**WRITTEN TESTIMONY OF**
**MAINE ATTORNEY GENERAL**
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**ON THE ALLOCATION OF ANTITRUST ENFORCEMENT**
**BETWEEN THE STATES & THE FEDERAL GOVERNMENT**

**October 14, 2005**

This written testimony supplements the Comments of the Maine Attorney General dated July 15, 2005,[1] and precedes oral testimony scheduled for October 26, 2005.

## TESTIMONY

I want to begin by thanking the Commission for according me this opportunity. I should also make clear that while I and my office participate actively in the National Association of Attorneys General, my comments today represent my views alone, not those of any other person or agency.

I will begin by providing some brief background concerning Maine's antitrust laws and our enforcement program. Maine's experience is of interest not because it is exceptional in any way, but because in most respects it is broadly representative of the experience of other States.

### Maine's Antitrust Record

As Maine's Attorney General, I am charged with the enforcement of state antitrust laws, including our Profiteering & Monopolies Law (which includes provisions closely modeled on sections 1 & 2 of the Sherman Act as well as section 7 of the Clayton Act) and our Unfair Trade Practices Act (modeled on the FTC Act).[2] Maine possesses enforcement authority under our antitrust statutes if the effects of a violation make

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[1] Hereinafter "Maine AG Comments."

[2] 10 MRSA sec. 1101 -1109; 5 MRSA sec. 205-A -213.

themselves felt within our borders, regardless of whether the relevant conduct occurs within or outside the State.[3] While some state statutes may be more limited in substantive scope or jurisdictional reach, we understand that many, perhaps most are akin to Maine's in this regard.

Moreover, as you know, the States possess some federal enforcement powers under federal law: in addition to the ability to sue to protect, or seek redress for harm to state proprietary interests, the Hart-Scott-Rodino amendments of 1976 conferred on the States authority to sue under the Sherman Act on behalf of citizens as *parens patriae*.[4]

Maine has a record of consistent antitrust enforcement, bringing approximately 50 enforcement actions over the past two decades.[5] Well over half of our enforcement actions have been single-state matters, most of them filed in Maine courts under state law. In many instances, we believe, these cases have addressed violations of which federal agencies were unaware, unlikely to be made aware, and in some respects, perhaps, ill-equipped to handle. On the multistate side, more than three quarters of our cases have been brought under the Attorney General's *parens* authority, permitting us to recover millions of dollars in restitution and damages for Maine citizens.

Whether in single-state or multistate contexts, we have developed excellent working relationships and valued contacts with the federal agencies. We have learned a great deal from our federal colleagues in the context of this cooperative partnership; at the same time, we have been able to contribute significantly in terms of local knowledge and connections.

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[3] *See e.g. In Re Microsoft Antitrust Litigation, 2001 Me. Super. LEXIS 47* (Me. Super. Ct, Cum. C'ty, March 24, 2001)

[4] 15 USC sec. 15c, 15f.

[5] A one-page summary of relevant statistics is appended.

**Overlapping Authority & Cooperation**

The American system of antitrust enforcement endows state and federal authorities with overlapping and potentially duplicative powers. While the statutory framework governing our system has existed essentially unchanged since 1976, it is inherently flexible, and has evolved steadily toward increasing federal-state cooperation and coordination. This evolution gathered additional momentum as renewed federal enforcement in the nineties swept away the *laissez-faire* attitudes of the Reagan years.

The Executive Working Group on Antitrust, formed in 1989, represented an important milestone on the path to state-federal cooperation, institutionalizing high level contacts to enhance coordination and reduce duplication. Even more significant was the issuance in 1998 of the *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and the State Attorneys General.*[6] The *Protocol* set forth detailed procedures for multiple agency merger reviews, covering successive stages of the cooperative relationship with the stated goal of maximizing cooperation and minimizing burden. More recently, in 2003 an offshoot of the Working Group, the State-Federal Cooperation Committee, began monthly meetings to focus on cooperative procedures in the merger area, and to troubleshoot coordination efforts.

It remains that the degree of informality with which antitrust enforcement functions in America might surprise an outsider. *Ad hoc* allocation, sporadic coordination on an as-needed basis, and project-specific partnership between one or more States and the designated federal agency are all vehicles for successful cooperation within a flexible and responsive system.

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[6] 4 Trade Reg. Rep. (CCH) para. 13,420 (March 11, 1998).

**The Commission's Questions**

The primary issue identified by the Commission for this panel's focus is whether our system of overlapping jurisdiction should be altered or adjusted in some fashion in response to criticisms suggesting that the current allocation of authority is duplicative, inefficient, costly, burdensome, and uncertain.[7] As a framework for analysis, the Commission has posed a series of questions regarding the proper role for state Attorneys General in both nonmerger and merger civil enforcement.[8] Specifically the Commission has asked:

(1) With regard to nonmerger civil enforcement:

- ✓ Is state *parens patriae* authority useful or needed?
- ✓ Should civil enforcement authority be divided among state and federal authorities based upon the intrastate, interstate or global *locus* of the alleged harm, or the primary affected market?

(2) With regard to merger enforcement:

- ✓ Are multiple reviews problematic in the current system, in view of burden, benefit, delay and uncertainty factors?
- ✓ To what extent has the state-federal protocol successfully addressed these issues?
- ✓ Should merger review be limited to federal agencies?

I offer brief answers to each of these questions below.

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[7] *E.g.*, R. Posner, *Federalism & the Enforcement of Antitrust Laws by State Attorneys General*, 2 Geo. J.l. & Pub. Pol. 5 (2004); M. DeBow, *State Antitrust Enforcement & a Modest Reform Proposal*, in Epstein & Greve (eds), *Competition Laws in Conflict* 267 ff.

[8] Antitrust Modernization Commission, *Request for Public Comment, Enforcement Institutions*, para. C & D, 70 Fed. Reg. 28902 -28907 (May 19, 2005), available at http://www.amc.gov/comments/request_comment_fr_28902/enforcement_comments.pdf.

**Questions on Nonmerger Enforcement**

**Role of state Attorneys General.** The States have played an important role in enforcing sections 1 & 2 of the Sherman Act and analogous state provisions, bringing a broad range of local or regional single-state cases. Eliminating or significantly limiting state nonmerger enforcement authority would dramatically reduce small-scale antitrust prosecutions at the local level. State Attorneys General bring invaluable local knowledge and contacts to such cases; without them, federal enforcers, often remote from the scene, would be hard-pressed to find the resources to replace them.

***Parens patriae* standing.** Any major reallocation of nonmerger enforcement authority would also have disturbing implications for multistate nonmerger actions, in particular those brought under state *parens patriae* authority. The States have recovered very significant sums for consumers, through multistate *parens* lawsuits. Given the FTC's doubtful ability to seek disgorgement, and the shortcomings of private class actions, there is no adequate substitute for the *parens* standing of state Attorneys General.[9]

**Division of responsibility.** The case for a division of responsibility rises or falls on the premises that (1) dual enforcement results in otherwise unavoidable duplication, and (2) the level of duplication is beyond what should be tolerated. In the nonmerger area, however, very little duplication exists. Many single-state nonmerger cases involve local or regional matters unlikely to attract federal interest or attention. By the same token, the largest category of multistate nonmerger cases are *parens* matters. In these cases, by definition, the States are breaking ground untilled by federal enforcers.

One of the great strengths of our system is that the federal-state overlap ensures seamless coverage. Any limitation of state jurisdiction would risk tearing a hole in that enforcement fabric. Wherever the line is drawn, and whatever its basis, some significant category of cases will be likely to escape appropriate review as a result. These factors counsel strongly against placing any limitation on state antitrust jurisdiction in the nonmerger area.

**Questions on Merger Enforcement**

**Role of state Attorneys General; limitation to federal level.** State Attorneys General also play an important role in merger enforcement. Again, a major alteration in this realm, for example preempting state merger jurisdiction, would be likely to have the effect of exempting a significant volume of local and regional mergers from review altogether.[10] Moreover, to the extent that federal agencies could assume the mantle of local merger enforcement, it is doubtful that the substitution would reduce either burdens or delays. State enforcers are present on the ground and locally well-connected. With all due respect, in the context of local enforcement, we are the rapid responders, capable of greater efficiency with time and resources than our federal counterparts.

**Multiple merger reviews; effect of protocol.** A merger review conducted by multiple States in collaboration with a federal agency represents a unitary proceeding, which as such involves no duplication. On the other hand, a multi-agency review may pose some risk of imposing unwarranted burdens. The implementation of the merger protocol has gone a long way toward minimizing that risk. The Commission may wish to

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[9] *See* discussion in Maine AG Comments 19-20.

[10] While some larger States report that, on average, 15% of their merger cases are conducted without federal involvement, our own data show that approximately 65% of the mergers reviewed by Maine did not receive concurrent review bay any federal agency.

explore whether modest incremental initiatives designed to rationalize the joint review process and further reduce burdens might make sense. At the same time, caution should be exercised to avoid compromising the coverage, flexibility, and constitutional values underlying our dual enforcement system.

**A Quintessentially American System**

Our system of overlapping state-federal jurisdiction has important advantages. It ensures seamless coverage of enforcement matters whether local, regional or national in scope. Moreover, its relative informality and flexibility enhance our ability to bring appropriate resources to bear rapidly and efficiently.

Two broad criticisms have been leveled against this dual system. It is said to (1) result in costly duplication and inefficiency; and (2) generate uncertainty by allowing too much scope for conflicting enforcement approaches.[11] In concluding my remarks, I will address these criticisms in turn.

First, as outlined above, Maine's experience (believed to be broadly typical) suggests that the extent of duplication and inefficiency resulting from the overlap is much less than may have been assumed. Moreover, in recent years we have made steady progress toward greater interagency cooperation, further minimizing duplication and reducing burdens. It may be that the Commission can identify further modest,

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[11] Some critics have gone further, suggesting that States have applied antitrust laws inappropriately for parochial purposes unconnected to antitrust policy. M. DeBow, *supra* fn. 6 at 276, citing a Maine merger case, *Maine v. Connors Bros., Limiited,* 2000 -2001 Trade Cases (CCH) para. 72,937 p. 87, 973 (Me. Super. Ct, Ken. C'ty, March 29 2000). As we explain in Maine AG Comments at 12 -13, Mr. DeBow misinterpreted the somewhat unusual circumstances of *Connors*; moreover, there is no evidence that state enforcers generally have engaged in a pattern of inappropriate parochialism.

incremental steps that might be taken in this direction.

The critics' second point merits a response of a different order. Some degree of philosophical divergence and accompanying uncertainty are inevitable in a system of concurrent and overlapping authority. These features of our system are in some ways inconvenient, and may be undesirable, from the perspective of efficiency. But in evaluating this critique, values distinct from, and in the end, more important than efficiency must be considered.

Our system of concurrent enforcement is no accident: it is grounded in the unique brand of federalism enshrined in our Constitution. Maine (like each of the other forty-nine States) is a sovereign entity, with sovereign powers and interests. In Justice Brandeis' phrase, the States have been assigned a special constitutional role as "laboratories of democracy," within which differing approaches to government may be tested.[12] The constitutional roots of our antitrust pluralism were acknowledged by Senator Sherman in 1890, and reaffirmed by the Supreme Court in its 1989 *ARC America* decision.[13]

If we accept the American brand of federalism, the capacity of our system to accommodate divergent approaches should be seen, not as a weakness, but a source of strength. Just as freedom of speech is essential to democracy, openness to differing antitrust philosophies stimulates doctrinal vitality, and endows judicial decision-making with a greater legitimacy. This point is well-illustrated in *Microsoft*, as critics of the non-

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[12] *New State Ice Co. v. Liebmann,* 285 US 262, 311 (19322) (Brandeis, J., dissenting).

[13] *See* comments of Senator Sherman, 21 Cong. Rec. 2457 (1890) (Sherman Act designed to supplement state antitrust enforcement under state statutes and common law); *California v. ARC America*, 490 US 93 (1989).

settling States may be better able to acknowledge now that the smoke has cleared.[14] Ultimately, philosophical inclusiveness is characteristic of a quintessentially American system in which, as enforcers, scholars and advocates, we can all take considerable pride.

[14] *Massachusetts v. Microsoft Corp.*, 373 F 3rd 1199 (DC Cir. 2004); *see* discussion in Maine AG Comments at 21 -23, 27 -28.

**Maine Antitrust Enforcement**
Summary: 1984-2005

50 antitrust actions

40% multistate/ 60% single state

40% merger/ 60% nonmerger

10% multistate merger/ 30% single state merger

30% multistate nonmerger/ 30% single state nonmerger

All but one multistate action filed in federal District Court under federal law

All but two single state actions filed in state court under state law

10% of multistates involve a federal partner

10% of single state actions involve a federal partner

80% of multistates brought as *parens patriae*

0% of single state actions brought as *parens patriae*

100% of multistate actions involve interstate or international impact

25% of single state actions (all mergers) involve interstate or international impact