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The American
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COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

WORKING GROUP ON ENFORCEMENT INSTITUTIONS

July 15, 2005

INTRODUCTION

These are the comments of a Working Group on Enforcement Institutions established by the American Antitrust Institute for purposes of responding to the AMC's request for public comments. These comments reflect a consensus of the Working Group, but it should not be assumed that all agree with every statement or position herein. The Working Group is chaired by Kevin O'Connor (LaFollette, Godfrey & Kahn), and the members are Patricia Conners (OAG, Florida), Robert Doyle (Sheppard Mullin), Harry First (N.Y.U.), Albert Foer (AAI), and Kathleen Foote (OAG, California). We also appreciate the assistance of Robert Hubbard (OAG, New York).

A. Dual Federal Merger Enforcement

1. Should merger enforcement continue to be administered by two different federal agencies? What are the advantages and disadvantages resulting from having two different federal antitrust enforcement agencies reviewing mergers? For example, does it result in bureaucratic duplication, inconsistency in treatment, more thorough enforcement, beneficial diversity in enforcement perspectives, or competition between antitrust enforcement agencies?

Antitrust enforcement in two federal agencies (not to mention sectoral regulation) is a result of history, not necessarily of logic. The Working Group believes that antitrust merger enforcement should continue to be administered by both the executive branch Department of Justice and the independent Federal Trade Commission. The somewhat different approaches of the two federal agencies allows us to see both benefits and disadvantages of each approach and the rivalry for budget, good cases, and professional reputation may help both agencies improve: a suitable reflection of the benefits of competition. At this point in time, we are aware of no pressing need to reallocate authority.

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2. Should merger enforcement authority be reallocated between the FTC and DOJ? If so, how should it be reallocated? Please provide specific reasons for proposed reallocations.

As a general matter, the Working Group believes that diversity of antitrust enforcement institutions (*e.g*. competition between the agencies for cases and for professional reputation) produces better results. Centralization may cut down on diversity of viewpoints and policy competition over what merger enforcement policy and cases are best. Both agencies have proven themselves competent at handling mergers, albeit in very modestly different ways.

Having affirmed our position that reallocation is not desirable, if reform is nonetheless to be recommended by the AMC, the Working Group sees distinct benefits to a FTC-centralized merger enforcement program. The Commission, accordingly, would take the lead in all merger enforcement, perhaps with the exception of mergers concurrently under the auspices of the DoJ and a fellow executive agency. The principal advantage of the FTC is its unique administrative adjudication potential, particularly when compared to preliminary injunction proceedings. Through administrative litigation in selected cases, the FTC has the potential to develop a body of consistent merger law and, most importantly, provide guidance to the business community, by merger decisions based on a complete and fully developed evidentiary record.

If the same value could be achieved through a preliminary injunction proceeding as through administrative litigation, then there would be no reason for the Commission ever to proceed past the preliminary injunction phase. A preliminary injunction hearing has a limited purpose: to determine whether to enjoin the consummation of a proposed transaction pending a full adjudication on the merits. Thus, the district court overseeing a preliminary injunction hearing is not charged with making a final ruling on whether the acquisition is unlawful.

Because a preliminary injunction proceeding has a limited purpose, the evidentiary record produced is often limited in scope. A court may not hear any witnesses, but instead may rule solely on the basis of the papers filed by the parties. A preliminary injunction proceeding is generally much shorter in duration than a full trial, and because of its expedited nature, the thoroughness of the evidentiary presentation and analysis may be less than would be expected in a full trial. Since merger analysis can be a highly complex, fact-intensive undertaking, it may be particularly ill suited for final resolution on the merits in the abbreviated forum of a preliminary injunction proceeding.

On the other hand, an argument can be made that getting an answer quickly is more important to merging parties and perhaps to the economy than in getting it perfectly right, complete with a full record and carefully crafted judicial and/or administrative opinions; and in this sense, perhaps preliminary injunction proceedings work reasonably well for mergers that are awaiting consummation.

To the extent it is intended that the administrative process will take on a larger role, attention must be given to the quality and quantity of administrative law judges available to the FTC, which the Working Group believes should be selected by the agency on the basis of merit and relevant experience. It should be obvious that if the FTC were to take the lead on all or virtually all merger cases, its staff would have to be enhanced, perhaps by transfers from DOJ. Transferring or relocating DOJ's expert merger staff to the FTC seems minimally disruptive, relatively costless, and an efficient way of accomplishing this goal. Moreover, consideration would have to be given to how the agency would deal with the ups and downs of merger waves, so that its staff would not lag behind mounting waves or find itself making work in troughs.[1]

We reiterate that we are not advocating that merger enforcement be allocated to one agency.

B. Differential Merger Enforcement Standards

See Question A.2. above.

C. Allocation of Merger Enforcement Among States, Private Plaintiffs, and Federal Agencies

1. What role should state attorneys general play?

The state attorneys general do and should play a significant role in merger enforcement under federal law. State attorneys general have been bringing merger challenges under the Clayton Act[2] for several decades. The absolute number of such challenges is relatively small[3], and the reasons for state AGs to assume such potentially costly and burdensome undertakings are generally firmly rooted in recognized state policy interests. The Working Group believes that the state role is justified as well as valuable, as recognized by the Supreme Court in 1990[4].

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[1] Because the agency has in recent years come to depend on Hart-Scott-Rodino fees as an essential part of its funding, some examination ought to be given to the usefulness and propriety of this development.

[2] Some states may also bring merger challenges under state statutes. These are rare and generally solitary; thus, they do not present the multiple-review situation on which the Commission has focused. Most merger challenges by states are, in fact, brought under the Clayton Act.

[3] Precise data on the number of state merger challenges, settlements and investigations not resulting in enforcement action is not readily available. In reaching its conclusions the Working Group has relied on a recent compendium contained in State ABA Section of Antitrust Law, STATE ANTITRUST ENFORCEMENT HANDBOOK, Chapter 3 (Mergers) and Chapter 5 (Health Care) (2003) and informal information from individual states, much of which is contained in the footnotes below.

[4] *California v. American Stores*, 495 U.S. 271 (1990).

Mergers occurring in sectors where states bear significant responsibilities, either as regulators or as public service providers, traditionally draw scrutiny and enforcement action by state attorneys general. It is thus no accident that numerous state AGs have scrutinized health care mergers closely over the years, both with and without the participation of the FTC.[5] The police power uniquely held by states confers on them heavy duties with respect to public health, as well as public safety, public education, waste disposal, environmental protection, consumer protection, transportation, recreation, and both urban and rural redevelopment. A state's interest in preserving competitive markets in these areas is often fundamentally linked to its ability to meet its explicit public responsibilities effectively.

A corollary to this point is that state attorneys general or their client state agencies may have special knowledge of and a special stake in the affected market, due either to regulatory authority or to other important relationships to the merging parties. The former category embraces state utility regulators, state energy and health departments, transportation and port authorities. Other agency relationships may include contractual ties affected by the merger, *e.g*. Thomson/West law books (7 states, 1996, affecting state court publication contracts); USA Waste/Waste Management (13 states, 1999); Central Parking/Allright (6 states, 1999), and health care mergers affecting Medicaid agencies. Some markets, such as oil and gas, present state attorneys general with a powerful combination of factors militating in favor of action on a pending merger.[6]

State antitrust enforcement is overwhelmingly local, whether the merger itself is "national" or not. Mergers challenged by states are the ones that affect local markets: supermarkets, movie theaters, transit hubs, and retail stores of many kinds. Waste disposal company mergers are an especially significant local concern where states enforcement has been essential. When major national firms[7] merge, the state's interest is in its local impacts. Investigating jointly with a federal agency, logically the state provides special expertise when examining street-level competition between stores. When the merging businesses are local to begin with, state attorneys and investigators again are especially well suited to evaluate local market conditions and they often provide special expertise.[8] This benefit is widely recognized. What appears less well

[5] *Id.* at 137-168. Healthcare Mergers investigated or challenged by the states include: Columbia/HCA/Healthtrust (TX, 1995); Long Island Jewish Med Ctr (NY, 1997); Kenosha/St Catherine's (WI, 1997); Marshfield Clinic/Wausau Med Ctr (WI, 1997); Columbia/HCA/Alexian Bros (CA, 1998); Tenet Poplar Bluff (MO, 1998); Aetna/Prudential (TX, 1999); St. Francis/Vassar Bros (virtual merger)(NY, 2001); Sutter/Summit (CA, 2001).

[6] Factors implicated in oil company mergers are state regulatory responsibilities for energy, shipping and transportation, state fuel contracts, state tax revenues, and consumer access to competitive retail supplies. Texaco Shell joint venture (WA, OR,1997); Shell Texaco (CA, HI,1998); Exxon Mobil (13 states,1999); BP/Amoco and BP/Arco (CA, OR, WA, 2000); Chevron Texaco (12 states, 2001); Valero Ultramar (CA, OR, TX, 2001); Conoco Phillips (6 states, 2002); Valero/Kaneb (CA, 2005).

[7] Retail Mergers: Bon-Ton Stores/May Co. (NY, 1994); Ahold/StopNShop (CT, MA, RI, 1996); Wells Fargo/First Interstate (CA, 1996); Staples/Office Depot (10 states, 1997); Albertson's/American Stores (CA, NV, NM,1999); Wells Fargo/First Security (4 states, 2000); Suiza/StopNShop (6 states, 2001).

[8] Ski resorts (ME, CO, CA); Theatres (NY, IL, DC); Ferry service (CA); Newspapers (CA, HI); Sardines (ME).

recognized in debate about the subject is the fact that the best judge of what mergers present "local" issues is invariably the state itself. Existing law and federal/state cooperative guidelines and practice allow the state to exercise that judgment expeditiously and straightforwardly.

One other role for the states, of course, is to provide alternative enforcement decisions on matters the federal agencies choose not to pursue. That diversity of antitrust enforcement institutions produces better results is discussed elsewhere in these Comments.

2. Should merger challenges from multiple sources be limited? Has federal-state coordination protocol succeeded in addressing burden, delay and uncertainty?

The Working Group believes it makes little sense to try to limit the ability of state attorneys general to challenge mergers under the Clayton Act, because their judicious exercise of the power is both justified and benefits the public as explained above. In circumstances where federal enforcement efforts are also in progress, the federal and state agencies' own success at coordination to avoid delays and reduce burden on the parties suggests that no major surgery is needed here.

Since the American Stores decision in 1990, procedures for cooperation among federal and state enforcement agencies investigating the same mergers have been developed and formalized in two stages[9]. The 1998 federal/state Merger Protocol has eliminated much of the potential for either delay or burden in merger review by both state and federal agencies. The states have generally practiced adherence to HSR timelines, and on a case-by-case basis further progress in minimizing duplicative efforts and maximizing synergies has been made. Often an efficient, informal division of labor has occurred in which the state attorneys (and their experts) have focused on a particular submarket or consumer group. For example, in oil mergers the states tend to study concentration of retail markets and making sure that retail stations go to new entrants or independents, while the FTC has tended to focus on refineries and distribution issues.[10] While the results of such cooperation are only anecdotal, they attest to improvements in depth as well as efficiency of review.

To the extent that the federal and state agencies might find it useful to take yet a further step in codifying their collaborative practices, the resulting enhanced guidelines or protocols would undoubtedly assist practitioners in working with the agencies involved in a particular merger transaction. Among other things, such guidelines or protocols could provide for a standing state-federal cooperation committee for mergers, some form of

[9] Merger Compact (1994) – disclosure; Merger Protocol (1998) – coordination.

[10] Other examples of specialization by state investigators include dissemination of state judicial decisions (Thomson/West), agricultural lending impacts (Wells Fargo/First Interstate Bank), and state government enterprise software needs (Peoplesoft/Oracle).

notification to the states at the time of HSR filings, and clearer confidentiality protections for inter-agency communications and information exchanges.

3. What role should private parties play in merger enforcement, and what authority should they have to seek to enjoin a merger?

Under Section 4 of the Clayton Act, private parties have standing to sue for monetary damages if injured in their "business or property" by an unlawful merger; under Section 16, private parties also have standing to sue for injunctive relief to prevent "threatened loss or damage" caused by an unlawful merger. These rights are cabined, of course, by Supreme Court doctrine requiring proof of "antitrust injury" when suing for damages and "threatened antitrust injury" when suing for injunctive relief.[11]

Historically, although private party challenges to mergers have not been infrequent, as a general matter private merger litigation has been much less common than private Section 1 or Section 2 litigation.[12] The importance of private party merger litigation has been further diminished by the Supreme Court's more recent restrictive views of standing, which have limited the ability of the most likely private plaintiffs – targets of takeovers and competitors of merging parties – to bring suit. The result is that private merger challenges have grown increasingly rare.

Nevertheless, there is still a potentially important role for private parties to play in merger enforcement. The federal agencies' resources to police mergers across the entire economy are, obviously, limited. The agencies have historically challenged – at most – between 1 and 2 percent of mergers notified under Hart-Scott-Rodino, which, of course, is not even the entire universe of mergers that take place. In times of intense merger activity (for example, the 1999-2001 merger wave), the agencies may need to pursue a policy of enforcement triage that focuses only on those mergers that raise the most significant problems. Having private actions thus provides an important, if limited, supplement to federal agency enforcement resources.

One area in which private enforcement might prove particularly valuable is suits by consumers alleging injury from an unlawful merger. Although these suits appear to be rare, state governments, with sufficient economic interests at stake, are logical parties to bring such suits for damages (in addition to their power to sue for relief as *parens patriae* for injury to the general economy of the state). This type of merger enforcement could be an important addition to merger enforcement by the federal antitrust agencies because

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[11] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (suit by competitor for damages arising out of allegedly unlawful merger); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (suit by competitor to enjoin allegedly illegal merger).

[12] An ABA Monograph reports 144 private Section 7 cases in an 11-year period, an average of nearly 14 per year. In the five year period 1981 to 1986 there were more private Section 7 cases filed than federal antitrust agency Section 7 cases, but this was a period of low federal merger enforcement. *See* ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS, 397 n.491 (5th ed. 2002).

such suits would directly focus on consumer injury and the adverse effects on price and output that come from diminished competition.[13]

4. What lessons, if any, can be learned from Europe's referral (or "one-stop shop") system of allocating merger enforcement between the EC and Member States? How does the more regulation-oriented European tradition (as opposed to a more enforcement-oriented U.S. tradition) affect any comparison of the two systems?

It is difficult to draw generalized conclusions from Europe's experience with merger regulation. Although it may be true that the European Commission has generally shown a more regulatory orientation than U.S. federal or state enforcers, differences between the European and U.S. experiences go far deeper than that.

Perhaps the most important difference is that antitrust enforcement in Europe under the EC Treaty has historically been much more centralized than antitrust enforcement has been in the United States, which has a long history of both state and private antitrust enforcement. When the European Commission finally began its work in the early 1960s, with a primary mission of developing a single market for the entire E.U., Member State enforcement agencies were very weak and the Commission consequently was required to centralize its enforcement authority. More recently, as specifically reflected in the Commission's modernization program, the Commission has come to understand that Europe needs a network of enforcement agencies if antitrust enforcement is to be effective and the Commission has consequently made a greater effort to share authority with Member State enforcement agencies. Nevertheless, in the merger area, although Member States are free to apply national merger law (including premerger notification requirements),[14] the Commission has still retained exclusive jurisdiction over all mergers of a "Community dimension" save as it allows Member States to be involved, pursuant to quite specific rules controlling this delegation.[15]

In a sense, the European approach reflects the underlying constitutional make-up of the European Union, where strong effort must be made to pull independent nation states toward the center if there is to be any "union" at all. By contrast, the U.S. approach reflects the historic U.S. federalism concern for the potential danger from too much

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[13] *Cf.* Complaint in *United States v. Oracle*, Case No. C 04 0807 (N.D. Cal. 2004) (Section 7 suit filed by Department of Justice and seven states) (suit for injunctive relief, alleging that "many of the states," through various government entities, purchased the high-function enterprise software involved in the case), available at http://www.usdoj.gov/atr/cases/f202500/202587.htm; South Austin Coalition Cmty. Council v. SBC Communications, Inc., 274 F.3d 1168, 1170 (7th Cir. 2001) (suit by plaintiff retail telephone users improperly dismissed on standing grounds; "these plaintiffs complain about the kind of injury (reduced output and higher prices) against which the antitrust laws are directed") (case dismissed on common carrier exemption to Section 7) (Easterbrook, J.), *cert. denied*, 537 U.S. 814 (2002).

[14] *See* Council Regulation (EC) No 1/2003, Art. 3(3).

[15] *See* Council Regulation (EC) No 139/2004 (EC Merger Regulation), Art. 9 ("Referral to the competent authorities of the Member States").

centralization. The U.S. antitrust enforcement system has thus evolved in a way to make sure that state institutions can survive an inevitable tendency to centralize government functions.

These very different histories and constitutional environments caution against a too-quick transplant of the current European approach to the United States. In addition, it is still too early to tell whether, as a practical matter, the more rigid and bureaucratic rules that the Europeans use to structure their merger enforcement will produce better coordination in enforcement than is achieved in the U.S. through more informal approaches.[16] The new modernization procedures went into effect barely one year ago and further experience will be necessary before we can see whether those mechanisms have useful lessons for the structure of U.S. antitrust enforcement.

D. Role of States in Enforcing Federal Antitrust Laws Outside the Merger Area

1. What role should state attorneys general play in non-merger civil enforcement? To what extent is state *parens patriae* standing useful or needed? Please support your response with specific examples, evidence and analysis.

The state attorneys general do and should play a significant role in non-merger civil enforcement under federal antitrust law. They continue to fulfill the vital role of, among other things, obtaining monetary recoveries on behalf of natural persons for violations of the federal antitrust laws as intended by Congress when it passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976. No other government enforcement agency can, could, or should fill this important role.

The states have used their authority to bring numerous non-merger actions under federal law for the benefit of their citizens and their governmental entities both in individual state actions and in multistate actions. Table A accompanying this submission, which is not intended to be all-inclusive, lists numerous multistate civil non-merger antitrust cases brought by state attorneys general since 1983, many of which were brought *parens patriae* on behalf of natural persons. These cases resolved such allegations as horizontal price-fixing, vertical restraints, boycotts, tying arrangements and market allocation. In addition to these cases, state attorneys general have individually brought numerous antitrust actions under federal antitrust law, alleging such violations of the antitrust laws as price-fixing or monopolization.[17] As a result of their efforts, state

[16] See, e.g., EU Refers Cable Operator Merger to Germany, 88 Antitrust and Trade Reg. Rep. (BNA) 172 (2005) (German Federal Cartel Office requests referral from the European Commission of cable tv merger with effects only in Germany; Commission then agrees to refer merger; FCO has previous experience analyzing cable mergers).

[17] A comprehensive list of multistate cases as well as individual actions brought by state attorneys general under federal and state antitrust laws is currently being compiled by the National Association of Attorneys General's Multistate Antitrust Task Force. We understand that this information will soon be available through a searchable database. The database and the information derived therefrom will further demonstrate the role significant role state attorneys general have played in the recovery of damages,

attorneys general have recovered hundreds of millions of dollars for their citizens, usually in a *parens patriae* capacity as well as their governmental entities. As the chief legal officers of their states, no other antitrust enforcers in the United States system of concurrent enforcement are as well situated and as incentivized as state attorneys general to represent injured consumers in non-merger civil antitrust actions under federal law.

Absent *parens patriae* authority, the state attorneys general would not be able to provide their citizens an effective avenue through which to recover antitrust damages. This was, of course, a primary reason why Congress gave consumers their *parens patriae* authority in the first place. Neither the federal enforcement agencies nor private plaintiffs are as well situated to bring actions on a broad basis seeking relief for a particular state's citizens. The federal enforcement agencies generally do not have authority to seek damages on behalf of residents of a particular state injured by violations of federal antitrust law. Moreover, and very significantly, although private plaintiffs can seek damages on behalf of certain classes of citizens, obtaining class certification, dealing with issues of contingent fee awards, and the complexities of competing litigations filed by overlapping classes can present daunting barriers to effective recovery. In addition, state attorneys general are in a position to seek injunctive relief, even complex injunctive relief, where private parties may not be incentivized to do so. The responsibility given state attorneys general to represent consumers *parens patriae* to recover treble damages for violations of the federal antitrust laws has not been taken lightly. Using their *parens patriae* authority, state attorneys general have focused on those cases that have most affected consumers and the public interest and, but for the presence of the state attorneys general in any number of such cases, the monetary recoveries and appropriate injunctive relief obtained for the benefit of consumers may not have been achieved.

Of course, many *parens patriae* cases have been brought by state attorneys general as multistate cases. The Multistate Antitrust Task Force, as it is currently structured, was first established in 1983, under the auspices of the National Association of Attorneys General.[18] One of the Task Force's functions is to facilitate coordination of multistate cases and the effectiveness of this effort in obtaining significant monetary and injunctive relief for consumers in all 56 states and territories is measured by the hundreds of millions of dollars obtained as a result.

Finally, an important characteristic of concurrent enforcement authority of state attorneys general is that they can effectively compensate for "false negative" enforcement decisions by the federal enforcement agencies in cases of national or even international scope. A "false negative" enforcement decision occurs when a meritorious case under existing law is not brought. Several cases brought by attorneys general where the federal enforcement agencies made a determination not to pursue a matter demonstrate why concurrent enforcement is a strength, not a weakness, of our antitrust enforcement system. In an enforcement system where no enforcement agency or bureaucracy has the

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injunctive relief, or both, for the citizens of each attorney general's state for violations of the federal antitrust laws.

[18] See Lloyd Constantine, The Importance of State Antitrust Enforcement, speech to the AAI, June 22, 2004, available at http://www.antitrustinstitute.org/recent2/360.cfm.

monopoly power to preclude the initiation of important cases, "false negative" enforcement decisions are less like to occur.

The importance of concurrent enforcement by state attorneys general in civil non-merger cases, is illustrated perhaps most graphically in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). In that case, the United States Department of Justice declined to investigate despite a direct request to do so by several states. Nineteen states sued 32 insurers, reinsurers and an important trade association of insurers, in the face of federal inaction. The states alleged that the defendants had engaged in boycotts of certain types of business and municipal insurance. The states were particularly sensitive to these violations because their own municipalities and governmental agencies had been unable to obtain certain types of property and casualty liability insurance from domestic commercial insurers, allegedly due to a conspiracy among domestic insurers, domestic and foreign reinsurers, and the trade association representing the domestic industry. In other words, although the conspiracy was international in scope, the effects of the conspiracy were felt acutely at the local level. Ultimately, the states prevailed on three important issues in the Supreme Court, including the ability of U.S. courts to reach the conduct of foreign reinsurers operating largely outside of the United States. In addition, the case settled for important structural injunctive relief that radically transformed the Insurance Services Office, the central association of commercial insurers, from an organization dominated by the industry into one controlled by non-industry board members. More to the point, many of DOJ's subsequent international cartel cases are premised on the precedent established by *Hartford Fire Insurance*.[19] Had the antitrust enforcement system not provided concurrent authority to the states, not only would the conspiracy not have been stopped, important decisional authority would not have been created.

Another example of the importance of our concurrent enforcement system occurred in the mid-1980s when the federal antitrust enforcement agencies decided not to enforce several portions of federal antitrust law including, for example, the *per se* rule against minimum resale price maintenance. The state attorneys general, using their concurrent enforcement authority, stepped into the breach, brought their own cases, recovered damages for their citizens, established effective injunctive relief, and enforced the law.[20] Congress indicated its agreement with this approach, when it forcefully rejected the attempts by federal antitrust enforcement agencies to effectively repeal, unilaterally, the *per se* rule against minimum resale price maintenance.[21] Although it is always possible for the antitrust bar to debate particular policy issues, *per se* treatment of minimum RPM was and is the law. It was only because we had a system of concurrent enforcement that the law was effectively enforced.

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[19] *See also* Robert Skitol & James Meyers, *Ten Milestones in 20th-Century Antitrust Law and Their Importance to the Decade Ahead*, Antitrust Rep., Aug. 2000, at 6 (listing *Hartford Fire Insurance* as a "milestone case" in the field of antitrust law).

[20] Constantine, *Antitrust Federalism*, 29 Washburn L. J. 163 (1990).

[21] *Id.*at 177, n.111.

Finally, no discussion of this subject would be complete without noting the states' role in the enforcement action brought against Microsoft by the Antitrust Division and a number of states in 1998. The interest of some states in the *Microsoft* litigation originated in the perceived weakness of the decree negotiated by DOJ and Microsoft in 1994-95.[22] It was during the time, mid-1995, that this decree was being approved that Microsoft attempted to allocate markets with Netscape, a course of conduct that ultimately formed an important factual basis for the subsequent broader litigation. But in 1995 and 1996, it was not obvious to the world at large or to the states that DOJ would be pursuing a broader case against Microsoft. Many in the states viewed it as a repeat of the situation involving the *Hartford Fire Insurance Co.* case. In 1997, several states began investigating Microsoft's conduct. The states' pre-complaint investigation was staff-driven, extensive, and was conducted for the most part independently of the DOJ investigation, although the states continually sought to coordinate with DOJ to the fullest extent possible.[23] The states' decision to sue was based on the merits after an extensive analysis of the relevant facts and law, not (as some later alleged) on lobbying by Microsoft's competitors. The states had prepared their complaint and were prepared to proceed on a bipartisan basis including a coalition of attorneys general that represented both conservative Republicans and liberal Democrats.[24] The states and DOJ eventually worked out an understanding to file similar complaints and to litigate jointly a broader case against Microsoft.[25] Given the magnitude of the litigation, it was noteworthy that the states and DOJ were able to litigate this case jointly to a successful resolution. Although DOJ brought enormous talent and resources to the litigation, the states also provided exceptional resources, expert witnesses and resolve to the government's case.

In conclusion, the states' role in civil non-merger enforcement has been extraordinarily important. Hundreds of millions of dollars of damages and innovative and helpful injunctive relief have been obtained for state consumers that likely would not have been obtained otherwise. Important antitrust case law has been generated by the states' efforts, case law that now underpins some of DOJ's most successful national and international cartel enforcement efforts. The states' role in preventing "false negative" enforcement decisions by federal agencies runs the gamut from the mundane, such as shoes and consumer electronics, to the sophisticated, reinsurance and computer software. It is a record that underscores the strength of our concurrent enforcement system and certainly does not suggest the need for any significant change.

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[22] *See United States v. Microsoft Corp.*, 159 F.R.D. 318, 330-38 (D.D.C. 1995) (finding proposed consent decree was not in public interest because it failed to address all of Microsoft's alleged anticompetitive behavior and did not have an effective monitoring mechanism), *rev'd and remanded*, 56 F.3d 1448 (D.C. Cir. 1995). *See also Concurrent Enforcement is Focus of Discussion Within ABA Section*, 83 Antitrust & Trade Reg. Rep. (BNA) No. 2070, at 161 (Aug. 16, 2002) (Patricia A. Conners commenting on the states' perception of the 1995 consent decree).

[23] O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 Ant. L. J. 413, 427 n.79 (2002).

[24] For example, at the time of the filing of the states' complaint in 1998, the Attorneys Generals of New York and California were both conservative Republicans, Dennis Vacco and Richard Lundgren, respectively.

[25] O'Connor, *supra*, note22, at 423.

2. Should state and federal enforcers divide responsibility for non-merger civil antitrust enforcement based on whether the primary locus of alleged harm (or primary markets affected) is intrastate, interstate, or global? If so, how should such an allocation be implemented?

No. First, even if it were necessary, it would be very difficult to draw clear distinctions between intrastate, interstate, or global loci of alleged harm. For example, one can ask rhetorically whether the locus of the injury in the *Hartford Fire Insurance* case, discussed above, was local, national, or global. The correct answer was probably, all of the above. Such a dividing line would likely be highly artificial and arbitrary and not conducive to effective federal antitrust enforcement. The question presumes that states do not focus on matters of local impact when, in fact, they do. A case that is global, international, or national in scope may also have local market effects that are significant. It is the local market effects, not the global, international and national, that typically concern the state attorneys general, and as the chief legal officers of their sovereign states, it is their obligation to ensure that violations of state and federal laws that affect local markets, whether those effects be in one or several states be appropriately redressed. No federal enforcement agency can adequately and appropriately fill that role and still tend to the larger effects of the antitrust conduct in question. Conversely, and as a practical matter, not all state attorneys general have the resources to pursue an antitrust matter with local market effects. As a result, if the federal agencies are barred from pursuing local or regional non-merger civil antitrust matters, and the state or states with direct responsibility do not have the resources to prosecute such matters, violations may go unaddressed. Finally, a division of responsibility could undermine the important role the states play in preventing the "false negatives" referred to in response to the previous question.

Having said all that, this question appears to be premised on the assumption that the state attorneys general and the federal enforcement agencies routinely overlap in their pursuit of non-merger civil matters. However, if this is the premise of the question, it is a false one. It is rare that the state and federal enforcement agencies ever overlap in any meaningful way in their enforcement of the federal antitrust laws in non-merger civil cases. The *Hartford* and *Microsoft* cases are the exception, not the rule. To the extent that they do, either because they are looking at a matter at the same time or one enforcer pursues a matter after another, the overlap is minimal. This is because the focus of the two federal enforcement agencies and the states is very different. The DOJ Antitrust Division rarely brings civil non-merger antitrust cases. They focus instead on criminal enforcement. The Federal Trade Commission generally seeks only non-monetary equitable relief. The states, meanwhile, either as part of multistate initiatives or individually, use their federal antitrust authority under the Clayton Act to obtain monetary damages for natural persons *parens patriae* and governmental entities and to seek appropriate injunctive relief, where appropriate. Neither of the federal agencies represents consumers and state and local public entities in this context. Therefore, to the extent the federal enforcement agencies and the states may pursue a civil non-merger

matter at the same time, each is seeking a different remedy, requiring a different focus and different proof during any investigation and any subsequent litigation.

The federal and state enforcers also often represent unique constituencies with only the state attorneys general in the role of enforcing the federal antitrust laws to recover monetary damages on behalf of natural persons. Were the states to cede their ability to recover their own unique remedies to the federal agencies in certain circumstances so that all remedies could be achieved by one federal enforcement agency (if that is the suggestion behind the question), the risk of under-enforcement of the antitrust laws would be very real, and it is likely that natural persons are likely to be the ones who would suffer from any lack of appropriate recovery. The federal enforcement agencies are simply not in a position to represent the citizens of sovereign states to recover monetary damages. And, the record of state attorneys general as effective advocates recovering hundreds of millions of dollars for consumers and public entities demonstrates that they have aggressively carried out the role Congress envisioned for them in 1976.

When both a federal enforcement agency and a state enforcer or group of state enforcers does pursue a matter at the same time, there is typically significant cooperation, sharing of information, ideas and strategies, and coordination right through litigation. Two examples of excellent coordination in civil non-merger cases include the Microsoft case (which was well coordinated through to the end of trial and the subsequent appeal), with respect to joint matters handled with the Department of Justice and the Mylan Labs case which was jointly investigated, prosecuted, and settled with the Federal Trade Commission.

To the extent that the coordination of civil non-merger matters between the federal and state enforcers is informal and case-by-case dependent, there is, of course, always room for improvement and increased consistency. It might therefore make sense for the federal agencies and the state attorneys general to develop a protocol for coordination of joint or parallel investigations in civil non-merger matters, much like the one currently in place for merger reviews. In fact, the American Bar Association Section of Antitrust Law this past January made a similar recommendation in its Report to the President on the state of antitrust enforcement by the federal enforcement agencies. To the extent, any perceived problem in coordination or overlap exists, we suggest that all avenues to establish an effective protocol to improve transparency regarding such coordination be undertaken first before consideration is given to dividing enforcement responsibility along the extremely impractical and unrealistic lines suggested in the question.

Additional Submissions: Table A Multistate Cases

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