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September 29, 2004

Via Email and Hand Delivery

Antitrust Modernization Commission
Attention: Public Comments
1001 Pennsylvania Avenue, N.W.
Suite 800-South
Washington, D.C. 20004-2505

Re: Comments regarding Commission issues for study

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To the Commission:

The antitrust laws are not only in need of "modernization": There is a good case to be made that the high administrative and error costs associated with judicial administration of federal antitrust laws create more burdens than benefits for private competition, and that the antitrust laws therefore should be scrapped entirely. As my colleague Robert A. Levy has argued persuasively, our century-old experience with antitrust demonstrates that "[t]he threat of abusive public power" exercised under the auspices of the antitrust statutes "is far larger" than the threat of private anticompetitive

behavior that antitrust statutes were intended to prevent.[1]

At a minimum, however, any package of antitrust reform – no matter how extensive – should include two particularly urgent and necessary fixes: First, Congress should curb the power of state attorneys general to file interstate *parens patriae* antitrust suits. Second, Congress should curb the use of RICO as an antitrust substitute.

1. Eliminate the Power of State Attorneys General to File Interstate *Parens Patriae* Antitrust Suits[2]

Beginning in the 1980s, state attorneys general have aggressively relied on their *parens patriae* power to sue on behalf of state residents under federal antitrust statutes. The result is an inefficiently duplicative system of federal and state antitrust enforcement, of which the recent Microsoft litigation is perhaps the most egregious example.

Robert Levy has characterized the problems with the Microsoft case this way:

> Nine states – relying on the same trial, the same facts, the same conclusions of law, and the same injuries to the same people – want[ed] to override a settlement between Microsoft and the federal government, supported by 41 of the 50 states. . . . [If accepted], the states' remedies would [have] affect[ed] competition and consumers outside their borders – raising for the very first time the prospect that a small group of states, with no particularized interests to vindicate, might somehow obtain divergent relief with wide-ranging, national economic implications.[3]

In light of the problems posed by duplicative state and federal antitrust enforcement actions, Judge Posner has recommended that the states should be "stripped of their authority to bring antitrust suits, federal or state, except . . . where the state is suing firms that are fixing the prices of goods or services that they sell to the state."[4] States, Posner argues, are simply "too subject to influence by . . . competitors . . . [particularly] when the [competitor] is a major political force in that state."[5]

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[1] See Robert A. Levy, *Antitrust*, in *Cato Handbook for Congress (108th Congress)* 401 (2002).

[2] This proposal is adapted from the chapter on antitrust reform contained in *The Cato Handbook for Congress (108th Congress)*. For further detail, *see* Levy, *supra* note 1, at 397-403.

[3] *Id.* at 401 (internal quotations omitted).

[4] *Id.* at 402 (quoting Posner). *See also* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 Geo. J.L. & Pub. Pol'y 5 (2004).

[5] *See* Levy, *supra* note 1, at 402 (quoting Posner).

To enforce principles of federalism,[6] and protect the national economy, Congress should adopt Judge Posner's proposal, and use its power under the Commerce Clause to revoke the *parens patriae* authority of the states to enforce antitrust laws (federal or state), with exceptions for wholly intrastate anticompetitive conduct directed at in-state consumers.

2. Curb the Use of RICO as an Antitrust Substitute

The Racketeering Influenced and Corrupt Organizations Act of 1970 (RICO) is a serious, and frequently overlooked, threat to meaningful antitrust reform, including efforts to reign in the very worst components of federal antitrust law – such as the Robinson-Patman Act, Section 2 of the Sherman Act, and Section 7 of the Clayton Act. That is because RICO provides plaintiffs with a vehicle for *evading* limitations that federal reformers may impose on antitrust claims.

To take one example, class action plaintiffs in the recent HMO class action litigation – one of the egregious class actions highlighted by Walter K. Olson in *The Rule of Lawyers*[7] – alleged that HMOs had violated RICO by engaging in a horizontal price-fixing conspiracy, which putatively involved cartelization, an illegal boycott, and improper use of market power to artificially lower physician reimbursement rates.[8] The federal district court in that case approved the theory as a valid RICO "extortion" claim,[9] despite the defendants' objections that this use of RICO (1) was contrary to the clearly expressed intent of RICO's enacting Congress, and (2) effectively permitted an end run around the heightened pleading requirements governing antitrust.[10]

This misuse of RICO suggests that a failure to curtail use of that statute as an antitrust substitute may leave open a dangerous loophole for creative plaintiffs – who

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[6] *See, e.g., BMW of N. Am. v. Gore*, 517 U.S. 559, 571-72 (1995).
[7] Walter K. Olson, *The Rule of Lawyers* 81 (2003).
[8] See, e.g., Second Amended Complaint ¶¶ 112-15, 30, *Shane v. Humana Inc.* (S.D. Fla. MDL No. 1334) (alleging that defendants had engaged in a horizontal conspiracy to use "overwhelming economic power" and "market dominance" to "manipulate" reimbursement rates in an "economically coercive" fashion) (on file with author); Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss at 14, *Shane v. Humana Inc.* (S.D. Fla. MDL No. 1334) (characterizing RICO allegations as "almost identical in scope to [allegations] of the illegal price fixing scheme of an antirust action") (on file with author). I was counsel to Aetna in the HMO litigation and a co-author, with Miguel Estrada, of the 12(b)(6) briefs on behalf of the managed care industry in that case.
[9] *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1276 (S.D. Fla. 2003).
[10] *See, e.g.*, Defendants' Joint Motion to Dismiss Provider Plaintiffs' Second Amended Consolidated Class Action Complaint at 12-15, *Shane v. Humana Inc.* (S.D. Fla. MDL No. 1334) (on file with author).

may use RICO to evade reforms intended to limit plaintiffs' ability to pursue certain problematic antitrust theories or claims.

The Commission, accordingly, should investigate options for limiting RICO in the antitrust context, including a ban on:

- attempts to plead "economic coercion" as a racketeering predicate[11];
- attempts to characterize an anticompetitive horizontal cartel, or a market sector victimized by anticompetitive activity, as a RICO "enterprise" within the meaning of RICO Section 1962(c); and
- RICO conspiracy claims aimed at anticompetitive agreements between garden-variety economic competitors.

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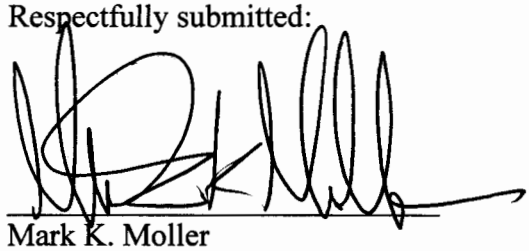
Respectfully submitted:



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[11] *See, e.g., In re Managed Care Litigation*, 135 F. Supp. 2d 1253, 1264 (S.D. Fla. 2001) (permitting plaintiffs to plead "economic fear" as a basis for the racketeering predicate of extortion, where plaintiffs plead that the "fear" is the product of "power akin to monopoly, something more than mere hard bargaining on a level playing field") (citing *Brokerage Concepts v. U.S. Healthcare*, 140 F.3d 494 (3d Cir. 1998)).