

The Role of State Attorneys General in U.S. Antitrust Policy: Public Enforcement through Private Enforcement Methods

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State Attorneys
General in US
Antitrust Policy

CCP Policy Briefings

INTRODUCTION

- State Attorneys General (State AGs) are elected, and are therefore overtly political public officials who enforce federal antitrust laws through private enforcement mechanisms. Their agenda goes beyond issues of antitrust and they have significant discretion to direct their enforcement efforts.
- The position and activities within antitrust enforcement policy are currently under scrutiny by the US Antitrust Modernization Commission (AMC) and the current trend appears to be towards centralisation.
- The focus of this paper is to examine features of modern US antitrust policy enforcement (with specific focus on the Sherman Act) by the State AGs through *parens patriae* actions. It compares *parens patriae* to class action; it examines methods of damage distribution, the degree of control exercised by the courts and the limitations of *parens patriae*. It does this by examining the types of cases that have been targeted.

BACKGROUND

- State AGs get their main source of authority from the notion of *parens patriae*. This is a doctrine with distant historical origins. In its early form in the US it was the means by which a state made representation to the federal system in the event of a conflict with another state, in effect acting as the trustee, guardian or representative of all citizens. Over time, it has transformed from a means by which the stability of the federation could be enforced, to a tool which has expanded the role of the state into antitrust issues.
- This was achieved in 1976 with the Hart-Scott-Rodino Antitrust Improvements Act. This legislation coincided with criticism of the enforcement activities of federal agencies and concern that private enforcement mechanisms did not provide sufficient redress for consumers. The legislation gave State AGs the authority to seek injunctions and treble damages on behalf of their citizens hurt by violations of federal antitrust law.

ISSUES

Class Actions

- In a number of cases the State AG has been appointed by the Court as the class representative and one might argue that this functions as an alternative mechanism to secure compensation for consumers. However, Class Actions are not a perfect substitute for the enforcement of the federal law by the State AGs through *parens patriae* mechanism. Class Actions have strict conditions attached to them by federal law and significant principal-agent problems. For example, a class action can be deemed unmanageable in cases where the amount of compensation is expected to be lower than the cost of damage distribution. There is also a perception, as a consequence of their political status, that State AGs are more accountable to the public than attorneys, and therefore, more likely to settle the case for the benefit of the citizens.

Distribution of Damages

- Since in most of the cases which are brought on behalf of a mass a part or whole of the damage fund remains undistributed, a variety of methods have been developed to exhaust the damage fund. Returning undistributed damages to the defendant, distributing the unclaimed damages to those who have claimed, using fluid recovery mechanisms such as coupons, depositing the damages to the state treasury and applying *cy pres* mechanisms are the main alternatives. This latter mechanism is the most desirable, as it requires the unclaimed damage fund to be put to the next possible, albeit indirect, use which benefits consumers injured by the conspiracy. To date, the courts approved *cy pres* distribution of damages only in *parens patriae* actions probably due to the political accountability of the State AGs.

Settlements

- Settlements achieved by State AGs are required to be “fair, reasonable and adequate” if they are to achieve court approval. However, since this test had been developed within the context of class actions, it mainly aims to prevent under-enforcement. The only

factor which the courts take into consideration which could prevent over-enforcement is the solvency of the defendants. Thus, the State AGs have a great degree of discretion open to them as a consequence of lax procedures and limited influence over them by the federal courts.

Limitations

- Only people, and not undertakings, are covered by *parens patriae*. Treble damages are only available for contravention of the Sherman Act. A state cannot bring action to protect its own interest, only those of its citizens. Nor can it bring action on behalf of indirect purchasers under federal law, although most of the state laws enshrine the right of indirect purchasers to obtain treble damages.

Cases

- The State AGs have brought 26 cases against Sherman Act violations between 1980 and 2006. Predictions had suggested that the focus would mainly be on price-fixing because the damage computation laws are more favourable. However, the cases have proved to be more diverse both in terms of the nature of the case and the markets covered. This suggests that State AGs are actively mixing and matching the opportunities provided to them by federal and state law to secure compensation for the largest class possible. The *cy pres* method of damage distribution is the most prevalent.

Antitrust Modernization Commission

- State involvement in the enforcement of federal statute was put on the agenda after the high profile role it had in the case against Microsoft where several states continued the pursuit of injunctive remedies after the Department of Justice and other states had settled. The Commission appears to have developed three options for enhancing the effectiveness of the allocation of duties between federal and state authorities - restricting *parens patriae* to entirely local matters, restricting it to certain agreed substantive matters (e.g. "stable" rather than "controversial" areas of antitrust activity) and requiring states to gain permission from federal authorities to initiate litigation. None appears potentially capable of enhancing the effectiveness of federal antitrust enforcement.

POLICY CONCLUSIONS

- The enforcement role of State AGs provides an interesting area of exploration for those interested in addressing the growing issue of the consumer/citizen dilemma. The election of an official with private enforcement powers who can enforce federal antitrust laws for public purpose gives direct accountability for both consumer and citizen issues.
- *Parens patriae* gives State AGs considerable discretion in every stage of enforcement including the distribution of damages and consequently has proved more advantageous than other mechanisms in providing relief to the masses.
- State AGs have targeted a variety of markets. There is increased cooperation between State and Federal authorities which has led to an increase in experience and expertise in action on behalf of consumers and the distribution of damages.
- The alternatives proposed by the AMC appear to be unfounded in the face of the practical experience and patterns of state enforcement activity. Removing the State AGs from the federal stage is neither the only nor the most desirable alternative.

THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

The full working paper (CCP Working Paper 06-19) and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

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