COMMENTS OF THE MAINE ATTORNEY GENERAL

ON THE ROLE OF STATES IN ENFORCING FEDERAL ANTITRUST LAWS OUTSIDE THE MERGER AREA

July 15, 2005

Attorney General G. Steven Rowe is grateful for the opportunity to present these views in response to the Commission's request for public comment, 70 Fed. Reg. 28,902 (May 19, 2005).[1]

Summary

The Sherman Act supplemented rather than preempted preexisting state statutes, creating a system of concurrent authority grounded in federalism. Maine has brought approximately twenty-five enforcement actions in each of the last two decades, under state and federal law, in both state and federal court. Maine's antitrust record over the past twenty years illustrates the benefits and value of concurrent state enforcement.

The Maine Attorney General has contributed special knowledge of local conditions to cooperative enforcement endeavors with federal agencies and brought actions to address violations of which federal agencies were unaware and with which they might have been ill-equipped to deal. Our antitrust experience has also enabled us to mount rapid-response advocacy or negotiating efforts involving local matters affecting competition in critical ways. Finally, acting as *parens patriae*, the Maine Attorney General has recovered very substantial sums in restitution and damages for consumers and citizens.

[1] This document was prepared with the help of Maine antitrust staff, Assistant Attorneys General Francis Ackerman and Christina Moylan. We acknowledge the valuable assistance of Robert Hubbard, Chair of the National Association of Attorneys General Antitrust Task Force and Chief of Litigation in the New York Attorney General's Antitrust Bureau. His contribution, and those of other state antitrust staff who have commented on prior drafts, are greatly appreciated. The views expressed are those of the Maine Attorney General.

Our system of concurrent and overlapping state-federal enforcement authority ensures seamless coverage. There is a risk that alterations could tear holes in that fabric. Further, our system allows for differing enforcement approaches based on competing philosophies. This intellectual tension infuses our system with vitality. Divergent enforcement decisions, far from providing evidence of waste or inefficiency, give an invaluable assurance of legitimacy and, in the end, a greater confidence that we are doing justice.

The Commission should exercise great care in formulating its recommendations. While certain adjustments should be entertained, we submit that the basic framework has proven its worth and should be preserved.

Introduction

The Commission has a unique opportunity to chart a steady course for the evolution of antitrust law in the new century. Among the issues the Commission has identified is whether to adjust or alter the balance of state and federal authority reflected in our enforcement system. In addressing the Commission's specific questions regarding the allocation of non-merger civil enforcement responsibilities and the usefulness of state *parens patriae* authority,[2] we describe illustrative aspects of Maine's antitrust enforcement record over the past twenty years. Maine's

[2] Although the Commission's specific questions focus solely on state enforcement of federal statutes, this discussion draws on our experience with enforcement of both federal and state law. Maine enforcement efforts have tended to employ federal law and the federal court system in the context of multistate actions; most of our single-state cases are brought under state law in state court. Nevertheless, our experience of enforcement under state law is applicable and relevant in light of two considerations; first, Maine's antitrust statutes are closely modeled on their federal counterparts, and second, a significant number of other states employ federal law and *fora* in single-state as well as multistate matters. Finally, some critics of state enforcement have advocated limitations on state jurisdiction without regard to whether enforcement under state or federal law is contemplated. Posner, *Federalism and the Enforcement of Antitrust Laws by the State Attorneys General*, Competition Laws in Conflict 252, 261 (Epstein & Greve, eds., American Enterprise Institute 2004) (inclined to forbid the states to apply their antitrust laws to violations occurring in or affecting interstate or foreign commerce). Thus, not only is Maine's state law experience applicable to the federal law focus of the Commission's specific questions: it is also relevant to the issue of jurisdictional balance across the board. Similarly, although the Commission's questions concern non-merger enforcement, we permit ourselves to include discussion of our merger program. In our view, experience in that context holds implications for non-merger enforcement as well.

experience demonstrates the benefits that even a small state[3] can realize within the current system. Changes to the existing state-federal balance are likely to jeopardize or eliminate some or all of those benefits.[4]

Prior to 1890, under the common law and early state statutes, states carried the mantle of antitrust enforcement alone. Consistent with fundamental principles of federalism, the Sherman Act was enacted by Congress for the explicit purpose of supplementing, not supplanting, those early statutes.[5] The Supreme Court's rejection of preemption-based challenges to state antitrust laws rests on clear expressions of legislative intent.[6]

While some states compiled consistent enforcement records throughout the twentieth century, Maine's enforcement program and, it seems fair to say, state antitrust enforcement in general, came of age in the 1970s. Two federal enactments provided the primary impetus. First, the Crime Control Act of 1976 made millions of dollars in seed money available to state attorneys general to establish or beef up antitrust enforcement units.[7] Next, the Hart-Scott-

---

[3] While many other states' enforcement records are more extensive and impressive by far, we hope the Commission will agree that at a minimum, our experience shows that small states, too, can make significant contributions.

[4] The Maine Attorney General participated in the unanimous adoption by the National Association of Attorneys General of a resolve to oppose federal preemption of any state antitrust statutes or other limitation of state authority on the ground that any such limitation is inimical to principles of federalism, and would harm antitrust enforcement, competition and ultimately consumers. The attorneys general further resolved to support continuing and increased cooperation between the states and the federal enforcement agencies to effectively promote free competition and consumer interests. Resolution, Principles of State Antitrust Enforcement, March 2005 ("NAAG Resolution"), available at www.abanet.org/antitrust/committees/state-antitrust/pdf/naag-sp2005-res.pdf.

[5] Senator Sherman declared that the act was designed "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); *see also* Himes, *State Antitrust Enforcement: Judge Posner and Five State Cases That Made a Difference*, ABA State Antitrust Enforcement Committee Newsletter, Vol. IV, No. 4 at 3, n.2 (Fall 2004) and sources cited therein, available at www.abanet.org/antitrust/committees/state-antitrust/pubs.html#cnl. Twenty-one states, including Maine, had already adopted their own antitrust statutes before the Sherman Act was enacted. *See California v. ARC America Corp.*, 490 U.S. 93, 101 n.4 (1989).

[6] *See California v. ARC America Corp., supra* note 5 (no preemption of state indirect purchaser statutes); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (no preemption of state law prohibiting oil company ownership of retail service stations and requiring uniform pricing terms); *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937) (no preemption of Puerto Rico's local antitrust law), as compiled in Himes, *supra* note 5, n.3.

[7] Crime Control Act of 1976, Pub. L. No. 94-503, 90 Stat. 2407 (codified as amended at 42 U.S.C. § 3701-96c (2000)).

Rodino Act invested state attorneys general with *parens patriae* authority to enforce the Sherman Act and recover treble damages on behalf of state residents.[8] A number of states responded, establishing new antitrust units or modernizing their antitrust statutes.[9] Subsequently, the minimalist enforcement approach of the Reagan Justice Department induced state enforcers to step into the breach;[10] and the National Association of Attorneys General (NAAG) Antitrust Task Force became increasingly active and effective in coordinating multistate enforcement efforts.

By the 1980s, Maine had long since replaced its own original statute with provisions closely modeled on the Sherman Act, section 7 of the Clayton Act and the Federal Trade Commission Act. Like many other state antitrust laws, the Maine statutes are interpreted in accordance with corresponding federal provisions.[11] In enforcing them, Maine has initiated approximately fifteen single-state antitrust actions in each of the past two decades, usually in Maine courts and under Maine law, with occasional federal participation or consultation. In addition, we have joined in ten or more of the multistate or combined multistate-federal actions filed in each decade, uniformly filed in federal courts under federal law. Despite limited resources,[12] we have compiled a record of unostentatious but consistent action to police markets within Maine, or regional markets of which the State or a section of it forms a part.[13]

---

[8] It also directed the Department of Justice to share investigative information with state attorneys general. 15 U.S.C. §§ 15c, 15f .

[9] *See* Folsom, *State Antitrust Remedies: Lessons from the Laboratorie*s, 35 Antitrust Bull. 941, 950, 955 (1990).

[10] Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 Geo. Mason L. Rev. 37, 45 (2002) and sources cited therein.

[11] *See, e.g., Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 875 F. Supp. 8, 14 (D. Me. 1994) (Maine statute parallels Sherman Act); see also 5 M.R.S.A. § 207(2).

[12] The office is often unable to assign the equivalent of more than a single attorney, and never more than two to antitrust.

[13] See Maine's Antitrust Enforcement Summary 1984-2005, attached hereto, for a list of cases.

It is no secret that the *Microsoft* litigation (discussed below) has given rise to numerous criticisms of state enforcement and not a few modest proposals to alter the state-federal balance of our antitrust enforcement system. A broad review of our own recent experience, however, indicates that by and large the current system of cooperative federalism is healthy and functions well. While minor adjustments should certainly be considered, we urge the Commission to exercise great caution in evaluating any proposal for wholesale change.

I. SINGLE-STATE ENFORCEMENT & ADVOCACY

A. State-Federal Cooperation

Maine can hardly be described as typical of the rest of the United States. On the contrary, its geographic size and diversity make it unique. From its rugged Atlantic coast to the forests, lakes and mountains of the remote interior, Maine's physical characteristics define its economy and markets in ways surprising to an outsider. For example, huge tracts of the state have a larger population of moose and bear than human beings.[14] While accounting for half the surface area of New England, Maine borders only one other U.S. state, New Hampshire, but shares an extensive international frontier with two Canadian provinces. Much of the border with New Hampshire, like the northwestern frontier with Quebec, is remote and mountainous; the eastern frontier with New Brunswick, in contrast, is more populated and accessible. Like Maine's great rivers, our highways tend to run south to north rather than east to west. These features can result in anomalies: in some instances, the old-timer's response to a tourist's request for directions – "you can't get there from here" – is not far from the truth.

Intimate knowledge of local geographic and economic idiosyncrasies is not only useful to the antitrust enforcer – it is indispensable. But that knowledge does not come easily or

[14] Maine's human population is approximately 1.3 million.

automatically to federal personnel at their desks in Washington or New York. Rather, the combination of on-the-ground local knowledge with expertise in its antitrust application is often available only from states that maintain active antitrust programs: both provide a solid foundation for successful state-federal cooperation.

Over the years, Maine antitrust personnel have enjoyed excellent working relationships with colleagues at both the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). Frequent *ad hoc* contacts and sporadic referrals in both directions from time to time have afforded opportunities for coordination or have set cooperative investigations in motion. Coordination and cooperation have assumed different forms. For example, our office worked closely with the DOJ on every phase of a 1991 bank merger investigation; ultimately, the State alone, with DOJ's blessing, filed an enforcement action, together with a negotiated Consent Decree, in federal court.[15] Another pattern is typified by a 2003 Section 1 health care case. The FTC and the State investigated jointly, then proceeded with separate, parallel filings.[16] On the other hand, in successive merger investigations in the retail pharmacy sector (1995, 2004), the FTC preferred a consulting and strategizing role, leaving it to the State to file complaints and negotiated consent decrees.[17]

Our experience of liaison with DOJ concerning a series of acquisitions during the period 1987-2004 in the context of Maine's declining herring processing industry provides an example of coordination as distinct from cooperation. In the first three of these acquisitions, the State concluded that enforcement action was justified based on the anticipated impact on the upstream

[15] *State of Maine v. Key Bank of Maine* (1991) (The single-state Maine cases referenced from here on will refer to the case name and year of disposition. For citations where available, see Maine's Antitrust Enforcement Summary 1984-2005, attached hereto).

[16] See *In the Matter of The Maine Health Alliance and William R. Diggins*, FTC File No. 021 0017 (August 27, 2003); *State of Maine v. The Maine Health Alliance* (2003). Separate, parallel cases ensured no gaps in enforcement and better compliance. See discussion *infra* at 11-12.

[17] *State of Maine v. Rite-Aid Corp.* (2004); *State of Maine v. Rite-Aid Corp.* (1995).

purchase market for fresh herring from fishermen active in the Gulf of Maine. The State allowed the acquisitions to proceed subject to conditions.[18] While it declined to investigate these initial transactions, in the fourth and final acquisition the DOJ for the first time perceived a substantial reduction of competition in the national retail market for canned herring products, and in its turn negotiated a resolution subjecting the transaction to conditions.[19] The State, on the other hand, saw no need for further antitrust intervention. The divergent state and federal responses to these transactions highlight the complementary roles we often play in policing various markets.

Many other states have enjoyed similarly fruitful one-on-one relationships with the federal agencies. The history of state-federal cooperation testifies to the ability of state enforcement programs to make significant contributions to the achievement of fundamental antitrust policy goals. At the same time, the *ad hoc* and sporadic nature of one-on-one state-federal relationships suggests that some opportunities for coordination or cooperation may have been overlooked. This Commission could encourage the states and federal agencies to elaborate state-federal protocols counseling or requiring reciprocal communication in appropriate circumstances. Routine contacts might be especially useful when an investigation takes on an international dimension.

B. Statistical Review

The usefulness of state antitrust programs is not limited to special knowledge of on-the-ground conditions. Nor has federal-state cooperation been limited to purely intrastate matters. Our office has endeavored to play a constructive role in protecting competition in almost every sector of the state's economy. Given technological influences on modern commerce, the commitment to free trade embodied in the Commerce Clause and the advent of the North

[18] *State of Maine v. Connors Bros. Ltd.* (1987, 1991).
[19] *U.S. v. Connors Bros. Income Fund,* No. 1:04CV01494 (JDB) (D.D.C. 2005).

American Free Trade Agreement ("NAFTA"), many Maine markets have increasingly attracted out-of-state and foreign participation or undergone geographical expansion, taking on an interstate or international character.

Interestingly, in sharp contrast to many other states, all but two of Maine's single-state enforcement actions over the period 1984-2005 have been filed in state court under Maine antitrust statutes. The two exceptions, both merger cases filed in federal court under federal law, date from the early nineties.[20]

In the sections below, we review some additional aspects of the statistical record.

1. Formal actions.

Just over half of our single-state formal actions have been merger cases. Of the remainder, one case was brought under the state analog to Section 2 of the Sherman Act and another lone case under Maine's unfair trade law. All other matters were grounded in our Section 1 analog; some 40% of these were price-fixing cases. These non-merger enforcement statistics appear in Table 1.

2. Lines of commerce.

During the period 1984-2005, Maine's single-state enforcement program has ranged over the length and breadth of the state's economy. The statistics show a disproportionate emphasis on the health care sector, which drew almost a third of our enforcement actions. Other industries accorded more than passing attention include fish-processing, solid waste, retail pharmacy and lumber. Table 2 provides a breakdown of our enforcement effort by sector. It should be noted, however, that this catalog of formal actions does not describe the full range of our antitrust activities. From time to time, we have engaged in

[20] *In re: Maine Pride Salmon, Inc.* (1993); *State of Maine v. Key Bank of Maine* (1991).

intensive advocacy efforts targeted on rapidly evolving or potentially troubled markets. These are described in a subsequent section of these comments.

3. Defendants by domicile.

Statistics distinguishing among actions naming in-state as opposed to out-of-state defendants can be informative, but may also be prone to misinterpretation. Our effort here is to assess the extent to which Maine's enforcement program (a) has focused on purely intrastate matters; (b) has prosecuted in-state defendants in order to protect competition in in-state markets frequented by out-of-state enterprises, or in markets extending beyond Maine's borders; or (c) has brought suit against out-of-state defendants for the purpose of protecting competition in any market. The information presented in Table 3 shows that somewhat more than half of all filings over the period reviewed (17 of 31 or 55%) named in-state defendants; the balance, 45% (14 cases) named out-of-state (10) or foreign (4) defendants.

The purely intrastate domain. The relatively small number of cases in which the named defendants are state residents and the relevant markets are not only geographically isolated, but have no out-of-state dimension (7 of 31 or 23%), indicates that the domain of the "purely intrastate" is narrow. Moreover, it may be shrinking: all but one of the seven cases identified as belonging to this category were filed a dozen or more years ago.[21] All of these filings were section 1 or section 2 matters, scattered across a variety of economic sectors.[22]

In-state defendants. Cases filed against in-state defendants with a focus on relevant markets that include out-of-state participants, or extend beyond the State's borders, account for 32% of cases (10 of 31) filed in the review period. This category is evenly divided among merger and non-merger matters; strikingly, eight of the ten cases arose in the health care sector.

[21] *State of Maine v. Bridgton Hospital,* (2000) (market allocation by competing hospitals).

[22] An example of a purely intrastate case is *State of Maine v. Getchell Bros. Inc.*(1989) (competing ice companies engaged in a territorial allocation of markets).

The primary goal in most of these actions has been to protect payor markets from the anticompetitive effects of provider mergers or collusion.[23]

Out-of-state defendants. Out-of-state defendants have been on the receiving end of 45% (14 of 31) of Maine's enforcement cases during the twenty-year period under review. In marked contrast to suits against in-state defendants, none of these cases has arisen in the health care sector; rather, they are all over the economy, ranging from potatoes, lumber and solid waste to banking, tourism, cinema, retail pharmacy and funeral parlors. The common purpose linking these otherwise diverse enforcement actions, as one might expect, was to protect competition within in-state markets on which the out-of-state violators had or were poised to have an anticompetitive impact.[24]

The mere fact that the named defendants in these cases were domiciled outside Maine cannot be viewed as indicative of hidden protectionist motives or a tendency toward political favoritism. Such a conjecture would necessarily depend on evidence that these cases were brought to achieve goals remote from antitrust policy. In fact, however, it sometimes does occur that a large out-of-state or foreign firm violates the law, and harms competition in local markets, to the detriment of its small business buyers, suppliers or competitors, as well as Maine consumers. Each of the fourteen cases Maine has brought over the years against out-of-state companies has sought to achieve legitimate antitrust goals, based on unexceptionable antitrust analysis.

[23] *See, e.g., State of Maine v. The Maine Health Alliance* (2003) (physician-hospital organization pricefixing and refusal to deal with health plans).

[24] *See, e.g., State of Maine v. Flagship Cinemas Management, Inc.* (2003) (out-of-state chain cinema acquired competing independent cinema in close proximity to Flagship multiplex).

C. Enforcement Highlights

1. The health care sector.

Maine has been notably active in the health care sector, filing a total of ten antitrust actions since 1984.[25] While arising in local markets, these cases have nevertheless held implications for out-of-state firms and interstate markets. Out-of-state insurance plans have been indirect beneficiaries, and there have been spillover benefits for some out-of-state consumers in markets spanning the Maine-New Hampshire border.

In the non-merger health care category, our primary focus has been on contracts between providers and payors. For example, medical practitioners and hospitals have used the activities of trade associations or physician-hospital organizations as a cloak for efforts to build up their market power relative to managed care firms. We responded with three major enforcement actions.[26] In the most recent case (as noted above), an investigation conducted jointly with the FTC resulted in parallel state and federal actions. Companion consent orders were deemed beneficial for two reasons. First, among the potential defendants were nonprofit hospitals which the FTC lacked authority to sue. Moreover, parallel orders would enhance the agencies' ability to monitor and, if necessary, enforce compliance.

Health care markets have evolved rapidly over the past twenty years. Many, if not most of the combinations or consolidations the State has sought to address through local antitrust enforcement might never have come to the attention of our federal counterparts. Provider

[25] Including four mergers, four price-fixing cases, a market allocation and a concerted refusal to deal. See Maine's Antitrust Enforcement Summary 1984-2005, attached hereto.

[26] *State of Maine v. The Maine Health Alliance* (2003); *State of Maine v. Maine Chiropractic Ass'n* (1999); *State of Maine v. Alliance for Healthcare Inc.* (1991).

mergers, for example, have been far below the value threshold necessary to trigger federal pre-merger notification requirements.[27]

The State's enforcement actions in the health care sector are indicative of something quite different from political favoritism or protectionism. They demonstrate a willingness to disregard political considerations and challenge popular local businesses, as well as local community and civic leaders, to protect competition. The short- and long-term benefits of these efforts are enjoyed by consumers in affected markets both within and beyond Maine's borders.

2. The herring industry.

In a recent piece critical of state antitrust enforcement, Michael DeBow suggests that state attorneys general may be unduly influenced by overriding local interests, such as preservation of local jobs, in making merger enforcement decisions.[28] DeBow singles out a 2001 Maine case, *State of Maine v. Connors Bros. Ltd.* (one of the fish-processing mergers alluded to above) as a prime example of such improper "parochialism."[29] Contrary to DeBow's supposition, however, this case offers an example of enforcement designed to protect local competition based on a legitimate antitrust analysis, through limited relief in furtherance of legitimate antitrust goals. The case is remarkable only for its somewhat unusual focus on the upstream purchase market for fresh fish, rather than the downstream market for canned herring products.

The case focused on the proposed acquisition by a large, New Brunswick herring-processing company, Connors Bros. Ltd., of a smaller Maine competitor, Stinson Seafood. Experience with similar, prior transactions had taught us that the primary assets to be transferred

[27] 15 U.S.C. § 18a.

[28] DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, Competition Laws in Conflict 267, 276 (Epstein & Greve, eds., American Enterprise Institute 2004).

[29] *Id.*

were the acquired firm's popular labels, and that one of the options open to Connors upon consummating the deal was to close down Stinson's four processing facilities in Maine and produce under the acquired labels at Connors' own New Brunswick plant. Our investigation found that the withdrawal of all four Stinson facilities from the purchase market on the American side would leave the remaining fish buyers with considerable monopsony power, to the detriment of U.S. fishing enterprises based not only in Maine ports, but in Gloucester, Massachusetts as well.[30] As in our reviews of prior acquisitions, we determined that if Connors closed the Stinson facilities, the result would be a significant diminution in competition in the purchase market for fresh herring.

The relief we negotiated permitted the transactions to proceed subject to two conditions, both designed to preserve competition in the purchase market. First, Connors agreed to invest a significant sum in modernizing and automating one of the four Stinson facilities;[31] second, it undertook to operate that facility at or above a specified minimum production level for a twelve-year term. These provisions were conceived as a means of ensuring that under its new Canadian owner, Stinson would continue to play an active, albeit diminished role as a purchaser of U.S.-caught herring. Preserving jobs was not the issue. The small number of jobs affected (75 or so) were not considered desirable, locally, by any but their aging incumbents. Investment in automation was needed not only to reduce costs, but to take up the slack left by a dwindling labor force.

In *Connors*, the State properly sought to shield competition in an affected local market from the substantial negative impact of a proposed acquisition. By adopting a flexible approach

[30] The Gulf of Maine market is fractured by the international frontier, since the Jones Act bars Canadian boats from landing fish in the U.S. Across the border, U.S. suppliers were effectively excluded by Connors' pre-existing commitment to long-term contracts with New Brunswick weirmen.

[31] Connors was permitted to select the facility.

to relief, we achieved this antitrust goal while otherwise permitting a foreign enterprise to proceed with its chosen strategy for expansion and development.

D. Beyond enforcement

Concerns with regard to policy matters or the evolution of antitrust law have occasionally prompted Maine to engage in non-enforcement advocacy efforts. For example, we have filed solo antitrust *amicus* briefs in state court, at the First Circuit and in the U.S. Supreme Court. [32] In addition, the Maine Attorney General has on several occasions ventured beyond enforcement or traditional advocacy before a court or quasijudicial forum, committing significant resources to the resolution or alleviation of complex antitrust problems through methods other than litigation. These efforts have usually been initiated in response to major or rapidly unfolding developments in an evolving or troubled economic sector. Typically, we have pursued such initiatives in a legislative, administrative or regulatory setting, with the benefit of stakeholder participation. Interventions of this nature tend to result in a continuing involvement as a market monitor, whether on a formalized or an informal basis. Some examples of projects of this nature are described below.

1. Hospital Cooperation Act.

Our Legislature recently considered amendments to Maine's pioneering Hospital Cooperation Act,[33] enacted in 1992 as a means of facilitating beneficial collaborative activities among hospitals under state supervision. In the context of a major health reform initiative enacted in 2004, a legislative commission concluded that to minimize duplication of hospital

---

[32] *Maine Attorney General's Memorandum of Law as Amicus Curiae, In re Microsoft Antitrust Litigation*, Doc. Nos. CV-99-709, CV-99-752 (Super. Ct. Cumberland Cty. Me.); Brief of Amicus Curiae State of Maine in Support of Plaintiff-Appellants, *Sandy River Nursing Care Center v. National Council on Compensation Ins.*, 985 F.2d 1138 (1st Cir. 1993); Brief of Maine as Amicus Curiae in Support of Petition for Certiorari, *Sandy River Nursing Care Center v. Aetna Casualty and Surety Co.*, 510 U.S. 818 (1993) (No. 92-1874). These briefs are available at www.abanet.org/antitrust/committees/state-antitrust/advocacy.html.

[33] 22 M.R.S.A. §1881, *et seq.*

services and control costs, consolidation and collaborative activities should be further encouraged and facilitated. Contemplated amendments would be intended to extend the existing law to a broader category of collaborative agreements and make it more user-friendly.

We have offered our public interest perspective and antitrust expertise throughout the legislative process.[34] Committed to fostering or protecting competition whenever feasible, we seek to minimize its curtailment when some curtailment is unavoidable. In this instance, we emphasized the importance of limiting approval of collaborative activities to proposals offering consumer benefits sufficient to outweigh any reduction in competition and insisted that the Attorney General maintain a supervisory role.

Advocacy efforts of this nature depend upon the Attorney General's ability to assign staff possessing significant antitrust experience -- experience that can only be gained hands-on, through an active and wide-ranging enforcement program. Even if regularly apprised of local developments in sufficient detail, federal enforcement personnel, lacking the necessary local connections and trust, would be ill-equipped to assume this mantle.

2. Petroleum Market Share Act.

In the late 1980s, New Brunswick refiner Irving Oil began to employ aggressive pricing strategies as part of a systematic drive to expand into Maine's retail petroleum markets -- to the concern of local competitors. A wave of predatory pricing complaints ensued and drafts of so-called divorcement legislation barring refiners from retail markets began circulating. We recognized the need to monitor the impact of Irving's expansion on local markets. However, there was little evidence to support the predatory pricing claims; moreover, divorcement would

[34] The provisions of the bill relating to the Hospital Cooperation Act have been carried over and will be taken up by the Maine Legislature's Health and Human Services Committee again next session.

have deprived consumers of the benefits that could result from Irving's demonstrated ability and will to compete on price.

Concerned to prevent potential damage to competition, this office was able to broker compromise legislation which was promptly enacted as the Petroleum Market Share Act.[35] Under the law, petroleum wholesalers report the annual gallonage delivered to each retailer they supply in the State. Analysis of the gallonage data enables us to figure accurate market shares for each of Maine's local retail markets. Using the Herfindahl-Hirschman Index, we report to the Legislature annually on levels of concentration. The data also permits us to rapidly and effectively evaluate any proposed merger or acquisition.

Currently, although Irving now has a significant presence, levels of concentration in these markets are relatively stable. The hue and cry for divorcement has subsided. Through timely advocacy, we were able to ensure that consumers were not deprived of significant competitive benefits.

3. Electricity & solid waste.

During the recent transition from a comprehensive regulatory system to competitive retail electricity markets, our office was called upon to advise the state Public Utilities Commission and to intervene in federal proceedings implicating Maine's interests. Over a two-year period, we intervened before the Federal Energy Regulatory Commission in two merger proceedings and numerous dockets relating to regional market structure, rules and administration.[36] Ultimately, we issued a 100-page report addressing market power issues and providing legislative recommendations.[37]

---

[35] 10 M.R.S.A. § 1671, *et seq.*

[36] *E.g., New England Power Pool*, F.E.R.C. Docket No. ER98-3853--000.

[37] Market Power in Electricity: A Study of Market Power Issues Raised by the Prospect of Retail Competition in the Electric Industry; Final Report, Dec. 1, 1998; presented to the Joint Standing Committee on

More recently, our office initiated and conducted a study of market power problems in the solid waste industry. Again, the result was a comprehensive report offering legislative recommendations.[38]

II. MULTISTATE ENFORCEMENT & ADVOCACY

State attorneys general are increasingly restricted by budget constraints, with the result that meritorious enforcement actions are often passed up for lack of resources. Multistate enforcement and advocacy to address competitive issues of regional or national significance allow states to leverage their limited resources by working together on issues of common concern.

A. Enforcement Highlights

In the last two decades, Maine has participated in more than twenty multistate enforcement actions, filing suit jointly with a group of litigating states, or signing on to an already-negotiated settlement.[39] These cases have resulted in recoveries for state agencies and consumers amounting to hundreds of millions of dollars in damages resulting from anticompetitive practices. Examples range from multiple actions against pharmaceutical manufacturers alleging unlawful agreements to prevent or delay generic entry[40] to suits charging

---

Utilities & Energy of the Maine Legislature by the Department of the Attorney General & the Public Utilities Commission, www.Maine.gov/ag/dynld/documents/McCoy.pdf.

[38] An Analysis of Competition in Collection & Disposal of Solid Waste in Maine, prepared by R. Townsend & F. Ackerman, Dec. 31, 2002, www.Maine.gov/ag/dynld/documents/Solid_Waste_Report.pdf. Our recommendations in this instance fell on deaf ears.

[39] See Maine's Antitrust Enforcement Summary 1984-2005, attached hereto.

[40] *See, e.g., Plaintiff States v. Bristol-Myers Squibb Co., et al.,* No. 01-CV 11401, MDL 1413 (see *In re Buspirone Antitrust Litigation,* 185 F. Supp. 2d 363 (S.D.N.Y. 2002)) ($93 million in damages and injunctive relief obtained against manufacturers of anti-anxiety drug BuSpar and generic equivalents).

shoe dealers with vertical price-fixing[41] or contact lens manufacturers with a concerted refusal to deal.[42]

Many of the cases were filed jointly by numerous states in federal court, often asserting supplemental state law claims.[43] In some instances, a relatively small group of states brought suit, with many others joining in the settlement, sharing in the monetary relief and providing defendants with some measure of closure.[44] Some multistate actions have accompanied parallel actions commenced by the DOJ or the FTC;[45] a few have paired us with private class counsel.[46]

B. Recovery of Compensation for Consumers: *Parens Patriae*

The single most effective tool for recovering damages or restitution for consumer victims and deterring future violations is the *parens patriae* power of state attorneys general.[47] Like his

---

[41] *See, e.g., State of Florida, et al. v. Nine West Group, Inc. and John Doe, 1-500,* 80 F. Supp. 2d 181 (S.D.N.Y. 2000) (resulting in injunctive relief and $34 million in damages distributed *cy pres*.)

[42] *In re Disposable Contact Lens Antitrust Litigation,* 2001-1 Trade Cas. (CCH) ¶ 73,150 MDL 1030 (M.D. Fla. 1994). Given that state agencies could themselves have blocked alternative channels of distribution in this industry, one noted commentator has observed that "[s]tate attorneys general were unusually valuable defenders of the competitive process because they were uniquely well positioned to help persuade state agencies neither to block such distribution nor to support defense arguments that agency regulations had done so." Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 691 (2003).

[43] *See, e.g., In re Compact Disc Minimum Advertised Price Antitrust Litig.,* No. 2:01-CV-125-P-H, 2003 U.S. Dist. LEXIS 12663 (D.Me. July 9, 2003). This fifty-state $143 million settlement resulted in about 3.5 million consumers receiving almost $13 apiece, possible only due to the states' "innovative" web-based claim submission procedure. Calkins, *supra* note 42, at 691-92. *See also State of Ohio, et al. v. Bristol-Myers Squibb Co., et al.,* No. 1:02-CV-01080 (D.D.C. 2003), which resulted in $55 million to consumers and state agencies that purchased the cancer drug Taxol as an example of the states adding supplemental state law claims in federal actions in order to recover for consumers under state *parens* authority. This approach avoids the *Illinois Brick* impediment to using federal *parens* authority on behalf of indirect purchasers. For a thorough discussion of the effect of the *Illinois Brick* decision on states and their consumers, see Testimony of Mark J. Bennett and Ellen S. Cooper Concerning Indirect Purchaser Actions Before the Antitrust Modernization Committee, submitted June 17, 2005.

[44] *State of New York, et al. v. Salton, Inc.,* No. 02-CV-7096 (2002 complaint); 265 F. Supp. 2d 310 (S.D.N.Y. 2003).

[45] *See, e.g., Connecticut v.Mylan Lab,* No. 1L98 CV 03115 (D.D.C. filed Dec 22, 1998), settlement approved sub nom. *In re Lorazepam & Clorazepate Antitrust Litigation,* 205 F.R.D. 369, 401 (D.D.C. Feb. 1, 2002).

[46] The "Vitamins" case, *Giral v. F. Hoffman-LaRoche Ltd.,* No 98 Civ. 7487 (D.C. Sup. Ct. Apr. 26, 2001), and parallel state cases, followed federal criminal indictments and record fines against manufacturers for pricefixing. While including class counsel to represent non-consumer purchasers, this matter required the participation of the states to facilitate a *cy pres* distribution to injured consumers to accord complete relief.

[47] *Parens patriae,* or "parent of the country," refers traditionally to the role of the state as a sovereign. It is a concept of standing utilized to protect quasi-sovereign interests such as the health, comfort and welfare of the people. Black's Law Dictionary, abridged 5th edition, 1983. In addition to express authority of the state attorneys general to recover monetary relief for consumers injured by Sherman Act violations, state statutory and decisional

counterparts in most states, the Maine Attorney General possesses broad common law authority to protect the public interest, including the interests of consumers and citizens.[48] In enacting the 1976 Hart-Scott-Rodino Act, Congress deliberately built on this common law foundation, according exclusive *parens* authority to state attorneys general to sue on behalf of consumers and citizens under federal antitrust law, in addition to state law.[49] Neither federal nor private enforcement was seen as adequate to the task of protecting consumer interests.[50] The House Judiciary Committee expressly articulated its intention to promote deterrence and consumer recovery "by providing the consumer an advocate in the enforcement process – his state attorney general."[51]

As to enforcement of federal antitrust law, state attorneys general are the only government officials expressly authorized to pursue money damages on behalf of injured consumers.[52] While the FTC has the authority to seek disgorgement,[53] this authority has been

---

law in most states imbues state attorneys general with authority to bring such claims under state law, a particularly important tool in light of *Illinois Brick.* See note 44. See "Authority Of State Attorneys General To Represent Consumers Under State Law," Exhibit A to the States' Motion for Final Approval of Settlement, endorsed by Judge Edmunds in *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 520-22 (E.D. Mich. 2003), appeal dismissed, 391 F.3d 812 (6th Cir. 2004), cert. denied, 125 S. Ct. 2297 (2005).

[48] *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973) ("The Attorney General, in this State, is a constitutional officer endowed with common law powers. *See* Constitution of Maine, Article IX, Section 11. As the chief law officer of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and *the protection of public rights.*" (emphasis in original)); *see also, Superintendent of Ins. v. Attorney General*, 558 A.2d 1197, 1200-1201 (1989) (AG role as protector of public interest paramount to his duty to represent state agency in an appeal of final agency action).

[49] 15 U.S.C. § 15c.

[50] See H.R. Rep. No. 94-499, at 6-7 (1976), reprinted in U.S.C.C.A.N. 2572, 2576-2577; *See, e.g.*, Farmer, *More Lessons from the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361, 376-77 (1999).

[51] H.R. Rep. No. 94-499, pt.1, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2574; Calkins, *supra* note 42, 682-83.

[52] 15 U.S.C. § 15c.

[53] 15 U.S.C. § 53(b) (authorizing injunctive relief and interpreted as including disgorgement and consumer redress among the equitable remedies available thereunder); *see, e.g., FTC v. Amy Travel Serv. Inc.*, 875 F.2d 564, 572 (7th Cir. 1989).

invoked rarely and is noted by one commentator to be of "uncertain legality."[54] When it has been used, the agency has enlisted assistance from the states in distributing recovered monies.[55] The Department of Justice has no corresponding authority.

While private class actions provide an avenue for recovering consumer damages, state *parens patriae* suits enjoy a number of well-recognized advantages.[56] For example, states need not meet the sometimes onerous requirements for Rule 23 class certification, such as commonality or adequacy of representation.[57] Because state attorneys general are presumed to act in the interests of the consumer citizens they represent, many cases in which consumer damages are too small to warrant the cost of administering individual claims require the states to act as agents for the distribution of *cy pres* compensation.[58] Moreover, states have the ability to investigate potential violations prior to litigation and offer a clear public policy perspective.[59] Moreover, the superiority of state *parens patriae* actions has been recognized by the judiciary.[60]

Ultimately, the proof is in the pudding. Multistate *parens* lawsuits have proven their value by securing substantial recoveries for state agencies and consumers. All but two of the twenty-one cases in which Maine has participated have brought in very significant sums for either direct or *cy pres* distribution.[61]

---

[54] See First, *Delivering Remedies: The Role of the States in Antitrust Enforcement,* 69 Geo. Wash. L. Rev. 1004, 1013 (2001); Calkins, *supra* note 42, at 693.

[55] Calkins, *supra* note 42, at 693.

[56] *See, e.g.*, First, *supra* note 54, 1039; Farmer, *supra* note 50, at 377.

[57] First, *supra* note 54, at 1039.

[58] *Id.* ("States not only have experience in making these distributions, they are also publicly accountable for ensuring that the payments go to groups that will benefit those harmed by the violation."); see note 46.

[59] Additionally, class counsel are often criticized as the primary beneficiaries of monetary awards, not consumers. *See, e.g.*, Farmer *supra* note 50, at 389.

[60] *See, e.g., Pennsylvania v. Budget Fuel Oil Co.*, 122 F.R.D. 184, 185 (E.D. Pa. 1988), *In re Montgomery County Real Estate Antitrust Litigation*, 1988 WL 125789, at *1-2 (D. Md. July 17, 1988) (refusing to extend a Rule 23 class to include a *parens patriae* group, finding that allowing both to proceed would be both legally impermissible and factually undesirable).

[61] In both of the two exceptions states obtained significant injunctive relief. *Massachusetts v. Suiza Foods Corp.*, No. 01 CV 11097 DPW (D. Mass. July 6, 2001) & *Vermont v. Suiza Foods Corp.*, No. 2:01-CV-194 (D. Vt. June 27, 2001) (companion New England states' actions obtained conditions relative to dairy industry merger); *New*

C. The Elephant in the Room: *Microsoft*

Any discussion of state antitrust enforcement requires consideration of the states' role in the antitrust litigation against Microsoft.[62] While Maine did not participate as a party in the case, we joined in a 24-state *amicus* brief defending the prosecutorial prerogative of the contingent of states that continued to litigate after DOJ and the other plaintiff states had settled with the defendants.

The *Microsoft* litigation has generated commentary well beyond the relatively insular world of antitrust lawyers. Thomas Friedman has identified the litigation as illustrating the fundamental strength of our economy, in which even the most powerful and rich corporation can be required by poorly paid government enforcers to comply with the antitrust laws.[63] The critics, on the other hand, decry any antitrust action "involving the most valuable company in the U.S. economy."[64]

To be understood, the states' activities need to be placed within the broader context of the antitrust concerns about the actions of Microsoft. The Federal Trade Commission initiated the federal antitrust investigation of Microsoft in 1990. The FTC suspended and transferred that investigation to the Antitrust Division of the United States Department of Justice, after the FTC Commissioners deadlocked 2-2 on whether to file a complaint against Microsoft.[65] DOJ's first antitrust litigation focused on Microsoft's requirement that computer manufacturers pay Microsoft for each computer sold, regardless of whether the computer used a Microsoft operating

---

York v. Primestar Partners, L.P., et al., 1993-2 Trade Cas. (CCH), ¶ 70,404 (S.D.N.Y. 1993) (exclusionary conduct in the cable television industry).

[62] Complaint, *New York v. Microsoft Corp*., No. Civ. A. 98-1233 (D.D.C. May 18, 1998); *See* DeBow, *supra* note 28, at 267; First, *supra* note 54, at 1032-34 (2001); Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 Geo. J.L. & Pub. Pol'y 5, 9-10 & n.9 (2004); Calkins, *supra* note 42, at 676 (discussing state enforcers' comparative advantages).

[63] Friedman, The Lexus and the Olive Tree, 357-58 (Farrar, Straus, & Giroux 2000).

[64] See DeBow, *supra* note 28, at 267.

[65] *United States v. Microsoft Corp*., 56 F.3d 1448, 1451 (D.C. Cir. 1995).

system. That claim was resolved by consent decree, which United States District Court Judge Stanley Sporkin rejected as inadequate.[66] The Antitrust Division appealed, the Court of Appeals reversed and instructed that a different judge be assigned on remand, concluding that the proceedings "cause a reasonable observer to question whether Judge Sporkin 'would have difficulty putting his previous views and findings aside' on remand."[67]

In light of the ambiguities and narrow focus of DOJ's decree and the continuing concerns about Microsoft's behavior, states began investigating Microsoft in 1997.[68] The state investigation paralleled the Antitrust Division's investigation. Those investigations culminated in a coordinated filing and detailed exchanges, cooperation, and coordination among the states and DOJ through discovery and trial in front of the new judge, Thomas Penfield Jackson, and Microsoft's appeal to the D.C. Circuit Court of Appeals.[69] The D.C. Circuit, in a unanimous en banc decision, affirmed Judge Jackson's central conclusion that Microsoft had engaged in illegal monopoly maintenance in violation of section 2 of the Sherman Act, but vacated Judge Jackson's remedial order, remanding for further proceedings. The D.C. Circuit also disqualified Judge Jackson.[70] After a change of administration in Washington, the third federal district court judge Colleen Kollar-Kotelly directed the parties to undertake extended settlement negotiations, aided by court appointed mediators. The Antitrust Division and nine states (the "Settling States") reached a settlement with Microsoft. Nine other states and the District of Columbia rejected that

---

[66] *United States v. Microsoft Corp*., 159 F.R.D. 318 (D.D.C. 1995).

[67] *United States v. Microsoft Corp*., 56 F.3d 1448, 1465 (D.C. Cir. 1995) (quoting *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989)).

[68] *See* O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 Antitrust L.J. 413, 423 (2002).

[69] Complaint, *United States v. Microsoft Corp*., No. Civ. A. 98-1232 (D.D.C. May 18, 1998); Complaint, *New York v. Microsoft Corp*., No. Civ. A. 98-1233 (D.D.C. May 18, 1998); see *United States v. Microsoft Corp*., 87 F. Supp. 2d 30 (D.C. Cir. 2000) (DOJ and the states sued Microsoft alleging violations of §§ 1 and 2 of the Sherman Act for unlawfully maintaining its monopoly in Intel-compatible personal computing operating systems and attempting to monopolize the Web browser market.).

[70] *United States v. Microsoft Corp*., 253 F.3d 34, 45-46 (D.C. Cir. 2001).

settlement (the "Litigating States") and pursued a remedies trial. Although the Litigating States got less relief than they sought, most accepted that determination. West Virginia appealed and then settled. Massachusetts alone pursued the appeal to decision.[71] Like the district court, the Court of Appeals considered and rejected Massachusetts's arguments on the merits.[72]

At this point, DOJ, the Settling States and the Litigating States all commit significant resources to monitoring Microsoft's compliance with the final judgments, regularly reporting to Judge Kollar-Kotelly.[73] During this same period, the European Commission investigated Microsoft for somewhat different conduct than was involved in the U.S. litigation, ultimately finding in 2004 that Microsoft had abused its dominant position, in violation of Article 82 of the EC Treaty. The European Court of First Instance subsequently denied Microsoft's request for interim relief from the Commission's decision and the merits of the finding are now being considered by that Court.

The scope of these efforts, including the length of the judicial decisions considering the claims and finding antitrust liability, illustrates the depth and importance of the concerns about Microsoft's illegal activities. Although two federal trial court judges have been disqualified, no trial or appellate judge has absolved Microsoft from antitrust liability. The effort to ensure that Microsoft complies with the antitrust laws has been a monumental undertaking. The States are proud to have done their part, sharing the work with federal enforcers, while ensuring that the states' views are heard.

---

[71] *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

[72] *Id.* at 1207-34.

[73] All enforcers agree that these efforts are necessary to remedy the antitrust violations. Although Microsoft's market share in the browser market is declining somewhat, its share of the operating system market is not. *The EC Decision Against Microsoft: Windows on the World, Glass Houses, or Through the Looking Glass?* at 10 (comments of Steve Houck) ANTITRUST SOURCE (Sept. 2004), available at www.abanet.org/antitrust/source/09-04/Sep04MSBB.pdf.

D. Amicus Efforts

As a complement to multistate enforcement, state attorneys general have become increasingly engaged in competition advocacy as *amicus curiae.*[74] Initially, these efforts were relatively few, *ad hoc* and sporadic. Today the NAAG Antitrust Task Force Amicus Committee coordinates an organized, formal process for reviewing opportunities for multistate *amicus* advocacy, assigning drafting responsibilities and gathering support.[75] Over the period 1977-2003, some 56 *amicus* briefs have been filed by two or more Attorneys General at all levels of the federal court system addressing a broad array of issues in widely varying economic contexts.[76] Though we have seldom played a leading role, Maine has joined in at least 24 of those briefs.

A number of significant sovereign interests motivate the state attorneys general, including Maine's, to participate as *amici*. We have consistently (witness these comments, as well as numerous *amicus* briefs) defended our concurrent enforcement authority as rooted in the history and principles of federalism.[77] In addition, since many modern state laws are modeled after or interpreted in accordance with federal law, states have a broad interest in ensuring that federal judicial precedent adheres to sound competition policy.[78] As *amici*, state attorneys general seek

---

[74] For a thorough discussion of the history, scope and effectiveness of multistate *amicus* efforts, see Ackerman & Hubbard, *Multistate Antitrust Amici: A Review of Multistate Antitrust Amicus Advocacy, 1977-Current*, available at www.abanet.org/antitrust/committees/state-antitrust/pubs.html.

[75] See NAAG Antitrust Task Force, *Protocol for State Consideration of Whether to Participate as Amicus Curiae* (2003), available at www.abanet.org/antitrust/committees/state-antitrust/advocacy.html.

[76] Ackerman & Hubbard, *supra* note 74, at 8, 10.

[77] Brief of Amici Curiae States in Support of Petition for Certiorari, *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 516 U.S. 1184 (1996) (No. 95-1118); Brief of Amici Curiae States in Support of Respondents, *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992) (No. 90-1029); Brief of Amici Curiae States in Support of the Federal Trade Commission, *FTC v. Butterworth Health Corp*., 121 F.3d 708 (6th Cir. 1996) (No. 96-2440); Brief of Amici Curiae States in Support of Petition for Certiorari, *Bogan v. Hodgkins*, 528 U.S. 1019 (1999) (No. 99-89); States' Amicus Brief in Support of Federal Trade Commission, *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997) (No. 97-CV-701). These and other *amicus* briefs cited herein are available at www.abanet.org/antitrust/committees/state-antitrust/advocacy.html.

[78] Brief of Amici Curiae States in Support of the Federal Trade Commission, *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) (No. 00-5362); Brief of Amici Curiae States in Support of Respondents, *Eastman Kodak*

out opportunities to protect the public interest by promoting free and open competition for the benefit of their consumers and citizens.[79]

Conclusion: If It Ain't Broke, Don't Fix It

Our current system of antitrust enforcement is rooted in a concept of federalism that allows for and values concurrent state-federal authority.[80] In enacting the Sherman Act in 1890, Congress respected that concept of federalism and preserved the states' independent antitrust authority. Today, the resulting balance of concurrent state-federal enforcement authority continues to provide effective coverage, functions well, and merits continued respect.

Maine's experience over a twenty-year period shows that concurrent state authority continues to offer substantial benefits.[81] In particular, state antitrust enforcement:

- ✓ Brings special knowledge of local terrain, as well as economic and political conditions in our state, to a cooperative partnership with the federal agencies;
- ✓ Applies that knowledge, together with hands-on enforcement experience, to confront and resolve local antitrust problems that evade federal radar;
- ✓ Alone possesses the public interest commitment, skills, experience and authority to seek and recover substantial sums as *parens patriae* for citizens and consumers;
- ✓ Alone is able to advocate and negotiate for outcomes consistent with sound competition policy in legislative and other contexts requiring a rapid turnaround;

Co. v. Image Technical Serv., Inc., *supra* note 77*;* Brief of Amici Curiae States in Support of Petitioner, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (No. 91-72); Brief of Amici Curiae States in Support of Petition for Certiorari, *Hahnaman Albrecht, Inc. v. Potash Corp. of Saskatchewan Inc.*, 531 U.S. 815 (2000) (No. 99-1844).

[79] Brief of Amici Curiae States in Support of Respondents, *Eastman Kodak Co. v. Image Technical Serv*., Inc., *supra* note 77; *In re: Cardizem CD Antitrust Litigation* (2003), available at www.abanet.org/antitrust/committees/state-antitrust/cardizemamicus.pdf; Brief of Amici Curiae States in Support of the United States, *United States v. Visa U.S.A., Inc*., 344 F.3d 229 (2d Cir. 2003) (No. 02-6074L); Brief of Amici Curiae States, *SBC Communications v. Federal Communications Commission*, 154 F.3d 226 (5th Cir. 1998) (No. 98-10140); Brief of Amici Curiae States in Support of Petition for Certiorari, *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc*., 512 U.S. 1221 (1994) (No. 93-1766) .

[80] "[T]he Framers . . . designed a system in which the state and federal governments would exercise concurrent authority." *Printz v. U.S.*, 521 U.S. 898, 919-920 (1997) (citing Hamilton, The Federalist No. 15); *see also* Madison, The Federalist No. 39, available at www.foundingfathers.info/federalistpapers/fed39.htm.

[81] The more extensive experience of other states would speak eloquently to the same effect.

- ✓ Is capable of independence, innovation and creativity, practical and doctrinal.

There may be some areas in which better communication and coordination could enhance the efficiency and sensitivity of our enforcement system. The Commission might encourage state and federal enforcement agencies to study the advisability of guidelines or protocols governing reciprocal communication in specific circumstances, such as matters involving a foreign market participant or displaying some other international aspect or dimension. Overall, however, the traditional state-federal balance in antitrust enforcement is functioning well. A proverb popular in Maine (and perhaps elsewhere) is directly applicable: "if it ain't broke, don't fix it."

In response to the Commission's specific questions:

- ✓ The role of state attorneys general in civil non-merger enforcement should not be restricted, since the imposition of limitations could result not only in a gap, but an abyss in enforcement coverage, to the detriment of out-of-state and foreign firms as well as local businesses and consumers exposed to the anticompetitive impact of consolidation, collusion or monopolization;

- ✓ Further, while the development of guidelines for communications, cooperation and coordination, could be useful (especially as to international matters), no hard-and-fast demarcation should be applied to divide responsibility for civil non-merger enforcement between state and federal agencies. Flexibility in assigning responsibility for particular matters provides state and federal enforcers with a greater range of strategic options, permitting more reliable coverage.

- ✓ Finally, *parens patriae* standing is needed and useful. Without it, Maine could not have realized the substantial sums in restitution and damages won in recent years for consumers and citizens, and future recoveries would be rendered unlikely or doubtful at best.

In his memorable defense of federalism, Justice Brandeis compared the states to laboratories, arguing that their independent social, political and economic experiments strengthen and enrich our polity as a whole.[82] His argument is as valid applied to antitrust enforcement across the board today as it was to price regulation in the Oklahoma ice industry in the nineteen-

[82] *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting).

thirties. Certainly, the coexistence of concurrent state-federal antitrust enforcement authority necessarily and predictably results in some inconsistency and divergence. But the advantages of pluralism far outweigh its drawbacks.[83]

This conclusion is supported by state enforcement experience. Our system of concurrent authority ensures seamless coverage through cooperative efforts as well as the availability of a cadre of experienced enforcement personnel to handle local matters – matters of advocacy or negotiation as well as enforcement proper -- on the ground. At the same time, our pluralism shields us from the intellectual complacency, dogmatism or arrogance that can result when any school of thought gains unchallenged primacy in its field. Thus, if state enforcement is sometimes inclined to challenge the tenets of the Chicago School, or reaches an enforcement decision at variance with a federal agency, this is not merely wasteful or inefficient. As in the adversarial system itself, some degree of philosophical tension in antitrust enforcement offers a promise of intellectual and doctrinal vitality, and more than that, a greater assurance that justice will be done.

In the end, even the *Microsoft* litigation illustrates the importance and advantages of concurrent enforcement. First, it bears recalling that every substantive judicial determination in that case held that Microsoft had violated the law. Moreover, critics of the role played by state enforcement miss a second essential point: the fact that the ten litigating states (including one that persisted with an appeal) lost in the end does not prove that their enforcement decisions were wrongheaded nor that our system is wasteful or inefficient. Rather, in the aftermath of the change in administration at the federal level, these losing efforts imbued the final outcome with a greater sense of public closure and legitimacy than might otherwise have been possible.

[83] *See generally* Burns, *Embracing Both Faces of Antitrust Federalism: Parker & ARC America Corp.*, 68 Antitrust L.J. 29 (2000).

We reject the assessment that our current system wastes resources, and therefore costs too much in "negative externalities."[84] With all due respect, those who tell us that "the case for federalism [in antitrust enforcement] is somewhat conjectural" have got it backwards.[85] It is the case against, not for antitrust federalism that is grounded in conjecture.[86] Since Congress set it in motion in 1890, our system of concurrent and overlapping enforcement has repeatedly proven its vitality, adaptability, versatility, effectiveness – and above all, its capacity for serving justice. In formulating recommendations to adjust, amend or alter the state-federal balance reflected in current American antitrust law and enforcement practice, the Commission should tread carefully and consider well. Our current enforcement framework, we submit, has proven its worth and should be preserved.

[84] Posner, *supra* note 62, at 7.
[85] *Id.* at 8.
[86] See *id.* at 14 ("data support my *conjecture* that *parens patriae* litigation is a method of protecting resident companies from competition" (emphasis added)).

MAINE ANTITRUST FORMAL ACTIONS 1984-2005

Case	Court	Docket No./Cite	Plaintiff	Issues
State of Maine v. Anesthesia Professional Association	Kennebec Superior Court	CV-84-250	Maine	Price-fixing, monopolization – anesthesiologists
State of Maine v. Bar Harbor Airways Incorporated, et al.	Kennebec Superior Court	April, 1986 Consent Decree	Maine	Merger of two small airlines
State of Maine v. Business Equipment Unlimited, et al.	Kennebec Superior Court	CV-87-103	Maine	Price-fixing and market allocation in the sale of toner
State of Maine v. McCain Foods, et al.	Kennebec Superior Court	CV-87-342	Maine	Coercive reciprocal dealing - agricultural equipmt/machinery
State of Maine v. Scott Paper Co.	Somerset Superior Court	1987-2 Trade Cases ¶67,786 (Me., November 25, 1987)	Maine	Forest products tying
State of Maine v. Eastern States Management Company. Inc.	Kennebec Superior Court	CV-87-260	Maine	conspiracy to monopolize landfill
In re Minolta Camera Products Antitrust Litigation	U.S. District Court for the District of Maryland	668 F. Supp. 456; 1987 U.S. Dist. LEXIS 8191; 1987-1 Trade Cas. (CCH) P67,622	multistate	Resale Price Maintenance
State of Maine v. Connors Bros., Limited. et al.	Kennebec Superior Court	CV-88-318 1988-2 Trade Cases ¶68,237 (Sep. 09, 1988)	Maine	acquisition – herring processor
State of Maine v. Connors Bros., Limited. et al.	Kennebec Superior Court	CV-87-321, CV-88-318 1991-1 Trade Cases ¶69,368 (Feb. 08, 1991)	Maine	amended consent decree
State of Maine v. Connors Bros., Limited. et al.	Kennebec Superior Court	CV-87-321, CV-88-318 1991-1 Trade Cases ¶69,367 (Feb. 08, 1991)	Maine	contempt of prior order
Commonwealth of Massachusetts, State of Maine, State of New Hampshire v. Campeau Corp., CRTF Corp.and Allied Stores Corp.	U.S. District Court	CV-88-1018-MA	multistate	acquiring or exercising ownership or control – department stores
In re: Augusta Lumber Company	Kennebec Superior Court	January, 1989 Assurance of Discontinuance	Maine	Unfair competition - joint advertising by 4 lumber companies
New York et al. v. Matsushita Electric Corp. of America	U.S. District Court for the Southern District of New York	Civil Action No. 89-2788 /89 Civ. 0368	multistate	Price-fixing Resale Price Maintenance
State of Maine v. Getchell Bros., Inc., et al.	Kennebec Superior Court	CV-89-413	Maine	Market allocation in the sale of packaged or bulk ice
State of Maine v. Key Bank of Maine	U.S. District Court for the District of Maine	91-0380-P-H	Maine	Acquisition of 11 branches of a competing bank
State of Maine v. Alliance for Healthcare Inc.	Kennebec Superior Court	CV-91-104	Maine	Price-fixing - physician/hospital/ managed care
New York v. Nintendo of America, Inc.	U.S. District Court for the Southern District New York	91-2498 775 F. Supp. 671 (S.D.N.Y. 1991)	multistate	Price-fixing; Resale Price Maintenance
State of Maryland et al v. Mitsubishi Electronics America	U.S. District Court for the District of Maryland	S91-815 1992-1 Trade Cas. (CCH) ¶69,743 (D. Md. 1992)	multistate	Price-fixing; Resale Price Maintenance

MAINE ANTITRUST FORMAL ACTIONS 1984-2005

In re Clozapine Antitrust Litigation	U.S. District Court for the Northern District of Illinois	No. 91-C-2431 MDL No. 874 (N.D. ILL. 1991)	multistate	Monopolization; Price-fixing; Tying Arrangement
State of Maine v. Cardiovascular & Thoracic Associates, P.A., et al.	Kennebec Superior Court	CV-92-412	Maine	Merger - cardiac surgeons
State of Maine v. Mid Coast Anesthesia, PA, et al.	Kennebec Superior Court	CV-92-09	Maine	merger - anesthesiologists
In Re: Maine Pride Salmon, Inc.	US Bankruptcy Court, District of Maine	Chapter 11, Case No. 93-10580	Maine	Fisheries merger
State of Maine v. Aloupis, Benoit, Harris, Lebowitz, Solomon	Kennebec Superior Court	CV-93-73	Maine	Agreement in restraint of trade; physicians
State of New York v. Primestar Partners, L.P.	U.S. District Court for the Southern District of New York	93 Civ. 3868 (JES) 1993-2 Trade Cas. (CCH) ¶ 70,404 (S.D.N.Y. 1993)	multistate	Monopolization
State of New York v. Keds Corporation	U.S. District Court for the Southern District of New York	1994-1 Trade Cas. (CCH) ¶ 70,549 (New York); 93 Civ.6721 (Florida) 1994 WL 97201, 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y.1994)	multistate	Price-fixing; Resale Price Maintenance
In re Disposable Contact Lens Antitrust Litigation	U.S. District Court for the Middle District of Florida	MDL 1030; No. 94-619-CIV: J-20 (M.D. Fla. Filed June 28, 1994) 2001-1 Trade Cas. (CCH) & 73,150 MDL 1030 (M.D. Fla. 1994)	multistate	Price-fixing; Boycott
State of Maine v. Rite-Aid Corp.	Kennebec Superior Court	1995-2 Trade Cases ¶ 71,148 (Me., September 29, 1995)	Maine	Drug store merger; Joint State-FTC investigation
New York, et al., v. Reebok International, Ltd	U.S. District Court for the Southern District of New York	95-2141 71,558 (CCH), 96 F.3d 44, 903 F. Supp. 532 (S.D.N.Y. 1995)	multistate	Price-fixing; Resale Price Maintenance
State of Maine v. Maine Heart Surgical Assocs., P.A.	Kennebec Superior Court	CV-96-336 1996-2 Trade Cases ¶ 71,654 (Me., July 22, 1995)	Maine	Merger – cardiac surgeons
State of Maine v. Central & Western Maine Regional PHO, Inc., et al.	Kennebec Superior Court	1996-1 Trade Cases ¶ 71,320; 1996 WL 157202 (Me., January 18, 1996)	Maine	Merger of 4 physician-hospital networks to jointly negotiate with managed care
State of Maine v. American Skiing Co./Sunday River	Kennebec Superior Court	1996-2 Trade Cases ¶ 71,478 (Me., June 27, 1996)	Maine	Price-fixing; DOJ had already cleared after divestitures in New Hampshire.
Texas v. Zeneca	U.S. District Court for the Northern District of Texas, Dallas Division	3-97CV1526-D 1997 U.S. Dist. LEXIS 13153 (N.D. Tex. 1997); 1997-2 Trade Cas. (CCH) ¶ 71,888 (N.D. Tex. 1997)	multistate	Price-fixing; Resale Price Maintenance
State of Missouri v. American Cyanamid Co.	U.S.D.C, Western District of Missouri Central Division	97 4024-CV-C-SOW 1997 U.S. Dist. LEXIS 4722. 1997-1 Trade Cas. (CCH) 71,712 (W.D. MO. 1997)	multistate	Price-fixing; Resale Price Maintenance

MAINE ANTITRUST FORMAL ACTIONS 1984-2005

In Re: Toys "R" Us Antitrust Litigation	U.S. District Court for the District of New York	CV-97-5750 (NG) (JLC) 191 F.R.D. 347 (E.D.N.Y. 2000); M.D.L. 1211	multistate	Horizontal non price restraint; Monopolization; Price-fixing
State of Maine v. Equity Corporation International	Kennebec Superior Court	CV-98-312	Maine	Funeral home merger
State of Maine v. Maine Chiropractic Ass'n,	Kennebec Superior Court	CV-99-135	Maine	Price fixing, concerted refusal to deal
State of Maine v. Casella Waste Systems, Inc., et al.	Kennebec Superior Court	CV-99-212	Maine	Proposed merger in solid waste hauling and disposal industry
State of New York et al. v. Hoffmann-LaRoche, Inc., Roche Vitamin, Inc.	U.S. District Court for the District of Columbia	Court Action No. 99.010358 (7)	multistate	Price-fixing
State of Maine v. Bridgton Hospital, MMC	Kennebec Superior Court	CV-00-87	Maine	Market allocation through agreement to restrict advertising
State of Maine v. Coutts Bros., Inc., et al.	Kennebec Superior Court	CV-00-088	Maine	Bid rigging (price-fixing) by utility construction contractors
State of Maine v. Connors Brothers Ltd.	Kennebec Superior Court	CV-00-63 2001-1 Trade Case ¶ 72,937 (Me. March 29, 2000)	Maine	merger - sardine processors
State of Florida, et al. v. Nine West Group, Inc. and John Doe	U.S. District Court for the Southern District of New York	1-500 80 F. Supp.2d 181 (S.D.N.Y. 2000); No. 00-CV-1707 (S.D.N.Y. Dec. 14, 2000)	multistate	Price-fixing Resale Price Maintenance
State of Connecticut v. Mylan Laboratories, Inc. *In re Lorazepam & Clorazepate Antitrust Litigation*	U.S. District Court, District of Columbia	CV. No. 1:98 CV 03114 (TFH) MDL No. 1290 (D.D.C. June 15, 2000) 205 F.R.D. 369 (D.D.C. 2002) No. 98 CV 3115 (D.D.C. 2000) - complaint 62 f. Supp. 2d 25	multistate	Monopolization Price-fixing
In re Compact Disc Minimum Advertised Price Antitrust Litigation	U.S. District Court - District of Maine	MDL 1391/2:01-CV 84-P-H MDL No. 1361 (D. Me. 2002) MDL-1391; No. 00-CIV-5853 (BSJ) (S.D.N.Y Aug. 8, 2000)	multistate	Price-fixing; Resale Price Maintenance; Minimum Advertising Pricing
State of Ohio, et al, v. Bristol-Myers Squibb Co., et al (Taxol)	U.S. District Court for the District of Columbia	1:02-CV-01080	multistate	Horizontal Non Price Restraint Monopolization
State of Maine v. Echostar Communications Corp./Hughes Electronics Corp./DirecTV/General Motors Corp.	U.S. District Court – District of Columbia	1:02CV02138	Maine	Merger review Price-fixing
Massachusetts v. Suiza Foods Corp. *Vermont v. Suiza Foods Corp.*	U.S. District Court for the District of Massachusetts U.S. District Court for the District of Vermont	No. 01 CV 11097 DPW (D. Mass. July 6, 2001) No. 2:01-CV-194 (D. VT. June 27, 2001)	multistate	Merger review -- dairy
Plaintiff States v. Bristol Myers Squibb Co.; Danbury Pharmacal, Inc.; Watson Pharma, Inc. *In re: Buspirone Antitrust Litigation*	U.S. District Court, Southern District of New York	01-CV. 11401, MDL 1413 185 F. Supp. 2d 363 (S.D.N.Y. 2002)	multistate	Monopolization

MAINE ANTITRUST FORMAL ACTIONS 1984-2005

In re Cardizem CD Antitrust Litigation	U.S. District Court for the Eastern District of Michigan	MDL 1278 Civil Action 01-71835; 01-CV-71835 99-MD-1278 (E.D. Mich. Jan. 29, 2003) 332 F.3d 896 (6th Cir. 2003)	multistate	Monopolization; Price-fixing
State of New York et al v. Salton, Inc.	U.S. District Court for the Southern District of New York	02-CV-7096 (S.D.N.Y, 2002), 265 F. Supp 2d 310 (2003)	multistate	Monopolization; Resale Price Maintenance; Vertical Non-price restraint
State of Maine v. Flagship Cinemas Management, Inc., et al.	Knox Superior Court	CV-03-087	Maine	Post-merger
State of Maine v. Maine Health Alliance, et al.	Kennebec Superior Court	CV-03-135	Maine	Price-fixing; Concerted refusal to deal Parallel FTC action
State of Maine v. Rite-Aid Corp./Community Pharmacy	Kennebec Superior Court	CV-04-273	Maine	Acquisition

TABLE 1: Maine non-merger enforcement cases 1986-2005

Price-fixing	6
Tying/recip. dealing	2
Market alloc.	2
Concerted ref.	2
Rule of reason	1
Monopolization	1
Unfair trade practice	1

TABLE 2: Maine enforcement cases by sector 1986-2005

Industry	No. of cases
Health care	10
Fish proc'g/aqua	4
Solid waste	4
Retail pharm.	2
Lumber	2

Other sectors (one case each): Airlines, potatoes, toner, ice, banking, recreation/tourism, cinema, funeral homes, construction

---

TABLE 3: Maine antitrust defendants by domicile / extent of protected market

Defendant/market extent	Total cases	Non-merger cases
In-state def./ "pure" intrastate mkt	7	7
In-state def./ "mixed" mkts	10	5
Out-of-st. def./ "mixed" mkt s	14	2
Out-of-st def. ext. mkt	0	0
