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October 19, 2005

**Via Express Mail and E-mail**

Antitrust Modernization Commission  
Attention: Public Comments  
1120 G Street, N.W.  
Suite 810  
Washington, DC 20005

**Re: Comments Regarding State Civil Nonmerger Enforcement**

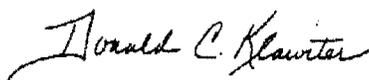
Ladies and Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments to the Antitrust Modernization Commission in response to its request for comments regarding State Civil Nonmerger Enforcement.

Please note that these views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



Donald C. Klawiter  
Chair, Section of Antitrust Law

**Comments of the Section of Antitrust Law  
of the American Bar Association  
in Response to the  
Antitrust Modernization Commission's  
Request for Public Comment**

**Regarding Government Enforcement Institutions: The Enforcement Role of the States  
With Respect to Federal Antitrust Laws in Civil Nonmerger Cases**

The Section of Antitrust Law ("Antitrust Section") of the American Bar Association ("ABA") is pleased to submit these comments to the Antitrust Modernization Commission (the "Commission") in response to its request for public comment dated May 19, 2005, regarding specific questions relating to Government Enforcement Institutions: The Enforcement Role of the States with Respect to Federal Antitrust Laws selected for study by the Commission. The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

These comments are addressed, in particular, to two questions raised by the Commission concerning dual state-federal enforcement *in civil nonmerger cases*. Specifically, the Commission asked:

- (1) What role should state attorneys general play in nonmerger civil enforcement? To what extent is state *parens patriae* standing useful or needed? Please support your response with specific examples, evidence, and analysis.
  
- (2) Should state and federal enforcers divide responsibility for nonmerger civil antitrust enforcement based on whether the primary locus of alleged harm (or primary markets affected) is intrastate, interstate, or global? If so, how should such an allocation be implemented?<sup>1</sup>

**Summary of Comments**

For the reasons set out below, the Antitrust Section cannot effectively evaluate, at least on an empirical basis, the costs and benefits of dual civil nonmerger enforcement. The lack of any systematic collection of information regarding state civil nonmerger enforcement activities handicaps any evaluation of these issues. The Antitrust Section notes that dual enforcement is based on our federal system of government and that, if enforcement regimes were created from scratch, state enforcement of the federal antitrust laws against nonmerger conduct might not be advisable. The Antitrust Section acknowledges that private and government entities have found ways to make dual federal/state enforcement work for the most part. Nevertheless, the Antitrust Section recommends that, to the extent practicable and consistent with confidentiality concerns, the states be more transparent by gathering and disseminating information concerning their enforcement record to the public and the antitrust bar. In addition, the Antitrust Section

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<sup>1</sup> 70 Fed. Reg. 28904 (May 19, 2005).

- Recommends that the Commission encourage increased effective coordination between state and federal enforcers in the investigative phase, filing and prosecution of litigation, settlement discussions and ultimate relief, if any.
- Acknowledges the benefits that flow from the states' parens authority to seek damages on behalf of consumers, but notes the risk of undue cost and burden if the states' parens actions are not effectively coordinated with their federal counterparts in seeking injunctive or other relief.

Finally, also for the reasons discussed below, the Antitrust Section does not support a formal allocation of antitrust jurisdiction in conduct cases based on the locus of alleged harm, e.g., intrastate, interstate, or global.

### Comments

These Comments, which set out the bases for the recommendations above, are divided into four sections. The first is a brief overview of the current dual enforcement regime. The second addresses the thin data concerning the number of civil nonmerger cases brought by state attorneys general. The third section considers the role of state attorneys general in enforcing the federal antitrust laws and the benefits and disadvantages of dual enforcement and parens patriae authority. The final section sets out the Antitrust Section's views concerning the proposed allocation of civil nonmerger enforcement authority under the federal antitrust laws based on the characterization of the matter as intrastate, interstate, or global, and considers possible alternative mechanisms.

#### **I. BRIEF OVERVIEW OF DUAL ENFORCEMENT REGIME**

The individual states, the Department of Justice ("DOJ"), and the Federal Trade Commission ("FTC") each have the power to assert claims under the federal antitrust laws, and to seek injunctive relief to enjoin alleged violations.<sup>2</sup> The states also have the right to pursue monetary damages on behalf of themselves as direct purchasers,<sup>3</sup> and on behalf of consumers (as natural persons) in their statutory capacity as parens patriae.<sup>4</sup> Neither the DOJ nor the FTC has the power to recover damages on behalf of consumers injured by alleged antitrust violations. The FTC has claimed the right to seek the equitable remedy of disgorgement, but has pursued that remedy sparingly. A state may seek injunctive relief under Section 16 of the Clayton Act in

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<sup>2</sup> 15 U.S.C. § 4 (empowers DOJ to seek injunctive relief in civil nonmerger matters); *id.* § 53(b) (empowers FTC to seek injunctive relief); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972) (state is "person" within § 16 of Clayton Act, 15 U.S.C. § 26, and may seek injunctive relief).

<sup>3</sup> 15 U.S.C. § 15; *see Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) (state may recover treble damages in proprietary capacity).

<sup>4</sup> 15 U.S.C. § 15c.

its common law *parens patriae* capacity to enjoin harm to its general economy attributable to an alleged federal antitrust violation,<sup>5</sup> but may not seek damages based on such a theory.<sup>6</sup>

While the DOJ and the FTC are separately authorized to issue precomplaint process,<sup>7</sup> the states derive their authority to investigate potential antitrust violations not from federal law but from their own state antitrust or related statutes. For example, many states are authorized to issue and enforce subpoenas similar to the civil investigative demands issued by the federal agencies.<sup>8</sup> These state statutes typically provide for document production, interrogatory responses, and interrogation under oath, and permit the attorney general to share the resulting information with other law enforcement agencies, including other states.

In instances of dual enforcement, the states can seek relief beyond that sought by a federal antitrust enforcer, and may pursue different or further relief in an individual action following settlement by the DOJ or FTC.<sup>9</sup> Likewise, states may currently pursue federal antitrust claims notwithstanding a decision by federal enforcers not to act.<sup>10</sup> Under the current federal system, the states act as independent decision makers with respect to enforcement under the federal antitrust laws.<sup>11</sup> It is in this context that tension between state and federal enforcement in civil nonmerger matters has emerged, prompting one federal judge to call for stripping the states of their authority to bring *parens patriae* suits<sup>12</sup> and precipitating requests to the Commission to study the issue.

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<sup>5</sup> *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 447 (1945).

<sup>6</sup> *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 253, 264 (1972).

<sup>7</sup> The Antitrust Civil Practice Act, 15 U.S.C. §§ 1311-1314, authorizes the DOJ to issue CIDs in connection with actual or prospective antitrust violations. Among other investigatory tools, the FTC Act authorizes the FTC to issue precomplaint subpoenas, 15 U.S.C. § 49, and civil investigative demands, 15 U.S.C. § 57b-1.

<sup>8</sup> See, e.g., OHIO REV. CODE ANN. § 1331.16; 740 ILCS §10/7.2 (Illinois); MD. ANN. CODE, COM. LAW I § 11-205.

<sup>9</sup> See, e.g., *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132 (D.D.C. 2002) (states pursued remedies following DOJ settlement); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197 (D. Me. 2003) (states pursued remedies following FTC settlement).

<sup>10</sup> See, e.g., *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

<sup>11</sup> See generally ABA Section of Antitrust Law, STATE ANTITRUST ENFORCEMENT HANDBOOK (2003).

<sup>12</sup> Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L. J. 925 (2001).

## II. ROLE OF STATES IN CIVIL NONMERGER CASES: THE QUANTITATIVE DATA

There are no reliable statistics that reveal the number of antitrust cases undertaken by the states with or following similar actions by the federal enforcement agencies during any particular period of time, or the subset of those cases brought under Sections 4 and 16 of the Clayton Act as *parens patriae* (as opposed to state law indirect purchaser actions). The states do not systematically report, on an individual state basis or through the National Association of Attorneys General (“NAAG”), antitrust enforcement matters under state *or* federal law.

Several commentators have compiled lists of state matters over varying periods of time, to assess trends in state enforcement. None has represented their compilation as a complete report of state enforcement activity. These authors utilized different sources for state activity: NAAG Bulletins, published reports in trade reporters, or other lists that permitted isolation of actions under *parens patriae* authority.

- Stephen Calkins, evaluating matters reported in NAAG’s monthly Antitrust Bulletin from 1993 through 2002, reported a total of 213 antitrust lawsuits by the states, of which 174 had a local aspect, 59 benefited a public entity, and 29 were to compensate consumers.<sup>13</sup> His review did not segregate those cases outside the merger area.
- Michael DeBow, examining indices of legal trade publications and other reference books, concluded that from 1993 to 2002, the states filed a total of 73 nonmerger cases: 52 horizontal Section 1 cases; 11 vertical restraint cases; and 10 Section 2 cases.<sup>14</sup> It is not clear whether the 73 nonmerger cases each included a federal antitrust claim; the case list suggests some were filed in state court under state law.
- Refining and supplementing the DeBow list to focus on *parens patriae* matters, Michael Greve compiled a list of 103 *parens patriae* actions through August 1, 2003, of which 48 fell within his defined 1993-2002 period.<sup>15</sup> Of that group, 35 were nonmerger cases. While the DeBow and Greve case lists vary in certain respects, one could surmise that roughly half of states’ nonmerger cases for that ten year period were as *parens patriae* under federal law.

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<sup>13</sup> Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 688 (2003).

<sup>14</sup> Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, COMPETITION LAW IN CONFLICT 267, 272 (AEI Press 2004) (hereinafter, DeBow) (Appendix of cases available at [www.aei.org/events/eventID.244.filter/event\\_detail.asp](http://www.aei.org/events/eventID.244.filter/event_detail.asp)).

<sup>15</sup> Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (2005) (list of cases available on request).

Isolated data suggests that a nontrivial number of the antitrust conduct cases brought by the states are brought in state court under state law. For example, a recent report of antitrust enforcement by the Office of the Attorney General of Maine reflects that, of the 24 matters reported over the past twenty years, most were filed in state court, and of the several matters lodged in federal court none involved civil nonmerger complaints.<sup>16</sup>

The lack of systematic collection of information regarding state civil nonmerger enforcement activities handicaps any evaluation of these issues. Accordingly, the Antitrust Section recommends that, to the extent practicable and consistent with confidentiality concerns, the states be more transparent by gathering and disseminating information concerning their enforcement record, preferably in some regularized way, and by providing information to the public and the bar concerning the reasons for those actions and respective outcomes.

### III. THE BENEFITS AND DISADVANTAGES OF DUAL STATE/FEDERAL ENFORCEMENT UNDER FEDERAL ANTITRUST LAWS

The Antitrust Section has no comprehensive data on the relative benefits and burdens of dual civil nonmerger state/federal enforcement. Although anecdotal reports provide helpful perspectives on dual enforcement, we are unable to reach a conclusion as to the relative costs and benefits across the field of dual nonmerger civil enforcement. We only note that they exist.

By way of background for the comments that follow, it is useful to note that the states have the ability to sue under the federal antitrust laws in *three separate and distinct capacities*.

- a. Proprietary Capacity – The states are “persons” for purposes of Sections 4 and 16 of the Clayton Act.<sup>17</sup> This status enables states to recover damages and injunctive relief in their “proprietary capacity” as purchasers of goods and services, for injuries allegedly caused by a violation of the federal antitrust laws. A state suing in its proprietary capacity generally is subject to all rules applicable to private plaintiffs. Finally, with the exception that the FTC may seek restitution for state and local governments under section 13(b) of the FTC Act,<sup>18</sup> generally the federal antitrust agencies do not have authority to recover damages for states and local governments.
- b. Section 4C Parens Patriae Capacity – When Congress passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”), it amended the

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<sup>16</sup> Christina Moylan, *One State’s Experience: Twenty Years of Antitrust Enforcement in Maine*, in ABA Section of Antitrust Law, State Antitrust Enforcement Committee Newsletter, Spring 2005.

<sup>17</sup> 15 U.S.C. §§ 15, 26; *see, e.g., City of Atlanta v. Chattanooga Foundry*, 203 U.S. 390 (1906).

<sup>18</sup> 15 U.S.C. § 57(b).

Clayton Act to give states the authority to sue under the federal antitrust laws to recover damages on behalf of natural person residents of their states. The states' authority to sue for damages is found in section 4C of the Clayton Act.<sup>19</sup> As with suits in their proprietary capacity, states suing in their section 4C *parens patriae* capacity generally are treated as private parties. With the exception of the FTC's authority to obtain restitution under section 13(b) of the FTC Act, there is no federal authority for the federal antitrust agencies to recover damages on behalf of consumers.

- c. Common Law Parens Patriae Capacity – In *Georgia v. Pennsylvania Railroad*,<sup>20</sup> the Supreme Court ruled that threatened injury to a quasi-sovereign interest by reason of an alleged violation of the antitrust laws will give states standing to obtain an injunction under Section 16 of the Clayton Act. Thus, a state may generally sue for injunctive relief in its common law *parens patriae* capacity whenever an antitrust violation allegedly affects commerce occurring in the state. The Supreme Court in *California v. American Stores*<sup>21</sup> subsequently held that a state suing in its common law *parens patriae* capacity under Section 16 of the Clayton Act has standing as a “private party” (and implicitly not as a quasi-sovereign), and the state's requests for relief are subject to equitable defenses generally unavailable to defendants in suits filed by the federal antitrust agencies. Nevertheless, subject only to the assertion of equitable defenses, states suing in their common law *parens patriae* capacity have all the power of the federal antitrust agencies to obtain injunctive relief to prevent or restrain violations of the federal antitrust laws.

#### A. Benefits of State Enforcement of the Federal Antitrust Laws

The benefits of state enforcement of the federal antitrust laws include the following:

*Familiarity with local conditions or local markets.* The state antitrust enforcers are typically familiar with local conditions and the potential competitive impact of particular conduct on local areas. Most filings by state antitrust enforcers, whether acting alone or with federal counterparts, seek relief from alleged violations involving localized anticompetitive effects.<sup>22</sup>

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<sup>19</sup> 15 U.S.C. § 15c (“Section 4C”). Related provisions are codified at 15 U.S.C. §§ 15b, 15d - 15h.

<sup>20</sup> 324 U.S. 439 (1945).

<sup>21</sup> 495 U.S. 271 (1990).

<sup>22</sup> Calkins, *supra*, 53 DUKE L.J. at 680 (“State attorneys general have a clear advantage in understanding local markets. 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.”).

*Familiarity with local governmental institutions as purchasers and economic actors.* The states are often large purchasers of goods and services. Consequently, state attorneys general are in a position to seek remedies, often totaling millions of dollars, for alleged antitrust violations that directly impact their clients – state agencies.<sup>23</sup> Moreover, the state enforcers’ familiarity with local institutions includes an ability to assist them in promoting competition.

*Experience in compensating individuals and legal tools for doing so.* In their *parens patriae* capacity, states can and do take the lead role in securing direct monetary compensation for individuals harmed by alleged antitrust violations, or, if such recoveries are not feasible, through cy pres distribution to programs designed to benefit consumers harmed by the alleged violation.<sup>24</sup> Such capabilities increase deterrence in appropriate cases.

*Ability of states to pursue additional defendants in dual matters.* In prosecuting alleged antitrust violations, the states can pursue additional defendants that the federal enforcers may not have identified or pursued.<sup>25</sup>

*Ability of states to pick up the slack during periods of lax federal enforcement.* The states can and do prosecute antitrust violations during periods in which the federal government chooses not to act, which may serve to deter potentially harmful conduct.<sup>26</sup>

*Aid federal authorities in investigations and in handling “overflow.”* Even in national cases receiving substantial federal government attention, state antitrust enforcers render substantial assistance to their federal counterparts by undertaking investigative and litigation tasks.

## **B. Potential for Tension in State/Federal Enforcement**

A state suit in any of its three capacities can cause conflict with the prosecutorial discretion of the federal antitrust agencies and additional expense to litigants. That can occur, for example, when the state sues in the face of a decision by the federal agencies not to prosecute particular conduct or a defendant. Litigants also incur additional expense where a state files a “tag-along” action to a federal prosecution, seeking damages in either its proprietary capacity or

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<sup>23</sup> Hubbard & Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, 17 LOY. CONS. L. REV. 497, 520 & n.127 (2005) (discussing bid rigging impacting New York state entities and multistate pharmaceutical cases).

<sup>24</sup> *In re Compact Disc Minimum Advertised Price Litigation*, F. Supp. 2d \_\_\_\_\_ (D. Me. 2003).

<sup>25</sup> *Id.* (states pursued and obtained injunctive relief against three major music retail chains not sued by FTC).

<sup>26</sup> O’Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413, 421 (2002) (noting that when federal antitrust authorities reduced enforcement, states became more active in enforcing state and federal antitrust laws on national and multistate scale).

its Section 4C *parens patriae* capacity, which damages could not be recovered by the federal agencies. The conflict and expenses associated with these suits inherently flow from an antitrust regime that currently permits suits by “private attorneys general” to supplement governmental enforcement. This is to be distinguished from duplicate investigations and suits by states for injunctive relief, whether simultaneous with or following a federal antitrust prosecution, where *both* the state and the federal agency have the authority to seek equitable relief. The fact that states may seek remedies not available to federal enforcers, however, does not mean that the dual investigations that arise from the power of the state and federal agencies to secure complementary remedies should not be managed more effectively to reduce apparent burdens. Dual enforcement of the federal antitrust laws by the federal agencies and the states can cause expense, delay, or inconsistent results in at least four ways. Countervailing benefits of dual enforcement are noted.

### **1. Costs of Dual Investigations**

The state attorneys general commonly use their state law investigatory powers to engage in pre-complaint discovery. While treated as private parties when they sue, the ability of state attorneys general to engage in pre-complaint discovery distinguishes the attorneys general from counsel for private parties.

While the federal agencies and the state attorneys general typically seek to cooperate with each other in negotiations with the recipient of the information requests, multiple demands for information, especially for documents, can result in duplication of effort and, without sufficient federal/state coordination, in conflicting demands for information and an increase in the expense and delay associated with an investigation. Commenters have reported an absence of effective coordination in the investigative phase.

On the other hand, simultaneous responses to federal and state demands for information can promote efficiency for targets of investigation. Assuming reasonable levels of cooperation between the federal and state officials, a common scope for information searches allows for one response to multiple demands and for coordinated discussions with federal and state enforcers using a common data set.

Increasingly, the state and federal enforcers allocate informally among themselves responsibilities for developing support for damages (on one hand) and equitable relief (on the other). Despite allocation of (or at) the remedial stage, we do not know the extent to which overlap may persist during the investigative stage when both have independent investigations ongoing. States have on occasion deferred to the federal agencies in the conduct of investigations (or vice versa) and/or relied principally on the federal investigative record in a follow on state case. Such a strategy would seem to reduce the cost and burden on both the governmental entities and the respondents.

### **2. Competing Law Suits**

Because of the relatively low injury standard applicable to states suing in their common *parens patriae* capacity for injury to their general economy, and the ability of states to obtain the full panoply of injunctive relief available to the federal antitrust agencies, duplication in effort and conflict in relief demanded can arise from simultaneous suits by one of the federal antitrust agencies and one or more states. While the federal agencies and the states seek, as a matter of practice, to file coordinated suits in a single court, the existence of additional plaintiff parties can increase the complexity, time, and expense associated with the prosecution of the case. There is no requirement, of course, that the federal agencies and the states file in the same court; for tactical or other reasons, suits in multiple courts could be filed. Unless the cases were transferred to a single court by the MDL Panel or by order of the individual courts, a defendant could face defending essentially the same case in multiple courts.

The Antitrust Section believes the Commission should support coordination of state/federal investigations and litigation whenever practicable.

### **3. Different or Additional Claims**

In addition to pursuing overlapping claims, the states also may bring additional claims not included in the federal agency's complaint, although the additional claims do not necessarily affect the scope of the relief sought. This necessitates the expenditure of judicial resources to adjudicate those additional claims and increases the litigation costs of the defendant.

A possible benefit of the states' ability to bring additional claims is that the "overlapping" federal/state claims may prove unsuccessful and the additional claims may be sustained. In such case, the states' suit would restrain anticompetitive conduct that otherwise may go unchecked. We have no examples of this phenomenon, but believe that, in theory, the states could assert such authority.

Certain commenters have criticized the states for unduly protecting local interests by virtue of their enforcement decisions, e.g., siding with in-state competitors hurt by out-of-state defendants, fighting to retain in-state jobs, etc.<sup>27</sup> One writer, however, concluded while "parochialism and externality concerns are theoretically well grounded, they do not find much empirical support in the states' actions to date," notwithstanding his description of *Microsoft* as an "alarming example" of "state antitrust parochialism."<sup>28</sup>

### **4. Different Remedies**

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<sup>27</sup> See, e.g., Deborah Platt Majoras, then Deputy Assistant Attorney General, United States Department of Justice, *Antitrust and Federalism*, Speech Before the New York State Bar, January 23, 2003, available at [www.usdoj.gov/atr/public/speeches/speech\\_majoras.htm](http://www.usdoj.gov/atr/public/speeches/speech_majoras.htm).

<sup>28</sup> DeBow at 275.

Another problem associated with common law *parens patriae* actions for injunctive relief is the specter of unnecessary or conflicting injunctive relief being ordered by the court. Again, while the federal agencies and the states have sometimes attempted to coordinate their demands for relief, there are examples of states demanding additional relief beyond that found acceptable by the federal agencies. The demands for additional relief, whether structural, conduct, or otherwise, can place defendants in a position of needing to accede to such additional demands “just to end the matter,” or to litigate further because the additional demands are unacceptable. Assuming that the federal agencies have obtained sufficient injunctive relief to eliminate the anticompetitive effects associated with the defendant’s illegal conduct, the granting of any additional injunctive relief, whether by settlement or litigated order, can be inefficient and expensive. Moreover, conflicting relief (although rare in conduct cases insofar as we are aware) may place a defendant in the untenable position of being unable to comply fully with two separate judicial orders.

Finally, there is nontrivial concern that consistent but separate consent decrees with the states and federal enforcers later may be enforced inconsistently because of differing constructions by state and federal enforcers. Presumably federal and state enforcers will seek to minimize the potential for such differing constructions of parallel orders. But, the concern remains to better coordinate settlement negotiations and to obviate the need for respondents to separately negotiate the same issues with both the states and federal enforcers.

The primary benefit of states’ ability to obtain additional relief is twofold. First, the federal agencies may not completely eliminate the anticompetitive effects of an antitrust violation. The additional relief may cover the local effects or conduct missed by the federal agencies. Second, the states can secure equitable relief from defendants not challenged by the federal enforcers.

The Antitrust Section believes the Commission should advocate the joint negotiation of settlements whenever practicable. Admittedly, there may be practical considerations that impede such joint resolutions such as the inability or unwillingness to share fully confidential information and work product between federal enforcers on one hand and state enforcers on the other, as well as a potential inability or unwillingness on the part of federal and state government enforcers to agree on enforcement objectives. But, on balance, it is a worthwhile objective.

We acknowledge the substantial controversy arising from the states’ role in the *Microsoft* case and, in particular, the differing views of some states (compared to other states and the DOJ) as to the terms of any settlement. These differences, as manifested during the remedies stage of the proceedings, are probably the exception to the trend toward more, not less, coordination and agreement among state and federal enforcers.

#### **IV. THE BENEFITS AND DISADVANTAGES OF PARENS PATRIAE AUTHORITY**

The Commission has asked for comment concerning the benefits and disadvantages of parens patriae authority, which we construe to include both the states' power to seek damages and injunctive relief. As to the ability to seek damages, at least two courts have ruled that a suit by a state in its Section 4C parens patriae capacity is a means superior to a Rule 23 class action, such that the existence of a Section 4C parens patriae case obviates the need to certify a Rule 23 class on behalf of persons covered by the parens patriae action.<sup>29</sup>

The Antitrust Section does not believe that the use of parens authority, even in multistate actions comprising the fifty states, creates an in terrorem effect any lesser or greater than that posed by well-represented national class actions. The burdens of dual investigations (one to support the damages claim, and the other to support equitable relief) are addressed above.

These comments do not address enforcement by the state attorneys general of state antitrust statutes. Nor has the Commission squarely asked for views on any proposed limitation on the power of the states to enforce state antitrust statutes outside the merger area. Moreover, based on available data, we do not believe we could make a compelling case for preemption in such cases. But we note that critical dual enforcement issues remain when states pursue indirect purchaser claims under state law alongside their federal enforcement counterparts. We further note that if the Commission aims to effect a change in dual enforcement, it may be required to think more broadly about state enforcement under state and federal law.

#### **V. ALLOCATION OF ENFORCEMENT AUTHORITY**

The Antitrust Section reached no consensus on whether federal antitrust jurisdiction should be allocated between the states and the federal agencies in some manner in conduct cases. We did, however, reach consensus that the Commission not support a division of jurisdiction along "intrastate" versus "interstate" lines.

The Antitrust Section has in the past advocated an allocation of responsibility which would place local matters under the purview of the states, and interstate matters under the responsibility of the federal enforcers.<sup>30</sup> Most recently, the Antitrust Section acknowledged the

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<sup>29</sup> *Pennsylvania v. Budget Fuel Co.*, 122 F.R.D. 184, 185-86 (E.D. Pa. 1988); *In re Montgomery County Real Estate Antitrust Litigation*, 1988-2 Trade Cas. (CCH) ¶ 68,230 (D. Md. 1988).

<sup>30</sup> Report of the ABA Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43, 56 (1989) ("The FTC should be the primary enforcement agency with respect to practices and restraints that are regional or national in scope; the states should have primary responsibility for prosecuting activities that predominantly affect one state"); Report of the ABA Antitrust Law Section Task Force on the Antitrust Division of

need for further steps to minimize duplication, and called on the Executive Working Group comprised of representatives from the FTC, DOJ, and the states to coordinate more effectively state/federal enforcement.<sup>31</sup> However, these efforts are not transparent; counsel typically are unaware of allocations of responsibilities with respect to a particular matter as between the investigating states and federal enforcer.

**A. Allocating Antitrust Enforcement Responsibilities Along Intrastate and Interstate Lines**

The Antitrust Section does not believe that the Commission should endorse an allocation of jurisdiction between state and federal antitrust enforcers in which state antitrust enforcers would be responsible for “intrastate” matters and federal antitrust enforcers would be responsible for “interstate” matters.

If such a division were to be defined consistent with constitutional notions of “intrastate” and “interstate” commerce, the proposal would leave state attorneys general with an extraordinarily limited range of operation. The federal government may regulate any activity under its Commerce Clause power as interstate in nature, even intrastate activities as long as the activity in question is economic and has more than a tangential connection to or effect on interstate commerce.<sup>32</sup> In the highly integrated American economy, it is hard to envision many anticompetitive intrastate business combinations or arrangements that would not have some interstate effect as that term is understood for federal constitutional purposes. For example, while California’s relative geographical isolation has contributed to the development of local, distinct markets for many products, many, if not all, of these markets still have an interstate

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the U.S. Department of Justice, 58 ANTITRUST L.J. 735, 772 (1989) (recommending that DOJ “once again be recognized as the national policy maker to the businesses that must interpret and comply with the law,” but recognizing that state attorneys general are “an important source of expertise and enforcement capability” and suggesting that DOJ “foster a ‘cross-deputizing’ relationship with the State Attorneys General in which the Division refers localized cases to the states and the State Attorneys General refer national cases to the Division”); ABA Section of Antitrust Law Report of the Special Task Force on Competition Policy, 61 ANTITRUST L.J. 975, 987-88 (1993) (“It is clear that duplicative antitrust investigations are a luxury that neither state nor federal government can afford in a period of scarce government resources. . . . Federal and state antitrust officials should continue to strive to harmonize their interpretations of appropriate antitrust enforcement standards and to allocate responsibility for investigations based on the likely impact of transactions. Transactions with primarily localized impact may be appropriate subjects for state enforcement, while multistate, national or international transactions should be the principal responsibility of federal antitrust enforcers”).

<sup>31</sup> ABA Section of Antitrust Law, *The State of Federal Antitrust Enforcement – 2004*, Report to the White House, *available at* [www.abanet.org/antitrust/comments/2005/reports.html](http://www.abanet.org/antitrust/comments/2005/reports.html).

<sup>32</sup> See, e.g., *Gonzalez v. Raich* (No. 03-1454), 125 S. Ct. 2195 (June 6, 2005); *Wickard v. Filburn*, 317 U.S. 111, 197 & n.27 (1942).

component.<sup>33</sup> And, smaller states tend to have “regional” rather than “local” markets because other states can be a few driving hours away, geographical barriers are often absent, the economies of those states can be too small to meet many of their citizens’ needs, and, putting to one side regulatory barriers that may exist in certain industries, business from other states can freely sell their products in those states.<sup>34</sup>

The Antitrust Section is not aware of any proposed division of jurisdiction between federal and state antitrust enforcers that would define “intrastate” and “interstate” in a different fashion from their constitutionally understood meaning, and any such division of jurisdiction would run afoul of the same or similar problems in our highly integrated economy. Even those conduct cases where state antitrust enforcement is not controversial (such as cases involving vertical distribution restraints) would not be susceptible to an easy division of labor along “interstate” versus “intrastate” lines. The European Union, the only other jurisdiction to have attempted such a division of jurisdiction in the merger arena, albeit a complex one, has eschewed such a division of jurisdiction in the conduct arena, and instead adopted a system that has expanded the role of its Member States in conduct enforcement.<sup>35</sup>

## **B. Alternative Allocation Proposals**

Other allocation concepts have been suggested, ranging from a proposal to formalize communication and investigatory access among state and federal enforcers, to a proposal to give federal enforcers an effective right of first refusal to investigate potential antitrust violations under federal law. Some of these proposals have some precedent in recently adopted European procedures, but there has been insufficient experience with these procedures in the EU to adequately assess their merit in that context. The Antitrust Section believes that these and other allocation proposals are worthy of further consideration, however.

One option was the proposal to manage antitrust enforcement by granting the federal enforcement agencies effectively a “right of first refusal” to pursue an investigation into alleged anticompetitive conduct. Under that option, a federal decision to initiate an investigation would preempt any state investigation or litigation of the same conduct.<sup>36</sup> Under a right of first refusal,

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<sup>33</sup> Compare, e.g., L.A County Superior Court Complaint, *People v. Econolife* 1-4 (filed Apr. 22, 2004), available at <http://caag.state.ca.us/newsalerts/2004/04-048.pdf>; Bill Lockyer, Report on Gas Pricing in California 1-6 (May 2000), available at <http://caag.state.ca.us/antitrust/publications/gasstudy/gasstudy2.pdf>; Bill Lockyer, Energy White Paper, A Law Enforcement Perspective on the California Energy Crisis, 6, 10, 17-18, 31 (Apr. 2004), available at <http://caag.state.ca.us/publications/energywhitepaper.pdf>.

<sup>34</sup> See, e.g., Final Report of the FTC, *Midwest Gas Pricing Investigation: Introduction & Background* (Mar. 29, 2001) available at <http://www.ftc.gov/os/2001/03/mwgasrp.html>.

<sup>35</sup> See Council Reg. No. 1/2003, O.J. L 1/3 (June 4, 2003).

<sup>36</sup> See DeBow at 280. DeBow suggests that federal authorities should be given the authority to move to dismiss cases where state antitrust authorities have requested injunctive relief if “the interstate aspects of the litigation outweigh the in-state interests asserted by the plaintiff state.”

a state initiating an investigation would be required to notify the federal agencies of its investigations. Likewise, the federal agencies must alert their state counterparts of new investigations which, depending on the proposal, may or may not automatically preempt any pending state investigation. One might implement a right of first refusal through liaison agreements between the states and the federal enforcers, with the ability of the states to join, after the investigative phase, as plaintiffs if the federal enforcer were to proceed with an enforcement action. The structure and implementation of a right of first refusal requires careful study to resolve issues surrounding the scope of the preemptive right, timing of notice, circumstances that require notice (e.g., what constitutes an “investigation”), and steps to ensure transparency if the federal enforcer subsequently chooses not to proceed with an enforcement action.

A second alternative is the use of a formal mechanism, in lieu of current ad hoc efforts, to coordinate investigations and litigation at a case-specific level. One suggestion is that an Advisory Committee of American States be set up parallel to the one in the European Union for Member States with a similar degree of access to the decisions/investigative materials of federal antitrust enforcers.<sup>37</sup> While any ultimate decisions would still be made freely by federal antitrust enforcers, such a procedure may, as a de facto matter, lead to increased coordination of effort by state and federal enforcers as well as an increased ability for state enforcers to defer to the investigative efforts and decisions of their federal counterparts. To minimize the creation of a new bureaucracy, such a committee could comprise existing state antitrust enforcers and/or utilize existing structures such as federal government liaison personnel, the Executive Working Group of NAAG or a multistate committee or task force as a means to effect case-specific coordination.

### **Conclusion**

The questions posed by the Commission concerning the benefits and disadvantages of dual civil nonmerger enforcement are worthy of serious consideration, but do not lend themselves easily to empirical cost/benefit analysis. Nevertheless, the Antitrust Section believes that our comments reflect, at least, the range of considerations that can arise in response to dual enforcement to address allegedly anticompetitive conduct. Finally, for the reasons discussed above, our current system is driven by long-established principles of federalism, and we cannot say, based on currently available data, that the costs of such a system outweigh its benefits to the public.

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(From the thrust of his article, it appears that this authority would not extend to per se cases, cases in which the state itself was a plaintiff, or cases in which the state exclusively sought damages, as he appears to have little quarrel with the exercise of state antitrust authority in these areas.)

<sup>37</sup> E. Varanini, *American and European Federalist Antitrust Enforcement: Let A Hundred Flowers Bloom And A Hundred Schools Of Thought Contend*, ANTITRUST REPORT, Summer 2004, at 96.