The Prospects Of Pa. Gaining Its Own Antitrust Law After 2024

By **Julian Perlman, Jeffrey Liskov and Andrew Martin** (December 13, 2024)

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Pennsylvania was front-and-center of the media coverage surrounding the 2024 election cycle. Votes within the commonwealth were crucial for determining the outcome of the presidential election, as well as the hotly contested battles for control of the U.S. Senate and the U.S. House of Representatives.

But particularly for the state's residents, there was more at stake than just the federal contests at the center of the media coverage, namely control of the Pennsylvania General Assembly and its impact on future legislation, including the Pennsylvania Open Markets Act, or H.B. 2012.

Both houses of the General Assembly, the Pennsylvania State Senate and Pennsylvania House of Representatives, had several close races. And the results of those contests left control of the General Assembly in essentially the same place it was before the election — Democrats retained a narrow majority in the Pennsylvania House, while Republicans retained a narrow majority in the Pennsylvania Senate.

These elections had direct implications on the future of antitrust law in Pennsylvania.

Why were these state legislative races relevant for antitrust law?

Pennsylvania is the only remaining U.S. jurisdiction that does not have its own state antitrust law. Whether that will change depends on how both chambers of the General Assembly choose to proceed in the new year.

The Pennsylvania Open Markets Act passed the state's House in July, largely along partisan lines, but with limited support from the Republican minority. The passage of the bill was slim, with a vote of 112-89. The bill has since languished in the Senate Judiciary Committee, and with the two-year legislative session ending next month, it appears that the bill will need to be reintroduced in the Pennsylvania House in the new year.

It must then be considered anew by the Pennsylvania Senate before it can proceed to Gov. Josh Shapiro's desk, meaning that there are hurdles to overcome before the bill becomes law.

What does the bill do?

Generally, the bill is drafted to be consistent with the federal antitrust laws, creating three categories of prohibitions: (1) restraints of trade, (2) monopolization or attempted monopolization, and (3) certain acquisitions that may cause harm to competition.

The first two categories closely mirror Sections 1 and 2 of the Sherman Act, and the third category closely mirrors Section 7 of the Clayton Act. Violations are remediable by right of private action, with mandatory trebled damages.

Notably, however, the bill would also criminalize restraints of trade and monopolization, which also closely mirrors federal law.

Finally, the bill would also add a state-level premerger notification requirement, mandating that merging parties that transact business in the state provide the Pennsylvania Attorney General's Office a copy of the federal Hart-Scott-Rodino notification, and include additional reporting requirements for transactions involving healthcare entities.

What are the pros and cons of the bill?

The bill has many potential upsides. Under current law, the attorney general's office lacks many of the clear-cut statutory authorities that other states' attorneys general have at their disposal under their respective state antitrust laws.

These include subpoena power, the authority to investigate and the ability to recover funds all concerning anticompetitive conduct, as well as the authority to assess penalties for violations of the law.

Passage of the bill enables the attorney general's office to more readily participate in multistate efforts to combat anticompetitive conduct, and enables Pennsylvania to reap the rewards of any recoveries therefrom.

The citizens of Pennsylvania would stand to benefit from state-level legal protections available to consumers in all other states.

However, some facets of the bill may be worthy of concern for business and industry. First, the bill singles out healthcare entities for increased scrutiny due to its enhanced premerger notification requirements for the sector.

Further, the premerger notification provision in general may be premature, when considering that the Uniform Law Commission has a model state-level premerger notification statute in draft. The bill's private right of action presents an additional reason for scrutiny, as it grants trebled damages and grants the Court of Common Pleas jurisdiction over alleged violations.

Trebled damages would heighten the stakes for companies sued under the bill. While this feature of the bill is designed to dissuade companies from engaging in anticompetitive conduct, it might also deter companies from doing business in Pennsylvania, given the exposure to enhanced liability.

The plaintiffs bar will certainly take note of a statutory scheme that confers trebled damages as a lucrative area, ripe for litigation. Conferring personal jurisdiction in the Court of Common Pleas also threatens inconsistent decisions among Pennsylvania courts — a reality that might be avoided by conferring jurisdiction unto the Pennsylvania Commonwealth Court instead, which would render statewide interpretations.

Finally, as with any new legislation, there is a measure of uncertainty in how the Pennsylvania state courts would interpret a new statutory scheme — although the federal antitrust laws and federal courts' interpretations thereunder will likely serve as strong persuasive authority.

What are the trends toward state-level enforcement?

As the federal government transitions to a new administration, in the coming months and years, its antitrust enforcement policies and priorities are certain to shift. Expect state antitrust enforcers to continue aggressive state enforcement, using tools under state law available to remedy perceived harms within a state's bounds.

State attorneys general can also work collaboratively and share information to enable multistate investigations and enforcement actions, if they see fit. It is also possible that state enforcers begin to more frequently prosecute anticompetitive conduct criminally.

Importantly, do not expect that this new era of aggressive antitrust enforcement is over — any gaps from the federal level will likely be filled by state-level enforcement.

Just last month, the Illinois Attorney General's Office secured a $1.8 million settlement from Metro Staff Inc., a staffing agency accused of engaging in unlawful wage-fixing and no-poach agreements, in violation of the Illinois Antitrust Act. This trend toward state-level antitrust enforcement is independent of the unknowns surrounding federal antitrust enforcement under the second Trump administration.

What are the prospects for passage in the new legislative session?

As we have seen in the Pennsylvania House, there may be some Republican willingness to support the bill, which is unanimously supported by the Democrats. But it is a different question whether there is any appetite to advance the bill in the Republican-controlled Pennsylvania Senate.

The Pennsylvania business community opposed the bill in the current session, and lobbied the Pennsylvania House against its passage. The business community's strong opposition signals that a rough road likely lies ahead for those seeking the passage of the bill in the Pennsylvania Senate.

If opponents have their way, the bill will likely need to undergo a more comprehensive stakeholder process that will require further revision and negotiation to achieve passage in the Pennsylvania Senate.

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