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I. INTRODUCTION

In 1994, while still with the Connecticut Attorney General's Office, I wrote a short essay that cautioned antitrust practitioners to beware of state antitrust enforcers and state antitrust law. The article was part of an issue that addressed significant changes in the world of distribution practices. Indeed the cover of the issue was entitled, *Braving the New World of Distribution*.

What I wrote in the first paragraph of that article still holds true today:

> As businesses go speeding down the "distribution superhighway," I would hope they stop long enough (or at least look in the rear-view mirror) to keep an eye out for the state antitrust police cruiser. If not, the architects of the brave new world of innovative distribution arrangements may end up posting bail at the state antitrust police barracks.[2]

The risks inherent in ignoring both state antitrust law and state antitrust enforcement reach far beyond vertical distribution relationships. Much has been written over the years about state antitrust enforcement, including the role of the National Association of Attorneys General Multistate Antitrust Task Force, and I will not seek to retell that story here.[3] Nor will I dwell on either the state indirect purchaser "repealers" of *Illinois Brick*[4] or the aggressive opposition of several states to the *Leegin*[5] decision.

Rather, I will focus upon one such substantive difference between state and federal antitrust law to illustrate my point. The array of important differences between state and federal antitrust law present complicated counseling challenges for the seasoned antitrust practitioner, and a trap for the practitioner unaware that such distinctions even exist.[6]

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[2] Robert M. Langer, *A Cautionary Tale*: *State Enforcer's Perspective on Vertical Restraints*, ANTITRUST at 9 (ABA Section of Antitrust Law, Spring 1994).

[3] *See, e.g.*, Robert M. Langer & Pamela Jones Harbour, *State Attorneys General: The Third Prong in the Antitrust Triad,* THE ANTITRUST REVIEW OF THE AMERICAS 2001: GLOBAL COMPETITION REVIEW SPECIAL REPORT (Oct. 2001).

[4] Illinois Brick v. Illinois, 431 U.S. 720 (1977).

[5] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[6] *See, e.g.*, Robert M. Langer, Suzanne E. Wachsstock, & Erika L. Amarante, *So You Think You're Safe Under the Antitrust Laws? A Word of Advice to Those Who Would Ignore the States*, ANTITRUST REPORT (Matthew Bender, Fall 2002) (discussing states' response to *Illinois Brick*); Robert M. Langer, Erika L. Amarante, & Erik H. Zwicker, *So You Think You're Safe Under the Antitrust Laws? Another Word of Advice to Those Who Would Ignore the States*, ANTITRUST REPORT (Matthew Bender, Issue 4, 2010) (discussing states' response to *Leegin*); *see generally*, ABA Section of Antitrust Law, STATE ANTITRUST PRACTICE AND STATUTES, (4th Ed. 2009); *see also* ROBERT M. LANGER, JOHN T. MORGAN AND DAVID L. BELT, CONNECTICUT UNFAIR TRADE PRACTICES, BUSINESS TORTS AND ANTITRUST, Chapter 9 (Connecticut Practice Series No. 12, 2012-13 Ed.) (Thomson Reuters).

II. STATE ACTION IMMUNITY

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.[7]sets out the two-part test under the federal antitrust laws to assess whether ostensibly anticompetitive behavior will be shielded by the state action immunity doctrine: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[8]

State legislatures and state courts are, however, not constrained by the federal standard in the development of criteria to evaluate when a person subject to state antitrust laws should be deemed immune from antitrust liability. Some states parallel the federal doctrine; others provide either broader or narrower immunity under their respective state laws. Indeed, the majority of states are neither silent on the issue, nor do they mirror the federal standard. Rather, these states incorporate some form of exemption or immunity for certain government authorized or required conduct undertaken by the state itself, its municipalities, and/or private actors.[9]

Connecticut's antitrust law will serve to illustrate the counseling and/or litigation dilemmas one may face when confronting a state antitrust statute. Conn. Gen. Stat. § 35-31(b) provides in relevant part:

> Nothing contained in [the Connecticut Antitrust Act] shall apply to those activities of any person when said activity is **specifically directed or required** by a statute of this state, or of the United States.
>
> (Emphasis supplied).

In 1975, in *Mazzola v. Southern New England Telephone Co.*,[10] the Connecticut Supreme Court interpreted Section 35-31(b) to represent "a narrowly drawn version of the doctrine of 'state action' immunity from antitrust liability articulated by the United States Supreme Court in *Parker v. Brown*."[11] As the *Mazzola* court pointed out, Section "35-31(b) limits [the *Parker*] holding by purporting to immunize only activities which are 'specifically' required or directed by state or federal statutes."[12]

The Court therefore determined that immunity under Connecticut law was more difficult to achieve than under federal law. Thirty years later, the Connecticut Supreme Court reaffirmed *Mazzola's* holding in *Miller's Pond Co. v. City of New London*,[13] in part, based upon the view that state courts are not required to "incorporate the federal case law defining state action immunity into" Section 35-31(b).[14]

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[7] 445 U.S. 97 (1980).

[8] *Id.* at 105.

[9] For a comprehensive review of state action immunity provisions under state antitrust laws, *see* chart appended to Robert M. Langer, Erika L. Amarante, & Erik H. Zwicker, *So You Think You're Safe Under the Antitrust Laws? Another Word of Advice to Those Who Would Ignore the States*, ANTITRUST REPORT at 68 (Matthew Bender, Issue 4, 2010).

[10] 363 A.2d 170 (Conn. 1975).

[11] *Id.* at 178.

[12] *Id.*

[13] 873 A.2d 965 (Conn. 2005).

[14] *Id.* at 979.

The obvious, but vitally important, take away from this brief excursion through Connecticut's antitrust jurisprudence is that compliance with the strictures of the federal state action immunity doctrine does not ensure—by any means—immunity from state antitrust law. The same holds true in a myriad of other circumstances, involving, *inter alia*, both substantive liability and the scope of available relief.[15]

During almost forty years of practice in both state government and private practice, I have witnessed many situations in which critical distinctions between state and federal antitrust law have been missed in their entirety. Borrowing a phrase appropriate for the occasion, *Verbum sat sapienti est*.[16]

[15] *See* note 6, *supra*.

[16] "A word to the wise is sufficient."