

**Testimony of California Chief Assistant Attorney General Thomas Greene¹
Concerning State Merger Enforcement
Before the Antitrust Modernization Commission**

July 15, 2005

I thank the Commission for providing me with the opportunity to submit this testimony. I direct my remarks specifically to the question of merger enforcement under the Clayton Act by state attorneys general.

Summary

State attorneys general acting singly or together play an instrumental role in merger enforcement. Our system of concurrent antitrust enforcement provides that both the federal agencies and the states have the authority to review and bring court challenges to anticompetitive mergers. The states, like any private party, may seek to enjoin a merger that violates section 7 of the Clayton Act. In addition, certain states may seek to enjoin mergers pursuant to state antitrust statutes that have analogues to relevant sections of the Sherman and Clayton Acts. States are vitally interested in the competitive effects of certain mergers which have the potential to raise costs to consumers and to the states themselves as purchasers. More particularly, states are keenly interested in mergers having local effects, regardless of whether the affected transactions are national, regional or local

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in scope. Such mergers may impact areas of the states' economies over which the attorneys general have traditional police power or regulatory responsibility. State merger enforcement over the last ten years represents a successful partnership with the federal agencies that increases the likelihood that anticompetitive mergers of all sizes will be scrutinized appropriately. Much would be lost by lessening the role undertaken by the states in reviewing mergers. Although state-federal cooperation can always be improved, our system of dual enforcement has served the U.S. economy well.

I. The State of State Merger Enforcement

The charts accompanying this comment confirm that state attorneys general devote significant resources to reviewing mergers of all sizes in various industries. This is true not only in large and mid-sized states such as Texas and Maryland but surprisingly in small jurisdictions such as Maine and the District of Columbia. Collectively, the states are likely to review ten to fifteen mergers per year. Texas and Maryland may be the only states that routinely keep track of merger investigations regardless of whether they result in a challenge, but their collected data are instructive. Texas, the second most populous state, opened on average over seven merger reviews in each of the last ten years. During that same period Maryland, a significantly smaller state, opened thirty-three merger investigations, including twenty that do not overlap the Texas list. California's history under both Attorney General Bill Lockyer and former Attorney General Dan Lungren is similar: about five to eight merger investigations per year.

A closer look at the Texas data yields interesting insights into state merger enforcement. Approximately fifteen percent of the mergers reviewed by Texas over the ten-year time period were conducted without the federal enforcers. Of that number, five out of the eleven state-only reviews resulted in a resolution in the form of a lawsuit, consent decree, letter agreement, fix-it-first

divestiture, or voluntary withdrawal of the transaction. California's experience in the last five years also shows that approximately fifteen percent of its merger investigations annually involve no other antitrust enforcement agency. Thus, the states are looking at some mergers on their own and achieving results without significant federal involvement.

The vast majority of all mergers reviewed involve overlaps of products or services that are marketed locally to consumers or bought by governmental agencies. The mergers on the Texas list involve healthcare, petroleum, waste hauling and disposal, agricultural commodities, telecommunications, banking and general retail. Those that California has undertaken fall into the same categories, though often involving different merging parties.

Maryland, with fewer resources, was able to investigate the local impact of national mergers as well as purely local mergers, working both with federal agencies and on its own for transactions lacking Hart-Scott-Rodino filings. Interestingly, local merger investigations conducted by the Maryland Attorney General since 1995 culminated in every case with either a decision not to challenge the merger or an abandonment of the transaction by the parties.

As illustrated in the following sections, states are working cooperatively with DOJ and the FTC, extending scarce federal enforcement resources and increasing the intensity with which local markets are examined.

II. Historical Role of State Attorneys General in Merger Enforcement

On numerous occasions the Supreme Court has recognized that “[a]ntitrust laws ... are the Magna Carta of free enterprise.”² During the explosive economic growth and industrialization of the late nineteenth century, free enterprise was in dire need of a tool to confront an unprecedented

² See, e.g., *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972).

consolidation of market power by national trusts. Common law and state corporate law restrictions on consolidation through merger were ineffective against monopolistic combinations such as Standard Oil. It was the states, however, and not the federal government, who responded to the threat by enacting the country's first antitrust statutes. By 1890, the year Congress approved the Sherman Act, twelve states had passed their own antitrust laws, and eight other states continued to adopt antitrust legislation into the next decade.

These antitrust laws were a natural extension of the states' traditional police power to protect the welfare of their citizens. By enforcing antitrust legislation, the state attorneys general filled a void in our economic system that had allowed trusts to engage in coercive behavior to the detriment of consumers and free enterprise. Prior to 1890, six states instituted actions challenging the intrastate activities of certain trusts with all six cases resulting in either the revocation of the defendants' business privileges or severance from the corporate trust relationship. Congress recognized the states' role in antitrust enforcement and enacted the Sherman Act with the intent to supplement state law rather than supplant it.³ Between 1890 and 1902, twelve states brought twenty-eight antitrust actions compared to nineteen brought by the United States Department of Justice during the same period. After the turn of the century, federal enforcement activity would eventually eclipse that of the states. Nevertheless, state cases during these formative years were oftentimes the only barrier to the dominance of the trusts and in several instances resulted in important, lasting success. For example, the Standard Oil trust was prevented from controlling the extremely profitable Texas oil

³ The Act's sponsor, Sen. John Sherman stated that the proposed legislation was intended to "supplement the enforcement of the established rules of the common and statute law by the courts of the several states." 21 Cong. Rec. 2457 (1890).

fields due to the active enforcement of state antitrust laws by the Texas Attorney General.⁴

Although the federal government eventually dissolved the Standard Oil trust under the Sherman Act⁵, state antitrust enforcement encouraged the growth of competition and shaped the structure of the modern oil industry.

In 1914, Congress enacted the Clayton Act and addressed a weakness in the Sherman Act that allowed anticompetitive mergers through the ordinary transfer of voting securities instead of trust certificates. Congress authorized the United States and individual states, as private parties, to enjoin anticompetitive mergers pursuant to section 7. Although the states are on the same footing as private parties under section 16, a state may bring suit for injunctive relief either in its proprietary capacity or exercising its quasi-sovereign interest as *parens patriae*.⁶ A state's quasi-sovereign interest in preventing an anticompetitive merger arises when the effects may "limit the opportunities of her people, shackle her industries, [and] retard her development."⁷

For most of the twentieth century, states focused their merger reviews on transactions with local effects. During the 1970s, state attorneys general entered a period of revival for both merger review and antitrust enforcement in general. In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"), providing states with *parens* standing in damages cases under section 4 of the Clayton Act. At the same time, Congress established a two year program to

⁴ See *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28 (1900); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); Joseph A. Pratt & Mark E. Steiner, "An Intent to Terrify": *State Antitrust in the Formative Years of the Modern Oil Industry*, 29 Washburn L.J. 270 (1990).

⁵ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁶ *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) (recognizing authority of state attorney general to enjoin mergers which are harmful to the general welfare and economy of the state).

⁷ *Id.* at 451.

fund state antitrust enforcement which many states used to establish bureaus and divisions exclusively dedicated to antitrust enforcement. In the early 1980s, just as the states were gradually increasing their activities in the national merger arena, federal merger enforcement underwent a temporary, but seismic shift which lasted until the first Bush Administration. When measured by the ratio of challenges, consent decrees and/or second requests to total HSR filings, the Department of Justice and Federal Trade Commission reduced their previous level of merger activities by seventy-five percent. As an example of the unprecedented transformation in merger policy, in 1987, then-Secretary of Commerce Malcolm Baldrige advocated for the repeal of section 7 of the Clayton Act. The reduction in federal oversight coincided with a significant increase in large mergers in concentrated industries.

The state attorneys general found themselves in largely the same position they occupied during the late 1800s. There was a void in antitrust enforcement that could potentially harm the states' consumers and economies. The most significant difference was that by filling the void, states would be preserving the consistency and predictability that is integral to successful antitrust enforcement. With their added responsibility, states proceeded to increase the number of merger actions, amicus curiae briefs, and administrative comments filed. The states also began to organize with each other to facilitate the review process. In 1983, NAAG created the Multistate Antitrust Task Force which is a permanent subcommittee comprising representatives from all fifty states, the District of Columbia, and five territories. The most important role of the Task Force is to provide a forum through which individual states may coordinate multistate investigations and litigation.

As the states started working together, cooperation between federal and state authorities began to falter. The FTC reversed its policy of assisting state attorneys general by sharing premerger

notification and market information obtained during a premerger investigation.⁸ In *Lieberman v. FTC*⁹ and *Mattox v. FTC*,¹⁰ the courts ruled that the HSR Act did not provide the states with a right to access premerger information. In response to these setbacks, the states entered into the NAAG Voluntary Pre-Merger Disclosure Compact in 1987. The NAAG Compact creates a contractual understanding among the signatory states and the parties to a transaction with regard to the sharing of information about the proposed merger. In exchange for parties voluntarily filing their HSR materials with a liaison state, the signatories conditionally agree not to exercise their right to serve additional requests for information or other investigative demands. The NAAG Compact was designed to benefit the states by providing notification of contemplated mergers prior to their consummation while the parties were spared the burden of complying with multiple discovery requests.

In 1987, the states also promulgated their own substantive merger guidelines. The NAAG Merger Guidelines were the result of an effort to bring uniformity to the states' enforcement procedures, provide the business community with the standards used by the attorneys general in reviewing mergers, and uphold the congressional intent underlying the Clayton Act. Although there were significant differences between the federal merger guidelines adopted in 1984 and the NAAG Merger Guidelines, both were revised and generally harmonized in 1992 and 1993, respectively.

As the 1980s drew to a close, federal and state cooperation began to improve. In 1989, the Executive Working Group on Antitrust was formed to articulate and enhance common enforcement

⁸ See 16 C.F.R. § 4.11(c) (1985).

⁹ 771 F.2d 32 (2d Cir. 1985).

¹⁰ 752 F.2d 116 (5th Cir. 1985).

objectives and to allow states access to HSR filing information. The Executive Working Group is comprised of the leadership from the two federal agencies and the state attorneys general from five states. Some benefits resulting from the Executive Working Group are enhanced federal/state cooperation and substantial reductions in duplication. State and federal enforcers reduced their goals to writing with the *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General* (the “Protocol”).¹¹ The Protocol describes procedures for strategic planning of merger review such as the division of responsibility for requesting and reviewing documents.

The most recent development in the relationship between federal and state antitrust enforcers involves the creation of the State/Federal Cooperation Committee in 2003. This committee acts under the auspices of the Executive Working Group and is comprised of three staff representatives from each of the two federal agencies and three state attorney general representatives. The committee meets on a monthly basis to address and resolve issues that arise from ongoing cases, as well as to identify specific procedures to use in joint investigations generally, with particular emphasis in the merger arena.

III. Benefits and Effectiveness of Dual State/Federal Merger Enforcement

The states are an essential component in our national system of merger enforcement. They protect vital public interests and lessen the likelihood of under-enforcement without imposing unfair

¹¹ Reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,420 (Mar. 11, 1998). Recently, NAAG unanimously adopted a resolution recognizing, among other things, that “the increasing level of cooperation between state Attorneys General and the federal antitrust agencies has been mandated by Congress and has been memorialized in several important Protocols concerning coordination of merger investigations, sharing information, and state prosecution of criminal antitrust offenses....” *Resolution: Principles of State Antitrust Enforcement*, NAAG (March 2005) (hereinafter 2005 NAAG Resolution), available at <http://www.abanet.org/antitrust/committees/state-antitrust/pdf/naag-sp2005-res.pdf>.

or inconsistent conditions. The states have significantly reduced duplication and burden in merger investigations and litigation through meaningful coordination and joint effort amongst themselves, the parties and relevant federal authorities.¹² Recent examples of meaningful coordination may be found by examining the Oracle¹³ litigation and Echostar¹⁴ investigation.

In Oracle, the twenty-nine participating states each entered into a confidentiality agreement with Oracle, wherein, among other things, Oracle agreed to provide up to six repository states with all documents it provided to DOJ. In fact, only three states (Maryland, New York, and Texas) were so utilized, with these states, in turn, shipping documents to the other involved states. Efficiencies were further enhanced and burdens on the parties lessened by the states' and DOJ's participation in coordinated interviews and depositions. Although defendants ultimately prevailed at trial, federal and state enforcers presented the strongest possible case by proceeding in a closely coordinated manner during the investigation and litigation of this case.

Echostar provides another illustration of successful coordination. In 2002, the DOJ, twenty-three states, the District of Columbia, and the Commonwealth of Puerto Rico filed suit to block the acquisition of Hughes Electronics Corp. (the operator of DirecTV direct broadcasting satellite service) by Echostar (the operator of the Dish direct broadcast satellite service). The states arranged meetings with technical experts on satellite functionality and capability. The states also provided

¹² While such coordination is on the increase, it is clearly not a new concept. Indeed as noted nearly two decades ago: "The states have achieved uniformity and near unanimity in enforcement ideology and methodology, as evidenced in documents such as our . . . Merger Guidelines . . . and our Merger Compact. More importantly, we now closely coordinate our investigations and litigation." Lloyd Constantine, Remarks at the 22nd Annual New England Antitrust Conference, Harvard Law School, *The Antitrust Enforcement Agenda for the New Administration: The State Perspective* (October 28, 1988).

¹³ *United States v. Oracle Corporation*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

¹⁴ *United States v. EchoStar Communications, Inc.*, No. 1:02CV02138 (E.S.H.) (D.D.C. 2002).

economic expertise to be used by both the states and the DOJ to assist in preparing for litigation of the case. Throughout the investigation, most meetings with the parties concerning economic and technical issues were held jointly with the states, as provided under the Protocol. The states established a liaison so that document production was handled by a single state. After the filing of the complaint, all aspects of the litigation were coordinated with DOJ. Shortly before formal discovery began, the parties abandoned the deal.

Before they decide to coordinate with federal enforcers in a merger review, states generally take into account two critical factors. First, states evaluate local market effects even if they ultimately work with the federal enforcers to review national mergers.¹⁵ Determining local market effects assists states in assuming their traditional focus on protecting consumers as *parens patriae*. Second, states consider whether the merger involves products purchased by the state or by governmental entities in the state.¹⁶

In Oracle, for example, the relevant products were financial management and human resources management software utilized by large and complex organizations such as governmental entities and educational institutions. In Echostar, the states focused on providing assistance in analyzing local markets. To this end, the states arranged to collect information from rural Multichannel Video Programming retailers as well as smaller cable systems operating in or near rural markets. In particular, they helped determine where cable competitors served a community and the level of competition those systems provided.

¹⁵ See 2005 NAAG Resolution, *supra* note 11 (“in merger cases, the effects of consolidation in national mergers are more often felt locally than nationally and state Attorneys General are at least as knowledgeable about those effects as are the federal antitrust agencies....”).

¹⁶ These factors explain the handful of local merger reviews undertaken by states acting singly or in small regional groups.

In 1996, California antitrust staffers under former Attorney General Dan Lungren worked very closely with the DOJ, and to some extent with the Federal Reserve economists, in reviewing the Wells Fargo/First Interstate Bank merger resulting in a sixty-six branch divestiture package. All of the branches were in California—many of them in Central Valley communities. During the phase of examining real-world conditions in numerous isolated local markets where market concentrations were very high, the California enforcer’s knowledge of geography and demography was invaluable to DOJ. In addition, while the federal enforcer’s economists studied special impacts on small business, California’s economist studied impacts on agricultural lending, especially crop loans, in which commercial banks have played an increasingly important role.

The long-honored tradition of strong merger enforcement by the states in regional and local mergers continues, either in conjunction with or exclusive of, federal agency participation. Because states tend naturally to focus on local markets they may know the geographic terrain, demography, economic make up and regulatory structure better than their federal counterparts.¹⁷ They may also have frequent contacts with public and private sector entities in the state and be in a position to identify quickly local issues and to interview local witnesses about potential market effects.

¹⁷ As noted by Professor Calkins in his discussion of the advantages and benefits of merger enforcement by state attorneys general:

For all the talk about globalization of competition, antitrust enforcement is routinely concerned about competition in local markets.... Intimate knowledge about local competitive conditions are essential to effective antitrust enforcement.

State attorneys general have a clear comparative advantage in understanding local markets. (citations omitted). It would make little sense for Washington-based enforcers trying to craft divestitures to remedy a grocery store merger, or debating about the viability of stores on different sides of some small town, not to consult with or involve a state enforcer who is more likely to be familiar with the history and current market dynamics of that area.

Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 680 (2003).

Accordingly (and predictably) states move aggressively against mergers that hit close to home, be it in banking,¹⁸ healthcare,¹⁹ petroleum,²⁰ supermarkets,²¹ or waste processing.²²

The states, as a group, have looked closely at consolidations in the oil and gas industry over the last several years. States are familiar with the pipelines, the gathering systems, the refineries and the storage facilities in our respective states from having studied them in multiple transactions. As a result, the states took lead responsibility in examining retail gasoline effects in the case of Shell/Texaco and natural gas gathering markets in the case of Conoco/Phillips. Similarly, the states have looked closely at the consolidation among waste hauling and disposal firms. Because the details of permitting vary among the states, federal-state cooperation is a virtual necessity in this industry. Likewise, the state's knowledge of local markets is invaluable in reviewing the delivery of healthcare. In California, for example, consumer access to healthcare services can be profoundly affected by the realities of traffic circulation within a metropolitan area. Information and

¹⁸ Cf., Press Release, Dept. of Justice, Justice Department Requires Wells Fargo & Company and First Security Corporation to Make Divestitures in Four States (Sept. 14, 2000).

¹⁹ Cf., *Wisconsin v. Kenosha Hosp. and Med. Ctr.*, 1997-1 Trade Cas. (CCH) ¶ 71,669 (E.D. Wis. 1996); *Wisconsin v. Marshfield Clinic*, Civil Action No. 97C0418C (W.D. Wis. June 19, 1990); *California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057, 1081 (N.D. Cal. 2000), *aff'd mem.*, 217 F.3d 846 (9th Cir. 2000).

²⁰ Cf., *State of New Jersey v. Exxon Corp.*, No. 1:99CV03183 (D.D.C. Nov. 30, 1999) (consent decree and final judgment); *California v. BP Amoco*, Case No. C000420 (N.D. Cal. Apr. 13, 2000) (consent decree and final judgment); *California v. Chevron Corp.*, No. 01-07746 (E.D. Cal. Sept. 13, 2001) (final judgment); *Utah v. Phillips Petroleum Co. and Conoco, Inc.*, No. 2 02 CV-0982 (D. Utah 2002).

²¹ Cf., *State of California v. Albertson's, Inc.*, No. SACV 99-825 DOC (ANx) (C.D. Cal. June 24, 1999); *Nevada v. Albertson's, Inc.*, No. CV-N-99-00333-ECR (D. Nev. June 24, 1999); *New Mexico ex rel. Madrid v. Albertson's, Inc.*, No. CIV 99-685 (D.N.M. June 24, 1999) (final judgment and consent decree).

²² Cf., *United States of America, State of Texas, and Commonwealth of Pennsylvania v. USA Waste Services, Inc. and Sanifill, Inc.*, Civil Action No. 96-2013 (D.D.C. 1996); *United States of America, State of New York, Commonwealth of Pennsylvania and State of Florida v. Waste Management, Inc., Ocho Acquisition Corp. and Eastern Environmental Services, Inc.*, No. CV98-1768 (E.D. N.Y. 1998); *U.S. v. USA Waste Services, Inc.*, 1999 U.S. District LEXIS 17577 (N.D. Oh.1999).

recommendations based on this awareness by state enforcers has proven extremely valuable to their federal counterparts when reviewing mergers of clinic-based health service companies. In the case of California's state-only challenge to Sutter Health's acquisition of Summit Medical Center, our analysis of the effects of traffic patterns in the San Francisco Bay area, while not adopted by the court, has been borne out subsequently in fact.

Often, much of the value added by the states is of a more qualitative nature that will not be readily apparent when looking only at final results. An example was the role played by the states in the proposed acquisition of Office Max by Office Depot. Several states filed declarations with the Court authenticating local newspaper advertisements or pricing surveys that substantiated head-to-head competition between the merging parties. These declarations played an important role in the FTC's successful challenge to the merger.

The important role of the states in effective merger law enforcement is also demonstrated when a state opts to undertake enforcement action in the absence of similar action by federal enforcers. For example, Connecticut brought an action against the merger of the major heating oil terminals in New Haven Harbor involving the only meaningful input point for the pipeline that serves the state.²³ Significantly, the Connecticut Attorney General did not learn of the merger until after its consummation, following premerger notification to federal regulators who not only failed to challenge the transaction, but also granted an early termination of the waiting period. Successful action by the state resulted in a consent decree containing important relief including a significant

²³ *Connecticut v. Wyco New Haven, Inc.*, 1990-1 Trade Cas (CCH) ¶69,024, 1990 WL 78540 (D.Conn. 1990).

divestiture of the merged assets.²⁴

Federal and state coordination generally continues at the conclusion of an investigation as enforcers work together to harmonize consent decrees. For example, many state decrees expressly provide that a defendant's conduct will not violate the state's consent decree if such conduct is specifically required by a parallel DOJ or FTC order.²⁵

IV. Criticism of State Merger Enforcement

Despite the many benefits arising from state merger enforcement, some critics have asserted unsubstantiated claims challenging the states' authority and effectiveness. Some have argued that state attorneys general, in making enforcement decisions, are unduly influenced by parochial considerations such as the impact of the merger on employment or headquarters location within the state, rather than consumer welfare.²⁶ The empirical basis for this criticism is remarkably thin. Even some of the critics themselves recognize that their criticism rests on anomalous examples and theoretical concerns. Professor Michael DeBow, for example, observes that, “[w]hile parochialism and externality concerns are theoretically well grounded, they do not find much empirical support in the states’ actions to date.”²⁷ Later in the same article, he concluded that “the vast majority of [state merger] cases ... appear, at least on the surface, to be concerned with the effects of the

²⁴ *Id.*; Richard Blumenthal, Robert M. Langer and William M. Rubenstein, *Antitrust Review of Mergers By State Attorneys General: The New Cops on the Beat*, 67 Conn. B.J. 2, 10-11 (1993).

²⁵ See *California v. Albertson's Inc.*, No. SACV 99-825 (final judgment and consent decree at 22) (C.D. Cal. 1999).

²⁶ See, e.g., Richard Posner, *Antitrust and the New Economy*, 68 Antitrust L.J. 925, 940 (2001); see also Richard Posner, *Antitrust Law*, 281-82 (2d. ed. 2001).

²⁷ Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, in *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* 267, 275 (eds. Richard A. Epstein and Michael S. Greve, American Enterprise Institute 2004); see also *id.*, 271 (Table 1 presenting the author's research on the volume of state actions in antitrust during the years 1993 - 2002).

challenged merger on consumer welfare, rather than on local effects on employment or competitors.”²⁸

The lack of substance to alleged parochial concerns was noted years ago in an ABA report to the Antitrust Section Council:

To date there is little evidence that the various problems potentially raised by concurrent state and federal jurisdiction to investigate and challenge mergers have actually occurred.

....

... While hypothetical state challenges to mergers with nationwide impact could raise serious concerns of conflicting jurisdiction, politicized enforcement decisions, inconsistent legal standards, oppressive burdens on the parties, and the general deterrence of beneficial mergers, actual examples of such abuses to date have been rare. The states seem generally to [have] acted responsibly, and in most cases conservatively, in the exercise of their merger enforcement authority.

....

... Both state and federal governments have legitimate, recognized interests in protecting their citizens from the diminution of competition, including that resulting from anticompetitive mergers. Neither state nor federal interest is inherently more legitimate or more important than the other.

....

... Until enforcement trends are clear and abuses (if any) are more common, there is much to be said for a cautious approach to major legislative “solutions” that would fundamentally alter the current balance between state and federal interests.²⁹

Little, if anything, has changed since this report was issued in 1989. More importantly, the handful of examples cited by critics are simply overwhelmed in number and success by the examples

²⁸ *Id.* at 277; see also Lloyd Constantine, *Antitrust Federalism*, 29 Washburn L.J. 163, 181 (1990) (“[t]he lone attorney general titling at a national merger for inappropriate or parochial reasons, which is the bete noir of this debate, is in fact, also its unicorn.”).

²⁹ Am. Bar Ass’n, Report of the Dual State/Federal Merger Enforcement Task Force to the Antitrust Section Council, *Legal and Policy Implications of Concurrent Merger Enforcement Activity under State and Federal Law* at 61, 64-65 (March 27, 1989) (hereinafter “ABA Report on Dual Enforcement”).

of state enforcement actions (many of them multi-state and many of them cooperative efforts with federal enforcers) which are in the mainstream of antitrust law and economics.³⁰

Another criticism of state enforcement has been that attorneys general bring meager resources to merger enforcement, often free-riding on federal efforts. According to these critics, merger enforcement would not suffer if it were the exclusive province of the federal enforcers.³¹ This criticism is belied by the states' enforcement record, as detailed in these comments. There is no dispute that state merger enforcers bring substantially fewer resources to the table than do federal enforcers. Nonetheless, there are many examples of effective and appropriate independent state merger enforcement, as well as cooperative state-federal enforcement. The states cannot and do not investigate every merger investigated by the federal enforcers. Their decision to use their limited resources to investigate a particular merger reflects a judgment (often a collective judgment of several states) that the merger is particularly important to consumers within their state or states, and

³⁰ Moreover, as noted in the ABA Report on Dual Enforcement,

There is nothing in the legislative history or structure of the Clayton or HSR Acts that supports the notion that the states should defer to federal decisions not to challenge mergers. . . . [P]rivate litigation raises many of the same concerns and imposes many of the same costs and uncertainties. Yet, at least where the plaintiff has standing . . . there are few suggestions that private enforcement is inappropriate, merely because it exists concurrently with federal authority.

ABA Report on Dual Enforcement, *supra* note 29, at 59-60. To the limited extent there is some divergence, it is instructive to note (as we also have done in our comments to this Commission regarding the indirect purchaser issue):

Federalism allows for the experimentation, the successes, and the failures needed to find the best approach for a given time and a given market. It reminds legislators, courts and scholars that, on many key issues, reasonable minds may differ and that, because society has conflicting and overlapping desires, there may not be one single answer.

Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 Antitrust L.J. 29, 44 (2000).

³¹ Posner, *Antitrust Law*, *supra* note 26, at 241.

that the matter represents a high priority allocation of resources.³² These necessarily prioritized enforcement efforts should not be a source of concern to anyone who believes in the value of merger enforcement to the economy and to consumers. To the contrary, the record demonstrates that state enforcers not only supplement and extend federal resources, but also independently bring important and groundbreaking cases.³³

V. Conclusion

The states believe the multi-level enforcement system created by our federal and state antitrust laws is a positive and powerful process by which anticompetitive conduct can be identified and minimized.

As detailed above, a review of merger work done by states in the last decade confirm that states mainly (1) are involved in reviews of mergers that may have a specific effect on consumers of their states, (2) follow mainstream antitrust jurisprudence in both joint and individual reviews and (3) coordinate efforts in joint investigations, regularly deferring leadership to the federal agency involved in joint reviews. Complaints of questionable unilateral investigations or burdensome joint reviews are generally unsubstantiated and exaggerated. Uncertainties as to when or how an attorney general will commence and proceed with a merger review are minimal.

Acknowledging that multiple enforcers involved in a single merger review may present some inefficiencies and possible conflicting results, state attorneys general and the federal agencies have established formal and informal procedures to maximize benefits and minimize negatives of joint

³² Patricia A. Conners, *The Role of State Antitrust Enforcement in Our System of Concurrent Enforcement*, Remarks Delivered at the ABA Section of Antitrust Law 2002 Fall Forum 200-22 (Nov. 7-8 2002) (transcript on file with the Duke Law Review, *cited in* Calkins, *supra* note 17, at 694 note 113).

³³ In the latter category are such matters as New York's successful challenge of a "virtual merger" between hospitals in the Poughkeepsie area. *New York v. St. Francis Hospital*, 2000-2 Trade Cases (CCH) ¶ 72,649, 2000 WL 1804194 (S.D.N.Y. 2000).

enforcement. The process of joint investigations makes it imperative to have continuing discussions between and among enforcers, and this is being addressed by the Executive Working Group and its State/Federal Cooperation Committee. Logistical concerns such as how to maintain privileges and confidentiality as well as how to standardize and improve joint document review can best be identified and resolved by the staff members of the Committee within the policies established by the Executive Working Group members. This ongoing work, on both levels, further addresses expressed concerns.

The multi-level enforcement system may theoretically present some inefficiencies and possible conflicting results. However, such perceived shortcomings of this system are far outweighed by its benefits, and do not justify the implementation of radical measures that would reduce or eliminate the jurisdiction or standing of the state attorneys general in merger reviews. I respectfully submit that the present state merger enforcement scheme is beneficial and should remain in place unabrogated.

[Note: Charts of enforcement activity by the states of Maryland and Texas are attached.]

Mergers and Acquisitions Reviewed by Maryland 1985-Present			
Year	Parties	Industry	Action Taken/Comment
1985	Conrail/Norfolk Southern	Rail transportation	Investigated local impact; merger not opposed.
1987	Piedmont/U.S. Air	Airline	Settlement Agreement w/State AG's.
1989	Pars/Data II	Airline reservations systems	Merger not consummated.
1989	Coors/Strohs	Beer	Investigation of local impact, with FTC; analysis of evidence determined that insufficient evidence of potential monopoly rents existed, merger not opposed.
1990	Blockbuster/Errolls	Video rental market	Investigation of local impact, 3rd party purchaser intervened to acquire Revco.
1991	Rite Aid/Revco	Drug Stores	Investigated with FTC; merging companies were active bidders on State contracts; merger not opposed.
1991	Systems Control/Hamilton Industries	Motor Vehicle Emission Testing Systems	
1991	Washington Post/Montgomery Co. Gazette	Newspapers	MD investigation, acquisition not opposed.
1992	MNC/Nations Bank	Banking	Investigation of local impact; w/DOJ; consent decree w/divisitures.
1994	Winner/Beltway	Beer Distribution	MD investigation, acquisition not opposed.
1994	BF/Atwoods	Waste Hauling	MD & FL investigation w/DOJ, Consent Decree filed.
1995	BF/DRJ	Waste Hauling	MD investigation; MD intervened in Bankruptcy Court to oppose acquisition. DRJ sold to 3rd party.
1995	Greenspring Dairy/Cloverland Dairy	Dairy products	MD investigation, w/DOJ; acquisition not opposed.
1996	Cargill/AKSO	Rock Salt	Investigation of local impact w/DOJ and multistate group.
1997	Texaco/Shell	Gasoline	Monitored States & Federal investigation.
1997	Baltimore Sun/Patuxent papers	Newspaper advertising	MD investigation, w/DOJ, acquisition not opposed.
1997	Staples/Office Depot	Office products	Investigation of local impact/w/FTC; supported FTC Motion for Preliminary Injunction w/Amicus Brief
1998	USA/Waste Management	Waste Collection/ Disposal	Investigation of local impact; w/DOJ and multistate group. Consent Decree w/divisitures filed.
1998	Exxon/Mobil	Gasoline	Investigation of impact on local retail gasoline market; w/FTC and multistate group. Consent Decree filed w/divisitures.

1998	Royal Ahold/Giant Food	Grocery stores	Investigation of local impact, w/FTC. Consent Decree filed w/divisitures of Maryland stores. MD not on Consent Decree.
1998	Transactive/City Corp.	Electronic Benefit Transfer Services	Investigation w/DOJ; DOJ filed Complaint. MD State official served as government witness.
1998	Bell Atlantic/GE	Phone Service	MD investigated local market w/DOJ.
1998	MCI/World Com	Long distance phone service	MD investigation w/DOJ and multistate group, Consent decree filed, MD not one of filing States.
1999	MARTA/Envirotest	Emission Testing Services	MD investigation on narrowing of bidders market on State contract; acquisition not opposed.
1999	H&S Bakery/Schmidt Baking Co.	Governmental bread purchases	MD investigation, acquisition not opposed.
1999	Aetna/Prudential Health Care	HMO's	MD investigated local market, w/DOJ and multistate group. No Maryland impact.
1999	Allright/Central Parking	Parking garages	MD investigated local market, w/DOJ and multistate group. Consent Decree filed, MD did not join.
2000	Fidelity National Financial/Chicago Title Long &	Title insurance	Advice and assistance on antitrust markets to MD Insurance Administration.
2000	Foster/Grempler Realty	Residential real estate	Merger not opposed.
2000	United/US Air	Airline	Investigation of local and national markets w/DOJ and multistate group. Merger abandoned.
2001	Reliant/Orion	Electric Power	MD investigation, acquisition not opposed.
2001	Churchill Distributors/Reliable	Wine spirits distributors	MD investigation, acquisition not opposed.
2001	EchoStar/Hughes	Satellite TV Subscription services	MD investigation of local market; w/DOJ & multistate group; merger abandoned.
2002	Comcast/AT&T	Cable TV	Investigation of impact in MD; w/DOJ and multistate group.
2002	Waste Management/Republic	Waste Collection	MD merger investigation of sale of Republic's Central Maryland assets to Waste Management; acquisition not opposed.
2002	TransCorp/Mark IV Merger	Transponder (EZPASS) market	Multistate group/ merger abandoned.
2002	Allied/Republic	Waste Collection	MD merger investigation of sale of Republic's Eastern Shore assets to Waste Management; acquisition not opposed.
2003	First Data/Concord	Electronic Payment System networks	Investigation of impact in MD; w/DOJ and multistate group; Consent Decree filed, MD did not join.

2003	West Marine/Boat US Merger	Retail Boat Equipment stores	MD investigation of market following FTC decision not to challenge merger. Merger not opposed.
2003	Oracle/People Soft	Enterprise Software	Multistate and DOJ/ MD joined DOJ & States lawsuit.
2004	Waste Management/ Allied	Waste Collection	Investigation w/DOJ of acquisition by WMI of Allied's Western Maryland assets; merger abandoned.
2005	Davita/Gambro	Kidney dialysis centers	Open
2005	Federated/May	Department Store chains	Open
2005	AMC/Loews	Movie Theatre chains	Open

MERGERS ACQUISITIONS REVIEWED BY TEXAS 1995 - PRESENT

Merging Parties	Industry	Date	Participants	Action Taken
American General/Unitrin Corporation	Home Service (Burial) Insurance	1995	4 - 5 states	Withdrawn
Columbia HCA/Healthtrust Hospital	In-Patient Acute Care Hospital Services	1995	FTC and multiple states	Consent Judgment TX, Case No. 9504873, 53rd District Court, Travis County, TX (Consent Order FTC, Docket No. C-3619), Divestitures and parallel decrees in Texas, Utah, Louisiana and Florida; TX has provision re: exclusivity and bundling not included in FTC
Kimberly Clark/Scott Paper	Paper products	1995	DOJ and Texas as state rep	Consent Judgment, TX & DOJ; Case No. 3:95 CV 3055-P, Northern District of TX, Dallas Division
St. Anthony's/High Plains Baptist (Amarillo)	In-Patient Acute Care Hospital Services	1995	FTC and Texas	Letter agreement with TX concerning best efforts to divest ownership of managed care entities
Archer Daniels Midland/Gruma	Corn tortilla flour	1996	DOJ and Texas	No relief sought; Fix-it 1st divestitures
Columbia HCA, Inc./St. David's Hospital JV (Austin)	In-Patient Acute Care Hospital Services	1996	Texas only	No relief sought
IBP Inc./Nemron Calhoun Meat Packing	Meatpacking	1996	Texas only	TX sued for TRO to allow time for further review (Case No. 6434, 87th District Court, Anderson County, TX); case removed and remanded; transaction consummated; state sought hold separate order; Ct denied requested relief
Lubbock Methodist/St. Mary of the Plains (Lubbock)	In-Patient Acute Care Hospital Services	1996	FTC and Texas	No relief sought
Spohn/Christus Health/Memorial Hospitals (Corpus Christi TX)	In-Patient Acute Care Hospital Services	1996	Texas only	No relief sought
Ultramar Diamond Shamrock/Phillips 66	Oil and gas	1996	FTC and multiple states	Withdrawn
Union Pacific/Southern Pacific RR	Rail transportation	1996	DOJ and multiple states	Comments in Opposition filed with STB; separate filings by CA and TX
USA Waste Services, Inc./Sanfill, Inc.	Waste Hauling/Disposal	1996	DOJ and multiple states	Jt Consent Judgment TX, PA & DOJ, Case No. 1:96CV02031, District of Columbia; divestitures in TX and PA.
Allied/USA Waste (Fl Worth)	Waste Hauling/Disposal	1997	DOJ and Texas	Jt Consent Decree DOJ and TX; divestiture of airspace in Ft. Worth
BRC/AIS	Election equipment	1997	DOJ and 8 states	Withdrawn
Compaq Computer/Tandem	Computer Manufacturing	1997	DOJ and Texas	No relief sought
Hanson PLC/Concrete Pipe and Products	Concrete pipe products	1997	DOJ and Texas	No relief sought
Loewen/Service Corp International (Hostile takeover bid)	Death care	1997	FTC and multiple states	Withdrawn
Mid-America, Southern Foods, Milk Products (Purchase of Borden)	Fluid milk processing	1997	DOJ and Texas	Consent Decree TX, Case No. 9710120, 200th Dist. Court, Travis County, TX (Consent Judgment DOJ, Case No. 3-97CV2162-P, Northern Dist. Of TX, Dallas Division); TX received \$30,000 atty fees
PCA/Humana	HMOs	1997	FTC and Texas	No relief sought
Wichita General Hospital/Bethania Hospital (Wichita Falls)	In-Patient Acute Care Hospital Services	1997	FTC and Texas	No relief sought-Immunity Legislation passed
American Home Products/Monsanto	Agricultural Technology	1998	FTC and Texas	Withdrawn
AOL/Compuserve	Internet Access	1998	DOJ and Texas	No relief sought
Central and Southwest Corporation /American Electric Power	Electric power	1998	DOJ and Texas	No relief sought
Cineplex/Odeon Theaters/Sony-Loews	Movie Theaters	1998	DOJ and multiple states	Consent Decree NY, IL & DOJ, Case No. 98 CV2716, Southern District of NY
Humana/United HealthCare Corp	HMOs	1998	DOJ and multiple states	Withdrawn
MCI/WorldCom	Internet backbone	1998	DOJ and multiple states	No relief sought ("Fix-it 1st divestitures completed)

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Merging Parties	Industry	Date	Participants	Action Taken
Monsanto/Dekalb	corn seed technology	1998	DOJ and multiple states	No relief sought ("Fix-it 1st" divestitures completed)
Nations Bank/Bank of America	Banking	1998	DOJ and multiple states	No relief sought
Nations Bank/Boatman's	Banking	1998	DOJ and multiple states	No relief sought
Service Corp International/Equity Corp International	Funeral Services	1998	FTC and 8 states	Consent Decree FTC, File No. 981 0353; divestitures in eight states
Sisters of Charity/Columbia HCA, Inc. S.E. Texas Hospitals (Beaumont TX)	In-Patient Acute Care Hospital Services	1998	FTC and Texas	Withdrawn
USA Waste Services, Inc./ Waste Management	Waste Hauling/Disposal	1998	DOJ and 12 states	Jt Consent Decree TX, 12 other states and DOJ, Case No. 1:98CV1616, Northern District of Ohio, Eastern Division; divestitures in 12 states; \$365,000 atty fees to states
Aetna U.S. Healthcare/Prudential Healthcare	HMOs	1999	DOJ and multiple states	Jt Consent Judgment TX & DOJ, Case No. 3-99CV1398-H, Northern District of TX, Dallas Division; divestitures in Texas (Houston, Dallas); TX received \$25,000 atty fees
APAC, Inc./Buster Paving	Paving/Concrete	1999	DOJ and Texas	No relief sought
Apple Computer/Power Computing	Computer Manufacturing	1999	DOJ and Texas	No relief sought
Baylor Healthcare System/Texas Health Resources (DFW)	In-Patient Acute Care Hospital Services	1999	Texas only	Withdrawn
Central Parking/Allright Parking	Parking	1999	DOJ and multiple states	Consent Decree DOJ, Case No. 99 0652, District of Columbia
Columbia HCA Healthcare Corp./Memorial Hermann Healthcare System (Pasadena)	In-Patient Acute Care Hospital Services	1999	Texas only	Letter Agreement requiring Columbia to use best efforts to upgrade emergency room
Exxon/Mobil	Oil and Gas	1999	FTC and multiple states	Consent Judgment TX, Case No. 3-99CV2709, Northern District of TX, Dallas Division (Consent Judgment FTC, File No. 991-0077; several other states filed separate consent judgments); TX received \$235,800 atty fees
Monsanto/Delta&Pineland SBC/Ameritech	cotton seed technology Telecommunications	1999	DOJ and Texas	Withdrawn
Sprint/MCI World Com	Telecommunications	1999	DOJ and multiple states	DOJ Consent Decree; divestitures in 3 states; multiple states filed FCC comments
EI Paso Natural Gas/PG&E	Oil and Gas	2000	FTC and multiple states	Withdrawn
Harris Methodist Health Plan/Pacificare (DFW)	HMOs	2000	Texas only	Consent Judgment TX, Case No. GV003437, 200th District Court, Travis County, TX (Consent Order FTC, Docket No. C-3997); TX received \$160,000 atty fees
Kroger/Winn-Dixie (Texas and Okla)	grocery stores	2000	FTC and Texas	No relief sought
Phillips/Chevron (Jt venture of chemical ops)	Chemical	2000	FTC and multiple states	Withdrawn (TX was preparing Prel. Injunction; FTC filed Motion for Prel. Injunction, Case No. 3-00CV1196-R, Northern District, Dallas, TX.)
Texas Health Resources(St. Paul Medical Center)/Zale Lipshy University Hospitals (Dallas)	In-Patient Acute Care Hospital Services	2000	Texas only	No relief sought
United Airlines/USAir	Airline transportation	2000	DOJ and multiple states	Withdrawn
Varian Medical Systems/Impac	Radiation treatment (oncology)	2000	DOJ and Texas	Withdrawn
American Electric Power/EnronCorporation(Houston Pipeline)	Natural gas pipeline	2001	DOJ and Texas	Letter Agreement requiring reporting of efforts to divest certain power plants; TX received \$25,000 atty fees
Baylor Health System/All Saints Hospital (Ft. Worth)	In-Patient Acute Care Hospital Services	2001	Texas only	No relief sought

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Chevron/Texaco	Oil and gas	2001	FTC and multiple states	Jt Consent Judgment TX and 11 other states, Case No.01 07746, Central District of CA (Consent Order FTC, Docket No. C-4023); TX received \$260,000+ (amt not known exactly) in atty fees (Atty fees & costs for all states totaled \$1,419,822).
Hewlett Packard/Compaq Phillips/Tosco	Computer Manufacturing Oil and Gas	2001 2001	FTC and Texas FTC and multiple states	No relief sought No relief sought
Seton Healthcare/St David's Health Partnership (Austin)	In-patient psych services	2001	Texas only	Withdrawn
Texas Health Resources, Inc (McCuision)/Christus Health Systems (Hospital acquisition, Paris TX)	In-Patient Acute Care Hospital Services	2001	FTC and Texas	No relief sought
Ultramar Diamond Shamrock/Valero Energy Corp.	Oil and Gas	2001	FTC and multiple states	FTC and CA & OR filed consent judgments
Wells Fargo/Marquette(First State Bank of Texas & First National Bank of Texas)	Banking	2001	DOJ and Texas	No relief sought
Baylor Healthcare System/All Saints Hospital (DFW Metropolis)	In-Patient Acute Care Hospital Services	2002	Texas only	No relief sought
Conoco/Phillips 66	Oil and Gas	2002	FTC and multiple states	Jt Consent Judgment TX & NM, Case No. H-02-3286, Southern District of TX, Houston Division (Consent Order FTC, Docket No. C-4058; Consent Judgments filed by 6 other states), NM and TX received \$419,644 atty fees
Dean Foods and Suiza Foods	Fluid milk processing	2002	DOJ and multiple states	No relief sought; "Fix-it 1st" divestitures completed
EchoStar/Hughes Corporation(DirectTV)	Satellite TV	2002	DOJ and multiple states	Withdrawn (Joint suit filed by TX, 24 other states & DOJ, Case No. 1:02CV02138, District of Columbia)
Winn Dixie/Brookshire (DFW)	grocery stores	2002	FTC and Texas	No relief sought
Archer Daniels Midland/Chickasha Oil Mill (TX Panhandle)	Agricultural processing	2003	Texas only	Withdrawn
Caremark/Advance PCS	Prescription Benefit Management	2003	FTC and 26 states	No relief sought
Univision/Hispanic Broadcasting Co (HBC)	Spanish Language TV	2003	DOJ and multiple states	(Consent Decree DOJ, Case No. 1:03CV00758, District of Columbia)
Arch Coal/Triton	Low-sulphur coal	2004	FTC and multiple states	Motions for Prel. Injunction filed by TX, five other states and FTC. PI Denied (Case No. 1:04CV00535, District of Columbia)
Bank One/JPMorgan Chase	Banking	2004	DOJ and multiple states	No relief sought
Christus Healthcare (Spohn)/Triad Hospitals, Inc. (Alice TX)	In-patient hospital	2004	FTC and Texas	No relief sought
First DataCorporation/Concord EFS	ATM Services	2004	DOJ and multiple states	Jt Consent Judgment TX, 8 other states & DOJ, Case No. 1:03CV02169, District of Columbia; TX received \$180,412 atty fees (Total received by States, \$552,725)
Oracle Corporation/PeopleSoft	Software	2004	DOJ and multiple states	Motion for Prel. Injunction filed by TX, 9 other states and DOJ. PI Denied (Case No. C 04-0807, Northern District of California, San Francisco Division)
Plains Energy/Link Resources	Crude oil pipelines	2004	FTC and Texas	No relief sought
Tenet Healthcare Corporation/Valley Baptist (Brownsville TX)	In-Patient Acute Care Hospital Services	2004	FTC and Texas	No relief sought
Triad Hospitals, Inc./Texas Health Resources (Denton TX)	In-Patient Acute Care Hospital Services	2004	FTC and Texas	No relief sought

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Merging Parties	Industry	Date	Participants	Action Taken
Cingular/AT&T Wireless	Cellular Telephone	2005	DOJ and multiple states	Jt Consent Judgment TX, CT & DOJ, Case No. 1:04CV01850, District of Columbia; TX received \$20,000 atty fees