
Regulatory Oversight Podcast: The Changing Landscape of State AG Antitrust Enforcement**Hosts: Ashley Taylor****Guest: Drew Mann****Ashley Taylor:**

Welcome to another episode of *Regulatory Oversight*, a podcast that focuses on providing expert perspectives on trends that drive regulatory enforcement activity. I'm Ashley Taylor, one of the hosts of the podcast and the co-leader of the firm's state attorney general practice.

This podcast features insights from members of our practice group, including its nationally-ranked state attorney general practice, as well as guest commentary from business leaders, regulatory experts and current and former government officials. We cover a wide range of topics affecting businesses operating in highly regulated areas.

Before we get started today, I wanted to remind all of our listeners to visit and subscribe to our blog at regulatoryoversight.com so you can stay up-to-date on developments and changes in the regulatory landscape.

Today, I am joined by my colleague, Drew Mann, from our office in Washington, D.C. to discuss the recent surge in antitrust actions by state attorneys general and examine the potential influence of the State Antitrust Enforcement Venue Act on state attorneys general antitrust enforcement.

Drew, I'm looking forward to today's discussion.

Drew Mann:

I am, too. Thank you for the opportunity to visit with you today, Ashley.

Ashley Taylor:

Well, Drew, first of all, let's talk about the last few months. There seems to have been an uptick in antitrust-related investigations and actions brought by state attorneys general. Is that a coincidence? Or should we expect that trend to continue?

Drew Mann:

Ashley, that's a great question I would say that it's not just a coincidence. But it's in fact a result of the state AGs taking a more aggressive stance on antitrust enforcement. When I was at the FTC, regularly, I would interact with state AGs in investigations and litigations. And there was cooperation. That was primarily through the Antitrust Multistate Task Force run by the National Association of Attorney Generals. And they were always there. They were always interested in investigations that we were conducting, and participating, and looking into what we were doing in terms of our investigation and litigation when I was at the FTC.

Under the previous administration, there was a concern that the antitrust enforcement was going to be lacking. And, in fact, the ABA antitrust meeting a few years ago, the head of the task force, made it crystal clear that AG antitrust enforcement would fill any gaps that federal antitrust enforcement lacked. And that was under the previous administration.

And so, during that time, the various state AGs started to increase their resources and allocate additional funds to really beef up their antitrust enforcement. And I think, as a result of that, we have, in fact, seen an increase in cases brought investigations. A recent example where the states have led is in the Google case where a coalition of states have a broad case, a monopolization case against Google for monopolizing multiple digital advertising technologies.

Ashley Taylor:

Drew, you mentioned in your answer the Antitrust Task Force. What is that task force? And how does it relate to state attorneys general?

Drew Mann:

Within the National Association of Attorney Generals, there are various task forces. Something that, Ashley, you are familiar with. And within the NAG, there are various task forces. One being a focus on antitrust. And so, there's a head of the task force. And then each state more or less has a representative that participates in that task force.

And so, the task force is – in regular, there's a liaison. The lead will have regular communications and meetings with both DoJ and FTC to understand what cases they're investigating. And then there's typically coordination that goes on where if the FTC or DoJ launches an investigation, then the task force becomes aware of it and they are able to participate and say, "Yeah. We're interested in that as well." Sometimes the investigations are localized. And so, not every state will participate. But oftentimes, some of the larger national scope cases, all of the AGs will in fact participate.

Ashley Taylor:

Drew, in the Kroger-Albertsons merger case, we saw two state attorneys general separate themselves from the FTC and bring separate standalone actions, Washington State and Colorado. As a former FTC attorney, what insights could you share with the listeners around that state separate action?

Drew Mann:

Yeah. This is a really interesting case. This is kind of the typical example of where the FTC was investigating and leading an investigation. And both Kroger and Albertsons made it public that the transaction was in fact being reviewed by the Federal Trade Commission as well as the states. The states were participating. FTC was taking the lead on that.

And the reality is, is that the FTC – stepping back over the last few years, the FTC has taken the position that they were not going to enter into any settlements. And they've been litigating cases and they've been losing. And so, this is one of those cases where the FTC started to go down

what I would say more of the historical path where they were looking at whether or not a divestiture could in fact fix the competition issues that they believed existed.

One of the reasons that the FTC has been losing these cases, these merger challenges, is because the parties have been what's referred to as litigating the fix. Rather than representing to the court, just the transaction itself, the parties are saying, "Your Honor, we have a plan in place to fix the concerns that DoJ or the FTC is currently raising." And so, the FTC has been losing because the parties have been prevailing in explaining to the judge that the fix that they had come up with would in fact replace competition.

And so, here we see that the complaint itself, both Washington AGs complaint and the Colorado complaints, two separate complaints, both filed in state court. Separately in the Washington King County court and also in Denver, the complaints themselves kind of give us – unpack what was really going on there.

And what was happening was the FTC was leading the divestiture discussion with the parties. And they had identified over 400 stores to divest. The divestiture buyer here though was a wholesale grocer. And the concern was – is that Washington AG and Colorado both pointed out that the standard for a divestiture buyer is that the buyer would replace the lost competition as a result of the transaction.

And so, here, the concern that both the Washington and the Colorado AG office have is that this divestiture buyer would not replace the lost competition. And so, more or less, the settlement discussions fell apart from the AG's perspective. And so, they went at it on their own.

Washington pointed to the failed divestiture in the 2015 Safeway merger where Albertson acquired Safeway. And as a result of that transaction, FTC required 168 stores to be divested. However, in Washington, those divestitures did not work. And many of those stores actually shut down. And so, the Washington AG is worried that the same exact thing will happen in the current Kroger-Albertsons matter. And so, they more or less decided to go at it on their own.

Interestingly, since those two standalone transactions, the FTC has in fact filed to block the transaction. And so, there's the Albertsons – and the Kroger-Albertsons parties are currently facing both FTC, Federal District Court litigation. They've got FTC part three litigation. And then they also have these standalone AG actions all looking to block the transaction.

Ashley Taylor:

Drew, the vast majority of the work that I have handled over the past 20 years has been in the consumer protection context. And in that context, number of state AGs have developed relationships with private councils. I don't see that same relationship being developed in the context of antitrust cases. Could you confirm what I believe to be just my observation? And I've always assumed that the lack of damages component in an antitrust case has been the reason you don't find as many plaintiffs' lawyers there. But just comment on that, if you would.

Drew Mann:

Great question, Ashley. It's actually a mixed bag on the antitrust side. Oftentimes, the AG offices, if – for example, in the Kroger-Albertsons case, we see them going at this alone, right?

On their own. They're not seeking private counsel to represent the AGs interests in those cases. But oftentimes – and the Google case is a prime example of that, where when there are multi-states that wanting to bring in action, they will in fact reach out, and interview, and hire private law firms to represent the state AGs interests.

Ashley Taylor:

Interesting. Interesting. Let me shift gears a little, Drew, to the State Antitrust Enforcement Venue Act. First of all, what is that? And what effect, if any, has it had on state AG antitrust enforcement?

Drew Mann:

Yeah. The State Antitrust Enforcement Venue Act was passed just over a year ago. It's a federal statute that President Biden signed into law. And what it does is it enables the state AGs to more or less litigate the cases, their cases, antitrust cases, on their own home turf.

And so, in terms of the effect that it's having, we've seen some recent activity in that where, back in October, there was a Google matter where Google was facing a multi-district litigation in New York. The cases had been consolidated. And the states filed to move the case back to Texas where it was originally filed. And there, the panel returned it back to Texas.

We saw that again happen in November. Generic Pharmaceutical cases. There, significant discovery had been going on. Multiple stating AGs had been swallowed up in this multi-district litigation. The states had originally filed actions up in Connecticut. And those cases had been consolidated in Pennsylvania.

And the states, back in November, decided that the things weren't progressing fast enough from their perspective. And so, they moved to separate themselves from the MDL and to return the cases back to Connecticut.

Interestingly, the Pennsylvania federal judge who's overseeing the discovery of that MDL filed a statement with the panel recommending that they not allow the removal of that and given that there were already efficiencies and great progress was being made. It'll be interesting to see what the panel decides there.

But, again, we also saw just recently in Arkansas back in January, the Arkansas AG filed a lawsuit against two companies related to pricing of pesticides. And the parties there wanted to file an action to move that lawsuit to North Carolina where they were facing similar claims. And the Arkansas AG invoked this State Antitrust Enforcement Venue Act saying that it should stay in Arkansas in order because they had the right to be able to litigate the case on their own. And in fact, the federal judge in Arkansas granted that for the AGs.

Interestingly, historically, there's always been this drive for judicial economy particularly in discovery. And what the State Antitrust Enforcement Venue Act does is it allows for these state AGs that if they're not pleased with the progress that's being made or they're just – they want to be able to litigate it on their home turf, they can go at it alone.

And so, what it does is it potentially raises the concerns that the parties have in terms of duplicative discovery requests. The coordination that they were receiving with the MDL goes away. And it increases the burden on the parties in terms of defending themselves in multiple venues for the same acts.

Ashley Taylor:

Drew, I'm thinking about your comments and your experience in both participating in and observing the coordination between the FTC and state AG. I'm also noting, the FTC and the Department of Justice antitrust division have focused on labor markets in their respective antitrust enforcement activity. Do you see any coordination with the state AGs in that area?

Drew Mann:

There definitely is coordination there. Particularly in labor markets, an interesting development was that the California DoJ just recently announced that they were going to kind of reinvigorate the Cartwright Act with their enforcement of no-poach and non-compete agreements. And interestingly, they even referenced the fact that they would potentially be bringing criminal cases under the Cartwright which the California DoJ has not done in over 25 years.

This announcement actually came out in a conversation that the California Department of Justice antitrust chief was having with DoJ counterpart. And that was at the ABA National Institute on white-color crime. And that statement suggests that there continues to be coordination. But, also, there is the potential of these states to kind of support the federal missions or policy statements and is in fact aligned even though they may be going at it alone.

For example, DoJ has for the last few years been aggressively bringing cases both civil and criminally with regards to no-poach agreements. And the civil investigations began back in 2017, 2018 time frame in Earnest. However, it wasn't until January of 2021 that DoJ brought its first criminal enforcement.

The theory there is that this is a per se price fix. It's a fix of the wage that companies are willing to pay. And the DoJ actually had a series of losses in this space. And so, you see here this California DoJ looking to more or less reinvigorate their criminal prosecution using the Cartwright Act. Which, interestingly, they indicated that the Cartwright Act was broader and deeper than its federal count counterpart. So, the Sherman Act.

And so, yeah, definitely, there's continues to be coordination. But I think, most interestingly, particularly in the labor market space, is that we see specifically California but other AGs being willing to go at it alone in an effort to support the missions that in fact were originally highlighted by the federal enforcers.

Ashley Taylor:

I want to close with an open-ended question and ask you to put your prognosticator hat on. What initiatives do you see the National Association of Attorneys General focused on in 2024 and 2025?

Drew Mann:

The National Association of Attorneys Generals, or the task force, some of the initiatives I think will continue to be aggressive merger, merger review. And so, both on the investigation side as well as litigating cases. And being willing to separate themselves as you see in the Kroger-Albertsons matter.

Also, the labor markets, that's particularly a hot topic right now with regards to antitrust enforcement. And we've seen it at the federal level. There has been activity at the state level. And we will continue to see aggressive enforcement from state AGs with regards to labor markets. And we also have the Venue Act, right? Which more or less kind of invigorates and strengthens the state AGs ability to bring cases and to litigate them on their own terms.

Ashley Taylor:

Drew, thank you for joining me today. I know I've enjoyed your candid remarks and your invaluable insights. And I'm sure our listeners have as well. I also want to thank our audience for tuning in today. And please make sure to subscribe to this podcast via Apple Podcasts, Google Play, Stitcher, or whatever platform you use. And we look forward to having you join us next time.

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