Mergers Face Steeper Slopes In State Antitrust Reviews

By **Ellen Jalkut and William Reiss** (May 13, 2025)

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Antitrust enforcement in the ski industry has been a rarity. But recently, the New York attorney general prevailed in an action challenging the acquisition and shuttering of a ski mountain in the Syracuse area.

The summary judgment victory in New York v. Intermountain Management Inc. was notable because, for the first time, a court explicitly held that the prohibition on agreements that restrain competition, as set forth in New York's antitrust law, the Donnelly Act, encompasses mergers and acquisitions.

In his decision, Justice Robert Antonacci, a New York Supreme Court justice in Onondaga County, clarified that in evaluating claims under the Donnelly Act, a court may rely upon Clayton Act jurisprudence.

This article examines the pertinent facts and holding of this case, which was limited to New York law, to underscore the growing trend among state antitrust enforcers to scrutinize and challenge anticompetitive conduct under state law.

New York Challenges Ski Mountain Acquisition

In 2022, the New York attorney general filed suit against Intermountain, challenging its $2.25 million acquisition of Toggenburg Mountain the year before. At the time of the acquisition, Intermountain already owned and operated two ski areas, Song Mountain and Labrador Mountain, in the same area.[1]

All three ski areas could be accessed from downtown Syracuse in approximately 30 minutes or less.[2] There was no dispute that Intermountain purchased Toggenburg with the intent to close it.

On the day the transaction closed, Intermountain issued a press release stating that Toggenburg's operations would be absorbed into Song and Labrador because "three ski resorts drawing from the same pool of skiers and snow boarders every year is a challenge."[3]

In an interview that ran the next day in Ski Area Management, Intermountain's majority shareholder and operator said that "[t]he idea here is primarily to purchase market share without the associated expenses of opening another ski hill."[4]

In addition to the purchase and sale agreement and asset purchase agreement, the parties agreed that in exchange for $200,000, the controlling owners of Toggenburg, John and Christine Meier and their family, would not open a competing business within a 30-mile radius of Toggenburg.

The Meiers, however, were allowed to continue operating another ski mountain, Greek Peak, located 45 minutes outside of downtown Syracuse, subject to a no-poach agreement covering Intermountain's employees.[5]

In its first and second causes of action, the New York attorney general alleged that Intermountain's acquisition of Toggenburg and the noncompete and no-poach agreements violated the Donnelly Act, New York's antitrust statute, by giving Intermountain a monopoly on the season-pass skiing market in the Syracuse area.[6]

Both parties sought summary judgment. A critical dispute between the parties centered on whether the court could rely upon federal Clayton Act jurisprudence in analyzing whether an acquisition violated New York's Donnelly Act.[7]

New York State Law

With the exception of nonprofits and certain healthcare entities, New York state law does not expressly regulate merger activity. When the Donnelly Act was passed in 1899, the prevailing concern was that trusts or agreements between direct competitors resulted in suppression of competition and control of markets.

The U.S. Congress dealt with the interstate effect of these trusts by passing Section 1 of the Sherman Act, which declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations … illegal."

Around the same time, almost all states passed laws outlawing similar conduct.[8] The Donnelly Act proscribes "[e]very contract, agreement, arrangement or combination" that establishes or maintains a monopoly or restrains "competition or the free exercise of any activity in the conduct of any business or in the furnishing of any service in the state."

Acquisitions necessarily involve agreements between separate entities, and thus could in theory be policed under Section 1 of the Sherman Act, and, by extension, the Donnelly Act. However, in its early years, the Sherman Act proved more successful in combating cartels than in combating anticompetitive acquisitions.[9]

As a result, in 1914 Congress passed Section 7 of the Clayton Act, which explicitly prohibits stock acquisitions that have the effect of substantially lessening competition or creating a monopoly. Nonetheless, the U.S. Supreme Court continued to limit the government's regulatory powers over acquisitions, whether raised as violations of the Clayton Act or the Sherman Act.

In 1950, Congress strengthened Section 7, closing loopholes to bring a broader range of mergers and other types of acquisitions under the Clayton Act's less demanding standard.[10] With this amendment, the Supreme Court embraced the government's ability to police anticompetitive mergers and acquisitions under the Clayton Act.[11]

Although the Supreme Court eventually recognized that elimination of significant competition between merging companies may also constitute a violation of Section 1 of the Sherman Act, most merger challenges are brought and analyzed exclusively under Section 7 of the Clayton Act.[12]

Despite the changes in federal antitrust laws, New York did not amend the Donnelly Act to address mergers or acquisitions, nor did it enact a separate antitrust statute. While the New York Court of Appeals held that the Donnelly Act "should generally be construed in light of Federal precedent," it recognized that the Donnelly Act was modeled solely on the Sherman Act.[13]

Prior to the Toggenburg decision, only one court had considered the appropriateness of applying Clayton Act jurisprudence in evaluating a Donnelly Act challenge to an acquisition, acknowledging that it was an open question.[14]

Application of the Donnelly Act to the Acquisition of Toggenburg Mountain

Notwithstanding the lack of clear precedent, Justice Antonacci held that Intermountain violated the Donnelly Act.

In reaching this conclusion, the court began with the basic requirement that to establish a claim under the Sherman Act or the Donnelly Act, the plaintiff must "[establish] both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market."[15]

Based on deposition testimony and documentary evidence, the court held that the parties to the acquisition understood that the sale was contingent upon Toggenburg's closure, and the prohibition against the Meiers' operating another ski resort within a 30-mile radius.[16] Hence, the agreement was not unilateral in nature, but contained reciprocal obligations.

After establishing the existence of a reciprocal agreement, the court quickly dispensed with the idea that the agreement was outside the purview of the Donnelly Act. Supporting this conclusion, the court cited case law recognizing the convergence of merger review under Section 1 of the Sherman Act — the model for the Donnelly Act — and Section 7 of the Clayton Act.

With no daylight between the respective standards, the court concluded "that a state court evaluating the merits of a Donnelly Act claim may properly consider relevant federal jurisprudential guidance arising under the Clayton Act."[17]

Despite establishing the relevance of Clayton Act jurisprudence, the court relied entirely on Sherman Act cases to conclude that the restraint at issue was a per se violation of the Donnelly Act.

Based on the agreement to close a competing facility and buy out a competitor from a specific geographic area, the court concluded that the parties to the acquisition entered into an impermissible market allocation agreement.[18]

Proposed Changes to New York's Antitrust Laws

Many commentators have speculated that federal enforcement of mergers will wane as the new administration looks to refocus the priorities of the Federal Trade Commission and U.S. Department of Justice. Concomitantly, state enforcers have announced that they are prepared to challenge mergers with or without government backing.

In 2024, Washington and Colorado initiated actions to enjoin the Albertsons-Kroger merger several weeks before the FTC brought its own action.

As part of the increased interest in state antitrust enforcement, numerous states are looking to strengthen their antitrust statutes. Relevant to this case, the New York Senate passed legislation to expand the coverage of New York's antitrust laws.

This bill, titled the 21st Century Antitrust Act, would outlaw unilateral action in the form of

unlawful monopolization or monopsonization.[19] The proposed law also requires premerger notification in the state of New York where such notification is required by the federal Hart-Scott-Rodino Antitrust Improvements Act.

New York is not alone in considering premerger notification. Nine states have introduced similar legislation requiring premerger filings this year, with Gov. Bob Ferguson of Washington signing the Uniform Antitrust Premerger Notification Act into law during the first week of April.

In the Intermountain case, even without specific state statute authorization, the New York attorney general expended resources successfully challenging an acquisition costing a mere $2.25 million, which affected a metropolitan area with fewer than 200,000 residents.

The clear takeaway is that no acquisition is too small to avoid scrutiny in an era of increased state antitrust enforcement, and enforcers will use any tool available.

Practitioners should advise clients of the risk of enforcement in any merger and acquisition, particularly when including ancillary agreements that may have additional affects on competition. Even with relatively small transactions affecting a market in only one state, state governments may challenge the deal.

In order to protect clients in an era of enhanced state antitrust enforcement, attorneys need to gain an understanding about the relevant product and labor markets to help structure deals in a way to avoid unreasonable anticompetitive effects.

There are times when a deal may require ancillary agreements. For instance, if a company is acquiring a business unit from a large conglomerate that has the capital and knowledge to quickly reenter the market, there may be a basis for a noncompete agreement that does not run afoul of the antitrust laws.

However, while it may be typical to include ancillary agreements, they are not always necessary, and their inclusion may suggest an unlawful intent. In the Toggenburg acquisition discussed above, the court found there was no competitive justification for the noncompete.

It is highly unlikely that the Meiers could acquire the land, permits and capital to build a new ski mountain in the Syracuse area when development of new ski areas has decreased to a trickle in the past 30 years.

Beyond noncompetes in the product market, counsel should consider how restrictions on employment may affect the labor market. If the acquisition involves employees with niche skills or affects only a small geographic area, agreements restricting the movement of employees can have outsized impacts that could draw government scrutiny.

As this case demonstrates, the increased interest in antitrust requires practitioners to reevaluate agreements that have become routine in recent decades.

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[1] New York v. Intermountain Management Inc., Sup Ct, Onondaga County, Feb. 24, 2025, Antonacci II, J.S.C., index No. 8588/22 ("Decision") at 4-5, 11.

[2] Id. at 37.

[3] Id. at 11.

[4] Id.

[5] Id. at 27, 34.

[6] Id. at 2.

[7] Id. at 22.

[8] James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 135 U. Pa. L. Rev. 495, 499 (1987).

[9] Herbert Hovenkamp, Antitrust Policy, Federalism, and the Theory of the Firm: A Historical Perspective, 59 Antitrust L.J. 75, 78 (1990).

[10] U.S. v. Rockford Meml. Corp., 898 F.2d 1278, 1282 (7th Cir. 1990).

[11] U.S. v. Von's Grocery Co., 384 U.S. 270, 276 (1966) (cleaned up).

[12] U.S. v. First Nat. Bank & Tr. Co. of Lexington, 376 U.S. 665, 673 (1964).

[13] Anheuser-Busch Inc. v. Abrams, 71 NY2d 327, 334-5 (1988).

[14] Reading Intern. Inc. v. Oaktree Capital Mgt. LLC, 317 F. Supp. 2d 301, 333 n. 22 (S.D.N.Y. 2003) (dismissing Donnelly Act claims based upon acquisition because Clayton Act claims were dismissed).

[15] Decision at 24 citing Global Reins. Corp. U.S. Branch v. Equias Ltd., 18 NY3d 722, 731 (2012) (citations omitted).

[16] Id. at 29.

[17] Id. at 30-31.

[18] Id. at 32.

[19] 2025-26 NY Senate Bill S.335 available at https://legiscan.com/NY/text/S00335/id/3035785.