

## Section 2 Enforcement: A State-Enforcement View of the DOJ Section 2 Report

### Don Allen Resnikoff

In issuing its September 2008 report on Section 2 antitrust enforcement,<sup>1</sup> the U.S. Department of Justice stated a goal of providing “clear, objective, effective, and administrable tests” for determining violations of law. “Such tests can provide businesses guidance that will more effectively deter violations.”<sup>2</sup>

The DOJ Section 2 Report is based on hearings jointly held by DOJ and the FTC, but the FTC declined to join in the Report. Three of the four sitting Commissioners complained that the DOJ Report “prescribes a legal regime that places the . . . [interests of monopolists] ahead of the interests of consumers.”<sup>3</sup> These Commissioners asserted that DOJ recommends “drastic changes” in the enforcement of Section 2 that would unnecessarily narrow the scope of illegality under that statute. The Commissioners “strongly distance” themselves “from the enforcement positions stated in the Report,” and stand ready “to fill any Sherman Act enforcement void that might be created.”

The antitrust enforcement role of the states has largely been left out of the discussion, even though the states’ role in monopolization cases is of significance to businesses and consumers. What role are states likely to have in future prosecutions of alleged monopolizing conduct, and how aggressive are state enforcers likely to be? Are the states likely to follow the DOJ’s lead in narrowing Section 2 enforcement, or to join the FTC Commissioners in filling the void left by the DOJ?

Of course, the answers will not be the same for all states. Some states have been aggressive in enforcing monopolization law, while many have not. Moreover, enforcement policies of a state can change swiftly based on local election results. Analysis of recent state enforcement efforts does offer some guidance to future action.

In this article I briefly review this record, focusing particularly on the activities of the most active and aggressive state prosecutors, whose efforts are of the greatest significance to businesses and consumers. Recent prosecutions by states suggest that aggressive state enforcers are likely to share the views of FTC Commissioners Harbour, Leibowitz, and Rosch that the DOJ unduly exaggerated the problems of prevailing enforcement standards, and that the focus of monopolization enforcement should be on consumer welfare. State enforcers are likely to agree with the three Commissioners’ particular criticisms of the DOJ Section 2 Report, including the DOJ’s suggestions

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thanks Messrs.  
Hubbard, Houck,  
Hurwitz, and Liebeskind  
for their comments, and  
acknowledges the great  
help of Joyce Choi.

<sup>1</sup> U.S. DEPT. OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (Sept. 2008) [hereinafter DOJ SECTION 2 REPORT], available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> Commissioners Harbour, Leibowitz, and Rosch, Federal Trade Comm’n, Statement on the Issuance of the SECTION 2 REPORT by the Department of Justice (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

of “safe harbors” for business conduct. State prosecutors tend to look at the specific facts of cases as the basis for exercise of prosecutorial discretion, not rigidly applied rules of thumb on questions like market share and market power.

### State Enforcement Activities Against Microsoft

The states’ record in past prosecutions supports this view. The active role of states in the litigation against Microsoft is well known. Good summaries of the history of the litigation and the states’ role may be found at a state-maintained enforcement Web site,<sup>4</sup> and in the recent U.S. district court opinion discussing decree modification.<sup>5</sup> Briefly, in 1998 a group of states joined with the DOJ in filing a complaint against Microsoft alleging monopolization, and two years later Microsoft was found liable for maintaining an illegal monopoly in personal computer operating systems. Following an appeal and several additional court hearings, the U.S. District Court for the District of Columbia issued judgments in 2002 prohibiting Microsoft from continuing certain unlawful conduct.

In testimony before the Antitrust Modernization Commission, Steve Houck and Kevin O’Connor, the attorneys who represented plaintiff states at the Microsoft liability trial, emphasized the independent and aggressive role taken by states.<sup>6</sup> They said that the states had decided to file a complaint against Microsoft before the DOJ did and were prepared to proceed without the DOJ. They said that after consolidation of the state and federal actions against Microsoft, the states made important contributions to the trial, and acted independently and assertively in pursuing settlement negotiations. (Others have complained that the states’ assertiveness caused settlement negotiations to fail.<sup>7</sup>)

Some of the states that participated in the liability trial against Microsoft agreed to settlement in 2001, but not all. Non-settling states filed in court for additional relief. The results of their efforts were meager, as the litigated decree added little to the consent decree. Both the consent and litigated decrees provided for termination five years after entry, subject to the court later ordering an extension.<sup>8</sup>

In October 2007, some states filed motions to extend the termination dates of the Final Judgments. Despite opposition by the DOJ, Judge Kollar-Kotelly partially granted the motions. The DOJ argued in part that “the California Movants do not provide any evidence that the goals of the expiring provisions of the Final Judgments have not been achieved.”<sup>9</sup> Judge Kollar-Kotelly reached a different conclusion:<sup>10</sup>

The Court’s decision in this matter is based upon the extreme and unforeseen delay in the availability of complete, accurate, and useable technical documentation . . . that Microsoft is required to make available to licensees [under the Final Judgments]. The Court concludes that the Moving States have

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<sup>4</sup> Coordinated State Enforcement of Microsoft Antitrust Judgments, available at <http://www.microsoft-antitrust.gov>.

<sup>5</sup> *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141 (D.D.C. 2008), available at <http://www.microsoft-antitrust.gov/pdf/Jan292008MemOp.pdf>.

<sup>6</sup> Stephen D. Houck & Kevin J. O’Connor, Comments on the States’ Role in the *Microsoft* Case Re: Working Group on Enforcement Initiatives, available at [http://www.law.columbia.edu/null/MSAMCFINAL?exclusive=filemgr.download&file\\_id=941362&showthumb=0](http://www.law.columbia.edu/null/MSAMCFINAL?exclusive=filemgr.download&file_id=941362&showthumb=0).

<sup>7</sup> Joe Wilcox, *Major Setback in Microsoft Settlement Talks*, CNET News, Apr. 1, 2000, available at <http://news.cnet.com/2100-1001-238717.html>.

<sup>8</sup> *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002).

<sup>9</sup> Brief for United States as Amicus Curiae in Opposition to Motions to Extend the States’ Final Judgment, *New York v. Microsoft Corp.*, Civ. Action No. 98-1233 (CKK) (D.D.C. Nov. 9, 2007), available at <http://www.usdoj.gov/atr/cases/f227500/227585.htm>.

<sup>10</sup> *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 144 (D.D.C. 2008).

met their burden of establishing that this delay constitutes changed circumstances, which have prevented the Final Judgments from achieving their principal objectives.

As a consequence of the court's granting the states' motion, significant portions of the Final Judgment are now enforced by the states alone.

The DOJ Section 2 Report's discussion of the *Microsoft* litigation reflects the DOJ's concerns about the pitfalls of Section 2 enforcement. Mild endorsement<sup>11</sup> is balanced by discussion of the complexity and risk associated with discerning anticompetitive conduct by a company like *Microsoft*.<sup>12</sup> The DOJ seems to sympathize with the testimony of *Microsoft* deputy general counsel David Heiner that fear of antitrust enforcement led to "[d]ecisions . . . not to include particular [product] features that would have been valuable to consumers."<sup>13</sup>

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### State Enforcement Against the Pharmaceuticals Industry

In addition to the *Microsoft* litigation, some states have been aggressive in initiating monopolization challenges in other industries, such as pharmaceuticals.<sup>14</sup> Two multistate actions brought against Bristol-Myers-Squibb provide good examples. In one, involving the pharmaceutical Buspar, the multistate complaint alleged, among other things, that "BMS was able to [illegally] prevent the entry of generic competitors and illegally maintain its monopoly in the United States over the sale of buspirone hydrochloride-based prescription drug products ("buspirone"). . . . BMS engaged in fraud in order to unlawfully maintain its monopoly for buspirone in the United States."<sup>15</sup> The second multistate action concerning the pharmaceutical Taxol involved similar allegations.<sup>16</sup> Both multistate actions against Bristol were built on FTC initiatives, but the multistate actions were more than mere tag-alongs. Both led to decrees providing for substantial money damages for consumers.

State assertiveness in monopolization cases is consistent with state assertiveness in a broad array of antitrust matters. The U.S. Supreme Court has recognized that separate federal and state exercises of prosecutorial discretion can comfortably reside within the nation's antitrust enforcement mechanism. States, for example, may challenge mergers that the federal agencies have chosen not to oppose.<sup>17</sup>

<sup>11</sup> DOJ SECTION 2 REPORT, *supra* note 1, at 11.

<sup>12</sup> *Id.* at 12 n.69.

<sup>13</sup> Sherman Act Section 2 Joint Hearing: Business Testimony Hearing Tr. 26, Jan. 30, 2007 (testimony of David A. Heiner, Vice-President & Deputy Gen. Counsel for Antitrust, *Microsoft* Corporation), quoted in DOJ SECTION 2 REPORT, *supra* note 1, at 15 n.81. In comparison, the *Microsoft* trial judge catalogued various ways in which *Microsoft*'s violations of Section 2 had hurt consumers and concluded that "[t]he ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with *Microsoft*'s self-interest." *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 112 (D.D.C. 1999). These findings are also available at <http://www.usdoj.gov/atr/cases/f3800/vii.pdf> (Findings of Fact 409–412).

<sup>14</sup> Elinor Hoffman of the New York State Attorney General's office gave an excellent brief overview of state pharmaceutical prosecutions at the National State Attorney General Program at Columbia Law School. *State Antitrust Enforcement in the Pharmaceutical Industry*, Presentation for Pharmaceutical Conference, National State Attorney General Program, Columbia Law School (May 10–11, 2007), available at [http://www.law.columbia.edu/null?&exclusive=filemgr.download&file\\_id=12308&rtcontentdisposition=filename%3DPharma%20101%20State%20Antitrust%20Law%20and%20Enforcement%20in%20the%20Pharmaceutical%20Industry5—07.ppt](http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=12308&rtcontentdisposition=filename%3DPharma%20101%20State%20Antitrust%20Law%20and%20Enforcement%20in%20the%20Pharmaceutical%20Industry5—07.ppt).

<sup>15</sup> Fourth Amended Complaint at 6, *Alabama v. Bristol Myers Squibb Co.*, 01 CV 11401 (MDL 1413) (S.D.N.Y. July 25, 2002). This multistate complaint is available on the Florida Attorney General's Web site at <http://myfloridalegal.com/busparcomplaint.pdf>.

<sup>16</sup> Complaint, *Ohio v. Bristol-Myers Squibb Co.*, 1:02-cv-01080 (D.D.C. June 2002). A draft of this multistate complaint is available on the Florida Attorney General's Web site at <http://myfloridalegal.com/taxol.pdf>.

<sup>17</sup> *California v. American Stores*, 495 U.S. 271 (1990); *California v. ARC America Corp.*, 490 U.S. 93 (1989).

State assertiveness in monopolization cases is unlikely to be diminished by the enforcement positions stated in the DOJ Section 2 Report. I believe that vigorous state prosecutors will continue to decide whether to pursue monopolization cases based on a pragmatic and sometimes aggressive view of specific facts, not on the DOJ's recently articulated and cautious enforcement rules of thumb. ●