

Cooperative Federalism in the Enforcement of Antitrust and Consumer Protection Laws

Federal Trade Commission 90th Anniversary Symposium

**Remarks by
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INTRODUCTION

In the interests of brevity and completeness, I will give a four-word speech today. Not, mind you, a speech limited to four words! Rather, a speech about the meaning of four words:

- * DIVERSITY;
- * COMMONALITY;
- * OPPORTUNITY; and
- * CHALLENGE.

And, as always is the case when talking about the meaning of words, we need to begin with context – because context gives words meaning, shades of meaning, and depth of meaning.

DIVERSITY

Our context today is our federal form of government and, more particularly, law enforcement policy within the context of enforcement pluralism.

In other words, we are operating in an environment with multiple actors, multiple actions, multiple motives, and multiple outcomes. This DIVERSITY, borne of federalism and embodying the very spirit of federalism, poses challenges for the enforcement of the antitrust and consumer protection laws.

What role has the Federal Trade Commission played within this scheme, and what role should the FTC play in the future? How can the FTC ensure that the overall level of enforcement falls within an appropriate, optimal range? In short, what can the FTC do to make enforcement work better?

Federalism is an abiding characteristic of our republican [small “r”] form of government. It reposes sovereignty in both the United States and the several states. Both economic policy and law enforcement policy are, of necessity, the product of multiple and diverse sources. This diversity of policy will continue unless Congress someday decides to occupy the field fully.

In the world of antitrust in particular, the Supreme Court has observed that Congress adopted the Sherman Antitrust Act, at least in part, to supplement – rather than supplant – the antitrust laws of the individual states.

And as John Delacourt has observed earlier today, the Court went even further in its state action cases – explicitly holding that adoption of the federal antitrust laws was not intended by the Congress to displace legitimate state regulatory regimes.

Federalism provides the same sorts of “checks and balances” in the law enforcement realm that separation of powers provides within the Constitution.

This is reflected in the fundamental decisions Congress made when it first shaped the antitrust regime – distributing enforcement responsibility among the Antitrust Division, the Federal Trade Commission, state attorneys general, and private plaintiffs enforcing state and federal laws.

Our beginning point is, thus, a deliberately rich tableau of diversity in enforcement authority. And if that is not enough diversity, the legal rules Congress adopted are themselves diverse.

Our nation’s core antitrust principles are, at heart, admixtures of law and economics. Rather than simply specifying which actions are and are not

permissible, the antitrust laws attempt to define the outer limits of acceptable business behavior, based on the “realities of the marketplace.”

Further, our antitrust rules are stated broadly –in a manner which Professor Milton Handler used to refer to as “uncalibrated yardsticks.”

The antitrust laws take their meaning, in large part, from experiential rules that have evolved from the courts on a case-by-case basis – in a form that is very true to their common-law origins.

The rules continually are refined as more cases work their way through the system – and the robustness of the case law is a direct result of the multitude of actions brought by many different enforcers.

Last week, at the close of the Commission’s Class Action Workshop, Commissioner Leary related a story of how Chinese officials reacted to our “messy” model of pluralistic enforcement. Conceptually, yes, the system is messy. That messiness is not, however, necessarily all bad. Indeed, federalism-based diversity permits a state to function as what Justice Brandeis once described as “*a laboratory . . . to try novel social and economic experiments without risk to the rest of the country.*”

Another abiding characteristic of our laws is that they are designed to be largely self-enforced. We don't expect public enforcement actions to be the predominant means of enforcement.

Indeed, without devaluing the importance of litigated enforcement actions in upholding our antitrust and consumer protection laws, I believe that a greater volume of enforcement activity actually occurs in the offices of antitrust and consumer protection counselors.

Our total enforcement regime, with all its multiple parts, is designed to create a deterrence effect - generating incentives for businesses to operate near the edge of the cliff, without going over the edge.

This "invisible hand" of deterrence in the world of antitrust enforcement operates in much the same way as Adam Smith described his invisible hand in economics.

COMMONALITY

As a result of this diversity in antitrust and consumer protection enforcement, we have multiple levels of government adopting both complementary and conflicting statutes. Moreover, these statutes may be enforced by variously motivated actors and agencies, applying rules of law that may change over time, even without legislative intervention.

This complex system has been evolving for more than a century.

I dare say, if Congress, in 1890, had projected the possible consequences of its actions at this level of detail, and had understood the great potential for non-functional outcomes, Congress just might have adopted a very different Sherman Act!

Yet, in our experience, the system has worked and continues to work, and there have been no drastic changes, in large part because of our second term for today: COMMONALITY.

The focus of this panel is on conflict and cooperation between the FTC and other governmental agencies. One of the main points I want to emphasize is the level of cooperation between the Commission and the state attorneys general in fulfilling our mutual antitrust and consumer protection missions.

Certainly, the diversity I've just described has given rise to many opportunities for conflict over the years. But in spite of this, by and large, the Commission and the state attorneys general today enjoy a relationship of mutual trust and cooperation.

This is true, in large part, because we follow common enforcement principles. We enforce statutes that have been modeled upon each other, and many of our enforcement guidelines are substantially similar as well.

Moreover, many state statutes mandate enforcement in a manner consistent with comparable provisions of federal law.

But even more importantly, we share common core values. In defining the very purpose of the antitrust and consumer protection laws, we realize that we share a common mission: *to preserve consumers' ability to make informed, voluntary choices in the goods and services they purchase; and to assure consumers that they will have a wide range of choices available to them.* Put another way, both the state and federal antitrust and consumer protection laws focus on promoting consumer well-being.

Commentators on federal-state relations in antitrust enforcement too often focus on occasional, case-specific differences of opinion that surface from time to time. In the final analysis, however, those disagreements are narrow and infrequent.

Differences may take on great importance to, for example, a party who feels pinched by the marginal implications of a federal-state disagreement.

In reality, though, both federal and state enforcers seek to determine what course of action will achieve the greatest value for consumers. And more often than not, consumer welfare is maximized when federal enforcers and state attorneys general engage in cooperative enforcement.

OPPORTUNITY

An exploration of the benefits of cooperative enforcement, will bring us to my third key term for today: OPPORTUNITY.

Professor Calkins has observed that the federal enforcement agencies and the state attorneys general each have comparative advantages in the enforcement of the antitrust laws.

For example, states have the advantages of proximity to and knowledge of local markets, as well as expertise in crafting effective damages remedies for public and individual consumers.

The federal enforcers enjoy greater resources, particularized knowledge of specific industries, expertise in fashioning equitable relief, and a broader scope of focus.

In light of the commonality of antitrust statutes and enforcement priorities, federal and state agencies should be encouraged to coordinate their activities in ways that maximize their comparative strengths (subject, of

course, to the rules of grand jury secrecy and the constraints of HSR confidentiality).

The Commission has recognized the benefits of coordinated enforcement – both to the agencies and to the targets of our enforcement actions.

Taking advantage of opportunity, the Commission has adopted procedures that facilitate federal-state coordination in appropriate cases.

For instance, FTC Rule 4.11(c), which implements certain statutory provisions of the Federal Trade Commission Act, permits the Commission to share non-public investigational materials with other law enforcement agencies, so long as the information is used only for official law enforcement purposes and the information is maintained in confidence.

Because HSR materials are statutorily confidential and cannot be shared with state attorneys general without the consent of the filers, the Commission has adopted the *Protocol for Coordination in Merger Enforcement Between the Federal Enforcement Agencies and State Attorneys General*.

The Protocol provides a means for coordination, including incentives for merging parties to consent to granting state attorneys general access to HSR materials.

Coordinated enforcement does not always mean that state attorneys general follow an enforcement lead taken by a federal agency.

At last week's Class Action Workshop, Assistant Attorney General Trish Conners of Florida detailed cases where coordinated filings were initiated in the first instance by federal agencies, state attorneys general, and private litigants.

In one case, federal and state involvement in an enforcement matter occurred because the defendant in pending private litigation requested it.

Coordinated enforcement can take an almost unlimited variety of forms. However, in most instances, it takes one of four forms.

First, there are actions where the FTC and state attorneys general seek similar remedies. One example is our recent settlement with *Perrigo*, where the Commission and state attorneys general each received disgorgement of profits and injunctive relief.

Second, there are matters where the Commission and state attorneys general seek complementary remedies. In *Toys 'R' Us*, the FTC obtained injunctive relief and the states obtained treble damage relief.

Third, there are cases where the FTC provides evidentiary support for state attorneys general under Rule 4.11(c), but brings no action of its own. *Contact Lenses* is a case that illustrates this type of coordination.

Finally, there are cases where the states provide evidentiary or *amicus* support to the Commission. In the *Staples* case, state assistance in gathering local market data was quite helpful to the Commission. In *Ticor*, the states' *amicus* brief in the Supreme Court was expressly cited by the Court as reinforcing the Commission's case.

Lest you think that all of this coordination only occurs on the antitrust mission, let me make clear that the level of cooperation and coordination in our consumer protection mission is equally high and, in some ways, even more routine than in the antitrust area.

Consumer Sentinel and our Internet Labs are available to state attorneys general and other federal enforcement agencies, such as the FBI and the Postal Inspectors.

We routinely engage in coordinated enforcement sweeps and strike forces targeting particular types of consumer problems. The Postal Service, the Secret Service and the FBI have, on occasion, detailed agents and analysts to work with Commission personnel on identify theft and other consumer cases where we share enforcement interests.

And in an extremely popular recent Commission initiative, the *National Do Not Call Registry*, the coordinated participation of state attorneys general, state utilities commissions and the FCC was integral to the success of that effort.

CHALLENGE

As I mentioned earlier, the fourth key word for today is CHALLENGE. It is a challenge to maximize the benefits of coordinated enforcement, while at the same time minimizing unnecessary duplication of efforts. I would like to recommend a few ideas that may help us rise to this challenge.

A good first step would be to strengthen and expand existing coordination mechanisms. For instance, there are periodic meetings of the so-called “Executive Working Group for Antitrust” – which includes the FTC Chairman, the Assistant Attorney General in charge of the DOJ Antitrust Division, and representatives of the states attorney general.

They meet to discuss issues of common interest. Extending those discussions to the staff level, and scheduling more frequent meetings, might further facilitate coordination. Staff-level meetings would enable state and federal personnel to assess candidly what is – and is not – working as well as it could. The results of these meetings could provide the Commission with insights leading to further refinements in existing procedures.

Joint staff training activities also would be useful.

These are just a few examples; I'm quite sure we could think of others.

We understand the benefits of cooperative enforcement. The CHALLENGE lies in making sure coordination happens, to the greatest extent practicable.

CONCLUSION

In conclusion, let me recount a story from the May 1989 celebration of the 100th Anniversary of the adoption of the Kansas antitrust law. At that event, Professor John Kincaid observed that

cooperative federalism needs to be revived as a two-way street, not as a one-way street in which the federal government mandates and the states are merely expected to agree to cooperate. There are proper niches for the states and for the federal government, and those niches need to be carved in clay so that they can be remolded to meet the contingencies of time and the exigencies of global economic competition.

Since that time we have made considerable progress toward Professor Kincaid's ideal world.

Our CHALLENGE going forward lies in the recognition that there is much more to be done.

We must recognize the unique aspects of our DIVERSITY. Only then can we truly fulfill our COMMONALITY of purpose. With forethought and diligence, we can all work together to take advantage of appropriate enforcement OPPORTUNITIES – which will benefit the Commission, state attorneys general, and most importantly, the public interest.

Thank you.