ALLOCATION OF ANTITRUST ENFORCEMENT BETWEEN THE STATES AND THE FEDERAL GOVERNMENT

Statement of Phillip A. Proger
Before the Antitrust Modernization Commission
October 26, 2005

Phillip A. Proger
Jones Day
51 Louisiana Ave, NW
Washington, DC 20001
(202) 879-3939

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I. Introduction

Thank you for the opportunity to participate in today's discussion about the role of states and the federal government in enforcing the antitrust laws. My comments today will focus on how to more efficiently allocate antitrust enforcement between the federal and state governments. I will only briefly discuss the history behind dual antitrust enforcement as there are numerous articles that discuss that issue.[1] I note, however, that the states clearly have the right to enforce both federal antitrust laws and their own state statutes. Congress, when it enacted the Sherman Act, did not preempt state law,[2] and under the Clayton Act states are "persons" able to enforce federal law.

On the whole, our system of multiple enforcement has benefited consumers. The existence of three enforcers -- federal, state and private attorney general -- each of which is responsible to the judiciary, has produced vigilant and effective antitrust enforcement. Multiple enforcement has also fostered the development of substantive antitrust law, as each enforcer pursues cases most relevant to its purposes. State attorney generals, for example, are quite effective at preserving competition among local businesses, particularly in cases involving conduct, such as vertical restraints.

[1] There are a number of articles that provide background on dual state and federal antitrust enforcement. *See, e.g.*, S. Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 676-679 (2003); M. DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal, in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 267, 269 (ed. R. Epstein and M. Greve, American Enterprise Institute 2004); R. Hubbard and J. Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, 17 Loy. Consumer L. Rev. 497 (2005); R. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. Sch. L. Rev. 1047, 1049-1060 (1991).

[2] *See*, Hubbard & Yoon, *supra* n. 1 at 505.

The federal enforcement agencies have played the lead role in developing merger policy, both through their enforcement activities and through publication of formal merger guidelines.[3] The federal agencies provide additional guidance on merger policy by publishing consent decrees (and the accompanying analysis to aid public comment) and more recently, statements explaining their decisions not to pursue enforcement in certain cases.

This system of multiple enforcement does have disadvantages. Enforcement actions pursued by both federal and state enforcers can lead to the creation of inconsistent standards. Different standards applied to the same body of law cloud the clarity of that law, retard the process of continuing development of that law, and make the law less predictable. In addition, dual enforcement can introduce real additional costs, particularly for investigations involving large, national entities. This is especially the case for mergers, where a combination of firms with assets and operations throughout the United States can face significant burden and delay in responding to multiple investigations, some of which are initiated by jurisdictions with a relatively lesser interest in the matter.

Although some commentators have suggested that the proper remedy to the potential confusion caused by multiple enforcement is to abolish the states' right to pursue antitrust claims,[4] I do not believe such a drastic remedy is appropriate in our Constitutional government based on federalism. Rather, I believe that the key to achieving consistent interpretation and predictability of the law, consistent enforcement, and efficient procedures is greater coordination between federal and state governments as well as among the individual states.

[3] U.S. Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines (as revised April 1997), available at http://www.usdoj.gov/atr/public/guidelines/hmg.pdf; (hereafter Federal Merger Guidelines).

[4] *See, e.g.*, R. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940-41 (2001) (suggesting that states be stripped of their authority to bring antitrust suits, whether under federal or state law, except under circumstances in which a private party could bring suit).

II. The Concept of Federalism

Although antitrust enforcement today is viewed by many as primarily a federal function, state antitrust laws actually predate federal statutes and the Sherman Act was intended "to supplement the enforcement" of state laws.[5] State enforcement of federal antitrust laws was further strengthened in 1976 with the passage of the Hart-Scott-Rodino Act, which authorized state attorneys general to enforce the Sherman Act through the use of *parens patriae* actions on behalf of their residents[6] and the Crime Control Act which authorized federal funds to states to enhance state antitrust enforcement.[7] In addition to enforcing the antitrust laws on behalf of their residents, states also have the right to sue on their own behalf and their political subdivisions (i.e., as a "person"), in their capacity as an injured consumer which purchased the product.

States may also challenge anticompetitive behavior under their own state antitrust laws.[8] State antitrust laws generally do not vary greatly in substance from the federal antitrust laws, and even where state statutes do vary in form from federal antitrust laws, those state statutes generally are interpreted by the state court consistent with federal law. Nevertheless, predictability is enhanced if state enforcers utilize their right to enforce federal law rather than state law.

Moreover, even though states certainly have the authority to enforce both federal and state antitrust laws, such enforcement must work in harmony with federal enforcement and with other states. Doing otherwise imposes significant regulatory burdens on businesses. In a shrinking

[5] 21 Cong. Rec. 2457 (1890).

[6] 15 U.S.C. § § 15c, 15f.

[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)).

[8] Almost all states have their own antitrust laws. Most states have enacted statutes directly comparable to Sections 1 and 2 of the Sherman Act, and many other states have statutes dealing with particular industries, as well as laws relating to specific behavior such as bid-rigging and below-cost sales. *See* ABA Section of Antitrust Law, STATE ANTITRUST PRACTICE AND STATUTES, Introduction 1-22 (3d ed. 2004).

commercial world, where firms routinely conduct business across the United States and its territories,[9] the prospect of facing enforcement challenges from over fifty different agencies can be daunting. State and federal authorities must therefore devise a framework for establishing when and by whom enforcement is appropriate, either as the primary enforcement action, or as a supplement to the other's efforts. Without such guidance, businesses making decisions about their behavior face increased risk, uncertain outcomes and greater compliance burdens. Coordinating enforcement actions and harmonizing substantive approaches eliminates uncertainty and results in sounder antitrust policies and more efficient investigations.

Coordinating antitrust enforcement also means delineating the appropriate role for each investigating jurisdiction. I believe that the proper role for state enforcement (and for federal enforcement) depends on the challenged behavior. Mergers, particularly those involving firms with assets and operations throughout the U.S., should *primarily* be investigated by federal enforcers. The federal government, with its far greater resources, depth of expertise, and remoteness from local politics, is better suited at investigating the competitive effects of a merger with nationwide consequences. When a merger is national, but with significant contact with one or more states, those states and the federal enforcers (DOJ or FTC) should work together to coordinate their investigations. To the extent possible, the states and federal enforcers should avoid duplication in discovery, inconsistent interpretation of the law, and inconsistent and/or multiple remedies (if and when relief is warranted).

State authorities, given their familiarity with local market conditions and prevailing business practices, on the other hand, are likely to be effective in investigations involving

[9] Many firms, American and foreign, conduct business around the world. Fifty years ago most antitrust (or "competition" as it is more commonly known throughout the world) enforcement was in North America. Today antitrust enforcement is worldwide with over ninety countries having some form of antitrust enforcement.

anticompetitive conduct with primarily local effects . There have been, for instance, cases involving the merger of local firms where enforcement was pursued by the states, even after the federal government chose not to challenge the transaction.[10] States are also effective in taking on matters with direct consumer impact, such as cases involving vertical restraints.[11] In these circumstances, enforcement policy may be better served if the federal enforcer defers to or assists the state enforcer.

III. Merger enforcement

Some of the more difficult issues in multiple enforcement arise in the context of merger review, which in today's borderless economy, increasingly involves transactions of wide geographic scope. The current business atmosphere requires that firms contemplating transactions not be faced with a confusing array of enforcement standards. In this arena, I believe that the federal government should be the primary enforcer of antitrust laws.

Antitrust merger enforcement over its history has balanced economic versus non-economic values. The federal government has, since the 1980s, based its merger enforcement primarily on economic values. Federal enforcers have also introduced a significant degree of transparency to its process through the publication of the Federal Merger Guidelines and analyses of investigated matters.[12] Well-established principles, in conjunction with transparency, increases

[10] *See, e.g., California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057 (N.D. Cal., *aff'd mem.* 217 F. 3d. 846 (9th Cir. 2000) (opinion not for publication at 2000-1 Trade Cas. (CCH) ¶ 72,896), *opinion after remand*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001) (hospital merger which FTC declined to challenge).

[11] *See, e.g. New York v. Salton, Inc.*, No. 02-CV-7096 (S.D.N.Y.) (September 6, 2002) (resale price maintenance and exclusive dealing case settled for $8 million to be used for *cy pres* distribution for health and nutrition charitable programs).

[12] Although in the past the agencies have only publicized analyses in cases that involved consent decrees and other relief (as required by statute), more recently the agencies have publicized their rationale for declining to pursue certain cases. *See, e.g., Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc***,** FTC File No. 021 0041 (October 2, 2002) available at http://www.ftc.gov/os/2002/10/cruisestatement.htm; *Statement of the Federal Trade Commission Concerning Federated Department Stores, Inc./The May Department Stores Company*, FTC File No. 051-0111 (August 30, 2005), available at http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf.

predictability for firms contemplating transactions likely to undergo federal merger investigation. Although the outcome of such an investigation can never be established beforehand, the available guidance allows firms to assess intelligently what issues are likely to cause competitive concerns, how those concerns can be addressed, and the likelihood of obtaining a resolution acceptable to both the merging parties and the federal government.

The states,[13] on the other hand, historically have balanced economic values with non-economic values. In addition, largely due to the greater number of state enforcers, states are more opaque in their enforcement decisions. These factors can lead to uncertainty and a reduced ability to assess accurately the antitrust risks of a transaction. This, in turn, can lead to inefficient results, as the eventual relief may be either over- or under-inclusive (or perhaps both).

Unlike federal enforcers, who review dozens of mergers every year, a state attorney general may review only a few mergers during his tenure. Many states also lack all of the resources necessary to conduct a thorough and large scale investigation. State antitrust divisions are generally small in comparison to their federal counterpart and they do not generally have economists or other experts on staff to assist. Today's mergers require sophisticated econometric and other data analysis, tools that are not likely to be readily available to most state antitrust enforcers.

Finally, states may be motivated to delay or block mergers for reasons other than to preserve competition. The political nature of the state attorney general's office makes constituent influence more likely than at the federal level. Blocking a merger may preserve local benefits, but deprive the rest of the country from the procompetitive efficiencies that may result from the

[13] Any reference to the "states" is a generalization which fails to recognize that state antitrust enforcement is not homogeneous. Some states have a long history of vigorous antitrust enforcement with significant assets employed in doing so. Other states assign greater priority to other areas of law enforcement.

merger. Certainly federal enforcers are not always immune from political pressure. Unlike state attorneys general, however, federal enforcers are not elected officials and are thus more distant from the political process.

Divergent merger review processes and standards would present fewer issues if differences could be harmonized through judicial review. Unlike conduct cases however, which are often resolved through litigation, merger cases rarely go to trial.[14] The judicial process is therefore less available as a tool for establishing a standard body of merger law. Thus, the onus for resolving inconsistencies lies with the enforcers themselves, who must work together to formulate a framework for coordinating their efforts.

Mergers that involve firms with national operations and no unique impact on a particular state or states are best investigated by the Department of Justice or the Federal Trade Commission. Although states certainly have an interest in ensuring that these "national" mergers do not adversely affect competition within their borders, their interest must be balanced against the decreased predictability and inefficiencies resulting from multiple investigations. This is not to say that states should never have a role in the merger review process in such "national" mergers, but only that their roles must be clearly defined and their reach appropriate to their interest.

The federal government, with two separate agencies that can investigate mergers, learned the lesson of coordination long ago, and established a formal process for assigning merger

[14] Merging parties (and the stock market) often cannot tolerate the delay in closing the transaction that would occur with litigation. As a consequence, antitrust enforcers -- federal and state -- as a practical matter have significant leverage over the merging parties when negotiating a "fix" to resolve any issues. Thus, merger law and enforcement, more than other areas of antitrust enforcement, depend less on judicial interpretation and more on agency interpretation. Both the federal agencies and NAAG have issued guidelines regarding horizontal merger enforcement. *See* Federal Merger Guidelines, *supra* n.3; Horizontal Merger Guidelines of the National Association of Attorneys General, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1306 at S-1 (Mar. 12, 1987) (hereafter "State Merger Guidelines").

reviews. Traditionally assigned by industry, the allocation process provides merging firms with some level of certainty about which agency will review their transaction, and to some extent, which personnel.[15] There is no similar coordination between the states and the federal government, nor among the individual states. The lack of coordination can be particularly troublesome when dealing with more than one state, as there can (and often is) divergent enforcement policies among the different states. Although the National Association of Attorneys General (NAAG) has issued a common standard for merger reviews among the states,[16] there is no mechanism currently in place to ensure conformity with those guidelines. Unlike the federal enforcers, states do not often issue public statements that set forth their reasons for challenging, or declining to challenge, transactions. Thus, their enforcement decisions are less subject to analysis and critique, and this lack of transparency may make it easier to make enforcement decisions that lack a solid grounding in antitrust principles.

The NAAG Merger Guidelines also do not resolve differences between federal and state antitrust enforcers. The NAAG Merger Guidelines, for example, differ from the DOJ/FTC Merger Guidelines in the definitions of the relevant product and geographic markets ,[17] the treatment of entry,[18] and efficiencies.[19] Harmony is difficult to achieve in the face of conflicting

[15] Although there have been some instances in which the federal agencies dispute which one is better suited to review a particular transaction, those instances are rare.

[16] State Merger Guidelines, *supra* n. 9.

[17] The State Merger Guidelines do adopt the DOJ-FTC market definition methodology as an alternative methodology, but cautions that in the event of a conflict, the investigating state will rely on the methodology that is based upon the most reliable empirical evidence and "most accurately reflects the markets." State Merger Guidelines, § 3A.

[18] For example, the State Merger Guidelines will only consider entry from unused excess capacity if empirical evidence proves that the entry is likely to occur within one year of any attempted exercise of market power. State Merger Guidelines § 3.3, 3.31, 3.32.

[19] The State Merger Guidelines only consider efficiencies if they can be shown by clear and convincing evidence. In addition, the efficiencies must be passed on to consumers, that comparable savings cannot be obtained through means other than the merger, and that the costs savings will persist over the long run. State Merger Guidelines § 5.4.

standards. NAAG should therefore either revise the State Merger Guidelines to reflect the current state of antitrust law and theory or adopt the Federal Merger Guidelines.

Besides the additional burden of grappling with different merger review standards, multiple investigations significantly increase the cost of compliance, both in terms of time and money. States and federal government must work together and states must work with each other to develop a consistent method of dealing with the procedural burdens imposed by multiple investigations. Despite the existing protocols, each state involved in the investigation legitimately has its own interests to protect, and thus information and data needs will vary across jurisdictions. Data may, for example, be requested in varying formats or for different time periods. Differences in technology capabilities and platforms represent a different burden. For instance, the federal government often readily works with the merging parties to produce documents electronically. Such has not been the case with many states, however, which often still require paper copies of document productions. The cost of preparing multiple responses can be significant.

NAAG has made progress in unifying the process of complying with multiple merger investigations. NAAG has drafted a protocol for coordinating merger investigations with the DOJ and FTC[20] as well as a voluntary Compact dealing with voluntary submission of materials to investigating states.[21] Much work still remains to be done to ensure complete coordination, however. To begin, not every state is a signatory to the 2003 Compact.[22] Thus, the advantages of using the Compact may be lost if one of the interested states is not a signatory. Furthermore, the

[20] Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, available at http://www.naag.org/issues/pdf/at-state_fed-protocol.pdf.

[21] Revised Voluntary Premerger Disclosure Compact (2003), available at http://www.naag.org/naag/resolutions/naag-res-spr94-premerger.pdf.

[22] California, Georgia, Louisiana, Nebraska, South Dakota, and Wyoming are not signatories.

voluntary nature of the Compact means that even signatory states are not required to use it in every investigation. Parties willing to use the Compact may nevertheless find themselves negotiating separately with some states, eliminating any efficiencies the Compact may have offered. NAAG must ensure that all states are Compact signatories and that states make every effort to use the Compact as a first option when dealing with merging parties.

Although the Compact represents a good starting point for coordinating enforcement efforts, it does not address some important issues, particularly confidentiality. Confidentiality statutes vary from state to state, with differing levels of protection. As it stands today, confidentiality protection for the parties' information must be negotiated on an individual basis for each state, a time consuming and complicated process that does not always result in uniform protection for the merging parties. The states, working through NAAG, could go a long way in eliminating the burden of this process by drafting a model confidentiality agreement (at least for merger investigations specifically, if not for antitrust investigations generally)[23], and implementing a procedure in which a single state takes the lead in negotiating and drafting confidentiality terms, with each participating state a signatory to the agreement. The optimal agreement would be modeled on the confidentiality provisions that govern federal antitrust investigations (or a similarly strong state statute) to ensure merging parties that their documents and information are afforded an adequate level of protection from disclosure.

Coordinating settlements among multiple jurisdictions can also become a difficult effort, as each jurisdiction attempts to extract concessions based on its own self-interests, interests which may or may not mesh with those of other jurisdictions. While seeking relief based upon individual circumstances may be a legitimate function of state enforcement inherent in our

[23] Obviously each state would have to pass into law the model confidentiality statute.

federalism, such relief adds uncertainty and costs. Although admittedly a more difficult question than confidentiality, state and federal enforcers should work together to avoid duplicative or inconsistent relief.

NAAG established the Multistate Task Force in 1983 to provide for greater coordination. The Task Force, which is a permanent subcommittee of the NAAG can play an even greater role in establishing a protocol for cooperation, to assure coherent merger review no matter the number of involved jurisdictions and to coordinate with federal enforcers. I would suggest that the best way to accomplish this task is to consider establishing permanent staff (lawyers and economists) at NAAG, with the responsibility of overseeing the process. These NAAG lawyers should also participate in multi-jurisdictional merger reviews, thus providing consistency as well as institutional memory. The Task Force can also streamline the process of review by, for example, drafting model confidentiality agreements and information requests.

Although much of my discussion has emphasized that the federal government should take the primary role in mergers with national scope, I believe that the states can play an invaluable role in investigating the local aspects of such mergers. Their superior knowledge of local market conditions and familiarity with local regulations that may affect competitive effects of merger or analysis of merger (e.g., licensing requirements) can greatly inform any federal enforcement decisions. States should also be able to pursue strictly local mergers on their own, in instances where the federal government has declined to investigate.[24] Investigating local mergers is a task

[24] *See, e.g., Maine v. Rite Aid Corp.*, No. CV04-273 (Maine Sup. Ct. Dec. 6, 2004) (consent decree under Maine antitrust law); *Maine v. Dead River Co.*, No. CV03-32 (Maine Sup. Ct. Feb. 18, 2003) (requiring throughput agreement and divestiture as condition of merger); *Massachusetts v. Sainsbury PLC* (Mass. Sup. Ct. July 30, 1999) (state consent decree requiring divestiture in grocer store acquisition); *Massachusetts v. Suiza Foods Corp.* (D. Mass. June 22, 2001) (consent order pursued by Massachusetts and Maine to rectify alleged anticompetitive of milk processing and distribution merger); *In the Matter of Stericycle, Inc.* (Mass. Sup. Ct. January 2, 2003) (consent order involving Massachusetts and Connecticut, requiring divestiture in medical waste disposal merger).

well suited to state attorneys general, whose primary duty is to protect the interests of the state's consumers.[25]

IV. Non-merger enforcement

There has generally been less concern expressed over state enforcement outside the merger context. Unlike mergers, for which there is rarely judicial review of enforcement decisions, conduct cases are often resolved in the courts. Thus, there is greater substantive harmony in conduct enforcement than in merger enforcement. Furthermore, states have advantages in investigating conduct-related offenses, the most important of which is the states' ability to directly compensate individual consumers. The Department of Justice does not have authority to seek compensation for individuals, and although the FTC may have such authority under the FTC Act, it has only invoked this power in consumer protection cases, and not antitrust ones.[26] In contrast, state attorneys general are authorized by federal law to recover treble damages for consumers injured by Sherman Act violations. Without state enforcement, consumers would need to file private lawsuits, an expensive and lengthy proposition which most individual consumers are unlikely to undertake.[27]

The states have used their *parens patriae* authority successfully. For example, several states obtained an $80 million settlement from pharmaceutical companies to compensate consumers and third-party payers for injuries sustained as a result of an allegedly unlawful

[25] State investigations can even provide guidance for later federal investigations. The FTC's recent consent order in the DaVita/Gambro merger involving renal dialysis centers in Michigan, for example, closely follows the analysis used by the Michigan attorney general's office in its investigation against Gambro's acquisitions 15 years prior. *In the matter of DaVita, Inc.*, FTC Docket C-4152 (October 4, 2005), available at http://www.ftc.gov/os/caselist/0510051/0510051.htm. *See also Sate of Florida v. Borden, Inc.*, 88-0273-CIV-Scott (S.D. Fla) (1989) (Florida settlement subsequently gave rise to criminal investigation by Department of Justice).

[26] The FTC uses this authority more often in consumer protection cases. *See* Calkins, *supra*, n. 1 at 682.

[27] Consumers also have redress through class actions. Such actions raise a set of issues beyond our subject today.

agreement to delay generic drug entry.[28] States have also been innovative in administering the distribution of settlements.[29] Acknowledging the states greater experience in this area, the FTC, in a case in which it disgorged profits from a defendant, allowed the states to distribute its recovery.[30] The states' use of the *parens patriae* authority serves as an additional deterrent to unlawful behavior and provides a mechanism for returning ill-gotten gains to injured consumers.

States have also been successful at obtaining injunctive relief. In *In re Disposable Contact Lens Antitrust Litigation,*[31] for example, thirty-five state attorneys general sued the major manufacturers of disposable contact lenses and the American Optometric Association, alleging a boycott of alternative distribution channels for disposable contact lenses. In addition to a monetary settlement, the states required the defendants to adopt non-discriminatory sales policies.

State enforcement in the non-merger context is also highly appropriate because it often involves localized conduct and/or localized effects. The states' greater familiarity with current market dynamics and history provides an advantage, as in-depth knowledge about local competitive conditions is essential to effective antitrust enforcement. Furthermore, the states' greater familiarity with local regulations and institutions also provides them with a deeper context in which to analyze behavior. States recognize this advantage and have actively challenged a

[28] *In re Cardizem Antitrust Litigation* (E.D. Mich. May 31, 2005), available at http://www.cardizemsettlement.com/pdf/CardizemNoticeR3.pdf.

[29] For example, states have used web-based submission to streamline the process. Calkins, *supra* n.1 at 691-92.

[30] *Connecticut v. Mylan Labs*, 2000-1 Trade Cas. (CCH) ¶ 73,273 at 90,403-04 (D.D.C. 2001). The FTC's recovery was combined with that of the states, with the states distributing the FTC's portion of the recovery.

[31] 97-861-CIV-J-20 (M.D. Fla. August 7, 1998).

host of local conspiracies, in industries such as health care, travel agents, roofers, auto body shops, dairies, and bakers.[32]

Non-merger enforcement is also a particularly fitting role for state attorneys general, whose mandate includes the protection of state residents' interest. Thus, behavior with largely local effects, scrutiny of which might be bypassed by the federal government, nevertheless remain subject to investigation by state enforcers. State attorneys general, for example, have actively filled a gap in federal enforcement of resale price maintenance practices, which have direct impact on consumers. In *In re Compact Disc Minimum Advertised Price Litigation*,[33] an action brought by several states alleging a minimum advertising pricing allegations, the settlement included $67 million in cash repaid to consumers. States also have the ability to use settlements for the general public good using *cy pres*, in instances where identifying the actual injured consumers is difficult. In *Florida v. Nine West Group*[34] the attorneys general for all fifty states settled a resale price maintenance case involving women's shoes, distributing the settlement *cy pres* to fund women's health, educational, vocational, and safety programs. This use of state enforcement powers is efficient, filling in for federal enforcement not only where the federal agencies decline to investigate, but also providing a mechanism for direct redress for consumers or to benefit the public good.

V. Conclusion

Both federal and state antitrust agencies have a role in enforcing competition laws. There must, however, be greater coordination among the various agencies and guidance as to what part each enforcement agency should play in investigations.

[32] *See, e.g., Maine v. The Maine Health Alliance* No. CV03-135 (Maine Sup. Ct. June 18, 2003) (health care); *see also* Calkins, *supra* n. 1 at 689-90.

(continued…)

[33] No. 2:01-CV-125-P-H (D. Maine Sept. 26, 2002)

[34] No. 00 Civ. 1707 (S.D.N.Y. March 6, 2000).

In the merger context, transactions that affect markets across the United States should primarily be investigated by the federal government, with assistance from the states for particular local issues. These efforts must be coordinated, however, to ensure that parties are not subjected to differing substantive standards and multiple discovery requests. Investigations by multiple state enforcers must also be coordinated and harmonized to provide some predictability in merger enforcement procedures.

State investigations in the non-merger context are particularly appropriate when the conduct in question involves local businesses or has an impact on the local market. In these instances, the states' greater familiarity with the local environment and regulations is an advantage that should be exploited.

Greater harmony on substantive law can be achieved by revising the State Merger Guidelines to better reflect the current state of antitrust law and theory, and providing greater transparency on state enforcement decisions. Increased procedural coordination can occur by revising the Compact to include all states as signatories, promoting its use as a primary tool when dealing with multiple investigations, and drafting a model confidentiality agreement that provides adequate protection for merging parties' information. Both substantive and procedural coordination can be accomplished through the NAAG Multi-State Task Force, but likely requires that NAAG allocate resources to establishing permanent staff devoted to establishing best practices, coordinating with the federal government, and acting as the primary point-person for multi-jurisdictional investigations.