FEDERAL OBSTRUCTION OF STATE ANTITRUST ENFORCEMENT: THE SECOND CIRCUIT FINDS NO PLACE FOR STATE PARTICIPATION IN THE FAST WORLD OF MERGERS

*Lieberman v. FTC**

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR)[1] was enacted for two reasons: to increase the effectiveness of the federal government's illegal merger prevention program;[2] and to allow state governments to play a more active role in antitrust enforcement.[3] The Act enhanced the federal government's ability to enforce the antitrust laws by requiring certain merging companies to submit financial information regarding the merger to the Federal Trade Commission (FTC or Commission) before the merger was completed.[4] Additionally, state antitrust enforcement was improved by allowing state law enforcement officials to sue antitrust law violators under federal law on behalf of the citizens of their state, thereby giving individual consumers a greater voice in antitrust enforcement.[5]

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* 771 F.2d 32 (2d Cir. 1985). Before Mansfield, Oakes, and Meskill, JJ.; opinion per Oakes, J.

[1] Pub. L. No. 94-435, 90 Stat. 1383 (1976). HSR has three titles which serve separate, but related functions. Title I, 15 U.S.C. § 1312 (1982), authorized the Department of Justice to utilize Civil Investigative Demands, a discovery device, to obtain premerger information in an antitrust investigation. Title II, 15 U.S.C. § 18a (1982), required parties to a merger who have assets of at least $10,000,000.00 to furnish premerger information to the Federal Trade Commission and to the Department of Justice. Title III, 15 U.S.C § 15(c) (1982), authorized state attorneys general to directly sue the merging parties on behalf of the citizens of their state in their capacity as *parens patriae*.

[2] Congress believed that if the government could evaluate relevant financial data before a merger was completed, antitrust enforcement would work better and faster for both government and industry. *See* H.R. REP. No. 1373, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2637, 2637.

[3] *See generally* 122 CONG. REC. 30,881 (1976). The states' role has increased by allowing them to sue the merging parties on behalf of individual consumers.

[4] *See* 15 U.S.C. § 18a (1982).

[5] *See id.* at § 15(c). Congress believed that individual consumers could not adequately pursue antitrust law violators because they were too small, and the federal government could not adequately represent all consumer interests because it was too large. Therefore, by allowing state governments to represent individual consumers, Congress recognized that there should be an intermediate step between the individual and the

While Congress was aware of how valuable premerger information would be to federal law enforcement officials, it also realized that premerger information often included sensitive financial information which should not be available to the general public. Congress understood that public access to confidential data could slow the premerger review process and possibly compromise the confidential nature of information submitted by merging companies.[6] It therefore provided a specific exception to the Freedom of Information Act (FOIA) within HSR.[7] Section 7a(h) of HSR states that

> any . . . material filed with the . . . Federal Trade Commission pursuant to this section shall be exempt from disclosure under . . . [the Freedom of Information Act] and no such . . . material may be *made public*, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of Congress.[8]

The tension between the federal government's premerger submission requirement for information and private industry's need for confidentiality and expediency has been heightened recently by a conflict between federal and state governments over who should have access to premerger information. Until recently, state governments, in comparison to the federal government, played an almost negligible role in antitrust enforcement.[9] Although most state governments had enacted antitrust laws by

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federal government in antitrust enforcement. *See generally* AMERICAN BAR ASSOCIATION, STATE ANTITRUST LAWS (1974).

The theory behind an antitrust suit brought by state attorneys general is that antitrust law violations injure individual consumers, as opposed to the public at large, in the form of inflation and higher prices for goods and services. *See* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, ANTITRUST PARENS PATRIAE BILL (1975). It is also easier for state attorneys general to bring antitrust lawsuits on behalf of individual consumers than it is for consumers to band together and pursue a class action suit. Consumer class actions are thought to present insurmountable problems of "manageability." *Id.* at 9. *See* Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 677, 708 (1977).

[6] *See* 122 CONG. REC. 15,812 (statement of Sen. Hruska) (1976).

[7] 5 U.S.C. § 552(b) (1982). Because the amendment was enacted as a specific exception to the Freedom of Information Act, the general public would not be allowed to have access to this information as they would normally have with respect to documents held by government agencies.

[8] 15 U.S.C. § 18a(h) (1982) (emphasis added).

[9] *See* Stone, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine in Old Wine Skins*, 4 J. CORP. LAW 547, 555 (1979).

1932,[10] relatively few states enforced these laws.[11] The federal government has traditionally assumed primary responsibility, under federal law, for antitrust enforcement.

Federal dominance in antitrust enforcement has changed, however, largely due to the passage of HSR in 1976. Because HSR also gave state law enforcement officials the ability to sue antitrust law violators on behalf of the citizens of their state, state antitrust activity has increased significantly.[12] Ever since state governments began to actively pursue antitrust law violators, the FTC has cooperated with state antitrust enforcement efforts by allowing state attorneys general to have access to premerger information. In fact, such federal-state cooperation was encouraged by formal FTC policy.[13]

State efforts to increase their antitrust enforcement presence suffered a serious setback recently in *Lieberman v. FTC*.[14] The litigation was prompted by the FTC's revised interpretation of state law enforcement's role in the premerger review process. In contrast to the Commission's well-established policy of sharing premerger information with state governments, the FTC suddenly began to deny requests made by state attorneys general to inspect premerger information. This action prompted the attorneys general of four states[15] to bring a declaratory judgment action against the FTC seeking to force the FTC to provide the attorneys general with premerger information obtained by it in the course of its investigation of the Texaco-Getty merger.[16] The Connecticut District Court held in favor of the

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[10] *Id.* at 553 n.62.

[11] *See generally* Stone, *supra* note 9.

[12] *See* Comment, *Parens Patriae Suits — Damages to a State's Economy Not Compensable Under the Clayton Act*, 18 N.Y. LAW FORUM 465, 468 (1972) (discussing the fact that until 1972 only two states had brought lawsuits under the antitrust laws in their capacity as *parens patriae*).

[13] *See* note 21 *infra*.

[14] 771 F.2d 32 (2d Cir. 1985).

[15] The lawsuit was brought by Joseph I. Lieberman, Attorney General, State of Connecticut, Hubert H. Humphrey III, Attorney General, State of Minnesota, Leroy S. Zimmerman, Attorney General, Commonwealth of Pennsylvania, and Arlene Violet, Attorney General, State of Rhode Island. *Id.* at 32-33.

[16] The Texaco-Getty merger was one of the largest mergers in United States history. *See Big Bad Oil: Not So Bad*, N.Y. Times, Jan. 10, 1984, at A22, col. 1 (editorial). "Subsequent to the announcement of the Texaco-Getty merger, Chevron Corporation . . . announced its 13.1 billion dollar takeover of Gulf Oil Co., thereby surpassing Texaco-Getty as the largest merger in United States history." Brief for Appellee at 6 n.6, Lieber-

plaintiffs and concluded that state attorneys general were not members of the "public" under section 7a(h) of HSR.[17] The Second Circuit reversed, however, and held that the FTC could properly deny state governments' access to confidential premerger information pursuant to section 7a(h).[18]

This Comment explores federal-state information sharing pursuant to the premerger review provisions of HSR. It also analyzes the *Lieberman* court's interpretation of HSR's legislative history and discusses the mode of statutory construction that the court employed. This Comment also touches upon the reviewability of FTC administrative decisions by federal courts and the public policy concerns raised by this controversy. This Comment then concludes that the federal statute that governs the release of premerger information by the federal government was designed by Congress to limit "public" access to this information, not state access, and that the effect of the Second Circuit's interpretation of HSR will be to stifle state antitrust enforcement.

Background

The FTC is the federal agency primarily responsible for the enforcement of federal antitrust laws.[19] The Commission's rules

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man v. FTC, 771 F.2d 32 (2d Cir. 1985) (citation omitted).

[17] 598 F. Supp. 669 (D. Conn. 1984).

[18] 771 F.2d at 32. *Lieberman* was not the first case to address the issue of whether the FTC had authority to disclose premerger information to the states. In Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985), the Texas Attorney General had also brought a declaratory judgment action against the FTC because the FTC had denied the Texas Attorney General access to premerger information obtained by it in the course of its investigation of the merger of the Chevron and Gulf Corporations. The United States District Court for the Western District of Texas, on cross-motions for summary judgment, granted the defendant's motion and held that section 7a(h) of HSR specifically precluded the FTC from releasing the information to state attorneys general. Shortly thereafter, the United States Court of Appeals for the Fifth Circuit affirmed the ruling of the Texas District Court and also held that section 7a(h) specifically precluded the FTC from releasing the information. *Id.* at 124. The Fifth Circuit had already decided the issue at the time that the Connecticut District Court was presented with the summary judgment motions in *Lieberman*. Nevertheless, Judge Blumenthal of the Connecticut District Court took issue with the Fifth Circuit approach and granted the plaintiffs' motion. 598 F. Supp. 669 (D. Conn. 1984). By reversing the Connecticut District Court, the Second Circuit brought the Fifth and Second Circuits into agreement.

[19] Congress established the Federal Trade Commission in 1914 as an independent regulatory agency. The President appoints five members for seven year terms with the advice and consent of the Senate. The Commission is divided into three sections: the

explicitly provide that the Commission will "cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions."[20] In the past, the FTC has assisted state governments by providing state attorneys general with premerger information obtained by it during a premerger investigation.[21] The purpose of this federal-state cooperation was to provide federal assistance to state antitrust enforcement efforts and to avoid regulatory overlap between federal and state governments.

Several times between January and April 1984, the attorneys general of Connecticut, Minnesota, Pennsylvania, and Rhode Island sought access to FTC records regarding its premerger investigation of the Texaco-Getty merger.[22] The attorneys general wanted the information so that they could assess the potential anticompetitive effects that the merger would have on their local economies.[23] Accordingly, pursuant to Commission Rule 4.11(c),[24] the attorneys general certified that the information, once obtained, would be kept confidential and would only be used for official law enforcement purposes.[25] The attorneys general sought the information pursuant to section 6(f) of the Federal Trade Commission Antitrust Improvements Act of 1980 (FTC Improvements Act).[26] However, the Commission determined that because it had obtained the information pursuant to the premerger disclosure restriction set forth in HSR, the premerger information request must be evaluated in terms of the

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Bureau of Consumer Protection, the Bureau of Competition, and the Bureau of Economics. *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (2d ed. 1984).

[20] 16 C.F.R. § 4.6 (1986).

[21] The Commission has set up specific procedures for state law enforcement officials to follow when they request access to Commission records. *See* 16 C.F.R. § 4.11(c) (1986). The attorneys general must certify that the information, once obtained, will be kept confidential and will be used only for official law enforcement purposes. *Id.*

[23] *Lieberman*, 771 F.2d at 34. The information sought by the state attorneys general was not the same as that received by the FTC. The attorneys general sought internal staff memoranda generated by the FTC in the course of their investigation, not the confidential material which the FTC received in the investigation. *Id.* at 33 n.1. The *Lieberman* court downplayed this distinction and stated that "we take it that this case is no different because state officials seek memoranda based on confidential material rather than the confidential material itself." *Id.*

[23] *Id.* at 37.

[24] 16 C.F.R. § 4.11(c) (1986).

[25] *See* Joint Appendix at 28, Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985).

[26] 15 U.S.C. § 46(f) (1982). See note 56 *infra* setting forth the text of section 6(f).

relevant HSR section, namely section 7a(h).[27] The Commission, in a 3-2 decision, found that section 7a(h) did not allow it to make premerger information available to the "public" and that state attorneys general *are* members of the public for the purpose of that section.[28] The Commission's interpretation of section 7a(h) effectively precluded state attorneys general from ever gaining access to confidential premerger information obtained by the FTC in the course of a premerger investigation without the FTC's prior approval.

The attorneys general contested the FTC's administrative determination in the United States District Court for the District of Connecticut.[29] They alleged, inter alia, that the FTC had misconstrued section 7a(h) of HSR by classifying their information request as "public" disclosure. They also argued that because the FTC had inconsistently addressed premerger information requests, as these requests had traditionally been granted and were now suddenly being denied, the FTC's decision was not entitled to the degree of deference normally accorded the judgment of an administrative agency.[30] Both the FTC and the attorneys general moved for summary judgment. The district court granted the states' motion, finding that section 7a(h) of HSR specifically authorized the FTC to disclose premerger information to state law enforcement officials.[31] The United States Court of Appeals for the Second Circuit reversed the decision of the Connecticut District Court holding that, pursuant to section 7a(h), premerger information requests could not be released to anyone, including state attorneys general.[32]

Analysis

A. *Deference to Agency Action*

Normally, an administrative agency's interpretation of its own rules or of the statute it has been empowered to administer

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[27] *See* text accompanying note 8 *supra*, which sets forth relevant parts of section 7a(h).

[28] *Texaco, Inc.*, 3 Trade Reg. Rep. (CCH) ¶ 22,146 (May 2, 1984).

[29] 598 F. Supp. 669 (D. Conn. 1984).

[30] *Id.*

[31] *Id.* at 678.

[32] *Lieberman*, 771 F.2d at 40.

is entitled to deference in the courts.[33] This is especially true if the agency has any special expertise in the administration of the statute.[34] Consequently, an important issue in *Lieberman* was what weight the Second Circuit should accord the FTC's administrative ruling interpreting section 7a(h). The district court in *Lieberman* noted two well settled factors which often discourage courts from overextending the concept of agency discretion.[35] First, if a controversy centers around the meaning of a statute, courts, not administrative agencies, are recognized as the experts.[36] Second, if an administrative agency has been found to have interpreted a statute inconsistently, no deference will be accorded its judgment.[37]

The attorneys general argued that the FTC itself had interpreted section 7a(h) inconsistently prior to the premerger information requests in question, and that therefore the FTC's judgment was not entitled to deference by a reviewing court.[38] In its

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[33] *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1982).

[34] *See* Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). In the instant case, the FTC never contended that they had special expertise. As a result, the Second Circuit never considered the issue. 771 F.2d at 37 n.10.

[35] 598 F. Supp. at 672.

[36] *See, e.g.*, Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981) (when administrative agency ruling is inconsistent with statute or frustrates congressional policy, courts are the final authorities).

[37] *See id.* (thoroughness, validity and consistency of agency reasoning are factors bearing upon amount of deference accorded agency's judgment); United States v. Leslie Salt Co., 350 U.S. 383, 396 (1956) (administrative agency's recent ad hoc contention as to how statute should be construed cannot stand in light of prior, longstanding consistent interpretation to the contrary); Isbrandsten Co. v. United States, 96 F. Supp. 883, 890-91 (S.D.N.Y. 1951) (administrative agency's statutory interpretation lacking uniformity and consistency entitled to little weight), *aff'd per curiam*, 342 U.S. 950 (1952).

[38] The attorneys general relied on *General Motors*, 3 TRADE REG. REP. (CCH) ¶ 22,118 (Feb. 7, 1984), a case in which the Chrysler Corporation sought access to premerger information obtained by the FTC in the course of its investigation of the General Motors-Toyota joint venture. The FTC was in the process of soliciting public comment on a proposed consent agreement when Chrysler requested the information. The FTC ruled that "information derived from Hart-Scott-Rodino submissions is not barred by 7A(h)'s prohibition from disclosure in consent order proceedings . . . ." *Id.* at 22,844. Essentially, the Commission held that although Chrysler's request could fall under the "administrative proceeding" exception in section 7a(h), *see* text accompanying note 8 *supra*, and that disclosure to Chrysler was not barred under that section, section 7a(h) should be read in conjunction with section 6(f) of the FTC Act. Thus, once the two statutes were read together, the FTC surmised that section 6(f) would serve to bar disclosure to Chrysler. This is precisely the opposite of the analysis employed by the FTC in *Lieberman*. In *Lieberman*, the FTC argued on appeal that section 7a(h) should *not* be read in conjunction with section 6(f). The attorneys general recognized the inconsistency

administrative opinion, issued before the federal action was commenced, the Commission acknowledged that it had previously provided state attorneys general with premerger information under HSR, and that, in general, it was their espoused policy to provide state law enforcement officials with this information.[39] However, the Commission attempted to distinguish its previous HSR releases on the ground that those releases were made by the General Counsel of the Commission, not the Commission itself.[40]

The Commission's attempt to distinguish their previous releases of HSR material to state attorneys general is disingenuous. The asserted distinction was that the General Counsel had released information prior to a "thorough analysis," by the Commission, of the "legal authority to release HSR material."[41] If it is true, as the Commission argued, that the release of premerger material to state law enforcement officials would slow the premerger review process, it seems inconceivable that the General Counsel of the Commission would ever release these materials

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of these positions and asserted that "[b]ecause the FTC in *General Motors* found Section 6(f) . . . [to] prohibit . . . release to Chrysler with respect to HSR materials, obviously State Attorneys General may then request release of this data under Section 6(f). The Commission cannot . . . contend that it may use Section 6(f) as a shield, while State Attorneys General may not use section 6(f) as a sword." Brief for Appellees at 43, Liberman v. FTC, 771 F.2d 32 (2d Cir. 1985).

The attorneys general contended that the conflicting positions adopted by the Commission in the two cases reduced the reliability of the FTC's judgment. The point actually was not significant because the Second Circuit found that the FTC's decision was not entitled to deference for other reasons.

[39] In fact, the release of premerger information to state attorneys general has prompted a number of lawsuits against the FTC by private companies seeking to halt the disclosure. *See* notes 51-55 and accompanying text *infra*. However, it should be noted that these releases were not made pursuant to HSR, but were made in accordance with section 6(f) of the FTC Improvements Act.

[40] *See Texaco, Inc.*, 3 TRADE REG. REP. (CCH) ¶ 22,146 at 22,995 (May 2, 1984).

[41] *Id.* The Commission stated:

> On some past occasions, the General Counsel of the Commission, exercising his delegated authority [to] act upon requests for information generally, has released HSR material to state attorneys general . . . on a strictly confidential basis. The Commission itself, however, has never expressly addressed this issue and previously did not receive any thorough analysis of the legal authority to release HSR material. Once a careful review of the governing legal statutes was undertaken, the statutory limits on the Commission's authority to share HSR materials were convincingly established. The prior actions, therefore, rightly should not control today's decision by the Commission.

Id.

without a full review of the relevant law. Furthermore, since the passage of HSR, the FTC has defended a barrage of lawsuits brought by private parties challenging the release of confidential information to state law enforcement officials.

The Second Circuit, however, did not place much emphasis on the FTC's defense of its position. In reaching its conclusion, the court relied primarily on the legislative history underlying the statutes and gave little credence to the Commission's agency deference argument. Although the Second Circuit concurred with the FTC's interpretation of section 7a(h), the court emphasized that it did so independent of the FTC. The court reasoned that the FTC's interpretation of section 7a(h) was not entitled to deference because Congress had also entrusted the administration of the statute to the Department of Justice, thereby vesting neither agency with the exclusive power to authoritatively interpret the statute.[42]

The Second Circuit's decision not to defer to the FTC's reading of the statute, in effect, greatly increased the degree to which the court was constrained to rely on the legislative history. The Second Circuit itself characterized the legislative history underlying the enactment of the crucial section, 7a(h), as "sparse."[43] The court also conceded that the statute itself was ambiguous.[44] Therefore, the Second Circuit had the unenviable task of construing the meaning of a statute that was not only ambiguous on its face, but whose legislative history provided few clues as to its meaning.

B. *Statutory Construction*

In the opening sentence of Judge Oakes' opinion, he deemed the issue of statutory interpretation "a difficult question."[45] One

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[42] *Lieberman*, 771 F.2d at 37. The Second Circuit's approach regarding the weight to be accorded the FTC's administrative determination differs markedly from the approach taken by the Fifth Circuit in Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985). *See* note 18 *supra*. In *Mattox*, the court deferred completely to the FTC's interpretation of the statute and relied on Chevron U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837 (1984), to make that determination. The *Chevron* Court held that as long as a determination made by an administrative agency was "reasonable," it should not be disturbed by a reviewing court. *Id.* at 844. In contrast, the *Lieberman* court did not defer at all to the agency's judgment. 771 F.2d at 37.

[43] *Lieberman*, 771 F.2d at 33.

[44] *Id.*

[45] *Id.*

reason for this was that the language regarding public disclosure that Congress chose in section 6(f) of the Federal Trade Commission Act (FTC Act)[46] was phrased similarly to the language used in section 7a(h) of HSR, yet the two sections had received different interpretations by federal courts.[47] Section 6(f), prior to its amendment in 1980, authorized the FTC to "*make public* . . . information obtained by it hereunder . . ." except trade secrets and names of customers.[48] Section 7a(h) presently renders premerger information filed pursuant to the section exempt from disclosure under the Freedom of Information Act and further provides that the information shall not be "*made public.*"[49] The Second Circuit, therefore, had to determine whether the public disclosure restrictions contained in the two statutes should be read to apply to the same group of people, or whether it was possible that state attorneys general were part of the section 7a(h) "public," while not being part of the section 6(f) "public."

The state attorneys general urged that the two statutes should be read together, in essence, *in pari materia*[50] to determine congressional intent. Since cases prior to the 1980 amendment had held that section 6(f) did not encompass state attorneys general, if the Second Circuit interpreted sections 7a(h) and 6(f) *in pari materia*, then the word "public" in section 7a(h)

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[46] FTC Act, ch. 311, 38 Stat. 717, 721-22 (1914) (codified as amended at 15 U.S.C. § 46(f) (1982 & Supp.)).

[47] *See* notes 51-64 and accompanying text *infra*. For example, in section 6(f) Congress authorized the FTC to "make public" certain information. A considerable amount of litigation arose as a consequence of the ambiguity of the word "public" in that section. The courts that addressed the question held that state attorneys general were *not* members of the public. However, the term "public" in section 7a(h) was interpreted to include state attorneys general. Section 6(f) was amended in 1976 to specifically reflect that state attorneys general were not members of the public pursuant to that section. For the text of the amendment, see note 57 *infra*.

[48] 15 U.S.C. § 46(f) (1982) (emphasis added).

[49] 15 U.S.C. § 18a(h) (1982) (emphasis added).

[50] *In pari materia* analysis is an aid to statutory construction and is employed by courts to gauge legislative intent from the face of an ambiguously worded statute, or one whose meaning can't be determined from its face. Theoretically, faced with such a problem, a court would look to another statute that treats the same subject matter as the statute in question and would construe the two statutes together, or, *in pari materia*. *See* United States v. Freeling, 31 F.R.D. 540, 549 (S.D.N.Y. 1962) ("statutes which use identical words in the same sense are to be construed in *pari materia* or with reference to one another.") (citing 2 SUTHERLAND, STATUTORY CONSTRUCTION, § 5201 *et seq.* (Horack ed. 1943)).

would also be held to not include state attorneys general.

The importance of *in pari materia* to the state attorneys general argument in *Lieberman* is obvious from a brief review of the litigation that occurred under section 6(f). Ironically, section 6(f) has been invoked extensively by the FTC to *justify* the release of premerger information to state attorneys general in the face of challenges to these releases emanating from the private sector.[51] In *Interco v. FTC*,[52] the United States District Court for the District of Columbia considered a challenge by the Interco Company to the FTC's decision to allow twenty-two state attorneys general access to premerger information obtained by the FTC from Interco pursuant to a premerger investigation.[53] The plaintiffs argued that the state attorneys general were members of the "public" under section 6(f) and therefore the FTC did not have the authority to release trade secrets to them.[54] The Court held that the FTC was authorized by section 6(f) to release the information.[55] Significantly, the *Interco* court had to interpret what Congress meant in section 6(f) when it said that the FTC was authorized to make certain information available to the "public." Section 6(f) had omitted any definition of the word "public" and had made no reference, either in the text of the statute, or in the legislative history of the original FTC Act as to whether state attorneys general should have access to only the information to which the public was allowed access, or whether they could have access to trade secrets.[56] After the *In-*

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[51] *See, e.g.*, Fleming v. FTC, 670 F.2d 311 (D.C. Cir. 1982) (suit seeking temporary restraining order and injunction against release of documentary materials to state attorneys general by FTC); Jaymar-Ruby v. FTC, 651 F.2d 506 (7th Cir. 1981) (declaratory judgment action seeking injunctive relief barring proposed disclosure by Federal Trade Commission of its investigative files to state attorneys general). These actions arose due to the ambiguity of the word "public" in the original section 6(f) of the FTC Act. In *Fleming* and *Jaymer*, the plaintiff-corporations argued that the FTC would make their trade secrets public by giving them to state attorneys general. Both courts held that the FTC had the authority to release confidential information to state attorneys general and that these releases were not "public" disclosure. *Jaymar*, 651 F.2d at 512; *Fleming*, 670 F.2d at 317; *see also* Interco v. FTC, 490 F. Supp. 39 (D.D.C. 1979), discussed at notes 52-55 and accompanying text *infra*.

[52] 490 F. Supp. 39 (D.D.C. 1979).

[53] *Id.*

[54] *Id.* at 46.

[55] *Id.* at 41.

[56] Section 6(f) of the FTC Act, as originally enacted stated that the FTC has the authority

> [t]o make public from time to time such portions of the information obtained

terco court concluded that state attorneys general were *not* members of the public, and could have access to trade secrets, the result was effectively codified by Congress.[57]

Since there had been no dispositive determination of the meaning of the "public" provision of section 7a(h) at the time that the state attorneys general brought their declaratory judgment action in *Lieberman*, the meaning attributed to the similar provision in section 6(f) became enormously important for the plaintiffs. Whether sections 6(f) and 7a(h) should be interpreted *in pari materia* was a threshold question because if this analysis was used, the court would be forced to concede that state attorneys general were not members of the public, as did the courts that had interpreted section 6(f). The district court in *Lieberman*, in deciding whether to apply this analysis, determined that the two statutes were enacted for similar purposes.[58] The court

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by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual or special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

15 U.S.C. § 46(f) (1976).

One argument successfully invoked by the FTC in *Lieberman* was that Congress's choice of the word "hereunder" limited the FTC's authority to disclose information not obtained under this section, i.e., information obtained under section 7a(h).

[57] In 1980 the statute was amended to include the following, after the last sentence:

Provided that the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, *except that the Commission shall disclose such information . . . to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such . . . State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.*

15 U.S.C. § 46(f) (1982) (emphasis added).

[58] *Lieberman*, 598 F. Supp. at 675. The same conclusion was also reached by the Fourth Circuit in Menzies v. FTC, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957). In *Menzies*, the Court specifically held that the Clayton Act and the FTC Act were statutes *in pari materia* and stated that, "[t]he Federal Trade Commission Act and the Clayton Act were enacted as remedial measures designed to correct the apparent deficiencies in the Sherman Act through administrative proceedings. They are statutes *in pari materia* which were enacted in the same session of Congress, and, therefore are to be construed together so as to reinforce their common legislative purpose." *Id.* at 83 (citation omitted). In Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985), *see* note 18 *supra*, the court distinguished *Menzies* and this analysis by noting that HSR merely amended the Clayton Act and was technically not enacted in the same session of Congress as the FTC Act. The court found that *in pari materia* finds its greatest force when statutes are enacted in the same session of Congress. The *Mattox* court correctly recognized that the

stated that "[b]oth section 7a(h) . . . and section 6(f) . . . were designed to protect the confidentiality of information provided to the Commission or to the Department of Justice."[59] Consequently, the district court found that the use of *in pari materia* analysis was justifiable.[60] The court accordingly held that, since the two statutes had similar language and common purposes, the two "public" provisions should be read to mean the same thing, essentially that state attorneys general were not members of the public.[61]

The Second Circuit came to precisely the opposite conclusion, finding that the two statutes had very different objectives.[62] The Second Circuit concluded that the difference between sections 7a(h) and 6(f) was that section 7a(h) limited the public's access to certain premerger information, while section 6(f) was designed to provide for the release of the information in certain circumstances.[63] Consequently, the Second Circuit found that an *in pari materia* analysis was not an appropriate aid to statutory construction in this case, and that the *Interco* court's interpretation of the "public" provision of section 6(f) was therefore irrelevant.[64] Thus, the Second Circuit was constrained to rely on the scant legislative history underlying the passage of the statute.

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statutes were enacted sixty-two years apart. *See also* United States v. Papercraft, 540 F.2d 131 (3d Cir. 1976) (finding that section eleven of the Clayton Act and section five of the FTC Act constituted separate weapons in the government's antitrust arsenal and accordingly should not be read *in pari materia*).

[59] *Lieberman*, 598 F. Supp. at 675.

[60] *Id.*

[61] *Id.*

[62] *Lieberman*, 771 F.2d at 40.

[63] The court determined that "Congress enacted section 6(f) to provide information to the public, albeit with an exception for trade secrets and confidential commercial information. Section 7a(h), however, plays an important limiting role in a comprehensive regulatory scheme that offers no place for state law enforcement efforts." *Id.* at 40 (citation omitted).

[64] *Id.* Despite the general acceptance of the *Interco* rule, which is now codified as section 6(f) of the FTC Improvements Act, the Second Circuit nonetheless questioned the rule's propriety and stated that "[e]ven if we were convinced that section 7a(h)'s 'public' should be given the same meaning as section 6(f)'s 'public,' which we are not, we could of course disagree with the *Interco* court's interpretation of the term." *Id.* at 40 n.16. The Second Circuit was clearly at liberty to disagree with the *Interco* court's interpretation of the term "public" at the time that *Interco* was decided. Realistically however, the Second Circuit no longer had the option to disagree — the result in the case had been codified by Congress. *See* note 57 *supra*.

The legislative history behind section 7a(h) offers little assistance in interpreting the statute's meaning. In fact, the only legislative history behind HSR that sheds any light on the issue is a statement made by Congressman Rodino, one of HSR's legislative sponsors, on the floor of the House, during the debates preceding the passage of the Act. Congressman Rodino, while comparing the vastly different Senate and compromise versions of section 7a(h), said that "[g]overnment agencies themselves cannot discretionarily release premerger data to *anyone*, but can disclose it only in 'judicial or administrative proceedings.' "[65] The Second Circuit concluded that Rodino's statement should be accorded substantial weight.[66] The court found that this statement supported the conclusion that Congress had intended to restrict access to premerger information to anyone outside of the federal government, therefore substantiating the FTC's argument that state attorneys general should not have access to confidential premerger information.[67]

The attorneys general attempted to show that the statement was taken out of context.[68] They also solicited Rodino's opinion of the meaning of section 7a(h) while the issue was being litigated, which was, of course, well after the section was enacted.[69] Congressman Rodino, in a letter to Joseph I. Lieberman,[70] explained that the disclosure of premerger material to state attorneys general had not been considered by the House prior to the enactment of HSR.[71] The Connecticut District Court apparently

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[65] 122 CONG. REC. 30,877 (1976) (statement of Rep. Rodino) (emphasis added).

[66] *Lieberman*, 771 F.2d at 39. In making this determination the court relied on Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985) (although single legislative sponsor's statements do not control interpretation of a statute they deserve to be accorded substantial weight).

[67] *Lieberman*, 771 F.2d at 39.

[68] The attorneys general contended that the statement was made while Rodino was comparing the different Senate and compromise versions of section 7a(h). The Senate version of section 7a(h) had envisioned that premerger information would be "subject to" the Freedom of Information Act. The compromise version, as enacted, rendered the information "exempt from" FOIA disclosure. *Id.*

[69] Letter from Joseph I. Lieberman to Peter W. Rodino, Jr. (August 10, 1984).

[70] Joint Appendix at 53, Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985).

[71] Congressman Rodino concluded his letter by stating that "I cannot recall any deliberations during legislative action on the Hart-Scott-Rodino Act on the subject of sharing premerger information with state law enforcement officials." Congressman Rodino did however admit that "the legislative history of the Hart-Scott-Rodino Act is now history and cannot be altered by anything that I (or anyone else) says or does at this point." *Id.* at 54.

did not rely at all on the letter. On appeal, the Second Circuit discounted the value of the post-enactment letter, stating that "[o]f course, the Congressman acknowledges that he cannot rewrite the legislative history. For that reason, we find the letter of little or no probative value."[72]

The court relied heavily on Congress' designation of an express exception to the disclosure restriction for members of Congress and congressional subcommittees.[73] The court surmised that if state law enforcement officials were not members of the public pursuant to section 7a(h), neither were members of Congress.[74] Essentially, the Second Circuit found that, because Congress had provided an express exception for itself, it knew how to make an exception if it wanted to, and that therefore the court should not imply other exceptions not expressly set forth. However, this literalist argument fails to account for plain human error, that is the possibility that Congress never considered whether state attorneys general should have access to the information.[75] It also places no emphasis whatsoever on cumulative legislative intent. In particular, the legislative history underlying the statute's passage provides no indication that state access to premerger information was ever considered or even discussed. State antitrust enforcement, nevertheless, consumed a full one-third of the legislative package. It is not likely that Congress would have deliberately enacted legislation that would have assisted and frustrated state antitrust enforcement simultaneously.

Furthermore, the method of statutory construction used by the Second Circuit, *expressio unius est exclusio*, or "mention of one thing implies exclusion of another," although recently "revived" by the Supreme Court, has been accurately criticized as overly literal in application.[76] The maxim essentially operates to

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[72] *Lieberman*, 771 F.2d at 39 (footnote omitted) (citing Bread Political Action Comm. v. FEC, 455 U.S. 577, 582 n.3 (1982) (finding that statements made by legislators after passage of Act are only personal views and have no probative weight)).

[73] *Lieberman*, 771 F.2d at 38. *See* text accompanying note 8 *supra*.

[74] *Id.*

[75] Although Rodino's post hoc characterization of HSR's legislative history was correctly determined to have little or no probative value standing alone, it is clear that the legislative history of the Act confirms his assessment. Taken together, Rodino's post hoc letter and the legislative history confirm the fact that state access to premerger information had not been contemplated by Congress.

[76] *See* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpre-*

make "what Congress enacts" to be "precisely what Congress intends," therefore leaving no room for statutory interpretation.[77] The maxim has been criticized because it makes unrealistic assumptions about congressional power insofar as it assumes that lawmakers will continually respond to new situations not expressly covered by the plain language of the original statute.[78] Courts that interpret statutory language literally, as did the *Lieberman* court with section 7a(h), in effect remand the problem to Congress and therefore delegate to Congress the task of reinterpreting the meaning of its own vague statutory language.[79] This is not to say that the *Lieberman* court did not attempt to determine congressional intent — it did. It erred however by attempting to cull the answers to its questions from a source that it knew offered no assistance: the legislative history behind HSR. Had the Court looked to the legislative history of the FTC Improvements Act, it would have undoubtedly concluded that Congress had acknowledged that federal-state information sharing is in the national interest.

The Second Circuit also noted that facilitating state enforcement of antitrust law by providing states with premerger information would retard the federal premerger review process, a process designed to respond quickly "in the fast world of

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tation in the Supreme Court, 95 HARV. L. REV. 892 (1982). The maxim had been largely ignored by the Supreme Court until it was resurrected in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974). *See* Note, *supra*, at 895 n.28. The *National Railroad* court relied on Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929) to support the maxim's revival. *Id.*

[77] Note, *supra* note 76, at 895.

[78] *See* Note, *supra* note 76, at 894-95. However, this is precisely what has happened in the instant case. Senator Metzenbaum has introduced a Bill into the United States Senate, S. 2022, 99th Cong., 2d Sess. (1986), which would overrule the results in the *Lieberman* and *Mattox* cases. The Bill provides:

> Section 7a(h) of the Clayton Act is amended by inserting before the period at the end thereof the following: ", or to officers and employees of appropriate [f]ederal law enforcement agencies or to any . . . State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information or documentary material will be maintained in confidence. The maintenance of confidence requirement does not preclude any use of such information or documentary material for official law enforcement purposes, including the preparation of comments regarding consent agreements or decrees proposed by the [Federal Trade] Commission or the Attorney General [of the United States] under any of the antitrust laws or the Federal Trade Commission Act.

S. 2022, 99th Cong., 2d Sess. § 8 (1986).

[79] Note, *supra* note 76, at 894-95.

mergers."[80] Apparently, the court construed congressional intent as placing greater emphasis on the speed with which premerger investigations are concluded than on the effectiveness of the investigations. The court found that Congress had not countenanced procedural delays, which would surely occur when state law enforcement officials intervened.[81] Although procedural delays may occur if state law enforcement officials seek to enjoin illegal mergers, it is unlikely that a great delay would occur if the FTC merely provided state attorneys general with premerger information. The mere sharing of premerger information in no way guarantees that state governments will impulsively seek to enjoin mergers.

While the Second Circuit's opinion in *Lieberman* conforms to the plain meaning and prima facie legislative history of section 7a(h), the decision directly contravenes the public policy supporting a federal-state sharing of law enforcement information. A careful review of the legislative history behind section 7a(h) clearly shows that Congress never squarely considered whether state attorneys general should be entitled to receive premerger information under section 7a(h). Moreover, when Congress or the courts have been presented with almost identical questions in the past, there has been overwhelming support for the notion that a federal-state sharing of law enforcement information is in the public interest.[82]

If the Second Circuit had looked to the broader policies underlying HSR, it would have undoubtedly found that its decision to exclude state access to premerger information actually frustrates time worn congressional policy.[83] In order to override the

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[80] *See* 126 CONG. REC. 11,831 (1980). Representative Preyer discussed the congressional policy of the FTC cooperation with state attorneys general and stated that "[in the FTC Improvements Act] we intended to confirm the Commission's policy of providing documents and information on a *nonpublic* basis to . . . State attorneys general for State law enforcement purposes. This sharing of information is in the best spirit of Federal-State cooperation." 126 CONG. REC. 11,381 (1980) (statement of Rep. Preyer) (emphasis added).

[81] *Lieberman*, 771 F.2d at 40.

[82] The legislative history underlying the FTC Improvements Act specifically addresses and encourages federal-state information sharing of material submitted to the FTC by merging companies. *See* note 80 *supra*. Furthermore, federal courts, in applying sections of the FTC Improvements Act have recognized this well established congressional policy. *See* notes 51-55 and accompanying text *supra*.

[83] For example, due to the litigation created by the ambiguous nature of section 6(f) of the original FTC Act, Congress had to amend the Act in 1980 so that it specifically

Lieberman result, Congress must enact legislation. Senator Metzenbaum has accordingly introduced a bill into Congress which, if enacted, would override the result reached by the *Lieberman* court.[84]

Conclusion

As a result of the Second Circuit's decision in *Lieberman*, whenever state law enforcement officers request premerger information from the FTC and are denied, they will be unable to compel the FTC to provide them with the information. Accordingly, state antitrust enforcement will be stifled and individual consumers will once again be forced to rely on the federal government to assert their rights.[85] This state of affairs clearly flies in the face of the *parens patriae* provision of HSR and should be promptly reversed by the legislation now pending in Congress.

Roger Slade

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provided that the FTC could release trade secrets to state attorneys general. Congress did this despite the fact that the decisions in those cases were favorable to state attorneys general. Now however, due to the Fifth and Second Circuit's literalist reading of section 7a(h) of HSR, Congress must amend that statute to express its intentions even though congressional intent can be easily gleaned from a history of federal-state cooperation and the 1980 amendment to the FTC Act.

[84] *See* note 78 *supra*.

[85] HSR was enacted to enhance the federal government's premerger review program "before the assets, technology and management of the merging firms are hopelessly and irreversibly scrambled together." H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 2637, 2637. Assuming, *arguendo*, that the federal government, after a premerger review has been completed, sanctions a merger, and state law enforcement officials subsequently seek to enjoin it, in all likelihood it will be too late. *Lieberman's* net effect will be to relegate the states to a position similar to that occupied by the federal government prior to the passage of HSR. Of course, this outcome is acceptable if you assume that the federal government can simultaneously represent individual, state and national interests.