



DEPARTMENT OF JUSTICE

Protecting Competition Across 50 United States: Advocacy and Cooperation in Antitrust Enforcement

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1. Introduction to State Cooperation and Advocacy

Good morning and thank you for that introduction. It was an honor to be invited to speak to you all this morning. Getting to speak to folks like you is one of the benefits of serving as the Acting Assistant Attorney General for Antitrust at the Department of Justice, which is both a challenging and rewarding role. Wow, have we been busy lately. In addition to an unprecedented litigation and investigation caseload, with the FTC last month we issued new guidelines for human resources professionals, two weeks ago we proposed revisions to our international guidelines, and we're finalizing revisions to our intellectual property guidelines. It's an incredible time at the Antitrust Division.

On top of all that, I've had a fair number of these speaking opportunities lately, and I've been using them to discuss the great work the Antitrust Division has been doing. A few months ago I spoke about our successes in civil enforcement, and more recently I've talked about the tremendous work of our criminal enforcers and the successes we've had in building relationships with our international counterparts. I've intended these speeches not as exercises in chest-beating, but instead to be thoughtful assessments of where we are today, looking back over several decades of enforcement as we also look forward to the coming transition. With this speech, I'd like to complete that retrospective by focusing on two particularly important, related areas of the Antitrust Division's work: cooperation with our counterpart state enforcers and competition advocacy at the state level.

I say state cooperation and competition advocacy are related because they both incorporate the recognition that, notwithstanding the hard work of the Antitrust Division and the FTC, protecting competition is not a job the federal government can or should do alone. Even as concentration has increased by certain metrics, our economy remains relatively disaggregated, and threats to competition come in all shapes and sizes across our country.

Instead of just relying on prosecutorial work at the state and federal level, we combine enforcement with advocacy, and we partner with the states, other agencies, and the business community to promote a competitive economy. The states feature prominently in that mission. As Alexander Hamilton told the New York Ratifying Convention: The "states must...be

considered as essential component parts of the union.”¹ That’s certainly true in antitrust enforcement, where they are essential component parts of the worthy effort to protect and promote competition throughout the American economy.

By the way I was going to do my best Lin Manuel Miranda impression for that Hamilton quote, but Bill MacCleod told me we weren’t allowed to rap at the Fall Forum.

Cooperative federalism works best on issues where the state and federal governments have a mutuality of interest, and that is certainly the case for antitrust enforcement. The states and the federal government each hope to preserve and promote the competitive process that is the central organizing principle of our free market economy—our mutual economic strength relies on competition playing out across connected local and national markets. While there may be some issues where state and federal goals diverge, antitrust is generally not one of them.

2. Then and Now – Antitrust Division Cooperation with State Antitrust Enforcers

Although we are united in our goal of promoting competition, I cannot say there are never disagreements on how to achieve that goal. As I’m sure you’ll hear today there are many perspectives on antitrust policy, and state enforcers share in that debate. There have been times in the past where those policy disagreements were stark. At the start of my career at the Division, federal and state enforcers sometimes had very different views on how to apply the antitrust laws to promote competition. In that environment cooperation between state and federal enforcers was less common, and tensions occasionally arose from differing perspectives on how to approach important enforcement decisions.

More recently, however, agreement has been much more common than disagreement, and the cooperation between state and federal antitrust enforcers has been excellent. That success is no accident. Constant nurturing from a great many hardworking people in state and federal government – and attention at all levels, from our career staffs right up to the top of our organizations – have helped foster the productive working relationships we enjoy today.

¹ The Debates and Proceedings of the Constitutional Convention of the State of New York, 17th June, 1788.

Christine Varney set a great tone in her 2009 speech on state cooperation, and she advanced that cause when she brought on Mark Tobey as the Antitrust Division's Special Counsel for State Relations and Agriculture. I have to give credit to Mark for his tireless efforts to make the partnership work well for the benefit of competition and the American consumer. I know Edith Ramirez has also helped drive the federal side of the partnership in her role at the FTC.

Meanwhile the State Attorneys General have contributed to the relationship with a number of important advocates. I'd like to recognize the contributions of Vic Domen and Kathleen Foote, the current and immediately prior leaders of the NAAG Multistate Antitrust Task Force, who are both here today, along with many others working through the Task Force and in the antitrust sections of State Attorneys General throughout the country.

3. Successful Cooperation in Civil Antitrust Enforcement

These consistent efforts to nurture the federal-state relationship have paid real enforcement dividends. We're proud at the Division of our record of success. As I've talked about before, our civil program is going strong, blocking 43 anticompetitive deals in important consumer industries like wireless, broadband, software, and appliances. And we've brought a number of conduct cases in industries from publishing to high tech hiring to health care. Our state partners have featured prominently in many of those cases. I can fairly say that if you've recently used a health insurer, flown on a commercial airline, or paid a cell phone bill, then you've directly benefitted from cases where state cooperation played an important role.

The numbers bear out the level of cooperation we've enjoyed with our state partners. Each of the six civil trial sections in the Division has worked on enforcement matters with the states; collectively we have worked with all 50 States plus DC and Puerto Rico. In the last seven years we have brought 25 cases with the states resulting in settlement or final disposition after trial. Five others are pending.

The Apple e-books case is a remarkable example of effective federal-state cooperation. The Texas Attorney General's Office opened the original investigation into the conduct of the e-book publishers and Apple and investigated for a period of time before calling the Antitrust

Division. Early fact investigation work by Texas and Connecticut enabled the Division to get up to speed quickly about the nature of the industry and the anticompetitive conduct that occurred. In fact, some testimony from early depositions taken by Texas and Connecticut proved to be very important in the liability phase of the trial. And, as a further result of productive coordination, the states' economist testified at trial about price and output effects of the alleged conspiracy, testimony which worked in tandem with expert testimony from the Division's retained economist to tell a compelling economic story.

A short anecdote from that case illustrates quite concretely the benefits of federal-state cooperation. One of the best documents that provided evidence of the conspiracy to raise e-book prices – a document that wound up being featured in the opening paragraph of the Government's Trial Brief – was found during document review by a staff attorney from the Arkansas Attorney General's Office.

No less significant in e-books, the states, using their *parens patriae* authority, along with private class counsel, negotiated monetary relief totaling over \$500 million from the publishers and Apple, returning over 200% of overcharges to e-book buyers. A novel feature of the relief is that consumers who purchased e-books during the damages period could opt to have their payouts transferred directly to customer accounts at the various online e-book stores.

The New York City tour buses case is another noteworthy example of federal-state cooperation. In that case, the Division teamed up with the New York Attorney General's Antitrust Bureau to examine the combination of the two largest hop-on, hop-off sightseeing tour bus companies in New York City at the time – the red buses and the blue buses. The merged entity, called Twin America, had an effective monopoly and seemed determined to try to evade antitrust scrutiny. At various points in time over a period of nearly three years Twin America tried to maneuver the case away from the New York Antitrust Bureau, such as by filing an application for transfer of federal licenses which would be subject to the exclusive jurisdiction of the Surface Transportation Board. The New York Antitrust Bureau kept the matter alive over the course of these gyrations by filing opposition papers every step of the way.

Because of the New York Antitrust Bureau's work, after the parties removed the jurisdictional impediment, our teams were in a position to conduct a brief investigation and then

file a lawsuit in 2012 to unwind the combination and obtain disgorgement of profits obtained from a ticket price increase imposed on consumers by the merged firm. As it happens, that was one of my first matters in my first stint as Acting AAG, back before Bill Baer arrived in 2012. In 2015, after nearly three years of litigation, the parties entered into a joint federal-state settlement that provided substantial disgorgement under state and federal law and forced the parties to give up scarce tour bus stop authorizations from the City so that other firms could compete in the market.

A further illustration of how the Division has opened up new and productive relationships with the states, in order to take advantage of unique state statutory powers, involves an initiative one of our Washington, DC criminal sections is now taking with the Georgia Department of Law. Under this plan, the Division will work with the Consumer Protection Unit of the Georgia Department of Law to distribute nearly \$1 million in restitution funds to victims of the real estate foreclosure auction bid-rigging cases brought in the Atlanta area. The Consumer Protection Unit has a long and successful record of returning overcharge damages to victims of all manner of consumer fraud cases and we sought to take advantage of those capabilities by partnering with them. A joint letter from the Division and the Department of Law will soon go out to the first group of victims.

4. Formal Guidance to Shape Conduct and Foster Cooperation

Our cooperation on civil enforcement is bolstered by the formal and informal guidance the Division provides through guidelines, workshops, and speeches, to name a few examples. This guidance helps illuminate our current practices and our thinking about critical issues of law and economics, and fosters communication between the Division and our state counterparts. Plus, we think it's just good government to be as transparent and predictable in our approach as possible—it's the right thing to do.

Over the past several years, our non-litigating sections have been busy updating guidelines and developing new guidance to help educate and inform industry and fellow antitrust enforcers.

Two weeks ago, we released proposed updates to the International Guidelines. We added a chapter on international cooperation to reflect the growing importance of antitrust enforcement in the globalized economy, updated the discussion of the application of U.S. antitrust law to conduct involving foreign commerce, and provided examples that address the issues we most commonly encounter in our international efforts. We're also updating our IP Guidelines, and are in the process of finalizing them based on the feedback we received through a public comment process.

About a month ago, we released new guidance for human resource professionals to educate them about how the antitrust laws apply to their job responsibilities and inform them of the Division's recent enforcement actions. As part of this guidance, we made clear that going forward employers who conspire to hold down wages or restrict hiring of each other's workers will be investigated criminally and, if appropriate, prosecuted criminally. Naked "no-poaching" agreements or agreements to fix wages stamp out competition just like agreements to allocate customers or to fix product prices, violations of the law that the Division has traditionally investigated criminally and prosecuted as hardcore cartel conduct. We hope this guidance will help HR professionals implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire similar employees.

We expect these updates will facilitate even greater coordination with state enforcers in our efforts to protect competition.

5. State Legislative Efforts and Competition Advocacy

In addition to working with our counterpart antitrust enforcers in the offices of the State Attorneys General, we also work productively with state legislatures and regulatory bodies. Later today I understand there will be discussion about how state law and regulation can work to open, and unfortunately sometimes close, markets. It is important that state lawmakers are mindful of the consequences on competition of their actions and understand how legislation or policies can enhance or cripple competition.

The landscape within which state enforcers operate is different from the federal environment. State Attorneys General face the challenge of balancing their role as enforcers of

state and federal competition law with the obligation to counsel professional licensing and regulatory agencies about the potential to displace competition. They must balance their institutional role as advocates for free and fair markets with occasional pressure from state lawmakers to restrict markets and insulate local firms from emerging technologies and non-traditional competitors. Recognizing this tension, it can be helpful for the federal antitrust agencies to weigh in regarding proposed state and local legislation to seek to vindicate competition principles.

State officials sometimes seek our views on the competitive significance of state legislation and policies. We welcome those requests and are eager to share our expertise in a way that can help advance both legal frameworks and policies in the direction of more efficient and well-functioning markets, or to shape corporate behavior away from harmful anticompetitive conduct. Additionally, inherent in these competition advocacy efforts is fruitful dialogue and learning that advances the Division's expertise.

States can play a critical role in addressing and preventing anticompetitive conduct through their own legislative efforts. For example, in 2010 the Division sued Blue Cross Blue Shield of Michigan alleging that "most favored nation" provisions in its agreements with hospitals raised prices, discouraged discounts, and prevented competitive insurers from entering the market. About two years later, Michigan enacted a law that banned these harmful clauses. This move alleviated our concerns and now benefits competition and consumers throughout the state of Michigan. Several other states have also enacted similar legislation.

We have also weighed in over the years on how state regulatory or legislative actions can sometimes close markets off from competition. For example, the Division, together with the FTC, has long supported repealing or scaling back state certificate of need laws. These laws typically require certain health care providers to obtain state approval before establishing new facilities, providing new services, or making certain large capital expenditures. This can create barriers to competition by delaying or prohibiting entry and, as a result, can limit consumer choice and stifle innovation. We've shared these views most recently with officials in South Carolina, Virginia, Michigan, Illinois, and Florida.

The Division, often with the FTC, has also been active in educating legislatures about how scope of practice laws, which define the set of professionals allowed to perform particular services, can limit competition for consumer services. For example:

- In Massachusetts and Puerto Rico we advocated for legislation expanding the scope of practice laws to permit optometrists to provide certain treatments for glaucoma, thereby expanding competition and access to care.
- In the legal services realm, we have discouraged overly broad practice of law definitions that limit competition from non-lawyers for services that are not necessary to address legitimate and substantiated harms. In July, the Division and the FTC encouraged the adoption of legislation in North Carolina that would provide consumers with the ability to use interactive software programs to fill out legal forms.
- Similarly in the real estate industry, we've weighed in on the benefits of competition from brokers who offer "fee-for-service" options for consumers and have cautioned against restricting these new consumer-friendly competitive choices.

The Division also recently submitted a statement on the potential anticompetitive effects of certain legislative proposals in California that would ban or limit contracts between court reporters or service firms and third parties, such as insurance companies, for multi-case contracts.

Whether advocating in favor of state laws that help keep markets open, or working to help state legislatures understand the negative impacts on competition their laws might cause, we have great respect for the state legislative process. While we as antitrust enforcers have a singular goal of competition, legislatures have to balance a host of potentially competing public policy goals that aren't squarely in our purview. All we can hope to do is foster an increased understanding and a deeper appreciation for the competition dimension of those decisions. That's the same approach we take in all the advocacy we do with other federal agencies and international enforcers as well.

6. Looking forward

I hope that what you've heard in these remarks is that the Antitrust Division works hard to promote competition not only in our own cases, but also through our cooperation with and advocacy before our state counterparts. And I also hope you've gotten some sense for the sustained commitment that this work requires from a great many talented people.

Our work advocating for competition with our state partners is never done. In just four days, trial will start in the Anthem/Cigna merger challenge brought by the Division alongside 11 states and DC. I won't comment on pending cases, but we look forward to working with the states as that important matter proceeds.

With an eye toward the future, allow me to conclude with some suggestions on federal-state cooperation in the cases to come.

For practitioners, I suggest embracing federal-state cooperation. It's not in anyone's interest to have divergent federal and state investigations and enforcement outcomes. Grant waivers early in investigations, and encourage state participation in CID depositions and party meetings. These steps will often reduce the investigative burdens on your clients and foster a dialogue that will simplify resolution or settlement if possible under the circumstances.

For the federal and state enforcement agencies, I'd encourage continued investment in the relationships that make cooperation work. As I mentioned earlier, those relationships were not always as strong as they are today, and I really believe they benefit from constant nurturing. Today's event provides a perfect opportunity for the kind of engagement that keeps our organizations connected, and I see many of our state counterparts out in the audience. I look forward to catching up with you all today—enjoy the Fall Forum.