

Wal-Mart v. Rodriguez: The Recent Threat to State Antitrust Authority

Introduction

In February 2002, Wal-Mart Stores, Inc. and Wal-Mart Puerto Rico, Inc. (collectively Wal-Mart), the largest discounter in Puerto Rico, agreed to acquire Supermercados Amigo, Inc. (Amigo), the largest grocery chain in Puerto Rico.¹ The Federal Trade Commission (FTC) and the Puerto Rico Department of Justice (PRDOJ) through its Office of Monopolistic Affairs (OMA) investigated the prospective merger. The FTC approved the merger contingent on the divestiture of four stores in markets that the FTC identified as presenting anticompetitive concerns. The PRDOJ did not approve the merger and continued negotiations with Wal-Mart and Amigo in order to reach an agreement that would minimize the impact of the merger on local labor and local producers. The parties did not reach an agreement and litigation followed.

These events were closely followed in the media. An article dated December 25, 2002 stated that the FTC was attacked for issuing the consent decree under allegations that it was insufficient and violated agency policy. The article also noted that legal, agricultural, and retail groups had banded together to require the FTC to issue an explanation of the consent decree before it could become final. Several other objections to the merger by different groups were also cited.²

On December 26, 2002, the United States District Court in the District of Puerto Rico issued an opinion, Rodriguez v. Wal-Mart Stores, Inc.,³ contrary to well-settled antitrust law that threatened the authority of state attorneys general to veto mergers already approved by the FTC and denied their ability to pursue non-antitrust issues in antitrust merger cases. The opinion enjoined the Secretary of Justice of the Commonwealth of Puerto Rico, Anabelle Rodríguez, from interfering in the acquisition of Amigo by Wal-Mart and in the divestiture of four Amigo stores in compliance with FTC requirements. It further enjoined

¹ Jaret Seiberg, Wal-Mart Deal Foes Attack FTC Decree, Puerto Rico Herald, Dec. 25, 2002 (*available at* <http://www.puertorico-herald.org/issues/2003/vol7n01/WalmartDealFoes-en.shtml>).

² Id.

Secretary of Justice Rodríguez from seeking a stay in any court of the Commonwealth of Puerto Rico that would interfere with Wal-Mart's operation of Amigo stores as wholly-owned subsidiaries of Wal-Mart Puerto Rico, Inc.

While this opinion was vacated by the First Circuit's opinion in Wal-Mart Stores, Inc. v. Rodríguez⁴ pursuant to a settlement agreement requesting vacatur by both parties, the issues raised in this case have far-reaching implications for state attorneys general and the system of state and federal two-tiered antitrust enforcement. This paper will use this case to discuss the long-recognized power of states and state attorneys general to pursue antitrust actions even in cases where the FTC has previously given a consent decree, arguing that state and federal antitrust enforcement actions are not mutually exclusive and that the states have authority to act contrary to the FTC. This paper will also discuss the expansive ability of state attorneys general to exceed narrow definitions of antitrust enforcement to counteract harmful secondary effects of mergers through their power of antitrust enforcement.

Factual Background of Wal-Mart v. Rodríguez

Fall 2001: Wal-Mart Stores, Inc. and Wal-Mart Puerto Rico, Inc. (collectively Wal-Mart) conducted due diligence examinations to assess the possibility of acquiring Supermercados Amigo, Inc. (Amigo), a supermarket chain in the Commonwealth of Puerto Rico. Wal-Mart Puerto Rico, Inc. and Supermercados Amigo, Inc. are companies incorporated in and having their principal place of business in the Commonwealth of Puerto Rico, while Wal-Mart Stores, Inc. is a Delaware corporation with its principal place of business in Arkansas.

February 5, 2002: Wal-Mart and Amigo signed a merger agreement, which required several additional procedures before the closing of the transaction as part of the companies integration process. Among these procedures were negotiations with federal and state agencies that typically oversee this type

³ 238 F. Supp. 2d 395 (D.P.R. 2002).

⁴ 322 F.3d 747 (1st Cir. 2003).

of transaction in an effort to anticipate and prevent potential antitrust concerns, including the FTC and the PRDOJ and the OMA.

Soon after the agreement to merge was announced, OMA served the merging parties with a Civil Investigative Demand (CID), which allowed OMA to request all the information that was being provided to the FTC.⁵ These agencies were conducting parallel investigations, and information was provided simultaneously to both of them under a waiver of confidentiality so that they could also share information between themselves. The FTC was expressly authorized by letter to provide the PRDOJ any materials they requested.

February 6, 2002: Wal-Mart filed a Hart-Scott-Rodino Application with the FTC explaining Wal-Mart's intention to merge with Amigo. The FTC then initiated a review process and investigation of the transaction, requesting several documents from Wal-Mart, which it provided over the next several months. After the FTC initiates an investigation, it typically results in an agreement between the agency and the acquiring party that consists of several consent decrees and orders. A consent package from the FTC addresses every competitive problem present in the transaction and every geographical market with potential problems, as well as the required divestitures, if any, that remedy these problems.

April 17, 2002: OMA requested that Wal-Mart prepare a white paper addressing a number of issues identified by the OMA.

May 3, 2002: A white paper and a summary spreadsheet reporting on local purchases and local suppliers with whom Wal-Mart had dealt since it arrived in Puerto Rico was sent to the PRDOJ.

April 22, 2002: The attorney for Amigo wrote a letter detailing the legal and constitutional problems with the PRDOJ's request for maintenance of local purchases from distributors, manufacturers, and suppliers. He explained that there was no relationship between the antitrust laws and the purchase of goods from local or foreign-based distributors. He stated that the PRDOJ's demands suggested facial

⁵ The PRDOJ had to file a CID to get the FTC papers, as it is not entitled to them as a matter of right after Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985), and Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985).

discrimination against out-of-state distributors and were not within the scope of the antitrust laws. The PRDOJ did not respond to this letter.

May 2002: Wal-Mart understood the concerns of the FTC and the FTC's expectations before it would free the transaction from antitrust concerns. The FTC identified three geographical regions with monopolistic concern, and the proposed plan was to divest four stores in these areas. While the FTC gathers information on potential divestiture buyers, the company requesting approval of a merger bears the burden. A group of Amigo stockholders and a few others had the idea to incorporate a company that would become the divestiture buyer for the stores. This group incorporated as Supermercados M-ximo (M-ximo). Wal-Mart selected this group as its buyer, and began the selling process when it received the FTC's approval.

There was a delay in implementing the FTC agreements, partly due to Wal-Mart's desire to reach a global settlement with all parties involved, including the PRDOJ, which had additional concerns. These concerns included reporting requirements during a period of several years after the merger was implemented and the level of Wal-Mart's purchases of goods from local versus foreign distributors and suppliers. Further, the PRDOJ communicated to the FTC that they did not believe that the divestiture of the four stores was enough to mitigate the antitrust concerns. The FTC, however, approved the merger with a divestiture of only those four stores.

May 9, 2002: After receiving Wal-Mart's white paper, the PRDOJ asked Wal-Mart to provide a Voluntary Assurance Letter (VAL) addressing Wal-Mart's intentions as to certain aspects of its business in Puerto Rico.

June 4, 2002: Wal-Mart sent the proposed text of the VAL to the PRDOJ. At this point, the main subject of the letter was the amount of purchases from Puerto Rico domiciled suppliers. The PRDOJ requested a commitment from Wal-Mart that it maintain a percentage of purchases from local suppliers as opposed to foreign-based suppliers.

June 20, 2002: The PRDOJ sent Wal-Mart a letter asking for more precise assurances with regard to local purchases, to which it responded that it had substantially increased its local purchases since 1999 and that it intended to sustain that trend. Wal-Mart was also required to submit certain sales reports, copies

of its contracts with local and foreign distributors, and any termination contracts with distributors for a five-year period following the transaction.

July 1, 2002: A meeting was held to address the remaining concerns of the PRDOJ, which involved four main issues: 1) the length of the reporting period; 2) the format of the reporting; 3) the PRDOJ's request for copies of Wal-Mart's past contracts with local suppliers; and 4) Wal-Mart's concern that these requests for assurances were not interpreted as past failures to comply with information requests in the past.

July 3, 2002: Another meeting was held, at which the PRDOJ learned that the M-ximo group was emerging to buy the divestiture supermarkets pursuant to the FTC's expectations. The parties offered to provide the OMA with any information required for the investigation of the transaction for the agreements.

August 5, 2002: A follow-up letter to the July 1 meeting was sent to Wal-Mart, giving "good to go" approval to the VAL, contingent on a change in wording from "expects" to "intends" to continue these local purchasing policies and practices. Wal-Mart interpreted this letter as final approval, but for that minor change, and assumed that the concerns of the PRDOJ had been assuaged. The PRDOJ, however, felt that there were no objections to what was written in the VAL to that point, but that the letter did not mean that the agreement had been approved with finality.

August 20, 2002: A letter of intent was sent on behalf of NewCo Food Retailing, Inc., which would be incorporated as Supermercados M-ximo if they were approved, expressing interest in purchasing certain assets and retaining certain liabilities of the four divested Amigo stores. The FTC required additional documents including agreements with landlords and information about its proposed management.

August 22, 2002: Wal-Mart sent a letter to the FTC informing them of the negotiated purchase price of the four stores to be divested.

September 17 and 18, 2002: Supermercados M-ximo was incorporated and the PRDOJ was informed that Wal-Mart was expecting to reach a final and formal settlement with the FTC within days. Wal-Mart was informed that the PRDOJ did not have a problem with M-ximo. The PRDOJ expressed interest in getting the agreements finalized. The agreements were supposed to mirror those of the FTC.

As M-ximo was less creditworthy than Amigo, Wal-Mart paid the landlords of the locales of the four divested stores a sum of \$5.4 million to mitigate their loss of a more creditworthy tenant; Amigo paid \$500,000 to share that burden. This took place before November 21, 2002⁶the deadline set by the FTC for approval of the merger.

October 2002: Near the end of the month the Legislature of the Commonwealth of Puerto Rico held hearings regarding the merger, in which representatives of both Wal-Mart and Amigo testified. Pressure began to build on Secretary of Justice Rodríguez. By this time she had received many letters, white papers, and personal visits from concerned parties expressing either support or opposition to the transaction. This pressure continued to build as time got closer to what had initially been the closing date of the transaction⁶Nov. 5, 2002, and is what eventually led to new demands on Wal-Mart. Along with Secretary of Justice Rodríguez, other officials gave input, including the Secretary of Economic Development and Commerce, the Chief of Staff, and the Governor. Secretary of Justice Rodríguez testified that this decision had created a lot of pressure for her as head of the PRDOJ. Around this time, the maintenance of the labor force and purchase levels issues were raised. The PRDOJ told Wal-Mart that the VAL negotiated during the summer would have to be renegotiated and changed in light of the shift from legal concerns to policy concerns.

Secretary of Justice Rodríguez was concerned with obtaining a fairness opinion letter⁶ to evaluate the divestiture of the four Amigo stores and make sure it was done correctly, because that divestiture had validated the FTC's approval of the merger for antitrust purposes. She testified that it was her duty to make sure that the divestiture was done correctly, that it wasn't a sham, and that M-ximo had the capacity to be a long-term market competitor.⁶ The OMA felt that it needed the fairness opinion letter to reveal the financial analysis sustaining the legality and legitimacy of the transaction.

⁶ Wal-Mart v. Rodriguez, supra at 404.

In light of the prior nods given to the merger by the OMA, it is clear that Secretary of Justice Rodríguez was driving the increased scrutiny of the transaction. She was particularly concerned with the merger's adherence to Articles 2, 4, and 5 of the Puerto Rico Anti-Monopoly Act.

November 5, 2002: This was the original deadline for closing the transaction.

November 21, 2002: The FTC documents and agreements with Wal-Mart were signed, suggesting that the merger transaction between Wal-Mart and Amigo and the mandated divestitures were in compliance with the applicable federal laws.

November 27, 2002: Secretary of Justice Rodríguez issued a press release of the most important requirements the PRDOJ was using to evaluate the transaction, including: 1) that Wal-Mart does not increase its concentration in local markets to an extent that reaches monopolistic levels; 2) that the divestiture of the four Amigo stores is real and non-fictitious; 3) that part-time jobs are as protected as full-time jobs are; 4) that sales of local agricultural products are not adversely affected; and 5) that the price paid for the four stores is within the parameters of the real market value for a transaction of this nature.

The parties negotiated following this release over the fairness letter, the changes the PRDOJ made to the fairness letter, the demand that Wal-Mart maintain the current labor force and the current level of purchases from local suppliers, and other language problems in the prior drafts of the agreement, including the definition of arm's length transaction. The final versions of the proposed agreement drafted by the PRDOJ had a clause stating that "the respondents will not reduce or suspend its current volume purchases of local agricultural and/or food products." There was additional language in the agreement suggesting that Wal-Mart could be subject to legal enforcement if they were to ever reduce their volume of local purchases, regardless of the reasons for such

decision. Wal-Mart felt that this put them at a disadvantage compared with competitors who freely conducted their business while knowing that Wal-Mart had these restrictions.

The protection and preservation of current jobs and the creation of new jobs was the administration's top priority.⁷ Pursuant to this concern, the VAL was changed to read, "Wal-Mart will continue to comply with all applicable labor laws and regulations and will not undergo a reduction of the current labor force of Supermercados Amigo nor will substitute its full time employees for part timers as a result of the transaction." This created some controversy, as the PRDOJ wanted to get Wal-Mart to agree not to alter the current labor force, meaning that the current employees would be protected from termination, whereas Wal-Mart only wanted to agree to maintain the current levels of employment, leaving open the possibility that employees could be terminated but that their positions would not be eliminated. Wal-Mart felt that this would be another provision that would disadvantage them in comparison with their competitors.

While Secretary of Justice Rodríguez expressed her confidence in reaching an agreement with Wal-Mart, there were still outstanding issues, such as the fairness letter, pending. Secretary of Justice Rodríguez requested two more days to negotiate beyond the extended December 5, 2002 deadline, but prior to that date she ordered that a draft of a complaint be prepared.

December 5, 2002: The closing of the transaction took place in the morning. At 3:00 P.M., Secretary of Justice Rodríguez announced that she would file a lawsuit in state court. She alleged that the transaction that took place between Wal-Mart and Amigo violated the Puerto Rico Anti-Monopoly Act and was contrary to the best

⁷ Wal-Mart v. Rodriguez, supra at 407.

interests of consumers, merchants, and distributors in Puerto Rico. She stated that Wal-Mart failed to comply with three conditions that she felt essential to her acceptance of the merger. These conditions were: 1) that the number of employees currently working at Amigo must remain at the current level; 2) that at a minimum the purchase of local agricultural products must remain at the current level; and 3) that the transaction must be made in good faith to protect the local market.

Wal-Mart felt that the additional requirements imposed by Secretary of Justice Rodríguez were retaliatory and suspect. It alleged that it was being singled out in violation of the Equal Protection Clause.

December 6, 2002: The Secretary of Justice filed a complaint in state court, alleging violations only of the Puerto Rico Anti-Monopoly Act. She also requested a preliminary injunction, which was granted that afternoon by the state judge. In her complaint, she added a geographical area that had not been cited as an area of concern in prior documents or discussions.⁸ Wal-Mart filed suit against Secretary of Justice Rodríguez, seeking an injunction against her involvement in the suit.

December 26, 2002: The U.S. District Court for the District of Puerto Rico filed its opinion enjoining Secretary of Justice Rodríguez from interfering in the merger between Wal-Mart and Amigo. This opinion was seen as a major threat to state antitrust enforcement and to the power of state attorneys general, drawing the interest of many experts and legal groups on the side of Puerto Rico.

March 20, 2003: The U.S. Court of Appeals for the First Circuit filed its opinion approving the settlement reached between the parties and vacating the district court's

⁸ Wal-Mart v. Rodriguez, supra at 409 (discussing the addition of the Municipality of Bayamón to the

opinion, as per the request of both parties as part of the settlement agreement.

State Antitrust Enforcement

Prior to the Hart-Scott-Rodino Act, states were able to use their *parens patriae* power to sue for injunctive relief from antitrust violations that were harmful to a state's citizens under Section 16 of the Clayton Act.⁹ It is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general. Historically the common law powers of the attorney general include the right and duty to take actions necessary to the maintenance of the general welfare.¹⁰ Now these powers have been codified and state attorneys general are able to pursue antitrust violations under state or federal law.

Secretary of Justice Rodríguez filed her claims in state court pursuant to Article 16 of the Puerto Rico Anti-Monopoly Act, codified at 10 P.R. Laws Ann. § 257. State law antitrust enforcement has coexisted with federal antitrust enforcement from the time the Sherman Act was passed in 1890, and the constitutionality of this dual system has long been accepted. Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.¹¹ State enforcers are able to use either federal or state courts to seek injunctive relief to prevent future antitrust violations, including seeking divestitures in merger cases.

Bringing this action in state court was not her only means of action in this matter, as most recent state antitrust enforcement has been pursued in federal courts through federal law.¹² States are fully authorized to enforce federal antitrust laws, as the United States Department of Justice (DOJ), the FTC, and state attorneys general have concurrent

areas of antitrust concern).

⁹ Joshua Ratner, *Conflicting Federal and State Enforcement of Federal Antitrust Law: Statutory Crisis or Celebration of Diversity?*, Multistate Litigation Seminar Paper pg. 2, Feb. 2, 2001; citing Georgia v. Pennsylvania R.R., 324 U.S. 439, 451 (1945); and Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

¹⁰ Harry First, *Symposium: Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct: Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 *Geo. Wash. L. Rev.* 1004, 1007 (2001), citing In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

¹¹ First, *supra* at 1011.

¹² First, *supra* at 1005.

jurisdiction over federal antitrust law. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 created a two-tiered antitrust structure whereby the federal government can sue for injunctive relief and the states can sue for damages over the same violation. Under this Act, state attorneys general were given the explicit right to bring *parens patriae* suits in federal court for injuries arising out of a violation of the Sherman Act.¹³

The Supreme Court ruled in California v. American Stores that states can pursue antitrust actions even if the FTC has granted a consent decree.¹⁴ Prior to American Stores, the Supreme Court ruled in United States v. Borden Co. that a prior consent decree did not bar a state action, stating that private and public antitrust actions were designed to be cumulative, not mutually exclusive.¹⁵ The case went on to recognize that there may be differences between public and private interests that may not necessarily coincide.

The two-tiered antitrust enforcement structure allows federal and state enforcers to use their own discretion in determining which cases to pursue. State and federal authorities will often be motivated by different concerns. There are non-doctrinal differences in antitrust enforcement between state and federal enforcers such as limited resources, which could cause the state or federal enforcer to choose a limited number of cases to pursue. The federal government may feel that if a matter is too local, that it is best left to state enforcers rather than spending federal resources on it. The federal government may also abstain if damages relief, which cannot be sought by the federal government, would be more appropriate than injunctive relief.¹⁶ It is always possible that

¹³ First, *supra* at 1008.

¹⁴ California v. American Stores Co., 493 U.S. 916 (1989).

¹⁵ 347 U.S. 514 (1954).

¹⁶ Ratner, *supra* at 15.

individual federal and state enforcement officials may differ as to the merits of a case and disagree as to its importance.

In addition to prudential considerations, policy considerations may play a large role in determining which cases a state or federal enforcer will pursue. Concern about localized impact on state employment or state economic activity may motivate states to take cases that the federal government may shy away from, instead choosing to pursue cases based on general notions of efficiency and national competition. While state interests such as protecting consumers, state business prosperity, and protecting state employment or the state's economy are not in themselves legally sufficient for an antitrust claim, they can shape whether a state brings a legal claim. State attorneys general are especially sensitive to these concerns, as they are primarily elected officials. They may face more intense political pressure from competing local business than their federal counterparts. Since local business is a component of their constituency, they are likely to address concerns it raises.¹⁷

Merger analysis is an area where state and federal enforcers often conflict, as state enforcement authorities make decisions based on very different motivations and analyses from those employed by the federal authorities.¹⁸ State approaches tend to be more restrictive than the federal approach, as states look to actual benefits passed on to consumers, while federal enforcers require a rather minimal prima facie statement of the efficiency of the proposed merger.¹⁹ In many ways, the decision to challenge a merger

¹⁷ Ratner, *supra* at 17.

¹⁸ Ratner, *supra* at 20, quoting David A. Zimmerman, Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers, 48 Emory L.J. 337, 338 (1999) (Limited Role).

¹⁹ Ratner, *supra* at 20, citing Conversation with Kevin O'Connor, Wisconsin Assistant Attorney General for Antitrust, and former chair of the NAAG Antitrust Task Force, January 30, 2001 (Conversation with Kevin O'Connor) and Jonathan Rose, State Antitrust Enforcement, Mergers, and Politics, 41 Wayne L.

may be more important than the merits of a particular case. The cost of delaying a merger can be disastrous for the parties due to a high degree of uncertainty. The morale of the acquiree company's employees may fall, all business is put on hold, the business plan may be impacted, and even the stock price may fall. No one wants a delay in a merger.²⁰ Merging parties that are challenged can expect to pay high fees to fight a legal battle, or they will avoid court, but face huge concessions at the negotiation table, even if they believe they have a strong case.²¹

There are several cases in which state attorneys general have sought different relief than that sought by federal antitrust enforcement agencies. The most striking of these cases is American Stores,²² both for its factual similarities to the instant case, and for its recognition of the states' roles as independent antitrust enforcers of both federal and state antitrust law in the merger context. In that case, as here, two supermarket chains wanted to merge. The FTC approved the merger contingent on a divestiture of several designated supermarkets. California enjoined the completion of the merger and sought to divest all of the acquired company's retail grocery stores (252 stores) spread throughout 62 California cities. The Court upheld California's right to pursue broader relief than that sought by the FTC. As states are more knowledgeable about local market conditions, it is not surprising that cases like this arise in which a state seeks enforcement measures that are not pursued by the FTC.

One theory of state antitrust enforcement is that states should attend to local antitrust issues, or intrastate issues, while federal enforcers should be concerned with

Rev. 71, 106 (1994) (Antitrust and Politics).

²⁰ Conversation with Steve Houck, Advisory Counsel to Puerto Rico, January 6, 2004.

²¹ Ratner, *supra* at 21, *citing* Limited Role, *supra* at 361.

²² California v. American Stores Co., 495 U.S. 217 (1990).

broader interstate issues. Some theorists think that cases should be divided on this intrastate/interstate line. Harry First argues against this, stating that instead of sifting cases of size or intrastate versus interstate impact, cases should be sorted for value-added. In other words, he feels that states are more likely to take cases in which they more easily understand the market and in which they are more likely to realize benefits for state consumers.²³ This argument suggests that states should engage in a calculus involving the benefit to be gained from a case or the harm to be prevented. This should not be limited to only antitrust issues, but should extend to the whole picture created by a transaction so that state attorneys general are pursuing cases of maximum impact to their constituents. This means that state attorneys general must be able to use policy considerations when determining which antitrust cases they should pursue.

Supermarket mergers are of particular concern in antitrust investigations, as mergers affect the pricing in small local areas in which individual consumers shop. In evaluating supermarket mergers, it is also important to look at the competitive effects of the merger systemwide as supermarket chains compete against one another. Supermarket chains tend to set prices systemwide by offering incentives such as double or triple coupons or loyalty cards for frequent shoppers. Rather than looking at individual stores that compete within a certain area, it is necessary to step back and look at the number of chains competing in the larger area that contains the merging stores. Supermarket mergers also directly impact local consumers, and can impact local employment, which may be important to local government officials, even if it is unrelated to antitrust

²³ First, *supra* at 18.

analysis.²⁴

District Court Opinion

The district court ignored decades of precedent in enjoining the Puerto Rico Secretary of Justice from interfering with the merger between Wal-Mart and Amigo. The opinion impugns the authority of the Secretary of Justice or a state attorney general to oppose a merger after the grant of an FTC consent decree, and also refuses to recognize the Secretary of Justice's prerogative in making policy-based decisions about which antitrust cases to pursue.

The district court attacked Secretary of Justice Rodríguez, accused her of acting in bad faith, and stated its belief that the December 6, 2002 complaint filed by the Secretary of Justice presented pretextual and bogus claims against Wal-Mart and Amigo, and that "[t]hese claims disguise conduct and motivation of an inherently spurious nature lacking any kind of authoritative legal support."²⁵ The court based its findings on the Secretary of Justice's "pattern of bad faith conduct" during November and December 2002, as she attempted to extract Wal-Mart's submissions to her imposed conditions as a result of public and political pressure. The court found her complaint to be "vindictive" in an effort to coerce Wal-Mart into yielding to her demands.²⁶ The court stated that the "real reason behind her bringing that action is unveiled: she is retaliating against Plaintiffs for not submitting to her public policy concerns, which were actually the concern of those exerting pressure on her, and in doing so she abused her powers as a

²⁴ First, *supra* at 11.

²⁵ Wal-Mart v. Rodriguez, *supra* at 409.

²⁶ *Id.*

state actor to infringe upon the rights of the Plaintiffs guaranteed by the United States Constitution.²⁷ The court classified the opinion letter as a counterfeit alibi.²⁸

The court found that Wal-Mart would likely succeed on the merits of its claims of constitutional violations of the Commerce Clause and the Equal Protection Clause. The court found support for this finding in the Secretary of Justice's demand in negotiations for maintaining a minimum level of purchases from local producers. The district court found that this would reduce Wal-Mart to exclusivity contract with local growers that would shut out out-of-state growers from doing business with Wal-Mart, therefore encumbering interstate commerce in violation of the Commerce Clause.

The district court further agrees with Wal-Mart that Secretary of Justice Rodríguez was engaged in selective or vindictive enforcement against Wal-Mart in violation of the Equal Protection Clause. The court states that the complaint against Wal-Mart was filed in retaliation for failed negotiations during which Wal-Mart was pressured to give up some of its constitutional rights under the Commerce Clause. The district court states that no other party had ever been required to provide a fairness opinion letter, and never before had demands like the ones made on Wal-Mart been made on other parties.

In issuing this opinion, the district court reopened an issue that has long been established as a matter of Supreme Court jurisprudence: cumulative antitrust enforcement under both state and federal antitrust law. The district court prevented Secretary of Justice Rodríguez from enforcing state antitrust laws, allowing the merger of Wal-Mart and Amigo to proceed based solely on the consent decree and divestiture requirements

²⁷ Wal-Mart v. Rodriguez, supra at 410.

laid out by the FTC, completely ignoring the significant role that state antitrust enforcement plays in all cases, but even more so in cases such as this that involve grocery chains, an intensely local issue, as well as policy concerns involving a merger's impact on local employment and production. This issue has been well-settled by the Supreme Court when it decided American Stores, holding that the states are able to pursue antitrust action against a party even after the FTC issued a consent decree.²⁹ This view that state and federal antitrust enforcement are not mutually exclusive and that state enforcement does not merely serve as a gap-filler when federal enforcement is not being pursued, is the bedrock of our antitrust jurisprudence. The policy considerations for cumulative antitrust enforcement, both cooperative and competitive, are hugely important. While there is opposition to such a significant role for state enforcers from critics such as Richard Posner, there is significant support for this system and the efficiency it brings to antitrust enforcement.

In response to the district court's opinion, several amici briefs were filed on behalf of the Commonwealth of Puerto Rico as it appealed this decision in the First Circuit. Two notable briefs are the Brief of the American Antitrust Institute (âAAIâ) and the Brief of Commonwealth of Massachusetts and 19 other states (âMA AGâ).

The AAI brief responds to the district court's holding by stating that it is not only wrong, but significantly impairs the ability of states to protect their consumers from anticompetitive conduct by enforcing state antitrust laws.³⁰ This brief sums up Wal-Mart's claims as an allegation that its constitutional rights were violated when Puerto Rico changed its negotiating position during the merger investigation, that no other merger enforcement actions have been brought by Puerto Rico in this industry,

²⁸ Id.

²⁹ California v. American Stores Co., 493 U.S. 916 (1989).

³⁰ Brief, *Amicus Curiae* of the American Antitrust Institute, Wal-Mart Stores, Inc. v. Rodriguez, No. 02-

and that Puerto Rico disagreed with the FTC regarding the propriety of the merger.³¹ These three issues are the precise reasons that this decision is so threatening to state antitrust enforcement. The harms that the AAI foresees as a result of this treatment are the potential for every antitrust investigation to result in a federal lawsuit concerning the conduct of the investigation and the wide avenue for parties to block valid enforcement actions that this would provide.

This brief further explores these issues in terms of their threat to the system of concurrent enforcement in American antitrust law, stating that "[t]he injunction issued by the district court strikes at the very heart of this concurrent enforcement system—this federal district court has intruded upon the basic power of states to review mergers, especially local mergers occurring entirely within their boundaries."³² The AAI invokes the necessity of the concurrent jurisdiction scheme in providing a check on federal executive power and in furthering competitive interests within individual states, citing two distinct advantages of concurrent enforcement over centralized enforcement: 1) it prevents underenforcement, as reasonable minds can and do differ as to which actions they should pursue and in this system there are federal, state, and individual plaintiffs that are each able to use independent discretion in determining when to enforce state and federal antitrust laws, and 2) concurrent enforcement leads to a higher case volume, which aids in the development of a rich case law in the field of antitrust enforcement.³³

The MA AG brief focuses on the right of state antitrust enforcers to have their well pleaded state law antitrust complaints heard in their own courts for the benefit of their own citizens. It sees the district court opinion as a threat to state antitrust authority precisely because it prevented Puerto Rico from enforcing its own antitrust laws in its own courts, instead allowing only federal enforcement, which threatens state interests. As in the AAI brief, the MA AG brief reiterates the ability of state enforcers to pursue antitrust regulation even in the face of contrary actions from federal enforcers. "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."³⁴ Rather than recognizing

2710 at 1 (1st Cir. Feb. 2003).

³¹ Brief of AAI, *supra* at 2.

³² Brief of AAI, *supra* at 4.

³³ Brief of AAI, *supra* at 5.

³⁴ Brief, *Amicus Curiae* of Commonwealth of Massachusetts and 19 Additional States, Wal-Mart Stores, Inc. v. Rodriguez, No. 02-2710, pg. 5 (1st Cir. Feb. 25, 2003), citing California v. ARC America Corp., 490 U.S. 93, 102 (1989).

this well-established principle of antitrust law, the district court acted contrary to it by chastising Puerto Rico for bringing a state claim when all concerns had been resolved by the FTC under the appropriate and applicable divestiture guidelines which were lacking in the PRDOJ.³⁵ Federal antitrust enforcement is irrelevant to state antitrust enforcement, although the different enforcers are able to cooperate as they choose.

The MA AG brief cites several good examples of cases in which state and federal antitrust enforcers engaged in parallel enforcement. In cases where federal enforcers do not take actions, states often will, and state enforcers are often able to obtain relief far in excess of that sought and obtained by federal enforcers under federal actions. Along with American Stores, the MA AG brief also cites Hartford Fire Ins. Co. v. California,³⁶ and New York v. Microsoft Corp.³⁷ In Hartford Fire Ins., several states took action against allegedly colluding national insurers, despite the fact that the DOJ failed to take any action. In Microsoft, the court permitted several states to seek additional relief than that provided in the settlement with the DOJ. The court noted, the well-established rights of the states to sue as *parens patriae* under federal law, along with the similarly well-established right of the states to supplement federal antitrust regulation with state antitrust laws made it clear that the states could proceed independently.³⁸

The MA AG brief clearly sets out the reasons that the district court's reliance on the Commerce Clause is faulty. Wal-Mart asserts that it was discriminated against because it was a foreign corporation, however, it has to show that it was discriminated against for that reason alone and not for some other reason. In this case, it is clear that Wal-Mart's merger got additional scrutiny due to its dominance of the Puerto Rico market and the fact that it sought to merge with the second largest market participant. In order to prove a violation of the Commerce Clause, Wal-Mart would have to show that a local company having Wal-Mart's attributes would not be treated in a similar manner. Wal-Mart is unique, however, and in no market could it show that there was a similarly situated party. Wal-Mart is the largest discounter and employer in North America. This means that it does not have a peer. As a result, transactions in which it engages may bear more heightened scrutiny due to potential anticompetitive effects of Wal-Mart's entering

³⁵ Brief of MA AG, *supra* at 5, citing Wal-Mart v. Rodriguez.

³⁶ 509 U.S. 764 (1993).

³⁷ 209 F. Supp. 2d 132 (D.D.C. 2002).

buying into a particular market. The concern for anticompetitive effects would necessarily be another reason for Wal-Mart's treatment in a particular case, speaking to something more than its foreign nature. As there is an additional reason for Wal-Mart's treatment in this case, the Commerce Clause was not violated.

The application of antitrust laws to Wal-Mart was also not in violation of the Commerce Clause. The MA AG brief states that "[t]he District Court's determination that Puerto Rico made excessive settlement demands on Wal-Mart is irrelevant to the Commerce Clause issue."³⁹ The brief argues that the laws were being applied to Wal-Mart just as they would be applied to any other market participant.

A question remains regarding what the role of the demands made by the Puerto Rico Secretary of Justice had in this case. The demands were outside the scope of both state and federal antitrust laws, but she did not pursue them when she brought the claim in state court. The briefs of AAI and MA AG do not address the power of state attorneys general to pursue policy issues that are ancillary to antitrust issues in antitrust actions. One major difference in antitrust enforcement between state and federal enforcers is the pursuit of policy objectives through antitrust enforcement used by state attorneys general. If the demands of the Secretary of Justice were brought into court, the court may well find that she lacked the authority to demand these concessions, however, the MA AG brief states that this has nothing to do with any of the violations claimed by Wal-Mart in this case.⁴⁰

Even if the motivations of the Secretary of Justice are mostly policy-based and exceed the scope of antitrust law, she must still bring a well pleaded antitrust complaint. This prevents a state attorney general from imposing too stringent demands on parties, as there must be some underlying antitrust violation. Some antitrust enforcers follow a more traditional view and believe that antitrust remedies should match antitrust violations and that antitrust enforcers should direct their energies at antitrust abuses. Activist state attorneys general may take an opposite approach, citing their roles as protectors of state citizens in injecting policy-related demands into antitrust enforcement.⁴¹ It is clear that state attorneys general use policy considerations in determining which cases to pursue. It is also clear that the parents

³⁸ Brief of MA AG, citing New York v. Microsoft (citations omitted).

³⁹ Brief of MA AG, supra at 14.

⁴⁰ Brief of MA AG, supra at 15.

patriae power of state attorneys general is expansive and could be used to remedy problems that are not expressly provided for in statutes or common law. Some of the concessions that Secretary of Justice Rodríguez sought may have been things that she could have pursued under her *parens patriae* power if they turned out to be as harmful as she thought they would.

There have been other cases in which non-antitrust issues were implicated in antitrust actions by state attorneys general, through which they could oppose mergers on grounds other than legal antitrust violations. One example of this involves hospital mergers that impact available reproductive services provided in a large area. A state attorney general was able to bring this case by citing the constitutional implications of the merger of the hospitals.

Outcome of this Case

This case was resolved through settlement between the PRDOJ and Wal-Mart prior to the Circuit Court's delivery of an opinion on the appeal. Pursuant to the settlement, the Secretary of Justice dismissed her Puerto Rico court case, which freed Wal-Mart from the preliminary injunction against it. Wal-Mart agreed to divest two additional stores, for a total of six stores when added to those divested pursuant to the FTC agreement. Wal-Mart also made promises regarding its labor and purchasing practices in Puerto Rico. Both parties jointly sought vacatur of the district court's opinion as a term of the settlement. It was granted by the circuit court. The Secretary of Justice's reason for seeking vacatur is that she feared that the district court decision might impair her ability to enforce the laws of the Commonwealth of Puerto Rico. The circuit court approved the settlement.⁴²

Conclusion

Prior case law establishes the power of states to enforce federal and state antitrust law, even in cases in which the FTC has already issued a consent decree, or has otherwise differed in its treatment of a case from the state enforcer. Following the vacatur of the district court's opinion, this should not be a live issue, as it wasn't a live issue when that opinion was issued, but was reopened in error by Wal-Mart and

⁴¹ Conversation with Steve Houck, January 6, 2004.

⁴² Wal-Mart Stores, Inc. v. Rodriguez, 322 F.3d 747 (1st Cir. 2003).

then the district court. The briefs of the AAI and the MA AG are persuasive in their arguments that there were no Equal Protection or Commerce Clause violations in this case. The issue that remains problematic is the ability of state attorneys general to pursue non-antitrust issues through antitrust enforcement. While their ability to use policy considerations as a guide for determining which cases they should take is clear, their ability to pursue non-antitrust claims is not. This will be the major issue going forward from this case.