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How the Antitrust Modernization Commission Should View State Antitrust Enforcement

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How the Antitrust Modernization Commission Should View State Antitrust Enforcement

By Robert L. Hubbard and James Yoon*

I. Introduction

State antitrust enforcement, long the subject of spirited debate between its critics[1] and supporters,[2] is now a topic for study by the

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[1] *E.g.*, Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal, in* COMPETITION LAWS IN CONFLICT 267, 280-81 (Richard A. Epstein & Michael S. Greve, eds., 2004) (proposing that reform measures place an emphasis on the states' role in local markets and provide the oversight of state enforcers to federal enforcers); Richard A. Posner, *Antitrust at the Millennium (Part II): Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001) (noting that states should be stripped of their power to bring antitrust actions, except in situations where a private firm would also be able to sue); DeBow, *supra* note 1, at 280-81 (proposing that states' power to bring *parens patriae* suits be abrogated); Michael L. Denger & D. Jarrett Arp, *Criminal and Civil Cartel Victim Compensation: Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 ANTITRUST 41, 45 (2001) (proposing federal legislation to preempt state indirect purchaser lawsuits).

[2] *See generally* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003) (discussing state enforcers' comparative advantages); Susan Beth Farmer, *More Lessons From the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361 (1999) (cataloguing efforts by state attorneys general to prosecute antitrust claims on behalf of their citizens); Harry First, *Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct: Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001) (quantifying the remedies brought by state attorneys general); Jean Wegman Burns, *Antitrust at the Millennium (Part I): Embracing Both Faces of Antitrust Federalism:* Parker *and* ARC America Corp., 68 ANTITRUST L.J. 29 (2000)

Antitrust Modernization Commission (the "Commission" or "AMC"). The Commission's work, the most recent formal federal review of the antitrust law, may culminate in recommendations concerning state antitrust enforcement.[3]

This article unabashedly argues that the Commission should conclude that state antitrust enforcement has benefited consumers; furthered competition throughout the economy including among antitrust enforcers; contributed significantly to antitrust jurisprudence; and helped make our economic system the envy of the world. Part II discusses how state enforcement has emerged as a topic for consideration by the Commission. Part III defines the role and sets the context of state antitrust enforcement, emphasizing what state antitrust enforcers do. Part IV responds to two major themes of the critics of state antitrust enforcement: first, the political context of the actions taken by state attorneys general merits praise, not criticism; second, states have significantly added to antitrust jurisprudence, both theoretically and practically, as is illustrated by how states have investigated, litigated, and resolved antitrust matters, large and small. Finally, this article discusses how state enforcement has enhanced consumer choice and fostered competition among antitrust enforcers.

II. The Commission and State Antitrust Enforcement

The legislation establishing the Commission does not specify what topics should be covered and does not mention state enforcement.[4] Yet, the legislation's sponsor, Representative F. James Sensenbrenner, prominently mentioned state enforcement in his initial press release about the legislation as one of only three topics within the antitrust laws that merited study.[5] Representative

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(discussing the benefits to antitrust jurisprudence of the diversity and innovation enabled by antitrust federalism).

[3] Similar formal federal reviews of the antitrust laws have occurred in 1938-41, 1955, 1967-69, 1977-79, and 1998-2000. Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029, 1032-45 (2003).

[4] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), *available at* http://amc.gov/pdf/statute/amc_act.pdf.

[5] Press Release, Rep. F. James Sesenbrenner, Chairman, Committee on the Judiciary, U.S. House of Representatives, Sesenbrenner Introduces Antitrust Study Commission Legislation (June 27, 2001) (on file with the Loyola Consumer Law Review). This initial press release provided: "Three areas in particular that Chairman Sensenbrenner would like the commission to address are: 1) the role of

Sensenbrenner's comments about states at the Commission's first public meeting were more elaborate. He lengthened his list of topics and characterized state enforcers as "vital," while worrying about "divergent and sometimes inconsistent antitrust standards."[6] State attorneys general recognized that the Commission would likely study state enforcement, by expressing concern that no one nominated to be a Commissioner has state enforcement experience.[7]

As expected, state antitrust enforcement was raised in response to the Commission's broad-based request for suggested topics. An antitrust advocacy group, the American Antitrust Institute, suggested that the Commission probe how state enforcement can be made more effective.[8] The Cato Institute, a non-profit public policy research foundation based in Washington, D.C., suggested that state enforcers be stripped of their *parens patriae* authority.[9] In a letter to the Commission, Senators Mike DeWine, Chairman, and Herbert Kohl, Ranking Member, of the Senate Subcommittee on Antitrust,

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intellectual property law in antitrust law; 2) how antitrust enforcement should change in the global economy; and 3) the role of state attorneys general in enforcing antitrust laws." *Id.*

[6] Rep. Sensenbrenner's more elaborate comments on state antitrust enforcement at the Commission's first public meeting on July 15, 2004 provided: "[T]he relationship between federal and state antitrust enforcement efforts is another area of interest. While I believe that states have a vital antitrust enforcement role, interstate commerce may be adversely affected by divergent, and sometimes inconsistent antitrust standards." Antitrust Modernization Commission 1, 8 (July 15, 2004), *available at* http://www.amc.gov/pdf/meetings/transcript040715.pdf (last visited June 3, 2005).

[7] In three separate letters, the officers of the National Association of Attorneys General ("NAAG") and the leadership of NAAG's Antitrust Committee urged that people with state enforcement experience be appointed to the Commission. Letter from Chief State Legal Officers, to George W. Bush, President of the United States (Aug. 17, 2004); Letter from Chief State Legal Officers, to George W. Bush, President of the United States (Mar. 4, 2004); Letter from Chief State Legal Officers, to Senators Tom Daschle & Bill Frist, and Representatives Tom DeLay & Nancy Pelosi (Mar. 4, 2004) *available at* http://www.abanet.org/antitrust/committees/state-antitrust/advocacy.html.

[8] The American Antitrust Institute, Comments of the American Antitrust Institute on the Issues to be Included on the Commission's Agenda and Supplementary Statement of the American Antitrust Institute Concerning Commission Practice and Procedure to the Antitrust Modernization Commission 6 (Sept. 30, 2004), *available at* http://www.amc.gov/comments/aai.pdf.

[9] Letter from Mark Moller, Senior Fellow in Constitutional Studies, The Cato Institute, to the Antitrust Modernization Commission 2-3 (Sept. 29, 2004), *available at* http://www.amc.gov/comments/cato.pdf.

Competition Policy and Consumer Rights stated that "[a]n examination of the proper role of states in enforcing antitrust law would be an important topic for study."[10]

The states also submitted comments to the Commission that included sections on antitrust federalism, remedies, regulated industries, and merger reviews.[11] The most extensive comments were from the Antitrust Section of the American Bar Association, which focused on state enforcement and mentioned state enforcement in the sections on remedies, merger enforcement, and elsewhere.[12]

In its Initial Slate of Issues Selected for Study, the Commission responded by asking two questions focused on state enforcement:

> (1) What changes, if any, should be made to the enforcement role that the states play with respect to federal antitrust laws?
>
> (2) What role, if any, should private parties and state attorneys general play in merger enforcement?[13]

On May 9, 2005, the Commission posted "Study Plans," including a plan on "Enforcement Institutions."[14] The enforcement institutions study plan posed questions for public comment that elaborated on this state enforcement focus. As to antitrust

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[10] Letter from Mike DeWine, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Rights & Herb Kohl, Ranking Member, Subcommittee on Antitrust, Competition Policy and Consumer Rights, to Deborah Garza, Chair, Antitrust Modernization Commission & Jonathan Yarowsky, Vice Chair, Antitrust Modernization Commission 4 (Oct. 1, 2004), *available at* http://www.amc.gov/comments/senatesubcomm.pdf.

[11] American Modernization Commission, Amended Comments of Commission Issues for Study 1, 2, *available at* http://www.amc.gov/comments/stateags.pdf (last visited June 3, 2005).

[12] Report of the Section of Antitrust Law of the American Bar Association from Richard J. Wallis, Chair, Section of Antitrust Law 2004-05, to the Antitrust Modernization Commission (Sept. 30, 2004), *available at* http://www.amc.gov/comments/abaantitrustsec.pdf.

[13] Antitrust Modernization Commission, Issues Selected for Study, at 1, 2, *available at* http://www.amc.gov/pdf/meetings/study_issues.pdf. (last visited June 3, 2005).

[14] Memorandum from the Enforcement Institutions Study Group, to All [Antitrust Modernization Commission] Commissioners 1 (May 5, 2005), *available at* http://amc.gov/pdf/meetings/enforcement_institutions_study_plan.pdf.

enforcement generally, the study plan asked:

> 1. Some commenters have suggested that dual federal and state non-merger civil antitrust enforcement should be limited or eliminated. What evidence, if any, exists regarding burden, benefits, delay, and/or uncertainty involved in dual state and federal non-merger civil antitrust enforcement?
>
> 2. To what extent is state *parens patriae* standing useful or needed? Please support your response with specific examples, evidence, and analysis.
>
> 3. Should state and federal enforcers divide responsibility for non-merger 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 allocation be implemented?[15]

As to state merger enforcement, the enforcement institutions work plan asked:

> 1. What role should state attorneys general play in merger enforcement? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved in multiple state and federal merger reviews.
>
> 2. Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers? To what extent has the protocol for coordination of simultaneous merger investigations established by the federal enforcement antitrust agencies and state attorneys general succeeded in addressing issues of burden, delay, and/or uncertainty associated with multiple state and federal merger review?[16]

The Commission's work is on-going, with testimony

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[15] *Id.* at 2-3.

[16] *Id.* at 2.

scheduled to begin in late June 2005.

III. Enforcement Authority of State Antitrust Enforcers

Discussing state antitrust enforcement requires understanding the themes and context of state antitrust enforcement. Many scholars and practitioners have written about the activities of state attorneys general in antitrust matters.[17] Some of that commentary emphasizes specific actions taken by states.[18] Yet those details have not quelled, and indeed may have bolstered, criticism of state antitrust enforcement.[19] Understanding the authority of state attorneys general, how and why that authority is used, and how this authority fits within antitrust jurisprudence generally focuses on the question of whether state antitrust enforcement provides value and is worth the costs. State enforcers are neither federal enforcers nor private counsel, although what states do often interacts or overlaps with the actions of federal enforcers or private counsel. Like federal enforcers and private counsel, state attorneys general act in accord with specific authority and pursue specific types of antitrust claims.

A. The Antitrust Authority Used By State Attorneys General

In antitrust matters, state attorneys general try to protect the state, the public interest, and the people in their states. State attorneys general are the chief legal officers of states and often pursue the proprietary claims of the state or political subdivisions. That authority

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[17] *See supra* notes 2 and 3. Other writings of state enforcement include student materials within the library of State Attorneys General Program at Columbia Law School, including pieces on the Vitamins Indirect Purchaser Antitrust Litigation and the Compact Disk Minimum Advertised Price Antitrust Litigation. State Attorneys General Program at Columbia Law School, *available at* http://www.law.columbia.edu/center_program/ag/AG_Library (last visited June 3, 2005). For people with an historical bent, 482 pages of state antitrust enforcement materials are collected in *State Antitrust Enforcement*, XVIII JOURNAL OF REPRINTS FOR ANTITRUST LAW & ECONOMICS (Fed'l Legal Publications 1988).

[18] Patricia A. Conners, *Current Trends and Issues in State Antitrust Enforcement*, 16 LOY. CONSUMER. L. REV. 37, 43-50 (2003). *See generally* ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST ENFORCEMENT HANDBOOK (2003) [hereinafter ABA HANDBOOK] (specifying what state antitrust enforcers have done, including chapters on multistate investigations and litigation, mergers, criminal proceedings, health care markets, confidentiality concerns, and settlements).

[19] Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5, 8-13 (2004).

includes the right to pursue claims under federal antitrust law because the state and its subdivisions are "persons" entitled to seek remedies for antitrust violations.[20] States are very large purchasers of goods and services, and the attorneys general represents the states' interest as purchasers or other participants in the economy.[21] These proprietary claims have been a significant part of recent multistate actions such as those in the pharmaceutical industry.[22]

States, like federal antitrust enforcers, also focus on public interest issues. Under state law, many state attorneys general can prosecute antitrust violations as crimes[23] and almost all have broad powers to investigate potential civil claims.[24] In addition to the typical federal antitrust right to injunctive relief under Section 16 of the Clayton Act,[25] state attorneys general can act as *parens patriae* to prevent actual or threatened harm to the state's general economy.[26]

Finally, state attorneys general represent consumers. State attorneys general pursue damages on behalf of state residents through *parens patriae* actions under federal antitrust law.[27] This *parens patriae* authority for states arises upon filing the action, and does not

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[20] Georgia v. Evans, 316 U.S. 159, 161-62 (1942) (seeking treble damages); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 477, 450-51 (1945) (seeking injunctive relief).

[21] *E.g.*, New York v. Julius Nasso Concrete Corp., 202 F.3d 82, 84-85 (2d Cir. 2000) (alleging bid-rigging of concrete construction work, including for the New York City Convention Center); New York v. Hendrickson Bros., Inc., 840 F2d 1065, 1068-69 (2d Cir. 1988) (claiming highway construction bid-rigging).

[22] *E.g.*, New York v. Aventis, S.A., No. 01-CV-71635 (E.D. Mich. 2003) (Cardizem CD Antitrust Litigation) (challenging an agreement under which branded drug manufacturer paid a generic drug manufacturer to stay off the market); *In re* Buspirone Antitrust Litig., No. 01-CV-11401 (S.D.N.Y. 2003) (BuSpar Antitrust Litigation) (challenging an allegedly fraudulent assertion of patent and other intellectual property rights). The settlements of the litigations cited in this footnote are available on the settlements portion of the website of the State Antitrust Enforcement Committee of the ABA Section of Antitrust Law, *available at* http://www.abanet.org/antitrust/committees/state-antitrust/settlements.html. Those settlements define the specifics of the proprietary distributions and are sorted on the website by the court reviewing the settlement.

[23] ABA HANDBOOK, *supra* note 18, at 95-136.

[24] *Id.* at 170 n.1.

[25] 15 U.S.C.A. § 26 (West 2005).

[26] Georgia v. Pennsylvania R. Co., 324 U.S. 439, 477, 450-51 (1945); Hawaii v. Standard Oil Co., 405 U.S. 251, 260-61 (1972).

[27] 15 U.S.C. § 15c (2004).

depend on the showing needed to represent a class under Rule 23.[28]

The states' *parens patriae* authority lost much of its vitality and potential when the Supreme Court decided *Illinois Brick Co. v. Illinois,*[29] although states have continued to pursue claims limited by *Illinois Brick*, primarily through supplemental state laws in federal litigation in the pharmaceutical industry.[30] In *Illinois Brick*, the State of Illinois and 700 local governmental entities sued concrete block manufacturers, which sold to masonry contractors, which in turn sold to general contractors from which Illinois purchased the concrete blocks, claiming that the manufacturers had engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act.[31] The Court held that, with certain exceptions, only those who dealt directly with the price-fixer are injured within the meaning of Section 4 of the Clayton Act.[32] Others within the stream of commerce were labeled "indirect" purchasers and could not recover.[33] This decision usually

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[28] Section 4C eliminates the complex determinations that courts must make in Rule 23 class actions on whether the class is sufficiently numerous, manageable, and fairly and adequately represented by counsel, by simply authorizing state attorneys general to represent their citizens as *parens patriae*. *Parens patriae* authority is exercised as soon as the attorney general files the action. In contrast to Rule 23 practice, the court need not make factual findings before certifying a class. *Compare* 15 U.S.C. § 15c(a)(1) (2004) (no need for court approval or court findings as to adequacy of representation and the superiority of the means to adjudicate the claim) *with, e.g.*, FED. R. CIV. P. 23(c)(1)(A) (requiring court approval for class actions); FED. R. CIV. P. 23(b)(3) (requiring a finding of superiority of class adjudication); FED. R. CIV. P. 23(a) (requiring findings of typicality, impracticability of joinder, and fair and adequate representation). Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 573 n.29 (1983) (discussing that Section 4C of the Clayton Act is designed to remedy problems inherent in private Rule 23 antitrust actions, and exempted *parens patriae* suits from class action requirements of Rule 23).

[29] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[30] Examples of litigations in which states assert claims under state law, when federal law under *Illinois Brick* would not allow such claims, include: Plaintiff States v. Organon USA Inc., No. 02-CV-2007 (D.N.J. 2002) (Remeron); Ohio v. Bristol-Myers, Squibb Co., No. 1-01-01080 (D.D.C. Apr. 24, 2003) (Taxol); New York v. Aventis, S.A., No. 01-CV-71635 (E.D. Mich.) (Cardizem CD); Alabama v. Bristol-Myers Squibb Co., No. 01-CV-11401 (S.D.N.Y. 2003) (BuSpar). Each of these settlements are available on the settlements portion of the website of the State Antitrust Enforcement Committee of the ABA Section of Antitrust Law, *available at* http://www.abanet.org/antitrust/committees/state-antitrust/settlements.html.

[31] 15 U.S.C. § 1 (2004); *Illinois Brick,* 431 U.S. at 726-27.

[32] 15 U.S.C. § 15 (2004); *Illinois Brick,* 431 U.S. at 727-31.

[33] *Illinois Brick*, 431 U.S. at 735.

prevents consumers, and state attorneys general acting on their behalf, from recovering unless they bought directly from the price-fixer.[34]

B. The Context of State Antitrust Enforcement

In addition, the role of state attorneys general in antitrust matters is not merely the accumulation of the civil authority for state attorneys general under federal law, or the criminal, investigatory, and representational authority under state law. State attorneys general exercise their statutory and common law rights to protect their state's proprietary interests and their citizens' interests within a federal system.[35] States enjoy additional rights in this system, particularly in antitrust matters, because state antitrust law is not preempted by federal antitrust law.[36] Indeed, state antitrust enforcement predates federal antitrust enforcement; state antitrust statutes are older than the Sherman Act.[37] Within the substantive area of federal antitrust, private—including state—enforcement was not an "afterthought; it was an integral part of the congressional plan for protecting competition."[38]

States are independent decision makers entitled to deference under our constitutional system and state antitrust law is not preempted under that federal system. State attorneys general have the power and indeed obligation, to make independent decisions, including decisions that may diverge from the decisions made by

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[34] *E.g.*, Kansas v. Utilicorp. United, Inc., 497 U.S. 199, 207-19 (1990) (rejecting various ways around the "direct" purchaser rule of *Illinois Brick*).

[35] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601-02 (1982).

[36] California v. ARC Am. Corp., 490 U.S. 93, 97-102 (1989).

[37] *See* David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141 (1990) (at least twelve states had antitrust legislation prior to the United States Congress passing the Sherman Act in 1890); Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. ANTITRUST SECTION 358, 363 (1962) (twenty-one states had "constitutional or statutory" antitrust laws in 1890).

[38] California v. Am. Stores Co., 495 U.S. 271, 284 (1990). *See generally* Jay L. 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, 60-67 (2002) (discussing the authority underlying some states' decision to seek remedies against Microsoft after the United States Department of Justice and other states had settled).

federal enforcers.[39] As phrased by one of the founding fathers of modern state antitrust enforcement: "Federalism is not a suicide pact."[40] Antitrust federalism means that the market for antitrust enforcement, like the markets to which antitrust laws apply, is ruled by competition, and that competition among antitrust enforcers and bodies of law fosters alternatives, choice, innovation, and insight.[41]

The independent decision-making of state attorneys general in antitrust matters is most clearly illustrated in the area of vertical restraints. Since the 1980s, states have focused on vertical restraints, primarily resale price maintenance, and provided remedies on behalf of consumers through *parens patriae* actions.[42] Vertical agreements are among businesses at different levels of distribution such as among a manufacturer, wholesalers, and retailers. Vertical restraints include resale price maintenance, exclusive dealings, and tying arrangements. Horizontal agreements are among entities at the same level of distribution. Horizontal restraints include agreements among competitors to set the price at which the product will be sold or to allocate territories or customers.[43] States have been more active in pursuing vertical restraint cases than the federal enforcers.[44]

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[39] *See* New York v. Microsoft Corp., 209 F. Supp. 2d 132 (D.D.C. 2002) (upholding the right of a group of states to pursue additional remedies after the United States and a different group of states settled).

[40] Lloyd Constantine, *Antitrust Federalism*, 29 WASHBURN L.J. 163, 184 (Winter 1990).

[41] *See* Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413, 419-29 (2002) (discussing concurrent enforcement of antitrust law in the United States); Burns, *supra* note 2, at 30 (noting that "[s]uch diversity and experimentation are especially important in a field like antitrust, where debate continues on how best to approach certain key issues and the laws' proper goals").

[42] Conners, *supra* note 18, at 53-54.

[43] H. Hovenkamp, ECONOMICS AND FEDERAL ANTITRUST LAW §§ 8.1, 9.1 (1985).

[44] *E.g.*, *In re* Compact Disk Minimum Advertised Price Litigation, MDL 1361 (D. Me. 2003) (challenging music distribution imposition of minimum advertised price policies); New York v. Salton, Inc., 265 F. Supp. 2d 310 (S.D.N.Y. 2003) (alleging resale price maintenance and anticompetitive exclusive dealings); *In re* Toys "R" Us Antitrust Litig., 191 F.R.D. 347 (S.D.N.Y. 2000) (alleging group boycott); New York v. Reebok Int'l Ltd., 96 F.3d 44 (2d Cir. 1996) (alleging resale price maintenance); New York v. Keds Corp., 1994-1 Trade Cas. (CCH) 70,549 (S.D.N.Y. 1994) (alleging resale price maintenance); Maryland v. Mitsubishi Electronics America Inc., 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. 1992) (alleging resale price maintenance); *In re* Panasonic Consumer Electronics

C. States' Experience with Securing Remedies Such As Consumer Recovery

Making independent decisions in matters concerning vertical restraints and otherwise, state antitrust enforcers have been instrumental in recovering millions of dollars in cash or other value for injured consumers in checks, coupons, products, or a combination of these.[45] In addition to stopping the anticompetitive activities, states seek to ensure that consumers harmed by antitrust violations receive compensation.[46] States have often provided direct monetary to individual consumers that the states allege were injured by the antitrust violation.[47] In some instances, identifying the individual purchasers may be difficult or impossible, or the average individual recovery may be too small relative to the cost of administering each claim.[48] In that circumstances, states have distributed settlement proceeds *cy pres*; where states have delivered settlement funds are not delivered directly to consumers, but instead to programs designed to benefit the consumers harmed by the restraint, such as to non-profit organizations or charities that can provide programs that benefit individuals.[49]

Products Antitrust Litigation, 1989-1 Trade Cas. (CCH) ¶ 68,613 (S.D.N.Y. 1989) (alleging resale price maintenance). Businesses went to the States complaining about vertical restraints only after efforts to interest federal enforcers failed. Alan Malasky, *Commentary: Antitrust Federalism*, 29 WASHBURN L.J. 185, 185-87 (Winter 1990).

[45] Conners, *supra* note 18, at 37 (mentioning recovery of nearly $400 million on behalf of consumers and public entities in 2002).

[46] *Id.* at 59-60.

[47] States have delivered checks to consumers as part of the settlement of resale price maintenance litigations. *E.g., In re* Compact Disk Minimum Advertised Price Litigation, MDL 1361 (D. Me. 2003) (awarding cash payments directly to individual consumers); Maryland v. Mitsubishi Electronics America Inc., 1992 U.S. Dist. LEXIS 17395, at *1-2 (D. Md. 1992) (awarding cash payment directly to individual consumers); *In re* Panasonic Consumer Electronics Products Antitrust Litigation, 1989 U.S. Dist. LEXIS 6274, at *3-4 (S.D.N.Y. 1989) (awarding cash payments directly to individual consumers). *See generally* ABA HANDBOOK, *supra* note 18, at 211-21. Each of the settlements approved in the decisions cited in this footnote are *available at* http://www.abanet.org/antitrust/committees/state-antitrust/settlements.html. Those settlements define the specifics of the consumer distribution and are sorted on the website by the court reviewing the settlement.

[48] New York v. Reebok Int'l Ltd., 903 F. Supp. 532, 536-37 (S.D.N.Y. 1995).

[49] States have used *cy pres* distributions in their settlements of resale price maintenance and other vertical restraints claims. *E.g.,* New York v. Salton, Inc., 265 F. Supp. 2d 310, 314 (S.D.N.Y. 2003) (distributing to health and nutrition

Two recent multistate cases led by New York illustrate these different methods of distributing value to consumers. In *New York v. Feldman*, New York, Maryland, and California delivered checks directly to individuals impacted or who might have been impacted by the scheme.[50] *Feldman* challenged a bid-rigging scheme at public stamp auctions in which the defendants conferred prior to the public auctions, agreed to not compete at the public auction, and divided the "savings" from the agreement among themselves. The states alleged that the defendants' conduct deprived sellers, auction houses, and others of the benefits of a competitive marketplace, in violation of federal and state antitrust laws.[51] In *Feldman*, the states delivered to individual consumers the specific amounts that the states estimated the individuals were damaged based on records of the bid-rigging conspiracy.[52] The states also delivered checks to individuals who purchased stamps from the defendants during the time of the conspiracy for which records of the bid rigging conspiracy from which to estimate specific impacts were not available.[53]

In contrast, in *New York v. Salton, Inc.* forty-nine states and other jurisdictions recovered $7.7 million as a monetary settlement and distributed those funds *cy pres*.[54] The states' claim was that Salton had coerced its retailers who were discounting Salton's very popular indoor contact grill product to increase their prices in conformity to Salton's resale pricing policy.[55] Instead of distributing this money to specific individuals, the states distributed the funds *cy*

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related organizations); *In re* Toys "R" Us Antitrust Litig., 191 F.R.D. 347, 353 (S.D.N.Y. 2000) (distributing toys to charitable organizations); New York v. Reebok Int'l Ltd., 96 F.3d 44, 49 (2d Cir. 1996) (distributing to benefit athletic facilities, equipment, or services); New York v. Keds Corp., 1994 U.S. Dist. LEXIS 3362, at *10 (S.D.N.Y. 1994) (distributing to charitable causes benefiting women ages 15 to 44). Each of the settlements approved in the decisions cited in this footnote are available on the settlements portion of the website of the State Enforcement Committee of the ABA Antitrust Section, *available at* http://www.abanet.org/antitrust/committees/state-antitrust/settlements.html. Those settlements define the specifics of the *cy pres* distribution and are sorted on the website by the court reviewing the settlement. *See generally* ABA HANDBOOK, *supra* note 18, at 215-18.

[50] New York v. Feldman, 210 F. Supp. 2d 294, 298 (S.D.N.Y. 2002).

[51] *Feldman*, 210 F. Supp. 2d at 298.

[52] Order, New York v. Feldman, No. 01 Civ. 6691 (S.D.N.Y. Nov. 5, 2004).

[53] *Id.*

[54] New York v. Salton, Inc., 265 F. Supp. 2d 310, 313 (S.D.N.Y. 2003).

[55] *Salton*, 265 F. Supp. 2d at 312.

pres because identifying individual purchasers was difficult and the cost of identifying and delivering money to individuals cost more than the amount that each individual consumer would receive.[56] To insure that these funds would be used for the benefit of the class of purchasers covered by the settlement, the states provided the funds to organizations promoting health and nutrition-related causes.[57]

IV. Responding to the Critics of State Antitrust Enforcement

Perhaps due to a lack of understanding—or a lack of publicity—state antitrust enforcement has its critics. States are criticized as (1) making "political," not enforcement, decisions; (2) not adding to the development of antitrust theories and doctrine; and (3) acting as free riders on the efforts of federal enforcers.[58]

A. State Attorneys General Are Politicians

The first theme of the critics of state antitrust enforcement is that state attorneys general are subject to "political incentives" that have "a potential to generate socially perverse consequences."[59] The argument basically is that state politicians have an incentive to engage in antitrust litigation that is "protectionism" designed to

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[56] *Id.* at 314.

[57] Order, New York v. Salton, Inc., No. 02 Civ. 7096 (S.D.N.Y. May 10, 2004).

[58] *See generally* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General, in* COMPETITION LAWS IN CONFLICT 252 (Richard A. Epstein & Michael S. Greve eds., 2004) [hereinafter *Federalism and State A.G.s*] (discussing federalism and not finding support for states bringing *parens patriae* actions under federal law). A very similar version of the argument is published in Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5 (2004) (criticizing the states' use of *parens patraie* power in bringing antitrust actions). Both versions are based on Richard Posner, *Is Federalism Overrated?*, Address Before the American Enterprise Institute for Policy Research, (Apr. 21, 2003) *available at* http://www.federalismproject.org/masterpages/Antitrust/Posner.pdf. A state enforcer responded to that critique: Jay L. Himes, *Federal "Unemption" of State Antitrust Enforcement*, 9-14, Remarks for Antitrust, Competition and Trade Committee of LEX MUNDI (May 14, 2004), *available at* http://www.abanet.org/antitrust/committees/state-antitrust/unemption.pdf.

[59] *Federalism and State A.G.s*, *supra* note 58, at 258.

"advance their political agenda."[60] The argument, which appears to be based on a distaste for elected officials, concludes with an "independently desirable . . . reform" that the state attorneys general be "appointed rather than elected."[61]

This argument is both inaccurate and overstated. Only forty-three state attorneys general are elected; five are appointed by the governor; Maine's Attorney General is selected by secret ballot of the legislature; Tennessee's is selected by the state supreme court.[62] Perhaps the means of selecting an attorney general merits study as illustrated by Maine's comparatively robust record of antitrust enforcement.[63] Yet, despite that caveat, the record is clear that states pursue antitrust matters in an overwhelmingly consistent manner through the NAAG Multistate Antitrust Task Force, protocols, guidelines, resolutions, and otherwise.[64]

Moreover, the argument falsely assumes that federal enforcers are never influenced by political considerations. Yet, federal enforcers are frequently influenced by politics. Federal enforcers are nominated and confirmed by politicians and consider it prudent to respond to the inquiries of politicians.[65] Federal enforcement,

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[60] *Id.*

[61] *Federalism and State A.G.s*, *supra* note 58, at 260.

[62] STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 15-19 (Lynne Ross, ed., BNA Books 1990) [hereinafter STATE ATTORNEYS GENERAL]; Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2002 (2001).

[63] A list of the formal antitrust actions taken by Maine is *available at* http://www.abanet.org/antitrust/committees/state-antitrust/maine_antitrust_actions.pdf.

[64] The documents underlying these coordinated state practices are available on the website of the American Bar Association, State Antitrust Enforcement Committee, *available at* http://www.abanet.org/antitrust/committees/state-antitrust/statepractices.html (last visited June 3, 2005).

[65] One particularly prominent recent manifestation of the influence of politics on federal antitrust enforcers concerns the nomination of Deborah P. Majoras as Chairman of the Federal Trade Commission. Ms. Majoras was nominated by President Bush on May 11, 2004. *Muris Will Leave Commission; Bush Taps Majoras to Lead FTC*, 86 ANTITRUST & TRADE REG. REP. (BNA) 512 (May 14, 2004). A May 2004 report from the General Accounting Office found that petroleum industry mergers caused prices to rise, which the FTC—the agency that reviewed those mergers for potential anticompetitive effects—disputed. *FTC Touts Gasoline Industry Experience, Challenges GAO Report's Determinations*, 87 ANTITRUST & TRADE REG. REP. (BNA) 32 (July 9, 2004). Dissatisfied with her response to questions about FTC policies toward the petroleum industry and

however, is funded by politicians.[66] Indeed, the Tunney Act, which requires court approval of the antitrust consent decrees negotiated by the United States Department of Justice, was passed by Congress precisely because federal enforcers allegedly had been improperly influenced by politics.[67]

But more fundamentally, in our adversarial system a lawyer is supposed to protect zealously the interests that he or she represents, even when that representation is "protectionism."[68] As phrased under New York law, "the attorney general shall . . . *protect* the interests of the state."[69] This right to "protect" the interests of the state and her citizens under the federal antitrust laws is well-established. For example, in *Georgia v. Pennsylvania R. Co.*,[70] the harmful effects of the alleged price-fixing conspiracy on state interests were:

(a) to deny to many of Georgia's products equal access

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gasoline pricing, Senator Ron Wyden of Oregon placed a hold on Ms. Majoras's nomination, to which President Bush responded with a recess appointment. *Bush Appoints Two New Commissioners, Will Designate Majoras as FTC Chairman*, 87 ANTITRUST & TRADE REG. REP. (BNA) 136 (Aug. 6, 2004). Prior to Ms. Majoras's second confirmation hearing, Senator Wyden withdrew his hold after receiving a letter from Ms. Majoras promising to "get to the bottom" of the differences between the FTC and GAO. *Wyden Lifts Hold on FTC Nomination; Senate Confirms Majoras and Leibowitz*, 87 in ANTITRUST & TRADE REG. REP. (BNA) 545 (Nov. 26, 2004).

[66] Politicians may seek to influence enforcement through funding or the withholding of funding. Haoran Lu, *"Presidential Influence on Independent Commissions: A Case of FTC Staffing Levels,"* 28 PRESIDENTIAL STUD. Q. 51, 51, 61-64 (1998); *see* Robert Abrams, *Antitrust Enforcement in the 1990s*, 29 WASHBURN L.J. 350, 351 (1990) (noting that the fifty percent staff cuts at the federal antitrust enforcement agencies in the 1980s limit federal enforcement possibilities); Robert Abrams & Lloyd Constantine, *Dual Antitrust Enforcement in the 1990s*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY: ESSAYS ON LEGAL, ECONOMIC, AND POLITICAL POLICY 484, 501 (Harry First et al. eds. 1991) (stating that federal enforcement depends in part on federal funding).

[67] 15 U.S.C. § 16(b)-(h); *see Hearings on S. 782 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 1 (1973) (quoted in 5 Julian O. von Kalinowski, ANTITRUST LAW & TRADE REGULATION § 96.03[1] (2d ed. Matthew Bender 2005)) (The Act was passed "to bring the consent decree process into the full light of day [and to] ensure that the courtroom rather than the back room becomes the final arbiter in antitrust enforcement.").

[68] *See supra* note 62 and accompanying text.

[69] N.Y. EXEC. LAW § 63.1 (Consol. 2004) (emphasis added).

[70] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945).

> with those of other States to the national market;
>
> (b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;
>
> (c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and
>
> (d) to hold the Georgia economy in a state of arrested development.[71]

The Court permitted the attorney general to defend precisely those interests, including interests that might be labeled "protectionist," such as state measures to promote "a well-rounded agricultural program." The Supreme Court decided as a matter of federal antitrust law:

> [W]e find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.[72]

In *Hawaii v. Standard Oil Co.*, the Court repeated the holding that state attorneys general can act as *parens patriae* to prevent actual or threatened harm to the state's general economy under the federal antitrust laws.[73]

The obligation of state attorneys general to protect the interests of the state and its citizens is not limited to competitive concerns or antitrust claims. An attorney general has obligations in a wide variety of substantive areas, such as consumer and

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[71] *Pennsylvania R. Co.*, 324 U.S. at 444.

[72] *Id.* at 447.

[73] Hawaii v. Standard Oil Co., 405 U.S. 251, 260, 266 (1972).

environmental protection, civil rights, charities, etc.[74] The Supreme Court has extended this range by recognizing the legitimacy and right of state attorneys general to act on behalf of their state's citizens generally in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, holding that "a State has a quasi-sovereign interest in the health and well being—both physical and economic—of its residents in general."[75] Considering these broader interests is part of a state attorney general's job, including when competitive concerns are being analyzed.[76]

Moreover, the argument that attorneys general act politically has a substantive antitrust component as well most clearly in merger review. Most of the criticism in the merger context is that states worry too much about jobs, and not enough about the competitive process.[77] Yet, preserving the competitive process requires preserving separate competitors,[78] and jobs are part of preserving that separate decision maker.

In addition, the criticism overlooks how antitrust enforcement is structured. State attorneys general have the responsibility to investigate competitive concerns and the right to assert antitrust claims. Judges, not plaintiffs or plaintiff-politicians, decide whether an antitrust claim exists and whether an antitrust remedy is appropriate.[79] That structure is a significant check on the "potential"

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[74] *See generally* STATE ATTORNEYS GENERAL, *supra* note 62. This book has thirty chapters, most of which focus on specific substantive areas for which the attorneys general have responsibilities: Chapter 10 is Environment; Chapter 14 is Civil Rights Enforcement; Chapter 15 is Charitable Trusts and Solicitations; Consumer Protection is Chapter 18; Antitrust is Chapter 20. *Id.* A state attorney general's wide range of rights and responsibilities is also illustrated on the website of the National Association of Attorneys General, http://www.naag.org/, which lists various NAAG projects in a variety of substantive areas.

[75] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

[76] One illustration of the impact of other issues on competitive concerns is in health care markets. In those matters, the attorney general's relationship with state agencies, such as the departments of health and insurance, coupled with obligations to protect charitable assets, impact the analysis. ABA HANDBOOK, *supra* note 18, at 142-46.

[77] *E.g.*, DeBow, *supra* note 1, at 275-77.

[78] *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 257-59 (2d Cir. 1989) (finding that the loss of an independent competitor is antitrust injury).

[79] Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?* in ANTITRUST LAW IN NEW YORK STATE 2, 42 (eds. Robert Hubbard & Pamela Jones Harbour, N.Y. State Bar Ass'n

of enforcers who are "politicians" to abuse their right to assert antitrust claims.[80]

Finally, state attorneys general—like all politicians and elected officials—deserve respect for bringing a unique perspective to antitrust issues.[81] Indeed, the founding fathers probably viewed the perspective of elected officials to be "their greatest source of wisdom, power, and legitimacy."[82] Courts have repeatedly recognized the superiority of government actions in a variety of contexts.[83]

Congress has expressly endorsed and expanded the authority and legitimacy in antitrust matters of state attorneys general, as the chief law enforcement officials of their states in antitrust matters.[84] When enacting Section 4C of the Clayton Act, Congress built upon the common law *parens patriae* powers of a state attorney general to create a representative for consumers superior to a Rule 23 class representative:

> H.R. 8532 employs an ancient concept of our basic English common law—the power of the sovereign to sue as parens

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2002) ("[M]any antitrust cases are the kind where reasonable people can differ, and . . . we rely on the judiciary, and not on executive fiat at either the state or federal level, to set our fundamental competition policy.").

[80] *See* O'Connor, *supra* note 41, at 423-29 (discussing how case law constrains the decisions made by different enforcers).

[81] Eliot Spitzer, *Antitrust Federalism Revisited*, NEW YORK STATE BAR ASS'N 2003 ANTITRUST LAW SECTION SYMPOSIUM 29-33 (2003) (discussing federalism in the context of antitrust and other areas of state and federal enforcement, such as environmental protection and civil rights); O'Connor, *supra* note 41, at 419-29 (discussing how antitrust federalism in the United States prevents under-enforcement, generates case law, and minimizes "false negative" enforcement decisions); Robert Abrams, *Antitrust Enforcement in the 1990s*, 29 WASHBURN L.J. 350, 351-52 (1990) (advocating cooperative and complementary antitrust enforcement by state and federal authorities).

[82] Abrams & Constantine, *supra* note 66, at 499.

[83] *See* Kamm v. California City Dev. Co., 509 F.2d 205, 210-13 (9th Cir. 1975) (involving false and misleading advertising and deceptive sales practices); United States v. City of Chicago, 411 F. Supp. 218, 243 (N.D. Ill. 1976) (regarding civil rights claims), *aff'd and rev'd in part on other grounds*, 549 F.2d 415 (7th Cir. 1977); Stuart v. Hewlett-Packard Co., 66 F.R.D. 73, 77-78 (E.D. Mich. 1975) (analyzing sex discrimination claims); Wechsler v. Southeastern Properties, Inc., 63 F.R.D. 13, 16-17 (S.D.N.Y. 1974) (concerning securities claims), *aff'd*, 506 F.2d 631, 636 (2d Cir. 1974).

[84] H.R. Rep. No. 94-499(I), at 5, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2575 (discussing how the state attorney general's primary duty is to protect the health and welfare of the state's citizens).

> patriae on behalf of the weak and helpless of the realm—to solve a very modern problem in antitrust enforcement. This doctrine is also firmly embedded in American jurisprudence. Since 1900 the Federal courts have expanded the power of a State to sue "'in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them.'"[85]

A state attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.[86]

Implementing that endorsement of state attorneys general, Congress relieved them of the obligation to comply with class action procedures and statutorily established them as the best representatives for consumers in their respective states. As Representative Peter Rodino, Chairman of the House Judiciary Committee and one of the principal sponsors of the 4C legislation, explained:

> [T]he compromise bill does not incorporate the various requirements of rule 23(b)(3): That the claims be "typical"; that common issues "predominate" over individual ones; that the action be "manageable" within the meaning of rule 23—for this bill represents the legislative conclusion that the State's attorney general is the best representative conceivable for the State's consumers—as the courts have repeatedly recognized.[87]

Since passage of Section 4C, courts have rejected attempts by private class action parties to supersede *parens patriae* authority asserted by state attorneys general.[88]

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[85] *Id.* at 8-9, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2578 (citing *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 443 (1945)).

[86] *Id.* at 5, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2575.

[87] 122 Cong. Rec. 30,879 (1976); *see* H.R. Rep. No. 94-499(I), at 6-8, *reprinted in* 1976 U.S.C.C.A.N. 2572, 2576-78.

[88] Pennsylvania v. Budget Fuel Co. Inc., 122 F.R.D. 184, 185-86 (E.D. Pa. 1988) (class certification allegations stricken because parens patriae authority asserted by the Pennsylvania attorney general is superior representation); *In re* Montgomery County Real Estate Antitrust Litig., 1978 U.S. Dist. LEXIS 16556, at *4-5 (D. Md. July, 17, 1978) (settlement approval denied without attorney general participation as *parens patriae*).

B. States' Claims Add to Antitrust Jurisprudence

The next criticism is that states do not add to the antitrust jurisprudence. In the words of Judge Posner:

> Because of resource constraints that I have mentioned, it is unlikely that state attorneys general will be sources of innovative antitrust doctrines or methods of proof—and in fact, I know of no examples where they have been.[89]

But a simple recitation of leading United States Supreme Court cases brought by state attorneys general belies the assertion that state attorneys general are not sources of innovative antitrust doctrines or methods of proof. In *California v. ARC America Corp.*, the Court unanimously held that claims under state antitrust law, even when inconsistent with claims under federal antitrust law, can be secured in federal court litigation.[90] In *ARC America*, four states sued in federal court on behalf of themselves and all governmental entities within their respective states as "downstream" or "indirect" purchasers of cement and concrete used in state projects.[91] The United States Court of Appeals for the Ninth Circuit held that, although state antitrust laws permitted recovery for these purchasers, these state antitrust laws were preempted by contrary federal antitrust laws.[92]

On writ of certiorari, the issue before the Supreme Court in *ARC America* was whether *Illinois Brick*, which usually prevents "indirect" purchasers from recovering damages, also prevents recovery under state statutes.[93] The Court considered a California statute that declared that California law was different than federal law, a Minnesota statute that rejected the *Illinois Brick* prospectively, an Alabama statute that since 1907 had permitted "indirect" damages, and an Arizona statute that used language similar to the federal statute but which had not been construed by Arizona state courts. The Court found no preemption by Congress of any of these state antitrust

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[89] *Federalism and State A.G.s, supra* note 58, at 258.

[90] California v. ARC Am. Corp., 490 U.S. 93, 101-02 (1989).

[91] The four litigating states were Alabama, Arizona, California, and Minnesota. *ARC Am. Corp.*, 490 U.S. at 97.

[92] *In re* Cement & Concrete Antitrust Litig., 817 F. 2d 1435, 1447 (9th Cir. 1987).

[93] *Id.* at 100.

laws.[94] The Court held that state indirect purchaser statutes were not preempted and that Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies.[95] *ARC America*'s endorsement of state antitrust law has allowed the development of a whole new area of practice, including recent state litigation in the pharmaceutical industry.[96]

Similarly seminal is *Arizona v. Maricopa County Medical Society*,[97] in which the State of Arizona sought review of a judgment of the United States Court of Appeals for the Ninth Circuit that denied the state's motion for summary judgment against defendant medical societies.[98] Arizona sued the defendant medical societies for price-fixing in violation of Section 1 of the Sherman Act.[99] Arizona alleged that agreements among competing physicians to set maximum fees for health services that they rendered to insured patients were a *per se* illegal price-fixing conspiracy.[100] The medical societies argued that the *per se* rule was inapplicable because the agreements were among doctors and that the judiciary had little antitrust experience in the health care industry.[101] The Supreme Court held that the *per se* rule was as applicable to the medical profession as to any other provider of goods or services; the Sherman Act establishes one uniform rule for price-fixing agreements applicable to all industries alike.[102]

California v. American Stores Co.,[103] another very important Supreme Court decision, involved state enforcement in a merger case. In *American Stores*, the Court held that divestiture is a form of injunctive relief within the meaning Section 16 of the Clayton Act.[104] The State of California sued to enjoin American Stores from merging with a competitor to double its share of supermarkets in California

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[94] *Id.* at 100-02.

[95] *Id.* at 102.

[96] *See supra* note 31.

[97] 457 U.S. 332 (1982).

[98] Arizona v. Maricopa County Med. Soc'y, 643 F.2d 553, 555 (9th Cir. 1980).

[99] *Id.*; 15 U.S.C. § 1 (2004).

[100] *Maricopa County Med. Soc'y*, 457 U.S. at 336.

[101] *Id.* at 342.

[102] *Id.* at 348-55.

[103] California v. Am. Stores Co., 495 U.S. 271 (1990).

[104] 15 U.S.C.A. § 26 (West 2005); *Am. Stores Co.*, 495 U.S. at 296.

after the Federal Trade Commission ("FTC") gave its final approval to the merger.[105] California sought a preliminary injunction to prevent the integration of the two merging companies and a divestiture of all the acquired stores located in California, which the district court granted.[106] On appeal, the Court of Appeals for the Ninth Circuit set aside the injunction granted by the district court reasoning that divestiture is not a remedy available in private actions under Section 16 of the Clayton Act.[107] The Supreme Court reversed the Court of Appeals, concluding that the plain text of Section 16 authorizes divestiture decrees as a form of injunctive relief to remedy Section 7 violations in private actions.[108]

Moreover, the innovations in antitrust doctrine spurred by state attorneys general extend internationally. In *Hartford Fire Insurance Co. v. California*, nineteen states sued domestic and foreign insurers for allegedly conspiring to restrict the terms of coverage of commercial general liability insurance in the United States.[109] In the leading case on the reach of the antitrust laws beyond the United States, the Court concluded that the Sherman Act applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[110]

These important state enforcement actions clearly demonstrate that states contribute to antitrust jurisprudence. Furthermore, even New York acting alone has fostered innovative antitrust doctrines and methods of proof.[111] In *New York v. Julius Nasso Concrete Corp.*,[112] the United States Court of Appeals for the Second Circuit addressed the issues of causation, estimating damages, and establishing collateral estoppel.[113] New York alleged a

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[105] *Am. Stores Co.*, 495 U.S. at 275-76.

[106] California v. Am. Stores Co., 697 F. Supp. 1125, 1135-36 (C.D. Cal. 1988).

[107] California v. Am. Stores Co., 872 F.2d 837, 845 (9th Cir. 1989).

[108] *Am. Stores Co.*, 495 U.S. at 282, 296.

[109] Hartford Fire Ins. v. California, 509 U.S. 764, 770 (1993).

[110] *Hartford Fire Ins.*, 509 U.S. at 796.

[111] New York v. St. Francis Hospital, 94 F. Supp. 399, 422 (S.D.N.Y. 2000) (granting summary judgment on liability for plaintiff on price-fixing and market allocation claims against two competing hospitals). Of course, other district court cases in litigations brought by other states not discussed here have also contributed significantly to furthering antitrust jurisprudence.

[112] New York v. Julius Nasso Concrete Corp., 202 F.3d 82 (2d Cir. 2000).

[113] *Id.* at 86-89.

bid-rigging conspiracy in the construction business by organized crime.[114] The United States prosecuted the conspiracy criminally, as a RICO violation.[115] New York appealed the decision of the district court, which rejected the State's proof on damages.[116] Defendants cross-appealed the district court's granting of summary judgment for New York on the issue of antitrust liability based on the collateral effect of the prior criminal RICO conviction.[117]

The Court of Appeals upheld the district court's ruling on collateral estoppel for antitrust liability and vacated the trial court's finding of no damages.[118] The court found that in an antitrust case where all the sellers were members of the conspiracy, the district court has discretion to conclude that the finding of antitrust activity and the purchasing of services from the convicted defendants without more may prove causation.[119] As to the issue of antitrust damages, the court recognized that New York's burden of proving antitrust damages is not as rigorous because of the lack of market information that is unaffected by the bid-rigging activity.[120] In such a case, the plaintiff need only provide some relevant data from which the court can make a reasonable estimated calculation of the harm suffered so that the finder of fact can make a just and reasonable inference of damages.[121]

Similarly, in *The Bon-Ton Stores, Inc. v. May Department Stores*, New York teamed with a regional department store chain and sued to enjoin the acquisition of a local department store chain by a national department store because it would diminish competition in the Rochester, New York area.[122] The dispute over the definition of the relevant product market was crucial to the case.[123] The plaintiffs argued the relevant product market to be "traditional department

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[114] *Id.* at 84-85.

[115] *Id.*

[116] *Id.* at 86.

[117] *Julius Nasso Concrete Corp.*, 202 F.3d at 86.

[118] *Id.* at 84.

[119] *Id.* at 86.

[120] *Id.* at 88.

[121] *Id.* at 89.

[122] The Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F. Supp. 860, 862 (W.D.N.Y. 1994).

[123] *Id.* at 865.

stores" but the defendants argued the relevant product market to be all stores selling general merchandise, apparel and furniture.[124] The district court determined, after reviewing the evidence and taking actual market realities into consideration, that the "traditional department store" constitutes a proper sub-market of a larger retail market.[125] The court enjoined the department store acquisition because it would harm consumers by raising prices for merchandise and reduce competition by excluding a competitor from the Rochester market.[126]

C. States Both Lead and Initiate Antitrust Litigation

Contrary to being free riders, states are often the first and only plaintiff in antitrust matters. Acting alone, states have initiated matters or extended matters into new areas or for new claimants. The cases cited in the footnote illustrates these points for all fifty states.[127]

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[124] *Bon-Ton Stores, Inc.*, 881 F. Supp. at 865.

[125] *Id.* at 875.

[126] *Id.* at 877-79.

[127] The following cases are illustrative of states' initiatives in antitrust matters:

Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 311 (5th Cir. 1978) (Alabama and local educational authorities sued manufacturers and distributors of school bus bodies, claiming defendants conspired to fix prices and restrain trade);

Alaska v. Chevron Chem. Co., 669 F.2d 1299, 1300-01 (9th Cir. 1982) (Alaska sued manufacturers of agricultural fertilizer for fixing prices and allocating markets);

Arizona v. Maricopa County Med. Soc'y., 457 U.S. 332, 336-37 (1982) (Arizona sued medical societies for price-fixing through agreements among competing member physicians who agreed to set the fee amounts they could collect for their services);

Arkansas v. Chicago, Rock Island & Pac. Ry., Co., 128 S.W. 555, 55-56 (Ark. 1910) (Arkansas sued a railroad corporation for fixing the rates to be charged for freight and passenger service);

California v. Am. Stores Co., 495 U.S. 271, 275-76 (1990) (California sued for an injunction after the fourth largest grocery chain acquired all of the outstanding stock of the largest grocery chain in California, alleging the merger constituted an anti-competitive acquisition);

Colorado v. Goodell Bros., Inc., Civ. A No. 84-A-803, 1987, at *1 (D. Colo. July 7, 1987) (Colorado sued contractors alleging a conspiracy to restrain trade in the highway construction industry by bid-rigging on various highway construction projects);

Connecticut v. Am. Med. Response, Inc., No. Cv-99-589962 (Conn. Super. Ct. June 3, 1999) (Connecticut sued to prohibit acquisition of major competing ambulance service providers in Connecticut);

Delaware v. Mid-Atlantic Paving Co., C.A. No. 7197, 1983 WL 14930, at *1 (Del. Ch. June 24, 1983) (Delaware sued a construction company for price-fixing the sale of liquid asphalt);

District of Columbia v. CVS Corp., Civ. No. 03-4431 (D.C. Sup. Ct. May 30, 2003) (District of Columbia sued to challenge the acquisition of a pharmacy);

Florida v. Abbott Labs., 1993-1 Trade Cas.(CCH) ¶ 70,241 (N.D. Fla. 1993) (Florida sued and settled with infant formula manufacturers for a conspiracy among competitors regarding pricing and marketing of infant formula products);

Georgia v. Pennsylvania R. Co., 324 U.S. 439, 443-44 (1945) (Georgia sued defendant railroads for conspiring to fix rates charged for transportation of freight);

Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 253 (1972) (Hawaii sued defendants for conspiracy to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products and for monopolization of the market);

Idaho v. Daicel Chem. Indus., Ltd., 106 P.3d 428, 430 (D.C. Sup. Ct. May 30, 2003) (Idaho sued chemical manufacturers for an illegal conspiracy to fix prices in the commercial sorbates industry);

Illinois v. Sangamo Constr. Co., 657 F.2d 855, 857 (7th Cir. 1981) (Illinois sued construction companies for engaging in a conspiracy to allocate highway construction projects put out for public bids);

Indiana v. The Home Brewing Co. of Indianapolis, 105 N.E. 909, 910 (Ind. 1914) (Indiana sued a corporation for monopolizing the business of selling beer and other intoxicating liquors);

Iowa v. Scott & Fetzer Co., Civil No. 81-362-E, 1982 WL 1874, at *1 (S.D. Iowa July 8, 1982) (Iowa sued defendants for antitrust violations, in a case testing the state attorney general's ability to sue under the parens patriae provision of the Clayton Act);

Kansas v. Am. Oil Co., 446 P.2d 754, 755 (Kan. 1968) (Kansas sued corporations engaged in the supply of liquid asphalt for bid-rigging asphalt sales and allocating sales territory);

Kentucky v. Plainview Farms Dev. Corp., No. 234010, 1977 WL 18405 (Ky. Cir. Ct. Sept. 6, 1977) (Kentucky sued a real estate developer for an unlawful tying arrangement which conditioned the purchase of a residential condominium or unit upon the purchase of use of a recreational facility);

Louisiana v. Seifert, 524 So. 2d 160, 161 (La. Ct. App. 1988) (Louisiana sued three defendants for monopolization and attempted

monopolization of the film industry);

Maine v. Connors Bros. Ltd., 2000-1 Trade Cas. (CCH) ¶ 72,937 (Me. Super. Ct. 2000) (Maine, in a consent agreement, permitted a Canadian sardine processing company to a acquire the assets of a Maine-based competitor);

Maryland v. Blue Cross & Blue Shield Ass'n, 620 F. Supp. 907, 909 (D. Md. 1985) (Maryland sued health insurers for price fixing and allocating markets, customers, and contracts by submitting non-competitive and collusive bids);

Massachusetts v. William Bayley, Ltd., 1983 WL 14914, (Mass. Super. Ct. Jan. 21, 1983) (Massachusetts sued defendant for exclusive dealing by requiring bid specifications for public construction and renovation projects specify exclusive use of the products of a certain manufacturer of security windows);

Michigan v. McDonald Dairy Co., 905 F. Supp. 447, 450 (W.D. Mich. 1995) (Michigan sued dairy companies on behalf of public schools for bid-rigging on contracts to supply milk to area school districts);

Minnesota v. Nat'l Beauty Supply Co., No. 736778, 1977 WL 18389 (D. Minn. June 9, 1977) (Minnesota sued five beauty supply wholesalers for price-fixing and eliminating discounts from wholesale prices of beauty supplies);

Mississippi v. Jackson Cotton Oil Co., 48 So. 300, 300 (Miss. 1909) (Mississippi sued two competing cotton seed oil manufacturers for a price-fixing conspiracy to limit the price of a commodity);

Missouri v. Poplar Bluff Physicians Group, Inc., No. CV195-393-CC, 1995 WL 788087 (Mo. Cir. Ct. Apr. 12, 1995) (Missouri sued a group of physicians who operated a medical clinic-partnership for conspiracy and attempted monopolization for the sale of prescription drugs and durable medical equipment to patients, nursing homes and residential care facilities);

Montana v. SuperAmerica, 559 F. Supp. 298, 299-300 (D. Mont. 1983) (Montana sued an oil company for a conspiring with its competitors to fix prices for gasoline);

Nebraska v. Associated Grocers, 332 N.W.2d 690, 691 (Neb. 1983) (Nebraska sued dairy product wholesalers, a retail grocer and individuals for price-fixing the sale of milk);

Nevada v. Merkley & Hankins, Inc., No. 20644, 1988 WL 247972 (D. Nev. July 6, 1988) (Nevada sued a gasoline and petroleum product wholesaler for fixing the resale prices of gasoline);

New Hampshire v. New Hampshire Grocers Ass'n, Inc., 348 A.2d 360, 360-61 (N.H. 1975) (New Hampshire sued a retail grocers association for attempts to coerce manufacturers and distributors to refrain from offering fresh baked goods to discount bakery stores);

New Jersey v. Morton Salt Co., 387 F.2d 94, 95 (3d Cir. 1967) (New Jersey filed suit in district court against seven corporations, seeking treble damages for violations of Sections 1 and 2 of the Sherman Act);

New Mexico v. Scott & Fetzer Co., Civil No. 81-054-JB. 1981 WL 2167 (D. N.M. Dec. 22, 1981) (New Mexico sued defendants for antitrust violations, in a case testing the state attorneys general ability to sue under the parens patriae provision of the Clayton Act);

New York v. St. Francis Hosp., 94 F. Supp. 2d 399, 402-03 (S.D.N.Y. 2000) (New York sued two New York hospitals for engaging in illegal price-fixing and market allocation through joint negotiations);

North Carolina v. P.I.A. Asheville, Inc., 740 F.2d 274, 276 (4th Cir. 1984) (North Carolina sued the owner of psychiatric facilities alleging that acquisition of particular facility violated the antitrust laws);

Ohio v. Louis Trauth Dairy, Inc., 925 F. Supp. 1247, 1248-49 (S.D. Ohio 1996) (Ohio sued several dairies, alleging conspiracy to set prices and allocate territories in sale of milk to school districts);

Oklahoma v. Allied Materials Corp., 312 F. Supp. 130, 131 (W.D. Okla. 1968) (Oklahoma sued corporations for conspiring to rig bids for liquid asphalt sales);

Oregon v. Fields & Endsley, Inc., No. 151873, 1984 WL 15669 (Or. Cir. Ct. Oct. 4, 1984) (Oregon sued defendants for price-fixing wholesale and retail gasoline);

Pennsylvania v. Providence Health Sys., Inc., Civ. A. No. 4:CV-94-772, 1994 WL 374424 (D. Pa. May 26, 1994) (Pennsylvania charged that three competing hospitals combining to manage the provision of health care would result in an anti-competitive concentration of market power);

Puerto Rico v. Wal-mart Puerto Rico, Inc., 238 F. Supp. 2d 395, 409 (D.P.R. 2002) (Puerto Rico sued to obtain a preliminary injunction to enjoin a retail chain from buying a chain of grocery stores);

Rhode Island v. Neptune Int'l Corp., Civil Action No. 80-4503, 1980 WL 4688 (R.I. Super. Ct. Dec. 30, 1980) (Rhode Island sued a manufacturer-wholesaler and retailer of furniture products for price-fixing and implementing exclusive dealing and refusal to deal agreements);

Loftis v. South Carolina Elec. & Gas Co., 604 S.E.2d 714, 715 (S.C. Ct. App. 2004) (South Carolina instituted an UTPA (consumer protection) action against SCE&G for routinely overcharging municipal franchise fees to a portion of its population);

South Dakota v. Cent. Lumber Co., 123 N.W. 504, 506 (S.D. 1909), *aff'd*, 226 U.S. 157 (1912) (South Dakota sued a lumber company for criminal and civil antitrust violations by forming a combination to restrain trade);

As the parentheticals in the footnote specify, many of these cases are local and involve local activity such as groceries, dairies, construction firms, and a varied list of manufacturers and retailers. The majority of the litigations assert claims for price-fixing and bid-rigging, but include other antitrust claims such as tying, monopolization, and exclusive dealing.

D. States Work Together with Federal Antitrust Enforcers

Even when states are not the lead or first-named plaintiff, states' participation adds value to the litigation, contributing to a more complete analysis. States help build a case by adding their knowledge of the local markets and familiarity with the local geography, help navigate through state agency and regulatory

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Tennessee v. Joe Stewart Body Shop, 1992-1 Trade Cas. (CCH) ¶ 69,748 (W.D. Tenn. 1992) (Tennessee sued auto body repair shop for attempting to fix the prices of repair services);

Texas v. Zeneca, Inc., No. 3-97 CV 1526-D, 1997 WL 570975, at *1 (N.D. Tex. June 27, 1997) (Texas led a multistate case against a pesticide manufacturer for conspiring with its distributors to fix resale prices);

Utah v. Univ. of Utah, 1994-1 Trade Cas. (CCH) ¶ 70,550 (D. Utah 1994) (Utah sued a state university hospital for exchanging wage information with other health care facilities concerning compensation paid to nurses, fixing prospective compensation, and discouraging others from negotiating with other third-party payers);

Vermont v. Densmore Brick Co., Inc., Civil Action File No. 78-297, 1980 WL 1846, at *1 (D. Vt. Apr. 10, 1980) (Vermont brought a state parens patriae action against a manufacturer of wood burning stoves for price-fixing);

Virginia v. Buckley Moss, Inc., Civil Action No. G-8998-2, 1983 WL 14948, at *1 (Va. Cir. Ct. Apr. 5, 1983) (Virginia sued a seller of decorative artwork for price-fixing the resale prices of its dealers);

Washington v. Larson, No. 39916-1-I, 1998 WL 141935 (Wash. Ct. App. Mar. 30, 1998) (Washington sued two pharmacy owners for price-fixing the prices that would be paid by insurers, third-party payers, or consumers for drugs);

West Virginia v. Meadow Gold Dairies, 875 F. Supp. 340, 343 (D. W. Va. 1994) (Action against two dairies alleging conspiracy to illegally and artificially raise price of milk supplied to school boards);

Wisconsin v. Marigold Foods, Inc., 1980 WL 4676, at *1-2 (Wis. Cir. Ct. Sept. 3, 1980) (Wisconsin sued a milk products firm for resale price-fixing selected dairy products).

overlays as in banking, health care, and insurance markets, and act as local counsel for their federal counterparts.[128]

From the perspective of the state, committing resources to a joint investigation is eminently reasonable. The marginal benefit is often worth the marginal cost. Within the investigation or litigation, the state can push to accomplish state goals. Attorneys general can bring specific attorney general tools to bear for the investigation or litigation as a whole, including subpoena power and the right to seek civil penalties, disgorgement, and other remedies.[129]

At the same time, a state's interest need not be protected only through joint action. Harm to the interests protected by the state can still occur if no other enforcer takes action. The federal antitrust laws give the attorney general the right to vindicate those interests.[130] Deciding whether to take action can involve probing whether the harm to those represented by the state can be "fixed," even if the transaction restrains, benefits, or is neutral in the rest of the country.[131] If parties refuse to "fix" the state's concern, that might illustrate that the transaction or restraint may be more about harming those represented by the state, as opposed to securing national or other benefits.[132]

When acting with others, states often focus on the rights of consumers, including the right to recover damage. States' *parens patriae* authority is the superior means of securing relief, particularly when returning monetary relief to consumers. States have gained much experience and have the tools to return money directly to consumers. In *In re Compact Disc Minimum Advertised Price Antitrust Litigation*,[133] for example, the states were instrumental in providing consumers with cash, while the FTC obtained injunctive relief.[134] In 1996, the attorneys general of several states began an

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[128] Calkins, *supra* note 2, at 679-84; ABA HANDBOOK, *supra* note 18, at 147-49.

[129] *See generally* Robert Hubbard, Non-Antitrust Offenses You Should Know: Remedies Pursued by State Attorneys General, Civil RICO Committee Program, ABA Antitrust Section spring meeting Apr. 2, 2003, *available at* http://www.abanet.org/antitrust/committees/state-antitrust/civilrico.pdf.

[130] *See supra* notes 21-45 and accompanying text.

[131] Constantine, *supra* note 40, at 180.

[132] *Id.*

[133] *In re* Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361, 2003 U.S. Dist. LEXIS 12663 (D. Me. July 9, 2003).

[134] *In re* Sony Entm't, Inc., 2000 FTC LEXIS 95, at *10-12 (F.T.C. Aug. 30,

investigation into whether distributors and retailers were illegally conspiring to stabilize or inflate or the prices of prerecorded music products through the adoption and implementation of Minimum Advertised Price ("MAP") policies.[135] The FTC initiated a parallel investigation and obtained consent decrees against the distributor defendants in 2000.[136] The states filed a complaint alleging that retailers and distributors conspired to fix the price of compact discs in violation of federal and state antitrust laws.[137] The case settled and the states recovered cash payments of $67.4 million dollars, as well as $75.7 million dollars worth of compact discs.[138]

States generally are better at getting consumers recovery than the competitive alternatives. The FTC's disgorgement remedy is used sparingly in antitrust matters.[139] The U.S. Department of Justice does not seek to get money to consumers injured by antitrust violations.[140] Federal enforcers simply do not—and probably should not—focus primarily on the monetary claims of consumers. When interacting with private counsel, states have pushed for greater consideration of consumers' interests. In the pharmaceutical cases representing end users, states have focused on consumers' interests, while class counsel focus on interests of third party payers.[141] In the vitamins antitrust litigation case,[142] class counsel and twenty-four states

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2000).

[135] *In re* Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197, 200 (D. Me. June 13, 2003).

[136] *Sony Entm't, Inc.*, 2000 FTC LEXIS 95 at *10-12.

[137] *Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. at 201.

[138] *Compact Disc Minimum Advertised Price Antitrust Litigation*, 2003 U.S. Dist. LEXIS 12663 at *5-6.

[139] Calkins, *supra* note 2, at 693.

[140] The Department of Justice arguably is entitled to a monetary remedy for consumers similar to the FTC's right to seek disgorgement in light of its right to injunctive relief under 15 U.S.C. § 25. Some cases endorse restitution or similar remedies for the victims of a violation if pursued by enforcers entitled to secure injunctive relief. Porter v. Warner Holding Co., 328 U.S. 395, 399-400 (1946); United States v. Moore, 340 U.S. 616, 619-20 (1951); Mitchell v. De Mario Jewelry, 361 U.S. 288, 296 (1960); S.E.C. v. Blavin, 760 F.2d 706, 712-14 (6th Cir. 1985).

[141] *See supra* note 90 and cases cited therein.

[142] *See supra* note 25 and cases cited therein. *See also supra* note 2. Spencer Weber Waller, *Symposium: Private Law, Punishment, and Disgorgement: The*

represented indirect purchasers, including states and consumers, and recovered $335 million dollars.[143]

Finally, any discussion of state enforcement from the perspective of the Antitrust Modernization Commission requires consideration of the litigation against Microsoft.[144] Much of the commentary on state antitrust enforcement discusses the states' role in the monopolization litigation against Microsoft.[145] Nonetheless, the litigation against Microsoft has generated commentary well beyond the relatively insular world of antitrust enforcement. Thomas Friedman has identified the litigation against Microsoft 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.[146] The critics, on the other hand, decry any antitrust action "involving the

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Incoherence of Punishment In Antitrust, 78 CHI.-KENT L. REV. 207, 221-25 (2003).

[143] Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 718-19 (2001). The first fifty pages of the Master Settlement Agreement in the Vitamins Antitrust Litigation for indirect purchasers is *available at* http://www.abanet.org/antitrust/committees/state-antitrust/vitamins1.pdf. The other four parts of that settlement are *available at* http://www.abanet.org/antitrust/committees/state-antitrust/vitamins2.pdf; http://www.abanet.org/antitrust/committees/state-antitrust/vitamins3.pdf; http://www.abanet.org/antitrust/committees/state-antitrust/vitamins4.pdf; and http://www.abanet.org/antitrust/committees/state-antitrust/vitamins5.pdf. The Master Settlement Agreement was filed in state courts throughout the country. The antitrust litigation pursuing damages against the vitamins cartel also included a settlement of the federal antitrust claims on behalf of direct purchasers. *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 255 (D.D.C. Feb. 25, 2002) (plaintiffs in this action represented all persons or entities who directly purchased the vitamins and choline chloride from defendant vitamin manufacturers such as feed mills, premix blenders, distributors, and brokers).

[144] United States v. Microsoft Corp., 87 F. Supp. 2d 30, 35 (D.C. Cir. 2000) (The U.S. Dept. of Justice and nineteen 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.).

[145] DeBow, *supra* note 1, at 267; First, *supra* note 2, at 1032-34; Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5, 9-10, 15 n.9 (2004); Calkins, *supra* note 2, at 676.

[146] Thomas L. Friedman, THE LEXUS AND THE OLIVE TREE, 357-58 (Farrar, Straus, & Giroux 2000).

most valuable company in the U.S. economy."[147] The passions extend to the work of the Commission—the Washington Post reports that Commission is sympathetic to antitrust defendants in general and Microsoft in specific.[148]

Much of this commentary lacks the broader perspective of the antitrust litigation against Microsoft. That broader perspective illustrates that the commentary focuses primarily on Microsoft being sued, not on the specifics of the antitrust claims. The federal antitrust monopolization investigation began in the Federal Trade Commission in 1990 and was transferred to the Antitrust Division of the United States Department, when the FTC reached a 2-2 deadlock and suspended the investigation.[149] The first governmental antitrust litigation focused on Microsoft's acquisition of Quicken, which was resolved by consent decree. The district court judge, Stanley Sporkin, rejected the consent decree.[150] The Antitrust Division appealed, the Court of Appeals reversed, and instructed that a different judge be assigned on remand, concluding that a "reasonable observer [would] question whether Judge Sporkin" could be unbiased.[151]

The next round involved the monopolization claims. The states joined the Antitrust Division in investigating and prosecuting Microsoft. The cooperation and coordination among the government enforcers was detailed and long-standing, through trial and appeal.[152] Microsoft was found by an en banc Washington D.C. Court of Appeals to have violated the antitrust laws and the new judge, Penfield Jackson, was also disqualified for the remand on remedies.[153] After a change of administration in Washington, the

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[147] DeBow, *supra* note 1, at 267.

[148] Jonathan Krim, *A Less Public Path to Changes in Antitrust*, WASH. POST, May 12, 2005, at E1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/11/AR2005051102087.html.

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

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

[151] *See generally Microsoft I.*

[152] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) [hereinafter *Microsoft III*].

[153] *See generally Microsoft III.* Microsoft appealed the District Court's finding of liability under §§ 1 and 2 of the Sherman Act and the various remedies. *Microsoft III*, 253 F.3d at 45-46. The Court of Appeals for the District of Columbia affirmed in part and reversed in part the District Court's judgment that Microsoft

Antitrust Division and nine states (the "Settling States") reached a settlement with Microsoft. Nine states and D.C. rejected that settlement (the "Litigating States") and pursued a remedies trial. Those Litigating States got less relief than they sought, most accepted that determination, West Virginia appealed and then settled, and Massachusetts pursued the appeal to decision.[154] The Court of Appeals and the district court both clearly held that Massachusetts was entitled to have its views heard.[155] Both the Settling States and the Litigating States monitor the resolution with Microsoft, regularly reporting to District Judge Coleen Kollar-Kotelly. At the same, the European Commission investigated and is taking action against Microsoft.

The list of government employees who have been in the cross-hairs for criticizing Microsoft is stunning. The antitrust enforcers include the Federal Trade Commission, Antitrust Division of the Department of Justice, twenty states, nine litigating states, two appealing states, and the European Commission. We are aware of only one other instance in which a federal judge was disqualified in an antitrust prosecution brought by a government enforcer. Amazingly enough, Microsoft succeeded in disqualifying two.

In the broad scheme of things, the effort to ensure that Microsoft complies with the antitrust laws has been a monumental undertaking. We are proud that the states have tried to do their part.

V. Conclusion

States have enhanced consumer choice and fostered competition in small and large markets through investigation, litigation, and resolution of many antitrust matters. States have also furthered antitrust jurisprudence through litigation on both the state and federal levels. The litigation record could not be clearer as to the importance of state enforcement of the antitrust laws in our federalist system.

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violated § 2 of the Sherman Act. *Id.* at 46.

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

[155] We note that now that Massachusetts has been heard (and its arguments rejected)—the criticism of state enforcement appears to have subsided and critics now focus on the actions in Europe taken against Microsoft.

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