



## COMMENTARY

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### **TRANSITION REPORT: THE STATE OF STATE ANTITRUST ENFORCEMENT**

This report is prepared for the National State Attorneys General Program of Columbia Law School. It has two objectives. The first is to assess the state of recent state antitrust enforcement, including the important relationship between state and federal antitrust enforcement agencies. The second is to consider, in light of that assessment, how state antitrust enforcement might be improved at a unique moment in history – the transition to a new federal administration in Washington, DC.

I have had a long and continuing involvement in state antitrust enforcement, including service as Chief of New York State’s Antitrust Bureau from 1995 to 1999.<sup>1</sup> The views expressed here are solely my own, based on many years of personal experience as a state antitrust enforcement official, private practitioner, and executive director of a not-for-

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<sup>1</sup> See Attachment 1 for a summary of the author’s relevant background.

profit that supports state antitrust enforcement. Those views have also been informed by a series of confidential interviews conducted specifically for this project in late 2008 and early 2009 with a diverse group of sophisticated, experienced antitrust counsel – state antitrust enforcers, members of the private bar (both plaintiff and defense), academics and current and former federal antitrust enforcement officials.<sup>2</sup> I am grateful for the time the interviewees spent talking with me, but – as noted – the views expressed here are mine alone.

The first section of this report contains a brief historical overview of state antitrust enforcement to provide some context for the remaining sections of the report. The second section examines the states’ recent record on antitrust enforcement. The final section makes recommendations to improve the effectiveness of state antitrust enforcement.

## **I. Brief Historical Overview of State Antitrust Enforcement**

The first state antitrust statutes predated the Sherman Act of 1890.<sup>3</sup> State enforcement officials were active in some of the earliest major antitrust litigation.<sup>4</sup> Beginning with the administration of Theodore Roosevelt, when the concentration of economic power became a prominent national political issue, the federal government, because of its greater reach and resources, displaced the states as the principal source of government antitrust enforcement. Some states have been very active over the years in antitrust enforcement, while others have not.

State antitrust enforcement was reinvigorated in the 1970’s as the result of two Congressional initiatives. One, the Crime Control Act of 1976, provided financial resources

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<sup>2</sup> See Attachment 2 for a list of the individuals with whom the author spoke.

<sup>3</sup> See Statement of Harry First Before the Antitrust Modernization Commission ([http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Statement-First.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf)), which summarizes the history of state antitrust enforcement with citations to relevant books and articles for those interested in additional detail.

<sup>4</sup> The states, *e.g.*, brought challenges to the Standard Oil, sugar, beef and tobacco trusts. *Id.*

to state attorneys general for antitrust enforcement.<sup>5</sup> The other, an amendment to the Hart-Scott-Rodino Act (“HSR Act”), expanded the enforcement power of state attorneys general by allowing them to sue *parens patriae* on behalf of consumers to recover treble damages for violations of the Sherman Act.<sup>6</sup> Those developments enabled the states to play an even more prominent role in the 1980’s when federal antitrust enforcement was scaled back by the Reagan Administration.<sup>7</sup> Given the divergent enforcement philosophies between the Reagan Administration and many state attorney generals, their relationship was often more contentious than cooperative. This divergence of views had some practical consequences, including litigation that resulted in limiting the states’ direct access to pre-merger HSR filings<sup>8</sup> and the publication of state Vertical Restraints and Horizontal Merger Guidelines which differed from their federal counterparts.<sup>9</sup>

As federal antitrust enforcement once again became more vigorous during the first Bush and subsequent Clinton Administrations, the relationship between federal and state antitrust enforcers became more cooperative and productive. With regard to merger enforcement, for example, the states and the two federal enforcement agencies (DOJ and the FTC) jointly promulgated the State-Federal Protocol for Coordination in Merger

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<sup>5</sup> Pub. L. No. 94 -503, 90 Stat. 2407.

<sup>6</sup> See 15 U.S.C. §15c.

<sup>7</sup> For example, the states became the only public enforcement agencies to pursue resale price maintenance cases, such as *State of New York et al. v. Salton, Inc.*, Civ. Action No. 02-CV-7096(LTS)(S.D.N.Y. 2002) and *New York v. Reebok International, Inc.*, 96 F.3d 44 (2d Cir. 1996).

<sup>8</sup> See *Lieberman v. FTC*, 771 F.2d 32 (2d Cir. 1985) and *Mattox v. FTC*, 752 F.2d 116 (5<sup>th</sup> Cir. 1985). The inability of states to obtain pre-merger filings directly from the federal agencies led to a pragmatic work-around that enables the states to obtain the same materials voluntarily from the merging parties in return for a commitment by the states to coordinate their investigation and reduce the parties’ burden. See Voluntary Premerger Disclosure Compact at <http://www.naag.org/assets/files/pdf/200612-antitrust-voluntary-premerger-disclosure-compact.pdf>. As discussed *infra*, this solution has been beneficial, but not ideal.

<sup>9</sup> The Guidelines were published through the National Association of Attorneys General (“NAAG”). See <http://www.naag.org/protocols.php>.

Investigations.<sup>10</sup> Cooperation also increased in the non-merger area, exemplified by the *Microsoft* litigation.<sup>11</sup>

With the advent of the second Bush Administration, the broad antitrust enforcement consensus that had existed for the past twelve years among all the agencies – the states, DOJ and the FTC – began to come undone. The shift was gradual at first. It became more precipitous as the federal agencies - DOJ in particular - adopted an enforcement approach increasingly characterized by presumptions favorable to defendants and a faith in the markets' ability to overcome the effects of anticompetitive conduct without government intervention. As a consequence, the relationship between top DOJ officials (*i.e.* those politically appointed rather than career staff) and state enforcement officials deteriorated, reaching what may be an historical nadir at the end of the second Bush Administration. Once again, *Microsoft* is a good barometer: in 2007, DOJ allowed most of the Final Judgment to lapse in one of its signature antitrust victories and joined its prior adversary Microsoft in an unsuccessful effort to defeat the states' motion to extend the term of their Final Judgment.<sup>12</sup>

What do the data show about state antitrust enforcement over the years? The best available data source, although incomplete, is the recently compiled NAAG State Antitrust

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<sup>10</sup> See [http://www.naag.org/assets/files/pdf/at-state\\_fed-protocol.pdf](http://www.naag.org/assets/files/pdf/at-state_fed-protocol.pdf). It is not uncommon for the states and federal agencies to work together in investigating and challenging mergers, sometimes successfully and sometimes not. See, e.g., In the Matter of Chevron Corp. 2001 FTC LEXIS 135 (Sept. 7, 2001); In the Matter of Exxon Corp., 201 FTC LEXIS 18 (Nov. 30, 1999); United States v. USA Waste Serv., Inc. 1992-Trade Cal (CCH) ¶ 72,678 (N.D. Ohio 1999); United States v. Waste Management, Inc., 2000-1 Trade Cas. (CCH) ¶ 72,791 (E.D.N.Y. 1999); FTC v. Arch Coal Inc., 329 F. Supp. 2d 109, 119-23 (D.D.C. 2004); and United States v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>11</sup> The *Microsoft* case was the longest, most sustained federal-state coordinated antitrust enforcement effort ever – the joint prosecution of a complex monopoly case by DOJ and twenty states from discovery through trial and appeal until the remedies phase, when approximately half the states broke ranks with the new federal enforcement team appointed after the 2000 election. The state coalition contained a diverse group of states, both politically and geographically.

<sup>12</sup> See *New York v. Microsoft Corp.*, 531 F. Supp.2d 141 (D.D.C. 2008).

Litigation Database.<sup>13</sup> These data were analyzed in two comments submitted to the Antitrust Modernization Committee, by Professor Harry First of NYU Law School and by the Attorneys General of Hawaii, Maine and Oregon.<sup>14</sup> Among Professor First's conclusions: there are many more single state than multistate actions, suggesting a relatively high degree of independence among the states; approximately 25% of the cases filed from 1995-2004 had some relationship to federal enforcement efforts; the number of civil enforcement actions filed by the states and each of the federal enforcement agencies was roughly similar; and the most common subjects of state enforcement activity were horizontal restraints and mergers. The three attorneys general analyzed merger cases brought by the states and concluded that slightly more than half were filed by a single state (many in state court); a significant percentage of the multistate cases involved just two or three states; and the predominant focus of all the cases was industries characterized by local markets such as health care, retail gasoline, movie theaters, banking, retail pharmacy, department stores and asphalt.

In sum, the states have come to be regarded as a significant feature of the institutional antitrust enforcement landscape in this country. The states play a key role in maintaining healthy competition in local markets: seeking to keep them free of horizontal restraints and of the anticompetitive effects of mergers (whether the mergers are local, regional or national in scope). The states take advantage of their capability, unique among all the enforcement agencies, to pursue treble damage *parens patriae* actions on behalf of their natural citizens. The states play a prominent role in antitrust enforcement by virtue of their representation of state agencies, which are major direct purchasers of many commodities

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<sup>13</sup> See <http://www.naag.org/antitrust/search>.

<sup>14</sup> See n. 3, *supra*, with respect to Professor First's comments and [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/enforcement\\_pdf/060723\\_suppl\\_state\\_merger\\_com.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/060723_suppl_state_merger_com.pdf) with respect to the comments of the three attorneys general.

and frequent targets of bid-rigging and other price-fixing conspiracies. The states provide enforcement in substantive areas that may be deemphasized for one reason or the other by the federal agencies, like vertical restraints. The states cooperate with the federal agencies, providing resources and credibility in cases primarily of local interest, but also including those of national significance like *Microsoft*.<sup>15</sup> And finally, in times of reduced antitrust enforcement, the states not only provide an alternative source of public enforcement for aggrieved victims of anticompetitive conduct, but act as a prod to the federal agencies both to take a hard look at potential violations and to pursue meaningful remedies.<sup>16</sup>

## II. The States' Recent Record on Antitrust Enforcement

This Section assesses the states' recent record in antitrust enforcement. As previously indicated, the conclusions are necessarily subjective, based on my own observations informed by the comments of those whom I interviewed.

The overall consensus is that the states have done a very good job in a very difficult environment. The adverse environmental factors include not just a frayed relationship with DOJ, but declining or stagnant resources and a litigation landscape favoring defendants –

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<sup>15</sup> See, e.g., “Joel Klein on Microsoft: Breaking Up Is Hard To Do,” October 3, 2000, available at [www.cencom.org/INDEX.HTM/ARCHIVES/transcripts/KleinMicrosoft.htm](http://www.cencom.org/INDEX.HTM/ARCHIVES/transcripts/KleinMicrosoft.htm). (“[The states] contributed several things in terms of public perception and the legitimacy of the case. In terms of working with us, I thought they were very effective and helpful in bringing their talent and resources to bear on a very hard problem. There were times when I hoped they learnt things from us, and times when we learnt things from them.”)

<sup>16</sup> The states can be effective in this role only to the extent that they are perceived as willing and able to proceed without the federal agencies. As noted, the states recently succeeded in extending the enforcement period in *Microsoft* despite DOJ's opposition. Other examples of states' success in pursuing litigation where the federal agencies had decided not to file an enforcement action include *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) and *New York ex rel. Spitzer v. St. Francis Hospital*, 94 F.Supp.2d 399 (S.D.N.Y. 2000). To be sure, the states have also failed in actions brought after the federal agencies had declined to proceed. See, e.g., *California v. Sutter Health Sys*, 217 F.3d 846 (9<sup>th</sup> Cir. 2000) and *New York v. Kraft General Foods, Inc.*, 923 F. Supp. 321 (S.D.N.Y. 1995). State-initiated lawsuits after federal inaction are the exception rather than the rule, as they should be. Nevertheless, they provide a useful check on “false negative” federal enforcement decisions and, in that regard, are a benefit of the overlapping jurisdiction resulting from our federal system of government.

including a string of defense-oriented Supreme Court decisions and the DOJ's recent *amicus* effort devoted almost exclusively to supporting antitrust defendants.<sup>17</sup>

Another relatively recent development with the potential to undermine state antitrust enforcement efforts is the advent of the Republican and Democratic Attorneys General Associations (RAGA and DAGA). These two partisan organizations solicit funds from corporations and others likely to be targets of state law enforcement efforts, in the antitrust area and otherwise. As such, they could have adversely affected the cooperative relationships which have characterized multistate cases and other endeavors of the NAAG Multistate Antitrust Task Force.<sup>18</sup> The staff attorneys in the state antitrust enforcement bureaus, however, have maintained their professional, non-partisan approach to law enforcement notwithstanding the increased partisanship and appearance issues created by RAGA and DAGA at the attorney general level.

One question facing the states, given the presumably more aggressive enforcement agenda of the new administration, is whether to focus more or less attention on strictly local cases, as opposed to those of regional or national scope. Implicated are issues of case selection (how best to use scarce enforcement resources) and effectiveness (how best to prosecute cases involving more than one state). Traditional opponents of state antitrust enforcement have tried to limit state efforts by suggesting that state attorneys general should confine themselves to local cases, generally those too small to interest the federal agencies. Others, not previously in that camp, suggest that states should defer to the federal antitrust agencies now that more aggressive federal enforcement seems likely.

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<sup>17</sup> One of those Supreme Court decisions, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), has made it much more difficult for states to pursue treble damage *parens patriae* cases involving resale price maintenance, which had been their exclusive province among enforcement agencies.

<sup>18</sup> See <http://www.naag.org/antitrust.php>.

How best to deploy their limited resources has always been, and will continue to be, a question that confronts state attorney general offices. In the end, it is a question of judgment for state decision makers, the resolution of which depends on a host of factors: the types of matters that arise at any given time; the availability of resources; the enforcement activity of the federal agencies; the pendency of private lawsuits brought on behalf of consumers and other aggrieved parties; the strength of the cases; the importance of the issues raised by the cases; and the opportunity costs of pursuing one case as opposed to another.

Most of the individuals with whom I spoke believe the states generally have done a good job allocating their resources. I agree and believe it would be a mistake for the states to make significant changes in case selection based primarily on a local/non-local distinction or the existence of a new administration in Washington. Among those reasons: 1) it is very difficult, if not impossible, to define what is local and what is not especially in today's economy where most activity has at least some interstate effects; 2) many significant antitrust violations have disparate impacts on states and their residents that may not be remedied without state involvement;<sup>19</sup> 3) there is no guarantee that Obama Administration antitrust enforcers will take actions consistent with state interests;<sup>20</sup> 4) as the NAAG data show, most state enforcement is already done by states acting alone or with several other states although cases of national import, which tend to generate more publicity, may obscure that fact;<sup>21</sup> 5)

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<sup>19</sup> A very simple example is a large retail merger with an anticompetitive impact in a state that may go unremedied if the state's antitrust officials do not investigate even though the merger may be investigated by one of the federal agencies and/or other states.

<sup>20</sup> The states' antitrust enforcement interests will not necessarily align with those of the federal government simply because the new administration is Democratic and likely to be more aggressive than its predecessor in enforcing the antitrust laws. Thus, for example, the states could well have a different view of mergers involving a party in which United States is a major equity or debt holder or which otherwise impacts the administration's industrial policies. Moreover, state antitrust enforcers did not always see eye-to-eye with their federal counterparts when the Democrats last held sway during the Clinton years.

<sup>21</sup> *Supra*, at 5.

states may have different priorities and enforcement objectives than either DOJ or the FTC; and 6) and state attorneys general will lose the ability they currently have to influence corporate conduct if they focus exclusively on small local cases.

States, of course, must make enforcement decisions wisely. A significant part of the decision calculus will include consideration of the actions of their fellow enforcers, both at the state and federal level, as well as of private counsel. In addition, once an enforcement decision has been made, the states must be committed to providing the resources necessary to prosecute those cases effectively. The remainder of this Section considers in greater detail three critical issues: the current state of the federal/state relationship in antitrust enforcement; the states' selection of cases and the states' overall effectiveness.

#### **A. Antitrust Federalism – The Current State of the Relationship**

Dual antitrust enforcement by the states and the federal government is inherent in our federal system. Indeed, as noted, the states were active in antitrust enforcement even earlier than the federal government, no doubt as result of their historic role regulating corporations and business conduct generally.<sup>22</sup> Some critics – particularly those who favor minimalist antitrust enforcement – have decried dual enforcement as inefficient and argue that enforcement ought to be centralized in the federal government.<sup>23</sup>

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<sup>22</sup> See U.S. Department of Justice *amicus* brief (Charles Fried, Solicitor General; Charles F. Rule, Assistant Attorney General) in *State of California et al. v. Arc America et al.* (Supreme Court, October Term, 1987) (<http://www.usdoj.gov/osg/briefs/1987/sg870016.txt>): “The regulation of business practices stems from the common law and has been traditionally undertaken by the States.”

<sup>23</sup> See, e.g., Richard Posner, “Is Federalism Overrated?”, Keynote Address, American Enterprise Institute for Public Policy, April 21, 2003, available at [www.federalismproject.org/masterpages/Antitrust/Posner.pdf](http://www.federalismproject.org/masterpages/Antitrust/Posner.pdf). Some critics point to the problems created by the possibility of inconsistent enforcement decisions, particularly in merger cases. But this problem is more theoretical than actual. In part, that is because a state seeking to enjoin a merger that has been cleared by a federal agency will, as a practical matter, have to explain to a skeptical court why it chose to proceed in the circumstances. Other critics suggest that state enforcement is more political than federal enforcement. That suggestion, however, is belied by *Microsoft* where federal remedial policies changed sharply after the 2000 election, especially in contrast to those of the states.

In fact, dual enforcement has much to recommend it: greater resources to police the proper functioning of free markets which are the foundation of the success of the American economy;<sup>24</sup> development of complementary areas of expertise (the states being particularly knowledgeable about local markets and historically closer to consumers); a productive interplay of diverse points of view in matters that are the subject of joint federal/state investigation; and insurance against false negative federal enforcement decisions during times of reduced federal enforcement. Moreover, in our system, the courts – not DOJ, the FTC or the states – are the ultimate arbiters of both the meaning of the antitrust laws and the merits of litigated enforcement actions. Cases brought for different reasons and from varied perspectives by multiple enforcers increase the richness of the tapestry presented to the judiciary for its review. In any event, antitrust federalism is here to stay.<sup>25</sup> The real question is not whether it should exist, but how to make it most effective: how best to coordinate between the federal agencies and the states to encourage efficient use of resources, to maximize good enforcement outcomes, and to minimize burdens on those being investigated.

As previously indicated, the relationship between the states and DOJ at the end of the second Bush Administration left much to be desired.<sup>26</sup> To some extent, the poor relationship was a product of differing enforcement philosophies – brought about by DOJ’s abandonment of the general consensus that had prevailed among federal and state antitrust enforcement agencies for the prior decade. The problem was exacerbated by the aggressive

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<sup>24</sup> In his AMC comments, Professor First argues that the combined antitrust enforcement actions of the federal agencies and the states have declined relative to the GDP, leading him to conclude that under-, rather than over-, enforcement is the greater danger. First Statement, *supra*, n. 3, at 23-24.

<sup>25</sup> After lengthy review, the Antitrust Modernization Commission, in its Report and Recommendations issued in April, 2007, recommended against any statutory change in the states’ role in antitrust enforcement. [http://govinfo.library.unt.edu/amc/report\\_recommendation/chapter2.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf), at 187.

<sup>26</sup> State AAGs and DOJ staff attorneys have often forged excellent working relationships on various matters notwithstanding the discord at the top. As is the case at the FTC, the strength of these relationships varies depending on the identities of the individuals involved.

efforts of politically appointed DOJ antitrust officials to push their *laissez-faire* enforcement agenda. In *Microsoft*, for example, not only did DOJ oppose extension of the states' Final Judgment, but one of its top officials took the unprecedented step of personally lobbying state attorneys general not to take an enforcement action.<sup>27</sup> DOJ's frayed relationship with the states at the end of the second Bush administration is not unique.<sup>28</sup> While any change in the political leadership at the Antitrust Division is likely to have a positive impact on federal-state relations, the new chief, Christine Varney, may be particularly attuned to the importance of fostering good relationships with the states.<sup>29</sup>

By contrast, the FTC has received generally good marks for its efforts to work with the states and to coordinate with them. The FTC has requested states to join with it in filing actions in local federal courts.<sup>30</sup> In addition, the FTC - unlike DOJ - has included the states in training programs on substantive issues (like those involving the pharmaceutical and petroleum industries) that it knows will be of interest to them.<sup>31</sup> Moreover, state AAGs

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<sup>27</sup> See "Microsoft to Alter Windows Vista," *New York Times*, June 20, 2007, <http://www.nytimes.com/2007/06/20/technology/20soft.html?scp=1&sq=labaton%20barnett%20microsofft%20brown%20&st=cse>.

<sup>28</sup> The same official angered top EC officials by criticizing a judicial ruling in the *Microsoft* case in Europe ("EC's Kroes Slams DOJ Reaction to Microsoft Ruling," *Network World*, Sept. 19, 1997 <http://www.networkworld.com/news/2007/091907-ec-microsoft-antitrust-ruling.html>) and drew sharp criticism from FTC commissioners in response to his release of a report on Sherman Act, Section 2 despite DOJ's failure to reach consensus with the FTC ("FTC Commissioners React to Department of Justice Report," Sept. 8, 2008, <http://www.ftc.gov/opa/2008/09/section2.shtm>).

<sup>29</sup> During the 1994 Senate hearings on her nomination to be an FTC Commissioner, Ms. Varney was asked about her views on the FTC's relationships with state attorneys general. She replied: "I think it is an extremely important relationship. The Federal Government operates under limited resources, and we need to rely on our State and local partners.... I think it needs to be an active partnership with the attorneys general. And it can be very useful for the FTC in helping decide its allocation of resources, what is best done at the Federal level, what is best done at the State level, and also finding out what is really a problem. As you know, when you are closer to the people, you get a better sense of what the issues are in their everyday life that are making a difference." See [http://www.archive.org/stream/nominationofchri00unit/nominationofchri00unit\\_djvu.txt](http://www.archive.org/stream/nominationofchri00unit/nominationofchri00unit_djvu.txt).

<sup>30</sup> For example, the FTC and Minnesota recently filed simultaneous actions in Minnesota federal district court against Ovation Pharmaceuticals, Inc. in connection with its acquisition of the drug Neoprofen. See <http://www.crowell.com/NewsEvents/Newsletter.aspx?id=1115>. The FTC's effort to enlist Minnesota's cooperation no doubt reflects its view that there is value in having the state attorney general as an ally in the local courts.

<sup>31</sup> Joint training is desirable not merely because it gives the states access to federal resources, but because it increases the likelihood of convergence among the federal and state antitrust agencies with regard to both case selection and substantive issues.

believe that the FTC has done a more effective job than DOJ of sharing work product and integrating them productively into joint investigations. While the FTC's affirmative outreach has been beneficial, there is always room for improvement. For example, the level of cooperation extended to the states often depends – as it does at DOJ – on the identity of the staff attorneys who have been assigned to a particular matter and their prior history with the states. In addition, both federal agencies were criticized by state AAGs for not being sufficiently sensitive to the need to give them enough advance notice of enforcement decisions to allow them to obtain the necessary authority from their front offices to file jointly or simultaneously.

It is useful, therefore, to consider what structural steps can be taken to improve the relationship between the states and both federal antitrust enforcement agencies. This is not a trivial matter since, as previously noted, there is significant overlap between the antitrust efforts of the states and the federal agencies.<sup>32</sup> Moreover, particularly in light of the current budget constraints affecting government at all levels, it is especially important to think strategically about how the states and the federal antitrust agencies can mesh their efforts. The timing for such a review is propitious given the change in administrations and what undoubtedly will be a greater receptivity among the new DOJ officials to working with, rather than at cross purposes to, the states.

## **B. Case Selection**

Critics of state antitrust enforcement sometimes question the wisdom of state involvement in cases of national significance like *Microsoft*. There is no question that the

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<sup>32</sup> *Supra*, at 4 - 5.

states have the legal right, if not the obligation, to pursue such cases.<sup>33</sup> The almost uniform view, however, of those with whom I spoke – including defense lawyers and academics – is that the states have done an excellent job of case selection. For example, with some exceptions, the states’ merger review efforts have focused on cases where there are disparate impacts on local markets or where state agencies are significant purchasers.<sup>34</sup> Moreover, at least until *Leegin*, the states have been taken advantage of their unique expertise in policing vertical restraints. And considerable state effort has been expended on pharmaceutical and other health care cases,<sup>35</sup> which seems an appropriate focus given a) the disproportionate impact of the health care sector on the economy generally and on consumers in particular and b) the states’ unique ability to bring *parens patriae* damage actions. The states’ focus on health care antitrust is one shared by the FTC and likely to receive greater attention at DOJ.<sup>36</sup>

The principal criticism of the states’ case selection decisions came, perhaps surprisingly, from the plaintiffs’ class action bar rather than the defense bar. The attorneys who bring plaintiffs’ class action antitrust lawsuits, like state attorneys general suing *parens patriae*, represent consumers in treble damage actions. The overlapping roles can be complex, ranging from close coordination to conflict. The degree of cooperation between private class counsel and the states varies considerably from case to case. Just as in the

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<sup>33</sup> See *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 155 (D.D.C. 2002). Moreover, absent state participation, government enforcement would have ended prematurely. See *New York v. Microsoft Corp.*, 531 F. Supp.2d 141 (D.D.C. 2008).

<sup>34</sup> Fed’l Trade Comm’n v. Arch Coal, Inc., 329 F.Supp.2d 109 (D.D.C. 2004) is an example of a case with distinct local impacts. *United States v. Oracle Corporation*, 331 F.Supp.2d 1098 (N.D.Cal. 2004) is an example of a case involving significant state purchasers. Other mergers in which states have taken an interest tend to have direct consumer impacts like the Sirius/XM Radio investigation,

<sup>35</sup> See, e.g., *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508 (E.D. Mich. 2003).

<sup>36</sup> In written answers provided during her recent confirmation hearings, Christine Varney noted that health care was a significant cost driver in today’s economy, that President Obama had identified health care reform as a top priority, and that maintaining vigorous competition was a key to controlling health care costs. See <http://legaltimes.typepad.com/files/specter-to-varney.pdf>

states' relationship with the federal agencies, cooperation can enhance the likelihood of good outcomes and conflict can cause problems that undermine the efforts of both sets of counsel. The thrust of the criticism is that the states have not coordinated with private class action counsel as well as they should have. As a result, it is argued, the states may be squandering scarce resources that could have been better spent elsewhere rather than on litigation already being capably handled by the private bar.<sup>37</sup>

Those making this argument note that private class counsel often have certain advantages, including more experienced trial attorneys and readier access to economic experts.<sup>38</sup> The states, on the other hand, have certain advantages, such as the ability to conduct pre-complaint discovery – an advantage magnified by the *Twombly* decision.<sup>39</sup> An additional development, which should relieve one source of historic state concern – that class action settlements sometimes appear to benefit class counsel more than consumers - is the enactment of the Class Action Fairness Act (“CAFA”) in 2005. This legislation gives state attorneys general a better tool, if they are willing and able to exercise it, to police the fairness of settlements without the necessity of expending the often considerable resources necessary to litigate such cases.

### **C. Effectiveness**

Like their federal counterparts, state AAGs are handicapped by their inability to develop trial expertise comparable to that of the adversaries they face in the defense bar, both because of the paucity of antitrust cases that actually go to trial and because of personnel turnover. Nevertheless, the states get generally high marks for the effectiveness of

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<sup>37</sup> A somewhat different, but not entirely unrelated, criticism made by some state AAGs themselves is that their case selection process tends to be haphazard, rather than a conscious effort to pursue a considered strategic agenda.

<sup>38</sup> The states and private class action bar have cooperated to their mutual advantage in matters such as the *Vitamins* and *Compact Disc* litigations. The coordination has been less effective in the ongoing *DRAM* litigation (MDL 1486) in the Northern District of California.

<sup>39</sup> *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

their representation. There were, however, various criticisms of the states' efforts emanating from different segments of the antitrust bar, including the states themselves.

The most significant criticism from the defense bar related to the level of state commitment in certain merger cases. Several defense counsel observed that they understood why the states had decided to get involved in the investigations they pursued – *i.e.*, the case selection was appropriate. Moreover, they said they thought the states had made valuable contributions when they actively participated in the investigation. They noted, however, that in a number of instances the states seemed to do little more than sit silently on telephone conference calls, and questioned whether this was a wise use of state resources.

There are several possible explanations: the states are doing more than is apparent behind the scenes, which state AAGs say is often the case and reflects the primary role typically assumed by the federal agencies in a joint investigation; the states – particularly the smaller states – lack the resources and expertise to do specialized merger work; the states perceive their role as mainly one of bird dogging the federal agencies, either because they distrust the federal agencies' commitment to the investigation or fear the federal agencies will overlook local interests; and state antitrust bureaus that must support themselves financially through recovery of costs become involved, at least in part, to obtain attorneys' fees. In any event, the net result of the states' failure to take a more active role in these investigations (whether real or apparent) is to diminish the regard in which they are held by the private bar, and perhaps by the federal agencies as well. Moreover, to the extent the states participate in an investigation primarily to encourage the federal agencies to take a hard look or seek significant remedies, they are less likely to achieve their objective if the federal agencies perceive them as being unable or unwilling to act on their own.

Members of the defense bar also expressed frustration with two other aspects of the states' practice. The first is the request for attorneys' fees (sometimes driven by a state's need to recover costs for the reason noted above) when a merger investigation is concluded, even though the state may not have obtained divestitures or other relief. State AAGs note, however, that, unlike the federal agencies, they do not receive any HSR filing fees to offset the cost of the investigation. A particular criticism voiced by the private bar is the occasional lack of transparency in the fee requests (*e.g.*, no indication of the number of hours worked).

The second source of frustration noted by private counsel relates to the often lengthy negotiation of confidentiality agreements at the outset of an investigation, particularly one involving a merger. Private counsel seek confidentiality agreements to protect their clients' trade secrets and other proprietary information. The states are typically not unwilling to enter into such agreements, but may be limited in what they can agree to by controlling Freedom of Information statutes.<sup>40</sup> This problem, exacerbated in multistate investigations where a number of different statutes may apply, is particularly acute in merger investigations. Delay at the outset of a merger investigation may put the states irretrievably behind the federal agencies which don't face this problem since they are bound by the confidentiality restrictions built into the HSR Act.<sup>41</sup> Delay can also be detrimental to merging parties, which are anxious to resolve any regulatory concerns and consummate their deal. State AAGs blame private counsel for the often lengthy delays caused by these negotiations at the outset of an investigation. Whatever the cause, this problem - essentially

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<sup>40</sup> While state attorneys general may have an interest in keeping the public informed about what they are doing, they should be able to accommodate a company's legitimate concerns about public disclosure of its own confidential business data.

<sup>41</sup> Delay is especially problematical at the outset of merger investigations that are not only fast-moving and resource-intensive, but require specialized expertise more likely to be available to the federal agencies which have a significant number of dedicated personnel who do this kind of work exclusively or in large part.

“reinventing the wheel” for each new investigation - wastes resources and time, adversely impacts all parties, and should be amenable to solution.

Finally, the states have been commendably self-critical. The main concern expressed by state AAGs relates to the perceived decline in the effectiveness of multistate working groups. There is a general perception that the multistate working groups are not run as effectively or efficiently as they should be, and have been historically. Too much time is wasted on long, frequent conference calls involving all states, many of which are not familiar with the details of the case or investigation. This perceived waste of time discourages some states from participating. Small states may lack the personnel to participate at all. Larger states resent the waste of resources that could be utilized more productively elsewhere. Historically, multistate working groups had been run by an executive committee of committed states (usually including several AAGs from one or more larger states like California, New York, Florida, Texas, Pennsylvania or Illinois) which reported back to the other states periodically, particularly at key decision points.

Multistate working groups serve a useful purpose. They allow small and medium-size states to become involved in significant cases affecting their citizens that otherwise would be beyond their capability. Even from the perspective of larger states, multistate working groups not only make it easier to take on significant cases, but also free resources to prosecute other cases. Moreover, prosecution of a case by a collective group of states, rather than one state alone, heightens its profile and increases its potential impact. From defendants’ perspective, multistate cases enhance the value of settlement by ensuring consistent, universal resolution of all claims in one forum.

### **C. Recommendations for More Effective State Antitrust Enforcement**

This section contains recommendations to improve the effectiveness of state antitrust enforcement. In large part, they seek to address problems identified in the prior sections. One overriding problem, not previously emphasized, is lack of adequate resources as budgetary cutbacks have been implemented due to the economic decline and a shrinking tax base. This report makes modest suggestions for expanded, targeted access to federal resources that should aid all the states.<sup>42</sup> The recommendations are divided into two categories: Improving the Federal-State Relationship and Improving Effectiveness.

### **Improving the Federal Relationship**

**Recommendation 1: Reinvalidate and expand the Executive Working Group-Antitrust (EWG-A).** The EWG-A, which is supposed to meet annually but recently has been moribund, consists of state attorneys general on the NAAG Antitrust Committee, the Chair of the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division at DOJ. As indicated, the relationship between the states and the federal antitrust enforcement agencies, particularly DOJ, has been considerably less than optimal. An early goal of the top federal antitrust officials should be to meet with their state counterparts. An improved relationship is impossible without the support of the top officials in both federal agencies and the states. But that support must be communicated to and be implemented by staff attorneys. Accordingly, the EWG-A meetings - especially the initial one - should include a wider array of officials, both so that commitment to a common enterprise is communicated and so that staff attorneys who actually do the work can candidly discuss any problems and become stakeholders in whatever changes are

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<sup>42</sup> The report does not recommend major changes in substantive antitrust law, a large subject beyond its scope. Obviously, legislation intended to modify the outcomes of such significant Supreme Court decisions as *Leegin* or *Illinois Brick* – which involve areas of major historical interest to the states (resale price maintenance and *parens patriae* treble damage actions) – would have an enormous impact on state antitrust enforcement.

implemented. The initial meeting of the EWG-A should include key state AAGs selected by NAAG as well as additional supervisory level officials at DOJ and the FTC.<sup>43</sup>

**Recommendation 2: Expand joint training.** Trial advocacy is an important skill, not readily developed at the federal or state agencies, the lack of which puts government attorneys at a disadvantage to private defense counsel. Regardless of a government agency's commitment to vigorous enforcement, it will not succeed absent a strong litigation capability. Some states and NAAG, through its NAGTRI educational arm, do offer general trial training. Moreover, NAGTRI, in cooperation with the New Jersey Attorney General's Office, has begun to offer a NITA-style antitrust trial advocacy program that has been very well received by the AAGs who participated. In the past, DOJ has included state AAGs in one of its trial training programs. The state AAGs who attended this program found it to be useful. The FTC has also held joint training sessions with the states on substantive issues of common interest. Once again, the state AAGs who participated found these sessions to be useful. Joint federal/state training – both with respect to trial skills and substantive issues – allows the federal agencies to leverage their greater resources, fosters cooperation and encourages convergence. Moreover, DOJ and the FTC should consider combining their own training efforts and involving NAGTRI. A subject that may be of particular value is the investigation and litigation of a merger case since that is an area both of particular federal expertise and frequent interaction of federal and state antitrust enforcement officials.

**Recommendation 3: Promote common substantive goals.** As previously noted, the current litigation environment is a difficult one for all government antitrust enforcers and, indeed, for antitrust plaintiffs generally. Historically, there has been very little communication at a strategic level, even between DOJ and the FTC. Conflict among the

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<sup>43</sup> The recommendations of this report might serve as agenda items at the initial meeting.

agencies can only undermine their common goal of effective antitrust enforcement. Accordingly, the government antitrust enforcement agencies ought to think strategically together about what they'd like to accomplish, the kinds of cases that should be brought, what role the various agencies can play in fostering mutual objectives, how to enhance the prospects of prevailing at trial once those cases are brought, and even what common legislative initiatives they should support.<sup>44</sup> At a very basic level, the states and the federal antitrust enforcement agencies could discuss how to support each other through *amicus* efforts.<sup>45</sup> At a higher level, states could be incorporated into any efforts to amend outdated Guidelines in an effort achieve substantive convergence not just between the federal agencies, but with the states.

**Recommendation 4: Integrate state AAGs productively in joint investigations.** Currently, there is no consistently followed template for incorporating the states in joint investigations.<sup>46</sup> Integration is practically non-existent and cooperation is often haphazard, depending on the identity of the federal and state attorneys involved in a particular matter. Greater effort should be made to incorporate state AAGs more productively in joint investigations to take advantage of their unique strengths, to conserve resources and to avoid unnecessary duplication. For example, state AAGs can be particularly helpful in identifying and interviewing witnesses resident in their respective

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<sup>44</sup> State attorneys general can be helpful with local Congressmen on legislative initiatives affecting antitrust enforcement, like resale price maintenance, reverse payments, exemptions and direct purchaser lawsuits.

<sup>45</sup> As noted, DOJ's recent *amicus* effort has been almost exclusively in support of antitrust defendants. Moreover, even *amicus* briefs supporting sister agencies are often not filed until issues percolate up to the appellate level, long after law is developed at the district court level which makes enforcement more difficult. The federal agencies and the states should consider how to improve lines of communications and change procedures to encourage *amicus* support earlier in the litigation process on important enforcement issues of mutual interest.

<sup>46</sup> The 2008 Transition Report of the ABA Section of Antitrust Law urges the federal agencies to assess the effectiveness of state/federal coordination in joint investigations to facilitate more uniform and consistent enforcement. See <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf>, at p. 57.

states. A protocol for non-merger investigations or “best practices” manual might be useful. Depending on the circumstances, cross-deputation may be an option. The federal agencies should also think about how to take better advantage of the states’ unique capability, and the expertise they have developed, in returning money to injured consumers through *parens patriae* treble damages actions.

**Recommendation 5: Support legislative changes that will foster cooperation and provide targeted financial support to the states.** As previously noted, federal legislation jump-started state antitrust enforcement in the 1970s. The beginning of a new administration provides an ideal opportunity to consider legislative changes that will enhance the states’ capacity to enforce the federal antitrust laws.<sup>47</sup> The NAAG Multistate Antitrust Task Force should consider not only what changes in substantive federal antitrust legislation would be most desirable to promote their enforcement objectives, but how to make use of state attorneys general and the federal agencies to press Congress to make those changes.

Consideration should be given to what even relatively modest, non-substantive legislative initiatives might be undertaken to improve state antitrust enforcement. One example might be an amendment to the HSR Act that gives states notification of HSR filings and/or gives states immediate access to HSR filings provided the states agree to appropriate confidentiality restrictions. Such a change would eliminate much, if not all, of the current wasted effort now expended by counsel for the states and merging parties in negotiating

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<sup>47</sup> That is especially so since the new heads of both federal antitrust agencies, Christine Varney at DOJ and Jon Leibowitz at the FTC, have strong, long-standing ties to influential lawmakers on Capitol Hill. Arguably the single most important action Ms. Varney and Chairman Leibowitz could take to aid state antitrust enforcement would be to assist in obtaining legislative reform with regard to indirect purchaser litigation, which consumes scarce resources in protracted procedural wrangling over *Illinois Brick* issues and distorts consumer recovery because of variations in state laws. Such reform should have wide support among state attorneys general, 45 of whom submitted a letter to the AMC expressing their support for “legislatively overruling *Illinois Brick* because the current federal system perpetrates an injustice to injured downstream consumers.” See Comments to the Antitrust Modernization Commission, dated July 20, 2006, at [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/remedies\\_pdf/060720-StateAGsRemediesRev2.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/remedies_pdf/060720-StateAGsRemediesRev2.pdf).

confidentiality agreements at the outset of merger investigations. Moreover, it will put the states on the same time track as the federal agencies and ease the burden on the parties.<sup>48</sup>

In addition, thought should be given to how federal financial assistance might be used to benefit state antitrust enforcement. Some suggestions for consideration: provide a grant to allow states (through NAAG or otherwise) to procure document management software compatible with that used by the federal agencies, both to enhance state capabilities and to foster interaction with the federal agencies; provide a grant to NAAG to hire an attorney and/or economist with merger expertise to assist states in merger investigations; provide funding to improve and coordinate CAFA reviews; amend the HSR Act to give the states a percentage of the filing fee in lieu of attorneys fees to support their merger work, such monies to be allocated among investigating states according to time expended on the investigation; amend the HSR Act explicitly to allow *cy pres* distributions in *parens patriae* actions to institutions (like NAAG, AAI or the State Center) for use in future state antitrust enforcement efforts.

### **Improving Effectiveness**

**Recommendation 1: Improve effectiveness of multistate working groups.** As noted, the principal self-criticism heard from state AAGs related to the perceived decline in effectiveness of the multistate working groups. To be sure, the effectiveness of any working group depends in large part on the identity of its leaders. But there are structural changes that might be implemented to encourage better, more productive functioning of these groups. Training of new attorneys general and their chief deputies should emphasize the historical role, and potential usefulness, of this tool. If unsupported at the attorney general

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<sup>48</sup> See the ABA's 2009 Transition Report, n. 45 *supra* at 57, which recommended "early communication between the federal agencies and the states" in merger investigations..

level, particularly by the larger states with greater resources, the multistate working group is not likely to realize its full potential.

The incoming chair of the NAAG Multistate Antitrust Task Force should consider forming an ad hoc committee (perhaps consisting of former, as well as present, AAGs) to consider how the effectiveness of multistate working groups could be improved. Among the areas of potential focus: revising current best practices and making sure that leaders of each working group are aware of them; devising ways small states can participate through a representative with assured consultation at key decision points; limiting participation on the executive committee to those states willing to contribute significant resources; providing greater oversight through the Task Force Chair, NAAG Project Manager or appointed ombudsman to identify and rectify management problems at an early stage. The committee might also consider reviewing, more formally and systematically than has been done in the past, recent cases to determine what lessons can be learned from those matters where the working groups have functioned well and those where they have not.<sup>49</sup>

Also, as noted, merger investigations were the one substantive area most frequently identified by defense counsel where the value added of state participation was questioned. The states should think strategically about the kinds of merger cases where it makes sense for them to become involved – both because of the issues presented and the alternative use of resources. They should also think about how to improve their ability to participate more effectively in those investigations they decide to pursue. One aspect of this consideration should be how to enable smaller offices to overcome their resource limitations so they can have greater involvement in merger cases likely to have anticompetitive impacts in their jurisdictions.

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<sup>49</sup> State AAGs with whom I spoke, for example, identified as cases that worked well the recent *School Bus* investigation in the merger area and the *Microsoft* litigation in the non-merger area.

**Recommendation 2: Improve relations with plaintiffs' class counsel.** The states should think creatively about how to interact better with private consumer class counsel, including how to avoid duplicative efforts, how to take advantage of private counsel's relative strengths, and how to resolve conflict once it arises. Improving this relationship is critical given the states' budgetary constraints, the difficult litigation environment for all antitrust plaintiffs, and the change in the landscape wrought by *Twombly* and CAFA. Items for consideration might include how to use tolling agreements to allow private counsel to proceed without disadvantaging the states, how to cooperate at the investigatory stage, how to better coordinate *amicus* efforts on issues of mutual interest, and how to standardize and improve CAFA review.

**Recommendation 3: Improve relations with defense counsel.** Modest changes can be implemented to reduce unnecessary friction with defense counsel. For example, model confidentiality agreements can be published to reduce the often acrimonious, prolonged and wasteful negotiating at the outset of investigations. The states should also consider disclosing and, if necessary, keeping better track of their hours spent on investigations in which they hope to recover attorneys' fees so as to provide greater transparency to courts and defense counsel. The states also should consider modernizing substantive Guidelines and harmonizing them with those of the federal agencies to improve the ability of private counsel to advise their clients.<sup>50</sup> Outmoded, seldom used Guidelines provide little value to AAGs and are a source of confusion to defense counsel. Indeed, the states might consider the usefulness of maintaining separate Guidelines, which may have little or no weight in federal courts where most antitrust litigation is filed.

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<sup>50</sup> See ABA 2009 Transition Report, n. 45 *supra* at 57, which recommends that the states and the federal agencies "resolve the substantive differences between their guidelines."

**Recommendation 4: Provide greater opportunities to develop trial skills.** As noted, government antitrust enforcement attorneys typically have less trial experience than private counsel. The states should consider how to provide better antitrust trial training in-house or to expand the initial NAGTRI program. In addition, each state should consider how to provide real trial experience for its antitrust AAGs – whether by assigning them temporarily to criminal trial bureaus or by making a conscious effort to identify small price-fixing or bid-rigging cases they can take to trial.