

**ANTITRUST CLAIMS AGAINST FOREIGN FIRMS AND CARTELS:  
THE STATES' AUTHORITY AND INITIATIVES**

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**BY  
RICHARD L. SCHWARTZ<sup>1</sup>  
ASSISTANT ATTORNEY GENERAL  
ANTITRUST BUREAU  
NEW YORK ATTORNEY GENERAL'S OFFICE**

- 1. Introduction**
- 2. The States as Antitrust Enforcers**
- 3. State Antitrust Enforcement Authority over Foreign Firms and Out-of-State Conduct**
- 4. Potential Federal Law Claims**
- 5. Potential State Law Claims**
- 6. The States' Authority to Investigate Foreign Firms and Out-of-State Conduct**
- 7. The States' Role in Settlements and Litigations involving Foreign Cartel Participants**

1. Introduction

1.1. The States are no strangers to international antitrust enforcement. *See Hartford Fire*

*Insurance Co. v. California*, 509 U.S. 764, 796 (1993). (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”)

The *Hartford* decision has been described as one of the “Ten Milestones in 20<sup>th</sup> Century

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<sup>1</sup> The views expressed are solely the author's own and do not reflect the views of the New York State Attorney General's Office, or of any other person. I would like to express my appreciation to my Bureau Chief, Jay L. Himes, for the use of materials contained in his paper, “International Enforcement Activity at the New York Antitrust Bureau,” presented to the Competition Committee of the United States Council for International Business,” January 29, 2004.

Antitrust Law,”<sup>2</sup> a Supreme Court decision which “firmly established an expansive scope for U.S. antitrust enforcement against foreign conduct by foreign parties, paving the way for today’s exceptionally aggressive international enforcement program...”

## **2. The States as Antitrust Enforcers**

2.1. From the viewpoint of a foreign firm alleged to have participated in a price-fixing cartel, who are the States and how are they best approached?

### 2.2. Some Basics

2.2.1. The vast majority of States have antitrust laws of general application. These generally proscribe the same conduct made illegal by the Sherman Act, including price fixing and market allocation, which are usually *per se* offenses under state antitrust laws just as they are under the Sherman Act. *See, e.g., People v. Rattenni*, 81 N.Y. 2d 166, 171-72 (1993) (under New York’s antitrust law, some activities, including price fixing, “are deemed to be so pernicious to competition that they are found to be *per se* unreasonable”); *Oakland-Alameda County Builders’ Exch. V. F.P. Lathrop Construction Co.*, 482 P.2d 226, 231 (Cal. 1971).

2.2.2. State Attorneys General frequently pursue antitrust concerns with regional and national implications on a multistate basis. In 1983, the Multistate Antitrust Task force of the National Association of Attorneys General was created as a forum for liaison and coordination among the States on antitrust matters. A useful starting point for gathering information is the website of the State Enforcement Committee of the ABA, <http://www.abanet.org/antitrust/committees/state->

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<sup>2</sup>Robert A. Skitol & James A. Meyers, *Ten Milestones in 20<sup>th</sup> Century Antitrust Law and Their Importance to the Decade Ahead* (1999), at [http://www/dbr.com/media\\_html.asp?id=522](http://www/dbr.com/media_html.asp?id=522).

antitrust/home.html (“ABA Website”), which contains a list of State AAGs with antitrust responsibility who can function as contacts for persons wishing to approach the States.

Some useful introductory materials: Robert L. Hubbard (current Chair of the Multistate Taskforce), *Nuts and Bolts of Antitrust Enforcement by State Attorneys General*, ABA Website; ABA Section of Antitrust Law, *State Antitrust Enforcement Handbook (2003)*.

### **3. State Antitrust Enforcement Authority over Foreign Firms and Out-of-State Conduct**

3.1. States may bring claims against foreign cartel participants under both federal antitrust law and – in most cases – the antitrust and other consumer protection laws of the individual States.

#### 3.2. Subject Matter Jurisdiction over Foreign Commerce

With respect to subject matter jurisdiction over Sherman Act claims involving foreign commerce which has effects within the United States, the *Hartford Fire* standard will apply, and any related comity considerations (although *Hartford Fire* suggests that absent foreign and domestic laws which place “conflicting demands” on the defendant comity will not have much of a role to play). To the extent that U.S. export commerce is alleged to have been injured, the Foreign Trade Antitrust Improvements Act of 1982 applies, 15 U.S.C. §6a (limiting subject matter jurisdiction of the Sherman Act and FTC Act to conduct having a “direct, substantial, and reasonably foreseeable” effect).

3.3 State law claims might be asserted either in the courts of a particular state or in federal court, as supplemental claims (assuming an independent basis for the federal court’s subject matter jurisdiction). In either case, state law must first be consulted to determine to what extent the statute reaches conduct outside the State having effects in a particular state. In some cases,

legislatures have limited the territorial reach of state antitrust statutes. *See, e.g.,* Massachusetts Antitrust Act, Mass. Ann. Laws ch. 93, § 3 (applies only to activities which “occur and have their competitive impact primarily and predominantly within the Commonwealth and at most, only incidentally outside New England.”).

### 3.4 Constitutional Standards Governing Extraterritorial Application of State Antitrust Law

Generally, the analysis of any Due Process challenge will turn on whether the agreement or activity at issue has sufficiently substantial contacts with the forum state. The analysis runs roughly parallel to any Commerce Clause claim that a particular state antitrust law imposes an unreasonable burden on interstate commerce. Broadly, an application of a state antitrust statute might violate Fourteenth Amendment Due Process rights only if it punished actions occurring wholly outside the state and having no significant nexus with the state. *See, e.g., Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *see generally* State Antitrust Enforcement Handbook, pp. 27-30.

3.6. Of course, assuming subject matter jurisdiction is established, the relevant requirements for personal jurisdiction over the foreign firm or individual must also be met.

## 4. Federal Law Claims

### 4.1. Damages Claims

States may bring actions under Section 4 of the Clayton Act to recover treble damages as direct purchasers of goods or services.<sup>3</sup> States may assert such damage claims on their own behalf, in a

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<sup>3</sup> States and their political subdivisions are “persons” within the meaning of Section 4 of the Clayton Act. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-61 (1972).

proprietary capacity, but also on behalf of political subdivisions and other state governmental entities. They may act on behalf of state governmental entities other than the State itself either as authorized by state law or pursuant to a class action under Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D. Pa. 1979).

Finally, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 granted the States' *parens patriae* authority to bring treble-damages actions on behalf of natural persons. 15 U.S.C. §§ 15c-h.

#### 4.2. Claims for Injunctive Relief

States may bring actions for injunctive relief pursuant to Section 16 of the Clayton Act when an antitrust violation threatens injury to the State. 15 U.S.C. § 26.

### 5. State Law Claims

Potential state law claims include not only those based on state antitrust statutes, but on a wide variety of consumer protection statutes as well. Many states now have "Illinois Brick Repealer" statutes which specifically permit indirect purchasers, who cannot claim damages under the federal antitrust laws, to do so under state law. These were enacted in the wake of *California v. Arc America Corp.*, 490 U.S. 93 (1989), where the Supreme Court held that indirect purchasers could recover damages under state law flowing from the same conduct which gave rise to federal treble-damage claims under the Sherman and Clayton Acts. In addition to damages, many state antitrust laws provide for civil penalties, in amounts up to \$1,000,000 per violation, and other relief.

In many instances also, state laws provide for *parens patriae* actions for violations of state antitrust and other consumer protection laws, by statute or otherwise. State court class actions

are also generally available.

## **6. The States' Authority to Investigate Foreign Firms and Out-of-State Conduct**

What can a foreign cartel participant expect if it becomes the subject of an antitrust investigation by a single state or group of states? I'll use New York as an example.

### **6.1 Reach of Compulsory Process**

Two New York statutes provide ample authority for effective investigations of foreign firms suspected of participating in price-fixing cartels with anticompetitive effects in New York.

Section 343 of the New York General Business Law, part of New York's antitrust statute, the Donnelly Act, provides broad investigative authority that reaches any corporation which is subject to civil action jurisdiction.

Civil action jurisdiction, in turn, is governed by New York's long-arm statute, Section 302 of the NY Civil Law and Practice Rules. That statute provides jurisdiction when, example, a firm transacted business in the state or engaged in conspiratorial conduct outside the state which had an in-state impact.

A second statute which provides us with subpoena authority which may be used to reach foreign firms is Section 63(12) of the New York Executive Law, which empowers the Attorney General to seek "injunctive relief, restitution and damages" where "any person . . . engage[s] in repeated fraudulent or illegal acts" in conducting business. Under this statute, liability can be triggered not only by dishonest business conduct, but also by violation of federal, state, or even local law.<sup>4</sup>

Under these statutes, we have multiple approaches to issuing and serving an investigatory

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*See FTC v. Mylan Lab, Inc.*, 62 F.Supp. 2d 25, 49-50, *modified as to other rulings*, 99 F. Supp. 2d 1 (D.D.C. 1999) (antitrust violations); *New York v. Feldman*, 210 F. Supp. 2d 294 (S.D.N.Y. 2002) (same).

subpoena on a foreign corporation, including corporations located abroad. If the corporation maintains an office in New York, service of a subpoena on corporate personnel located there may require the corporation to produce documents located outside New York and to produce its officers, employees, and agents for investigatory statements in New York.<sup>5</sup>

If, on the other hand, the foreign firm in question does not maintain an office in New York, it may still be authorized to do business there. In that case, the Secretary of State of New York is, by law, an appointed agent for service of process.<sup>6</sup>

Even if the foreign firm is not authorized to do business in the State of New York, we still have authority to investigate under Section 343, and to serve investigatory subpoenas – whether inside or outside the State. Whenever the corporation is subject to civil action jurisdiction, by law service of process may be made on the New York Secretary of State.<sup>7</sup> So, we can accomplish service whenever, for example, the foreign firm transacted business in the state or engaged in conspiratorial conduct outside the state which had an impact in New York.

Where an investigatory subpoena must be served outside the United States, issues can arise concerning the manner in which service is to be made. There, much will depend on the country in which service is to be made, and other fact-specific considerations. The objective is to make service abroad in a manner which maximizes our ability to take effective enforcement action if necessary. Once service is made, foreign corporations or individual nationals would ignore our

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<sup>5</sup>See, e.g., *Matter of Grand Jury Subpoenas v. Kuriansky*, 70 N.Y. 2d 700 (1987); *Matter of Standard Fruit & Steamship Co. v. Waterfront Commission of New York Harbor*, 43 N.Y. 2d 11 (1977).

<sup>6</sup> N.Y. Bus. Corp. Law Section 304.

<sup>7</sup> N.Y. Bus. Corp. Law Section 307.

subpoena at great risk. Failure to comply is, by statute, a contempt and also a criminal misdemeanor under New York law.<sup>8</sup> If a contempt finding were made, or a criminal warrant outstanding, that would likely have consequences for the ability of a foreign firm to have access to New York markets, or of a business executive to travel to or through New York.

## **6.2 The New York Attorney General’s Broad Antitrust Investigative Authority**

The statutes discussed grant the New York Attorney General broad investigative authority to issue both document subpoenas and interrogatories, and to conduct investigative depositions of witnesses. To support an investigative subpoena, the Attorney General need only show “his authority, relevance of the items sought, and some factual basis for his investigation.”<sup>9</sup> There is no “probable cause” requirement, nor must the Attorney General “pinpoint exactly what the subpoenaed materials [are] expected to reveal.” *Id.*

The principles governing an investigative subpoena under the Donnelly Act are not those of civil discovery. When a Donnelly Act investigative subpoena is served, the recipient must either provide the materials sought, or invoke the remedies available under the statute, a motion to “quash, fix conditions, or modify” the subpoena. In this respect the recipient of a Donnelly Act investigative subpoena is in a position analogous to a person served with a grand jury subpoena.<sup>10</sup>

## **6.3 Confidentiality Considerations**

Generally, state statutes authorizing compulsory process for antitrust investigations also address

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<sup>8</sup> N.Y. Gen. Bus. Law Section 343.

<sup>9</sup> *In re American Dental Coop., Inc.*, 127 A.D. 2d 274, 283 (1<sup>st</sup> Dep’t 1987).

<sup>10</sup> *See Brunswick Hosp. Ctr. Inc. v. Hynes as Deputy Attorney General*, 52 N.Y. 2d 333, 337 (1981) (“[a] motion to quash or vacate, of course, is the proper **and exclusive** vehicle to challenge the validity of a subpoena or the jurisdiction of the issuing authority.”) (emphasis supplied).

confidentiality considerations to some extent. These statutes generally also provide a basis on which State Attorney Generals may shield legitimately confidential information from requests made under state analogues of the Freedom of Information Act.

## **7. The States' Role in Settlements and Litigations with Foreign Cartel Participants**

### **7.1. The Vitamins Settlement**

State Attorneys General played a key role in the settlements in the Vitamins case, which grew out of a worldwide conspiracy to fix prices, allocate markets, and engage in other collusive conduct in the bulk vitamins industry. A number of corporate and individual defendants pleaded guilty to charges of criminal price-fixing in some 25 DOJ prosecutions, which netted record-setting fines totaling approximately \$875 million.

Private direct purchaser actions were filed in federal courts and consolidated in a multidistrict class action in the District of Columbia. Private Indirect purchaser actions were also filed in numerous states, and eventually coordinated in the District of Columbia Superior Court, which coordinated pretrial proceedings and presided over an Alternative Dispute Resolution process. State Attorneys General entered into this ADR process, although they had not filed cases against any of the defendants.<sup>11</sup>

This process led, in October of 2000, to settlement agreements between leading defendants and the Attorneys General of 21 States, Puerto Rico and the District of Columbia. Under the agreements, approximately \$30 million was paid to the States in settlement of proprietary claims arising from purchases of state governmental entities in 47 States. There was also a \$118 million

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<sup>11</sup> See Kevin O'Connor, "Is the *Illinois Brick* Wall Crumbling?," in *Antitrust*, Summer 2001, at 34-40.

pool allocated among 23 jurisdictions to compensate damages claims made on behalf of consumers. The Attorney General in each jurisdiction decided how to allocate the State's settlement share, subject to agreed-upon limitations. An additional \$107 million was deposited in a business settlement fund to compensate claims made on behalf of businesses in 23 jurisdictions.<sup>12</sup> A separate settlement agreement in the amount of \$80 million was reached with the State of California.

These settlements were implemented through both federal and state court approval proceedings. The States' proprietary claims were asserted in a complaint filed in federal court in the District of Columbia. Consumer settlements were implemented through individual state court actions.

## **7.2. The DRAM Investigation and Litigation**

Following a multistate investigation, two actions were filed by the States in federal courts seeking damages and other relief against alleged participants in the DRAM price-fixing conspiracy. On July 13, 2006, the State of New York filed an action in the Southern District of New York. *State of New York v. Micron Technology, Inc., et al.*, No. 06 Civ. 5309 (S.D.N.Y.). On July 14, California and thirty-four other States filed a complaint in the Northern District of California. *State of California, et al., v. Infineon Technologies AG., et al.*, No. C 06 4333 (N.D.Ca.). Copies of both complaints are being submitted with this paper for distribution to seminar participants. On August 3, the *California* case was related to the multidistrict litigation already pending in the Northern District of California, *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, MDL -02-01486 PJH. As of this writing, it was uncertain whether

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<sup>12</sup> See "Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?", by Richard Wolfram and Spencer Weber Waller, in *Antitrust Law in New York State*, 2<sup>nd</sup>. ed. 2002, ed. Robert L. Hubbard and Pamela Jones Harbour, pp. 1-43 at 38.

and how the *California* and *New York* cases would be coordinated with the pending MDL proceeding.