

ANTITRUST MODERNIZATION COMMISSION

AMENDED)
COMMENTS REGARDING) **ATTORNEYS GENERAL OF THE**
COMMISSION ISSUES) **UNDERSIGNED STATES AND**
FOR STUDY) **DISTRICT OF COLUMBIA**
)

INTRODUCTION

The Attorneys General of forty-two (42) jurisdictions, including forty-one (41) states (the “States” or the “Attorneys General”)¹ submit these comments in response to the Antitrust Modernization Commission’s (the “Commission”) Request for Public Comment, 69 FR 43969 (July 23, 2004).

The States possess significant experience in many facets of antitrust enforcement and welcome this opportunity to assist the Commission in identifying issues that merit consideration. The Attorneys General are mindful that this submission exceeds the established 300-word per issue guideline. The joint character of this submission should, however, make it fully consistent with the Commission’s intent and, thus, appropriate. The undersigned would welcome the opportunity to meet with the Commission at its convenience. In particular, the States respectfully request notice of any meeting or session at which the Commission anticipates discussing state antitrust enforcement.

State antitrust law predates its federal counterpart, with twenty-one states having enacted either constitutional or statutory antitrust provisions by the time Congress passed the Sherman Act

¹ The signatory states and jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin.

in 1890.² Each signatory to this joint submission is the chief law enforcement officer of a sovereign State or other jurisdiction of the United States. As such, state attorneys general are the primary public enforcers of state antitrust law, authorized to bring suit under state and federal antitrust laws as *parens patriae* on behalf of citizens and consumers, and also to represent States and their agencies in state and federal antitrust actions for damages and injunctive relief. State attorneys general frequently cooperate successfully with federal authorities and members of the private bar in investigating and prosecuting antitrust violations.

The States urge the Commission to study the issues identified below. Part of the Commission’s mandate is “to examine whether the need exists to modernize the antitrust laws.” The Commission should approach this charge without preconceptions as to any need for so-called “modernization.” More specifically, the Commission should critically evaluate the suggestion that the utility or relevance of the antitrust laws has diminished as a result of changes in our economy over the last century. On the contrary, in interpreting and applying the law, the courts and the enforcement agencies regularly assess and respond to the changing economic landscape, thus assuring that the principles of competition underlying the antitrust statutes are as valid today as when those laws were enacted.

TOPICS FOR STUDY

I. Antitrust Federalism

The States respectfully recommend the issue of antitrust federalism to the Commission as an appropriate topic for study. States play an active part in concurrent enforcement of the antitrust laws and in pursuing recoveries for parties injured as a result of anticompetitive activities.

² Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY 155 (1955); David Millon, *The First Antitrust Statute*, 29 Washburn L.J. 141, 141 (1990). Today, every state has some variant of antitrust law. See 6 Trade Reg. Rep. (CCH) ¶¶ 30,202.03 –35,585 (2003).

Particularly in the aftermath of the *Microsoft* litigation, state attorneys general have been criticized for playing an enforcement role that either duplicates or is inconsistent with that of the federal government. Yet, recognizing the sovereignty of the states, our system of antitrust jurisdiction contemplates that federal and state enforcers will exercise independent judgment in determining which activities present the greatest risk of harm to competition. Most often, these independent analyses yield like conclusions, resulting in coordinated actions involving the States and the federal enforcement agencies. Such joint efforts create a powerful synergy, blending the national perspective of the federal agencies with the unique knowledge of local markets and *parens patriae* powers of the state attorneys general.

Occasionally, the independent deliberative processes of federal and state antitrust enforcement agencies can produce differing conclusions, causing enforcers to part ways in deciding which matters or arguments to pursue. Such differences resulting from unique perspectives on risk, policy considerations and priorities are essential to efficient and effective enforcement. Former FTC General Counsel Stephen Calkins recently wrote: “Diversity of views can be a good thing, struggling with challenging issues may enhance the antitrust discussion, and at times states bring an essential perspective to bear on an issue.”³ Another antitrust scholar has recognized that: “[f]ederalism serves antitrust jurisprudence, society, and democracy by giving voice to the diversity of opinion and by allowing the states to find ways to serve their citizens’ varying (and, at times, conflicting) concerns.”⁴

Given this discussion, the Commission’s consideration of the issue of federalism in modern antitrust enforcement is timely. The States urge the Commission to give it full and careful consideration.

³S. Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 734 (2003).

⁴J.W. Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 Antitrust L.J. 29 (2000).

II. Remedies

A thorough analysis of the efficacy of the antitrust laws should consider antitrust remedies, including monetary remedies, availability of damage awards to indirect purchasers and injunctive remedies.

The States encourage the Commission to examine damage awards and other monetary remedies. Adequacy of a monetary remedy depends upon its objective. If, for example, the primary objective is compensating aggrieved parties, single damages may be adequate while multiple damages may appear to confer a windfall. If deterrence and/or punishment are the goals, single damages are likely not sufficient, and treble damages—even when awarded to multiple layers of purchasers—are probably necessary. A study of how often treble damages are actually paid might reveal whether the typical reality of single damages under-deters undesirable activity. If the purpose of monetary remedies is to foster vigorous competition, the Commission should consider whether consistency in civil enforcement spurs competitive behavior. Finally, if monetary remedies exist to prevent the violator from benefiting from the violation, does disgorgement serve this function adequately?

A significant related issue is whether damage awards should be available to indirect purchasers. Although state legislation and judicial decisions have partially filled the indirect purchaser gap, inconsistencies and potential confusion remain. Civil litigation arising out of a violation resulting in harm to consumers could include a *parens patriae* claim brought by state attorneys general and a concurrent class action brought by the private bar. When the consumers are indirect purchasers, differences in state law can result in disparate treatment, depending upon whether each state's law permits recovery and whether governing law requires representation by the state attorney general. The Commission should explore potential solutions to issues arising from

competing representative authority, including possible legislation repealing the *Illinois Brick* decision.

Finally, the Commission should consider the effectiveness of injunctive remedies relative to the costs they may impose on defendants, enforcement agencies, private plaintiffs and the courts. Encompassed within this discussion are such issues as whether injunctive relief may be obtained quickly enough to be effective in rapidly changing markets and whether simultaneous negotiation and enforcement of injunctions by federal, state and private parties is efficient and effective. For example, what injunctive relief would be effective in networked markets where the violation has given the violator a *de facto* standard?

III. Regulated Industries

During the Commission's initial meeting, one of the issues identified as meriting attention was continued application of the antitrust laws in regulated industries. A significant concern is that courts at times are diluting the antitrust laws despite the existence of explicit antitrust savings clauses, such as found in the Telecommunications Act of 1996 (the "Telecom Act").

The States agree that this area is ripe for study, not only in the context of the Telecom Act but in other regulated industries such as energy, transportation services and agricultural commodities. States generally take the position that exemptions from the antitrust laws should be disfavored, yet courts and Congress arguably are taking an increasingly expansive approach to preempting the antitrust laws. In some instances, these enforcement gaps leave state enforcers, businesses and consumers with limited recourse against massive wrongdoing or potential harm.

For example, in recent proceedings before the Federal Energy Regulatory Commission ("FERC"), FERC admitted that it lacked the resources to police the energy market properly. At the

same time, courts often have invoked pre-emption and the filed rate doctrine to preclude effective remedies to consumers and states under the antitrust laws. Similarly, Congress has erected statutory barriers to effective antitrust enforcement in various regulated sectors. Specifically, Congress has placed beyond the reach of the antitrust laws a merger or consolidation approved by the Surface Transportation Board. This broad grant of immunity warrants revisiting.

Although these issues will require review of more than just the federal antitrust laws, the Commission could serve a significant role by highlighting areas of particular concern and proposing changes. The unique blend of perspectives on the Commission is well-suited to this task and state attorneys general have unique experiences to offer that would be valuable to that discussion.

IV. Merger Reviews

Increased state merger enforcement during the last two decades has led to many more merger reviews in which a federal antitrust agency and one or more states review the same transaction. Although state attorneys general are especially effective and efficient in gathering and analyzing evidence regarding the intricacies of local and regional markets⁵ and bring additional enforcement resources to these reviews, states are at times criticized as adding unnecessary time and cost. These criticisms ignore several important formal and informal steps taken by the states to minimize duplication and delay, while allowing states to exercise their sovereign judgment. These actions include:

1) adopting the Protocol for Federal-State Cooperation in Joint Investigations (“Protocol”) with the goals of “maximizing cooperation between...enforcement agencies” and “minimizing burden to the parties”;

⁵See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke Law Journal 673, 679-81.

2) establishing periodic meetings among representatives of the states, the FTC and DOJ to refine procedures and to discuss issues arising in current merger matters;

3) adopting the Voluntary Premerger Disclosure Compact (“Compact”),⁶ to ensure that states can more quickly gain access to documents, resulting in more timely joint reviews. The Compact also safeguards confidentiality and limits the number of states to whom the parties must provide documents; and

4) coordinating settlement negotiations with federal enforcement agencies to minimize the compliance burden on settling parties.

It is possible that implementing additional procedures could improve the effectiveness and value of the states’ participation in merger investigations. Accordingly, the States urge the Commission to consider the following questions:

- What modifications could be made to the HSR Act, the Protocol and/or the Compact to increase the States’ ability to perform timely reviews and decrease burdens on the parties?
- Can confidentiality procedures be streamlined to maximize the efficiency of information gathering and information sharing among enforcement agencies?
- Can concurrence by state and federal enforcement agencies on particular economic or industry-specific issues in merger analysis enhance the predictability of merger enforcement?

⁶Both the Protocol and the Compact can be found at the NAAG webpages, at <http://www.naag.org/issues/issue-antitrust-protocols.php>.

CONCLUSION

The undersigned Attorneys General respectfully submit these joint comments and offer their assistance in analyzing and resolving these issues. The Attorneys General have designated the following contact persons for the States to facilitate prompt responses to the Commission's questions, requests for information or other inquiries: Patricia A. Conners, Director, Antitrust Division, Office of Florida Attorney General Charlie Crist, and Chair of the Multistate Antitrust Task Force, Telephone: (850) 414-3600, E-mail: trish_conners@oag.state.fl.us; and Jennifer L. Pratt, Senior Deputy Attorney General, Antitrust Section, Office of Ohio Attorney General Jim Petro, Telephone: (614) 466-4328, E-mail: jpratt@ag.state.oh.us.

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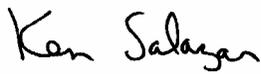
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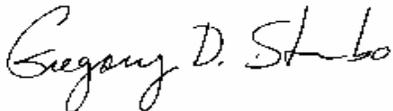
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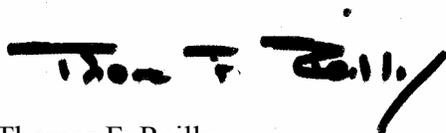
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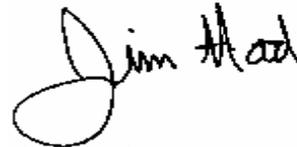
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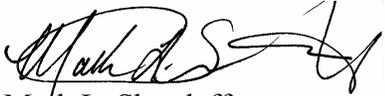
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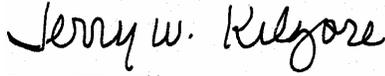
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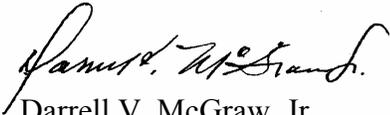
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