforcement: the federal agencies should not concern themselves with purely local matters, and the states should *only* concern themselves with purely local matters. As a review of the Texas attorney general's monopolization cases makes clear, a proper division of labor between federal and state governments would significantly diminish the states' involvement in monopoly cases.

As to local matters properly within the state attorney general's purview, state governments should develop institutional safeguards to ensure that the state attorney general is not acting to protect state residents from out-of-state competitors. There should also be safeguards to ensure that the state attorney general is not pursuing enforcement action purely on the basis of percentage market power, but rather is properly identifying the narrow special circumstances (almost invariably the result of prior government intervention or regulation) that would make it sustainable for a company in that industry to monopolize a dominant market share by restricting output or raising prices.

Mergers and Acquisitions

The particular scrutiny accorded to mergers and acquisitions under the antitrust laws is also founded on the fear of market concentration, and is subject to the same considerations that we argue above should counsel restraint in the treatment of monopolies and oligopolies. We devote a special section to a discussion of mergers because of the special treatment accorded mergers by the antitrust laws and the inordinate attention they receive from antitrust enforcers.

There are three basic kinds of mergers:* horizontal mergers among competitors, vertical mergers between suppliers and purchasers, and conglomerate mergers between companies in different markets. Antitrust enforcement should not be concerned with vertical or conglomerate mergers at all, ever, because such mergers can never injure competition or harm the consumer on their own, without an additional, entirely separate violation of the antitrust laws. And even horizontal mergers, which receive the most scrutiny, have significant potential for increased efficiency and consumer welfare. They should be scrutinized only in special circumstances (usually the result of prior government regulation) where it is clear the post-merger competitors have or almost certainly will collude to successfully restrict output and raise prices.

Antitrust enforcement imposes special costs on merger activity because federal premerger notification requirements are costly, and can turn into far more costly investigations.[53] The premerger notifications also open the door for state attorneys general to get involved in the process. Under Hart-Scott-Rodino (Section 7A of the Clayton Act), most mergers must be notified to the Department of Justice and FTC. Those two agencies then decide which of them will conduct the approval process on behalf of the federal government. However, because state attorneys general can still seek injunctive relief to block the transaction under Section 7 of the original Clayton Act, the parties' federal premerger notice often leads state attorneys general to open investigations of their own. Part II discussed the institutional framework through which states coordinate premerger review with the federal agencies. In the typical case, the parties offer state attorneys general waivers of confidentiality with respect to the federal filings in exchange for confidentiality agreements, and state attorneys general issue CIDs to obtain additional information.

As a matter of basic economics, mergers and acquisitions among competitors are indistinguishable from natural growth through efficient capital investments. When such a transaction shows a positive return on investment, the result is an efficient wealth—creating reallocation of resources within the economy as a whole. If the transaction shows a positive return on investment, it can only be because the efficiency and capacity of the firm (and hence also of the overall market) have increased. Gains in efficiency and capacity can only exert downward price pressure and benefit consumers.

The antitrust enforcers' concern with horizontal mergers are typically founded on one of three potential anticompetitive effects: "first the surviving firm may have assembled the instruments of dominance; second, the market, with uncertainty reduced, is more susceptible to collusion; and third, the merged firm itself may be able to raise prices unilaterally."[54]

* We treat mergers the same as acquisitions of substantially all the stock or substantially all the assets of another company, and refer to all of these are "mergers."

These supposed anticompetitive effects typically cannot occur in a market free of government interference because raising prices or reducing output will always draw new market entrants. It is where industries are heavily regulated—such as health care and telecommunications—that special (government-created) market conditions exist, creating potential problems of special concern to antitrust regulators. The health care area raises unique public policy concerns because it is not merely competition that suffers when output is restricted, but also public health. Unsurprisingly, these are the mergers that tend to receive the most scrutiny, particularly on the part of state attorneys general.

In keeping with economic rationality, vertical and conglomerate mergers are virtually always approved by the relevant federal agency as a matter of course, and few suits (whether by agencies or private parties) prosper on allegations of injury from vertical or conglomerate mergers. The ability of states to pursue injunctive relief under Section 7 of the Clayton Act and block vertical and conglomerate mergers is correspondingly limited. Accordingly, the focus of antitrust enforcement in this area is overwhelmingly on horizontal mergers. Still, the potential for abusive and costly state investigations piggybacking on federal premerger notifications is evident, even where the state would be highly unlikely to prevail in court. In addition, states are routinely involved in mergers that do not rise to the level of Hart-Scott-Rodino (HSR) review.

In Texas, premerger review leads to formal investigations in only a couple of cases per year. According to the Texas attorney general's office, investigations are opened "only where there is a uniquely local or uniquely Texas impact" and where there is a "reasonable belief that the potential impact is worthy of review." Nonetheless, companies contemplating HSR reportable mergers routinely share HSR reports with every potentially concerned state attorney pursuant to confidentiality agreements. Hence the Texas attorney general is at least informed of dozens of mergers per year, and must conduct a preliminary review of those filings in order to determine whether to open a formal premerger review investigation.

When the state attorney general becomes involved in premerger situations, the result is often to block the merger from taking place at all, or to require the parties to modify the intended transaction, sometimes through extensive divestitures, modifications of existing executory contracts, and even substitution of different parties for the original ones. Where the premerger review investigation leads to actual litigation, any of these outcomes may result by settlement or decree, and commonly include the payment of attorneys' fees, a particularly chilling aspect of premerger review from the point of view of merger activity.

We conclude, along with other authorities (*see Part VI, page 20*), that the states' involvement in premerger reviews is entirely superfluous and fraught with the potential for mischievous interference in private transactions that show a positive return on investment and a net benefit in terms of consumer welfare. This is an area where federal enforcement is itself arguably superfluous; Congress should and doubtless will revisit and hopefully curtail the HSR premerger notification and review requirements. In the meantime, there is little justification for adding to the burdens on private business combinations in the service of a prophylactic that almost never proves justifiable. Mergers and acquisitions may pose some danger in heavily regulated industries—almost invariably as a direct result of such regulations—but in markets that are functioning properly and free of government interference, merger activity is a vital pillar of the dynamic allocation of human and material resources upon which a free society depends for competition, innovation, and wealth.

Cartel Behavior—Horizontal Price Fixing, Bid-Rigging, and Market Division

In a typical market, cartel discipline is impossible to maintain because (1) individual cartel members have an inherent incentive to break with the cartel and increase output and (2) the higher prices draw new market entrants in at lower prices. But some economists theorize that in concentrated markets, marginal cost information is not readily available to outsiders and therefore creates an incentive to collude on price among existing competitors. Because cartel behavior can remain undetected by potential entrants while injuring consumer welfare, the antitrust laws take an especially harsh view of cartel behavior. Thus, virtually all agreements among competitors that have an effect on price—whether explicit or tacit—have been made per se illegal, and are the particular focus of criminal antitrust enforcement by federal and state agencies.

Price-fixing occurs whenever there is an agreement relating to price among competitors.[55] The price itself doesn't matter—the price may be quite reasonable, it may be in line with marginal cost, and it may be equal to the published price elsewhere. The essential focus of antitrust enforcement here is not economic but criminal, in particu-

Public policy is especially concerned with bid-rigging in the award of government contracts. State and federal criminal law adequately and properly empower state attorneys general to prosecute such cases.

lar criminal conspiracy, and investigations proceed much as they do in the context of conspiracies to commit other sorts of crimes. Bid-rigging is a particularly problematic because the contractual "offer" has already been made by the "purchaser;" hence price-fixing in the context of a bid is in the nature of a conspiracy to commit fraud.

Public policy is especially concerned with bid-rigging in the award of government contracts. It is over bid-rigging on government contracts that state attorneys-general most often sue or prosecute in their own behalf rather than as *parens patriae*. State and federal criminal law adequately and properly empower state attorneys-general to prosecute such cases.

Not all agreements among competitors that have an effect on prices are necessarily price-fixing, however. If the agreement has a valid objective protected by the law, and incidentally affects prices, courts will not consider it a per se violation of the antitrust laws and will instead apply a "rule of reason" analysis. The question over the states' role arises where the states sue in these close cases as *parens patriae* on behalf of state residents.

Horizontal market division and collective refusals to deal are often the economic equivalent of price-fixing. Market divisions are agreements to divide up a product or geographic market—or the customers themselves. Such agreements are *per se* illegal restraints on trade. A superficially analogous situation is presented by covenants not to compete between a business and a former employee. But such covenants usually have a valid legally-protected purpose, such as the protection of intellectual property or trademarks, and are treated as "ancillary restraints on trade" under the rule of reason.[56] Collective refusals to deal are, for example, agreements between a supplier and certain purchasers to exclude certain other purchasers who depend on that supplier. Collective refusals to deal are only anticompetitive in highly particular situations such as unusual "market power or exclusive access to an element essential to effective competition."[57] This situation arises most often as a result of government regulation. Otherwise, under the rule of reason, such cases are rarely sustained, and are usually considered ancillary restraints.

The Texas attorney general is involved in a moderate number of horizontal restraint cases. Since 2003, there have been about a dozen such cases, including five price-fixing cases, two bid-rigging cases, and four cases involving other horizontal restraints such as market division. In the typical case, Texas alleges violations of the state's own antitrust laws. These cases rarely involve the use of *parens patriae* authority.

Because cartel and other horizontal restraint cases tend to be the most local of the various kinds of antitrust cases, and because they are generally the cases where antitrust enforcement is most easily justified, we believe that these cases should continue to be a primary focus of the state attorney general's enforcement activity. We further note that our recommended repeal of *parens patriae* authority (*see Part VI, page 20*) will not affect the state attorney general's activity in this area.

Vertical Restraints on Trade—Resale Price Maintenance, etc.

For much of the 20th century, antitrust enforcement intervened heavily in the category of routine business practices knows as vertical restraints on trade. These include resale price maintenance, vertical market divisions, tying arrangements, exclusive dealing arrangements, price discrimination, and vertical refusals to deal. This is one area of antitrust law where the modern revision of antitrust and free market economics has had a major impact.

Virtually every species of a "vertical restraint on trade" is something a company would be entirely free to do if it simply acquired the relevant purchasers and integrated them into its distribution system. It may be less efficient to have the distribution coordinated among distinct suppliers and purchasers, but it is hard to argue that a diffuse distribution network is more anticompetitive than a vertically integrated company. For this reason, courts and enforcement agencies have been especially willing to revise their prior doctrines on vertical restraints, and the rule of *per se* illegality is nowadays applied far more narrowly and less often than before. "Interbrand competition is the competition among the manufacturers of the same generic product," said the Supreme Court in 1977, "and that is the primary concern of the antitrust law."[58] Hence, *intra*brand competition receives much less scrutiny.

Tying arrangements are a somewhat special case. They are called restraints on trade, but such arrangements are potentially anticompetitive only in circumstances closely analogous to monopolization. In the typical case, the firm has a monopoly (or "market power") over a product in one market, and uses its position to force customers to purchase a second product (in which it does not have a monopoly) if the customer wants to purchase the first product at all. The anticompetitive effect theoretically results from a cross-subsidy: the firm artificially raises the price of the monopoly product in order to depress the price of the second product to a point that excludes competitors in the second product. The case should depend on whether the artificially higher prices of the monopoly product are sustainable due to special circumstances. As discussed above in the section on monopolies, prices much higher than marginal cost always draw market entrants. Hence, tying arrangements are normally not sustainable because the higher price of the tying (monopoly) product is not sustainable.

Federal agencies nowadays rarely insinuate themselves into these types of cases. The concern with the role of state attorneys-general is that the modern revision of law and economics has not caught up to them, and that they may tend to use their enforcement powers in ways motivated by local bias, and which injure interstate competition.

The Texas attorney general properly has almost no involvement in cases dealing with vertical restraints—only two cases since 2003. The bar should be especially high for any state involvement in this category, as antitrust enforcement with respect to vertical restraints has perhaps the highest potential for injury to the public.

Manipulations of State Government Power Against Nonresident Competitors

Federal law itself creates enormous exemptions from the antitrust laws for broad categories of federal and state regulation that would otherwise be illegal under the antitrust laws. The classic examples are government-created cartels, such as the agriculture market and labor unions. These function at both the federal and state levels.

At the state level, firms sometimes seek cartel-like protection from nonresident competitors by gaining special advantages from their local governments. Under the *Parker* doctrine, antitrust laws cannot be used to attack such government-created preferences. But the *Parker* doctrine has been narrowly drawn, and state attorneys general still have not used the antitrust laws to challenge the anticompetitive practices of other states. This is an area where *more* involvement by state attorneys general could have procompetitive effects.

In general, the public should be made much more aware of the costly anticompetitive consequences of government-sponsored exceptions to the antitrust laws. The separate statement of Commissioner Kempf in the Antitrust Modernization Commission's 2007 final report is particularly insightful:

> The big exemptions and immunities—the ones that count—are ones for labor and agriculture. They impact much of what the average American east and drinks and uses to do things. And they do it every day. All day. These exemptions cost American consumers billions of dollars a year. Every year. As things turned out, there wasn't interest in facing up to those exemptions and immunities. Too much of a political football I suppose. The thinking—probably correct—ran something like this: No Democrat from an industrial state can support repeal of the labor antitrust exemptions and no Republican from an agricultural state can support repeal of food and dairy antitrust exemptions; so you get a bipartisan standoff: "I'll let you keep your exemptions if you let me keep mine."[59]

Like most state attorneys general, the Texas attorney general lends virtually no scrutiny to the actions of other states. We believe that Texas could and should lead the way in prosecuting the anticompetitive regulations of other states under the antitrust laws as discriminations against interstate competition. Such discrimination creates costly externalities that hurt the residents of Texas. There is room to prosecute such cases more vigorously now, given the narrow interpretation given to the *Parker* state action doctrine. The *Parker* doctrine could be further limited to permit even more involvement by attorneys general in pro-competition states such as Texas.

Part V: Antitrust and Technology

We have provided a broad overview of antitrust laws and their enforcement. While both our review and our recommendations (*see Part VI, page 20*) are accordingly broad, the particular focus that antitrust enforcers have given to high technology markets justifies a separate discussion of this topic.

In one sense, the focus of antitrust enforcement on high technology is nothing new. Standard Oil, IBM, and Microsoft were all technology companies that greatly profited from the innovations they brought into the marketplace. Yet, as researchers point out, the changing antitrust landscape since the Microsoft case has led to an ever-increasing focus on technology:

> In the United States, the changed landscape has resulted in a new enforcement approach that is remarkably direct and honest in identifying its targets, honing in on high-tech markets, innovative industries, and innovative practices. Indeed, large firms in markets involving innovation, intellectual property, standard setting, or the possibility of network effects have been put on notice of potential antitrust actions.[60]

The same is true in Texas. As shown above in the context of the state's monopoly cases, the Texas attorney general is heavily involved in enforcement action in high tech areas: Internet commerce, health care, and pharmaceuticals.

The challenge faced by antitrust enforcers in this area is that for the most part they are not dealing with the classic cartel arrangements where clear violations of law are more easily identified. Instead, enforcers are drawn to high technology companies acting alone because of the high profits and large market shares made possible by innovation. Thus the very innovative practices that are driving technological advancement are the same ones identified as potential violations of antitrust law.

Another trend in antitrust enforcement that negatively affects high-tech markets is the "diminished concern that erroneous antitrust interventions will hinder economic growth."[61] However, the potential harm to economic growth from antitrust interventions is just as great today as in the past. As Professor Joshua D. Wright (the current nominee for the vacant Republican seat on the Federal Trade Commission) and a colleague wrote:

> Applying antitrust laws to innovative companies in dynamic markets has always been a perilous proposition, and despite significant advances in economics and jurisprudence, it remains so. Successful firms such as Google, which compete in markets characterized by innovation, rapid technological change, and a strong reliance on intellectual property rights, are especially likely, and especially problematic, targets.[62]

Patents v. Antitrust

Antitrust law punishes monopolies. Patent law grants them. Thus many high tech industries find that defending their intellectual property can sometimes be a violation of the antitrust laws. What should antitrust enforcers do when faced with the tension between competition and intellectual property?

Just as innovation fuels inventions and revolutionary businesses practices, it also fuels clever and sometimes dangerous manipulations of patent rights. There are multiple ways a patent holder can abuse patent rights: as, for example, when competitors pool patents in an effort to alleviate licensing problems for a particular product, or when competitors make an agreement to refuse to license. An antitrust violation might also lie with an actor who fraudulently procures a patent or in bad faith brings spurious patent infringement litigation against competitors. An antitrust violation may also exist where one party attempts to coerce another to abandon enforcement of its property rights.

On the other hand, antitrust enforcers are also innovative in the use of their authority. They often require patent holders to license their rights, or alter complex transactions after the fact. These interventions can destroy the benefits of innovation for everyone. The risk of erroneous and damaging antitrust enforcement argues for setting the balance between innovation and competition within the scope of the patent itself. When antitrust enforcers instead seek after-the-fact changes in rights and transactions that have already been bargained for, they risk making commercial law more indeterminate and unstable, which is not good for anybody. That is why, in the conflict between a patent and the antitrust laws, the patent should generally win. That argues for a minimal role—if any—for state attorneys general in the conflict of patents and antitrust.

As noted previously, federal antitrust enforcement has generally accepted the proposition that antitrust laws should focus on the protection of consumers. However, this does not mean that antitrust law should be used to cure every alleged defect in the marketplace. The belief that "antitrust intervention is nearly always beneficial from a long-term consumer-welfare perspective" has led to diminished concern over the detrimental effects of antitrust enforcement, particularly in high tech industries.[63]

Increased antitrust enforcement in high-tech industries raises several concerns: 1) the same increased market share and other scale effects from which consumers benefit might also lead to the involvement of antitrust enforcers; 2) the rapid pace of innovation and complexity of high-tech markets make it much more likely that enforcers will make errors in the application antitrust law; 3) it is particularly difficult to distinguish procompetitive conduct from anticompetitive conduct in the single-firm context;[64] and 4) the rapid changes in high technology markets make it likely that, (a) the conditions that attracted enforcers in the first place will not long remain in place, and (b) any remedies that the enforcers or courts may impose on a company will miss the mark and do little to improve competition.

Looking back to the Microsoft case, it is easy to see how enforcement errors can be widespread in high tech antitrust cases. For instance, in 1998 nobody could have predicted that Linux and Google would pose transformational challenges to Microsoft or that computing would move so quickly from the desktop to phones, tablets, and the cloud. As Robert Crandall and Charles Jackson explain:

> There are three emerging technologies in that threaten Microsoft's comfortable position in desktop operating systems—smart phone operating systems, cloud computing, and virtual appliances. None of these appears to owe its existence to the antitrust remedies.[65]

They also point to similar problems with the IBM and AT&T cases:

> The antitrust authorities could not conceivably have predicted how the computer or telecommunications industries would change 10 or 15 years after they drafted their complaints. Nor could they possibly fashion decrees that would improve on the outcomes ultimately achieved in the marketplace in these two high-tech industries.[66]

Regulators simply can't keep up with the fast changing landscape in high technology industries. They shouldn't try. The benefits that consumers have seen from increased competitiveness have come from innovation and new technology rather than from antitrust enforcement. In the high-tech arena, enforcers can virtually never design remedies that increase competition. Increased competi-

Multistate Jurisdiction and the Microsoft Case

On May 19, 1998, in *United States v. Microsoft*, the DOJ along with twenty states and the District of Columbia filed suit against Microsoft Corporation alleging multiple violations of the Sherman Act. Among the charges were allegations that Microsoft participated in illegal monopolization and tying. A central issue was whether Microsoft had bundled Internet Explorer, a web browser, with their operating system in violation of antitrust law.

The Department of Justice was the lead enforcer at every stage of the litigation. States only made their presence felt in the remedies stage, when each generally sought remedies that would help competitors within its own borders. In the end, state involvement served only to prolong and complicate the issues surrounding settlement. *Microsoft* was a case of national importance; but state officials clearly were not motivated by national concerns and engaged in rent-seeking in the final stage of negotiations.

After years of litigation, in 2001, the DOJ and nine of the states settled, while nine other chose to pursue litigation. After most of those settled, two continued to hold out. Even those who thought that Microsoft was guilty of the alleged antitrust violations had to admit that the multiple jeopardy of defending against so many different enforcers might be bad for commerce and innovation.

Much of the high-tech industry today is involved in Internet commerce. While we see a clear role for the states in enforcing antitrust law in local commerce, it is difficult to discern a role for the states in transactions that are in most cases not only national, but international.

tion comes from new technologies and arrangements that are not in place or even dreamed of when enforcement actions begin or when remedies are proposed.[67]

As Manne and Wright argue, it is "critical that antitrust institutions develop some mechanism to combat the historical and systematic bias against innovative business practices."[68] It is in this light that we should examine the increasing involvement of state attorneys general in high tech antitrust enforcement.

We've already seen the potential geographic bias that comes from the involvement of state attorneys general in antitrust litigation. We've also noted the bias towards increased litigation and harsher penalties that stem from state involvement. In addition, there is the duplicative nature of state *parens patriae* lawsuits and merger investigations. When these factors are taken together, there is a clear danger that state antitrust enforcement will lead to an increase in "systematic bias against innovative business practices" in high-technology industries.

Finally, much of the high-tech industry today is involved in Internet commerce. While we see a clear role for the states in enforcing antitrust law in local commerce, it is difficult to discern a role for the states in transactions that are in most cases not only national, but international. Even under the most restrictive interpretation of the Commerce Clause, the federal government has the power to regulate the purchase of an e-book by someone in Florida from a company in Washington that is routed through a server in Virginia. Given the federal government's full competence to regulate interstate antitrust law, the added layer of state enforcement can only inhibit rather than enhance competition.

Part VI: Policy Recommendations

In order to further advance the modern law and economics revision of the antitrust laws, we make a series of recommendations for reform in federal and state antitrust law. Some of these reforms are meant to solve current problems, while others eliminate the potential for future ones. In some cases, we adopt the recommendations of the Antitrust Modernization Commission of 2007 (AMC).

- The expansion in *parens patriae* authority created by the Hart-Scott-Rodino Act should be repealed. Where private parties are injured, or may be injured, by a violation of the antitrust laws, the incentive of treble damages is largely sufficient to incentivize redress through the courts. The ability of state attorneys general, whose antitrust activities are subsidized by the federal government, to sue under *parens patriae* authority for treble damages has led to a costly and dramatic intrusion of state governments into commercial activity that is adequately protected by the original federal and state antitrust enforcement authorities contemplated when the first antitrust statutes were enacted.

- Congress should preempt state antitrust authority except in cases involving purely local matters and cases involving price fixing, bid-rigging, and horizontal market allocation. The states' authority to sue in cases involving mergers and vertical restraints in interstate commerce should be preempted altogether. (AMC, Separate Statement of Commissioner Carlton)

- The FTC should exempt (under Section 7A(d)(2)(B) of the Clayton Act) most vertical and conglomerate mergers from the premerger notification requirements of the Hart-Scott-Rodino Act. Congress should further tighten the existing thresholds such that they apply only in highly concentrated markets. This would correspondingly limit the scope of involvement of state attorneys general in premerger review.

- Congress should work to eliminate overlapping areas of federal and state antitrust jurisdiction. Some overlap may be beneficial. But states should not be able to exert enforcement pressure out of proportion to their interests on cases of primary national concern, especially where federal authorities have declined to get involved or have reached an appropriate resolution. Likewise, the federal agencies should not involve themselves in most cases of local concern, where the judgment of state attorneys general should be deferred to.

- The Premerger Review Protocol should be revised to streamline the process of federal-state and state-state coordination in the premerger review process. (AMC Rec. 35)

- State attorneys-general should work to harmonize their laws and procedures with respect to merger investigations. (AMC Rec. 36)

- Congress should limit the scope of the *Parker* state action doctrine.

  » Where the effects of potentially immunized conduct are not predominantly intrastate (i.e., create externalities) the state action immunity should not be available. (AMC Rec. 79)

  » Non-sovereign entities should not be immunized under the state action doctrine. (AMC Rec. 76)

- States should apply the state action doctrine with greater attention to possible consumer harm from immunized conduct. (AMC. Rec. 75)

Conclusion

States have an important role to play in antitrust enforcement. But state attorneys general should be mindful that the regulation of interstate commerce is primarily a federal concern. They should be vigilant against the temptation to protect local interests from legitimate competition. And by the same token they should work to protect their residents from anticompetitive conduct by the governments of other states.

Courts and enforcement agencies should also continue their modern revision of the antitrust law in keeping with the insights of law and economics.

By helping to create a more even playing field with less government intrusion, the recommendations highlighted above will provide Texans and all Americans with greater opportunity and prosperity through increased protections of private property and a growing, thriving U.S. economy. ✯

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Endnotes

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[31] *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).
[32] Ibid., 257.
[33] *Farmers Group, Inc. v. Lubin*, 222 SW 3d 417 (2007), 423.
[34] *Hawaii*, 257-58.
[35] *Farmers Group*, 424.
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[43] Ibid.
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