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# Making the Best of a Good Situation: Modernizing State Antitrust Enforcement

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## MAKING THE BEST OF A GOOD SITUATION: MODERNIZING STATE ANTITRUST ENFORCEMENT

Harry First\*

### I. Introduction

On June 27, 2001, the Chairman of the House Judiciary Committee, F. James Sensenbrenner, introduced a bill to establish an “Antitrust Modernization Commission.” The purpose of the Commission would be “to investigate and to study issues and problems relating to the modernization of the antitrust laws.” In a press release issued that day Sensenbrenner named three areas he wanted the commission to address: “1) the role of 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.”<sup>1</sup>

How did state antitrust enforcers—the Rodney Dangerfields of the antitrust enforcement system—get placed on the national agenda next to intellectual property and globalization? The answer, of course, is *Microsoft*, the reason for each of the items on Representative Sensenbrenner’s list. In an interesting, but not disconnected, coincidence, the day after Sensenbrenner introduced his bill the D.C. Circuit handed down its decision in *Microsoft*’s appeal of the Windows 95/98 case, brought by the U.S. Justice Department and twenty states and the District of Columbia.

Sensenbrenner’s bill reflected a growing criticism at the time with regard to how the antitrust laws were being enforced against *Microsoft*, and, specifically, a concern for the role that enforcers other than the Justice Department were playing in the *Microsoft* litigation. Indeed, nine months before Sensenbrenner introduced his bill, Judge Richard Posner—who had earlier been unsuccessful in his effort to mediate a settlement in the governments’ *Microsoft* case—presented a paper examining the application of antitrust in the new economy. Posner argued that the problem was not antitrust doctrine itself, which was “supple enough.” The problem was on the “institutional side” of antitrust. Enforcement agencies and courts lacked “adequate technical resources” and “do not move fast enough,” Posner argued, problems aggravated by multiple enforcement: “No sooner does the Antitrust Division bring a case, but the states and now the European Union are likely to join the fray, followed at a distance by the antitrust plaintiffs’ class-action bar.” One reform that

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\*Charles L. Denison Professor of Law, New York University School of Law. I thank Stephen Houck and Jay Himes for their comments on an earlier draft. I was Chief of the Antitrust Bureau of the New York State Attorney General’s Office from May 1999-May 2001, during which time I was responsible for supervising New York’s efforts in the *Microsoft* litigation.

<sup>1</sup>See [http://judiciary.house.gov/Legacy/news\\_062701.htm](http://judiciary.house.gov/Legacy/news_062701.htm). For Sensenbrenner’s remarks on introducing the bill, see 80 *Antitrust & Trade Reg. Rep.* (BNA) 614 (June 29, 2001).

Posner urged: forbid the states from bringing antitrust suits except where they are injured as purchasers.<sup>2</sup>

The Antitrust Modernization Commission did not end up recommending anything nearly as drastic as what Posner or a few other critics had earlier proposed, but its inquiries did surface and advance the debate on the proper role of states in our antitrust enforcement system. In the end, the Commission did no harm; it left to the future the possibility of changes that might do good.

In the first part of this paper I review the AMC's recommendations and some of the alternatives that were raised but either not adopted or not fully explored. In the second part I will discuss the future for state antitrust enforcement. My argument here is for a positive role for state antitrust enforcement, with some suggestions on how that enforcement could be improved rather than trimmed back.

## II. The AMC's Approach

### A. Recommendations

The Commission adopted seven recommendations relating to state antitrust enforcement and one recommendation implicating state antitrust law, although state antitrust law is not mentioned directly in the recommendation.

The two most critical recommendations, in light of the prior critique of state enforcement, deal with the question whether any statutory change should be adopted to restrict the states' ability to bring merger cases or to sue for civil relief under federal antitrust law (whether for injunctions or monetary damages on behalf of their citizens). The Commission recommended no statutory change in either area, but with substantial dissent on both points.<sup>3</sup>

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<sup>2</sup>See Richard A. Posner, *Antitrust in the New Economy* at 1, 13 (unpublished draft, Aug. 23, 2000) (authors' files). This speech was subsequently expanded and published in 68 *ANTITRUST L.J.* 925 (2001). Judge Posner later argued that the states should be stripped of their authority to bring antitrust suits under either state or federal law, or, at least, that the Congress should preempt state antitrust law insofar as it might affect interstate or foreign commerce. See Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 260-62 (Richard A. Epstein & Michael S. Greve, eds., 2004). See also *Antitrust in the New Economy*, 68 *ANTITRUST L.J.* at 940.

<sup>3</sup>See AMC REPORT at 192 (Recommendation 32, civil non-merger enforcement), 198 (Recommendation 34, mergers). Five of the twelve Commissioners dissented on the merger recommendation. Although only three formally dissented on the non-merger recommendation, two noted their view that the Supreme Court, under current law, would restrict the states' ability to seek equitable relief for conduct that does not result in state-specific injury. See *id.* at 192 n.\*. Note that in earlier tentative votes, six (possibly seven) Commissioners indicated their support  
(continued...)

The arguments over these two recommendations finally devolved into a single question: Is there a problem here? For the critics of state antitrust enforcement, the problem may have been exemplified by Microsoft, but the broader argument rested mostly on the theoretical potential for state antitrust enforcement to diverge from appropriate federal policy. Although many proponents of state antitrust enforcement view the potential for divergence as a positive reason for state antitrust enforcement, much of the argument in favor of state antitrust enforcement actually stressed the lack of empirical support for anything more than sporadic divergence between state and federal enforcers. Supporting this no-conflict argument were a number of efforts to assemble a data set of state antitrust enforcement actions, in particular the effort of the National Association of Attorneys General to survey all state antitrust enforcers and put together a list of case filings and outcomes. Although no one was able to assemble as comprehensive a statistical picture of state antitrust enforcement as the Justice Department's Antitrust Workload Statistics, nevertheless, the picture that emerged in the Commission's report was a generally comforting one: In non-merger enforcement the approaches of state and federal enforcers were "broadly consistent." In merger enforcement, the states played "useful roles," with no more than "two or three" examples of state enforcement that could be considered responsive to concerns other than competition.<sup>4</sup> In good lawyer-like fashion, the AMC's Report essentially concluded that those advocating legislative change had not carried their burden of proof.

The remaining five recommendations on state antitrust enforcement are more targeted. Two attempt, in effect, to shore up what the Commission saw as desirable aspects of current practice. For civil enforcement, the recommendation is to focus primarily on local matters.<sup>5</sup> For merger enforcement, it is generally to encourage "federal and state" enforcers to coordinate better, followed by three more specific recommendations for achieving this coordination—"harmonize" application of antitrust law, particularly on mergers, make consistent data

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<sup>3</sup>(...continued)

for recommending a statutory change in the allocation of merger enforcement. *See* Enforcement Institutions - States Discussion Outline, [http://govinfo.library.unt.edu/amc/pdf/meetings/061114\\_EnfInstStateDisc2dSuppOutline.pdf](http://govinfo.library.unt.edu/amc/pdf/meetings/061114_EnfInstStateDisc2dSuppOutline.pdf) (Nov. 10, 2006) (six tentatively supported right of first refusal; one tentatively supported limitation to localized impact); Supplemental Enforcement Institutions-States Discussion Outline, <http://govinfo.library.unt.edu/amc/pdf/meetings/EnfInst-StateSupplOutline060720circ.pdf> (July 20, 2006).

<sup>4</sup>*See* AMC REPORT at 194, 199, 200. For examples, *see id.* at 200 n.113.

<sup>5</sup>*See id.* at 192 (Recommendation 33).

requests, and have the states adopt a model law on confidentiality agreements.<sup>6</sup> Omitted from the non-merger enforcement recommendations, but included in the Report, is a conclusion that no change is necessary regarding state power to seek monetary damages as *parens patriae* under the Hart-Scott-Rodino Antitrust Improvements Act.<sup>7</sup> Omitted from the merger enforcement recommendations, but noted in the dissenting votes of three Commissioners, is a recommendation that merger harmonization be achieved through state adoption of the federal agencies' merger guidelines.<sup>8</sup>

The Commission's seventh recommendation involves indirect purchaser suits, one of the most important issues on the Commission's agenda. Because the states are now free to enact state indirect purchaser statutes, permitting plaintiffs to bring such suits in numerous state fora, an important question is whether there can or should be a uniform federal solution, without regard to whether one wants indirect purchasers to have standing or not. The Commission's recommendation is to allow indirect purchaser suits and to allow ready removal of state cases to federal court and consolidation with direct purchaser cases for pretrial and trial phases.<sup>9</sup> But the Commission did not recommend preemption of state indirect purchaser statutes: "[P]rinciples of federalism and practical political concerns counsel in favor of deference to the clear preference expressed by more than thirty-five states that allow indirect purchasers to pursue relief."<sup>10</sup>

## B. Exploring the Options

The dissents from the Commission's Recommendations, as well as formal comments and testimony the Commission received, indicate that there was a broad range of possibilities open to the Commission which were rejected or, perhaps, not fully pursued. I would put these proposals into three categories: authority stripping, general case allocation rules, and first-refusal rights.

### 1. Authority stripping

States could be stripped of their authority to enforce antitrust laws in two ways. Congress could alter federal law to deny the states standing to bring suit under federal antitrust law, including *parens patriae* suits for damages. Congress

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<sup>6</sup>*See id.* at 198, 200-203 (Recommendations 35, 36a, b, and c).

<sup>7</sup>*See id.* at 196.

<sup>8</sup>*See id.* at 200 n.\*.

<sup>9</sup>*See id.* at 270-71 (Recommendation 47).

<sup>10</sup>*Id.* at 273. Four Commissioners recommended the preemption of state indirect purchaser statutes, although one of them favored a federal indirect purchaser claim. *See id.* at 266 n.\*, 271 n.\*.

could also (or separately) preempt all state antitrust law. Although some academic commentators (primarily Richard Posner) have come close to advocating both approaches, only one Commissioner proposed preempting state antitrust law.<sup>11</sup> The Commission's report, however, does not discuss this possibility, taking as a given the Supreme Court's prior rejections of preemption arguments in antitrust cases.<sup>12</sup>

The Commission gave more serious consideration to proposals to strip the states of authority to enforce federal antitrust law against mergers or to seek equitable or monetary relief under federal law. The proposals to restrict state merger and equitable remedy enforcement were bottomed on concerns for interstate spillover effects and coherence in national antitrust policy (it is unclear what the concerns were regarding state *patria* suits for money damages). Although these concerns could be met by a complete withdrawal of a state's right to bring suit in these areas, much of the discussion in the Commission's Report was actually focused on allocating responsibility between federal and state enforcers. Authority stripping was not pursued as a serious option.<sup>13</sup>

## 2. General case allocation rules

A more limited approach to restricting state enforcement power would be to adopt a set of rules which allocate certain cases to federal enforcers and others to state enforcers. The most obvious way to split enforcement is between "national" and "local matters." Such a split would have the virtue of connecting with the major objections to state antitrust enforcement, state spillovers and conflicts with federal enforcement policy.

The problem with a national/local split is that it raises a difficult line drawing question. Many national merger transactions, particularly those which involve distribution at the retail level, have local market effects—natural gas pipelines, funeral homes, supermarkets, airlines, even business software. Similarly, Section 1 and Section 2 cases can involve "national matters" but with direct local effects—the FTC's proceeding against Unocal for monopolizing the technology market for producing low-emission gasoline for sale in California would be a good example, resale price maintenance by a national manufacturer of belts and handbags affecting a local store would be another. Of course, one could try to operationalize the national/local line by allocating to federal enforcers cases that involve interstate commerce and allocating to state enforcers intrastate-only commerce. Or, in a slightly more expansive version of this line,

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<sup>11</sup>See *id.* at 444-45 (Statement of John Warden).

<sup>12</sup>See AMC REPORT at 185.

<sup>13</sup>For a summary of the proposals see Memorandum from AMC Staff to All Commissioners, Enforcement Institutions – States Discussion Memorandum, May 19, 2006, available at [http://govinfo.library.unt.edu/amc/pdf/meetings/EnfInst\\_State\\_DiscMemo\\_pub.pdf](http://govinfo.library.unt.edu/amc/pdf/meetings/EnfInst_State_DiscMemo_pub.pdf).

one could allocate to the federal enforcers cases whose effects are not limited to a single, or small group of states, and to the states, ones that are so limited.<sup>14</sup> Taking this approach, however, would effectively limit state antitrust enforcement to the most local of matters—Chinese-language tours of lower Manhattan so long as no customers came from New Jersey (or, maybe, New Jersey, Connecticut, and Maryland). To keep state enforcers fully out of these matters, however, preemption of state antitrust law would also be required where some effects or conduct are “extra-territorial.” Otherwise, state enforcers could end-run the effort to remove them from antitrust enforcement by just bringing cases in state court under state law.

A somewhat different way to allocate authority would be by type of case. Under this approach states might be restricted to bringing cases involving only the clearest violations, such as price fixing, boycotts, or market allocation agreements.<sup>15</sup> This approach was presumably directed to the concern that state enforcement agencies are understaffed and prone to pursue antitrust cases that might lack clear consumer injury. Whatever the merits of the critique, however, writing the rules that could insure such an allocation could prove problematic, particularly if the desire were to confine the states to horizontal agreements.

By way of comparison, the European Commission, in its 2004 “modernization” effort, chose a rules allocation approach for dividing responsibility between the Commission and state enforcement agencies (now denominated “National Competition Authorities”). Prior to the modernization regulation, the Commission had divided responsibility fairly clearly between cases involving Community effect (for the Commission) and cases with local effect (for member states). The modernization regulation, however, sought to have member state enforcement agencies play a greater role in competition enforcement policy than before, establishing a “network of public authorities” consisting of the Commission and the NCAs.<sup>16</sup> The NCAs are given full power to enforce Articles 81 and 82 of the EC Treaty, and national courts given full power to apply both Articles.<sup>17</sup> The modernization Regulation provides that the Commission and the member state competition authorities “shall apply the Community competition rules in close cooperation.”<sup>18</sup> To carry out this more cooperative effort, the Commission subsequently adopted somewhat complex

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<sup>14</sup>See Staff Memorandum at 13.

<sup>15</sup>See, e.g., Separate Statement of Dennis Carlton, AMC REPORT at 400.

<sup>16</sup>See Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1, rec. 15.

<sup>17</sup>See *id.*, arts. 5, 6.

<sup>18</sup>See *id.*, art. 11(1); see also *id.*, art. 15 (cooperation with national courts).

rules for allocating cases to the competition authority that is “well placed” to act and for coordinating NCA actions.<sup>19</sup> In general, however, the Commission is “particularly well placed” if the practices involved have competitive effects in “more than three Member States” or if the “Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.”<sup>20</sup> Once the Commission initiates proceedings, however, the NCAs are relieved of their “competence” to apply Articles 81 or 82 (although there is still some room for applying domestic law).<sup>21</sup>

### 3. First refusal rights

A third approach would give the federal enforcement agencies some sort of right of first refusal in antitrust cases.<sup>22</sup> The narrowest approach here would simply involve state notification to the federal enforcement agency, with some time limit within which the federal agency could act or decline to act. A declination would then leave the state free to act. A stronger form of this approach would allow the federal enforcement agency to block the states from acting even if the federal agency did not bring suit (perhaps allowing the federal government discretion to refer the matter to the states even though it did not act). These approaches would reduce or eliminate inconsistencies in government antitrust enforcement, as well as proliferation of antitrust proceedings (although neither would do anything about similar effects from private litigation). The ability of the federal agencies to block state enforcement even when the federal agency does not want to bring suit is, of course, a particularly powerful way to insure uniformity where the federal enforcers believe that no antitrust enforcement is superior to antitrust enforcement.

First refusal rights present numerous implementation problems. There are two federal enforcement agencies—which one would get to make the decision? Suppose the federal agency chose to act, opening an investigation, but subsequently closed the investigation? Should a negative decision be supported with some kind of competitive impact statement, or would a simple “no” be enough? Would the state enforcer then also be barred from bringing suit under state law? Or from filing objections before state or federal regulators responsible from reviewing the conduct as well (for example, mergers in regulated industries).

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<sup>19</sup>The formal allocation of responsibility is set out in Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43.

<sup>20</sup>*See id.* at ¶¶ 14, 15.

<sup>21</sup>*See* Reg. 1/2003, art. 11(6).

<sup>22</sup>*See* AMC Staff Memorandum, *supra*, at 14-15 (mergers), 24 (*parens patriae*).

### C. So What Happened?

Given scholarly concerns about state enforcement, the initial impetus to establish the AMC, and the broad range of alternative approaches suggested to the Commission, what happened? How did the Commission end up accepting the status quo?

I offer three hypotheses.

#### 1. If it ain't broken...

The first hypothesis comes from the text of the Report itself. By and large the Commission did not find that there was much of a problem, in fact. True, there were some differences on mergers between the states and the federal enforcement agencies; but, for more than a decade the states have worked with federal enforcers, not against them, including most recently the Justice Department's litigation in the Oracle/PeopleSoft merger and the FTC's litigation in Arch Coal. The major disagreement in non-merger enforcement has been on vertical restraints, but that did not even become clear until *Leegin*, decided after the Commission's Report was issued. In any event, actual enforcement in RPM cases has been quite modest—by my count, the states filed only seven such cases in the decade between 1995 and 2004.<sup>23</sup>

Closely related to “if it ain't broken, don't fix it” is “if it ain't important, don't bother.” Whatever concerns that *Microsoft* raised with regard to state involvement in major antitrust matters, closer examination of the states' enforcement record showed that *Microsoft* was an unusual case in terms of national impact. Much of the states' enforcement efforts have taken place on smaller stages, involving local companies and localized markets. These cases have raised no national controversy. Why bother ending the states' ability to bring them, particularly if many of them involve price fixing or bid rigging, with limited economic impact and which couldn't have been bad to bring in any event?

#### 2. The politics of federalism

The Commission's Report acknowledges the politics of federalism only when discussing the indirect purchaser problem. State Illinois Brick “repealer” statutes are clear statements of state policy regarding the desirability of allowing victimized consumers to sue for their injuries arising from violations of the antitrust laws. In not recommending preemption of these statutes the Commission recognized both the policy strength of this legislative decision and the practical political problems that an attempt at preemption might raise.

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<sup>23</sup>See Statement of Harry First Before the Antitrust Modernization Commission, Oct. 26, 2005, at 22 (Table 5), [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Statement-First.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf).

The principles and politics of federalism were not mentioned in discussing the states' overall role in antitrust enforcement, but any proposal other than maintaining the status quo would have necessarily raised them. Whether the Commission had recommended authority stripping, case allocation rules, or a first-refusal system, some legislation would have been required to take away state enforcement power, at least if the recommendation were to move beyond the hortatory. Not only was the affirmative case for doing so weak, but proponents of change would have also encountered the deep politics of federalism. State antitrust enforcement predates the federal effort, had been stronger than the federal effort in its early days, and had, from time to time, become visible when federal efforts receded. Many believe that this backstopping is necessary to counteract excessive federal control, or, more accurately, excessive federal weakness, implicating the basic structure of federalism.

Underlining the broader political issue was the fact that antitrust was not the only area at the time in which weak federal enforcement was being counterposed with stronger state enforcement. The issue had been raised in environmental protection and, most clearly, in financial industry regulation, where New York and Massachusetts had moved aggressively to deal with conflicts of interest and fraudulent practices in the securities industry while the SEC lagged far behind. Indeed, at the same time that the Commission was considering the issue of state antitrust enforcement the securities industry was attempting—and failing—to get Congress to preempt state regulation in securities matters.<sup>24</sup> Congress would certainly have placed a proposal to preempt state antitrust enforcement in the broader context of a general policy debate over weak federal enforcement and the need for the states to step in.

### 3. The Commission's overall approach to modernization

President Eisenhower, at the establishment of the 1955 Attorney General's National Committee to Study the Antitrust Laws, expressed his hope that the study would “provide an important instrument to prepare the way for modernizing and strengthening our laws to preserve American free enterprise against monopoly and unfair competition.”<sup>25</sup> When that Committee finished its study, Louis Schwartz, in his famous dissent, wrote critically of the Committee's work: “The central thread of the Majority Report unwinds from a core of belief

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<sup>24</sup>See, e.g., Landon Thomas, *States, Intent on Regulating, Look at Morgan*, N.Y. TIMES, July 15, 2003, at C1 (describing state criticism of proposed federal “Securities Fraud Deterrence Act” as an effort to “broadly denude state regulators” of powers used to investigate conflicts of interest between research analysts and investment bankers).

<sup>25</sup>1955 Report at iv.

that the competitive situation in this country is satisfactory, and that the antitrust laws require modification chiefly to temper their rigor.”<sup>26</sup>

The AMC started with a rather different modernization charge—Representative Sensenbrenner was clearly not concerned about protecting free enterprise against monopoly—but the “central thread” of the AMC’s Report could be characterized in roughly the same terms as Schwartz characterized the 1955 effort: things are mostly satisfactory and the chief concern is to “temper the rigor” of antitrust and its enforcement.

The Commission’s approach to the institutions of state enforcement reflects this “temper the rigor” tilt. There is a recognition of the counterweight role that the states played in the early days of antitrust, but no discussion about whether that is still a necessary enforcement role (indeed, whether it has proved necessary in *Microsoft* itself). The thrust of the Report is consistency with the federal effort, without exploring whether that effort is too weak, and a direction to the states to get on board with federal approaches (“harmonize” application of substantive antitrust law in mergers, for example). The states’ appropriate role, particularly in non-merger enforcement, is to stick to local conduct and effects.<sup>27</sup>

In this context, “increase the rigor” was not on the agenda. Had it been, the Commission might have addressed ways in which to strengthen state antitrust enforcement, for example, by increasing the resources available to the states or, even, by amending Hart-Scott to give states access to the documents that merging parties produce for the federal agencies, thereby solving the document production problem in mergers. But the Commission ended up deciding that state enforcement was not, in the end, all that rigorous. There was then little to temper. The status quo was fine.

### III. Modernizing State Antitrust Enforcement

#### A. The Good Situation

##### 1. The Case for State Enforcement

The debate over state antitrust enforcement is basically about whether antitrust enforcement should be centralized or decentralized. A number of arguments support decentralization of enforcement. One is that decentralization

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<sup>26</sup>*Id.* at 390.

<sup>27</sup>See AMC REPORT, Recommendation 33, at 182. Three Commissioners did not join this recommendation, although they did not explain their reasons. *Cf.* Separate Statement of Commissioner Jacobson, joined by Commissioner Valentine, at 414-15 (discussing need for multiple enforcers, including the states, as a check on federal executive decisions).

of the institutions of antitrust enforcement produces policy diversification.<sup>28</sup> Different agencies can reflect different constituencies and interests; they can also develop different competencies and specializations. This policy diversification reduces the risk that violations will go unremedied. A second argument is that different enforcement institutions may have different resource commitments and constraints. It may be the case that two organizations with different sources of funding or somewhat different missions may be able to augment antitrust enforcement in a way that a single agency could not. A third argument relates to the constitutional structure of public enforcement agencies. Central enforcement agencies often need the factual and political support of more local agencies, particularly when cases involve local interests. The availability of decentralized enforcement institutions can provide that support.

Those who favor centralization argue the advantages of policy uniformity. A single agency increases the coherence of policy choices by avoiding contradictory results. The broader the jurisdictional competence of a single agency, the better able it will be to internalize all the social costs and benefits of any particular decision, leading to better policy choices. With one agency there is no opportunity for a complainant, who may want to use government antitrust enforcement to restrict the conduct of a more successful business rival, to engage in forum shopping to seek the most pro-enforcement agency. A single enforcement agency might also have the size to achieve economies of scale in its operations, making it a more efficient enforcer. Finally, a centralized agency would reduce compliance costs. Not only would regulatory duplication be avoided, but regulatory uncertainty would also be avoided. Parties would have a clearer understanding of enforcement policies and could be more certain as to whether particular business practices comply with the law or not.

The dispute between decentralization and centralization needs both theory and empiricism for its resolution. The theory part involves thinking about the effects of competition in antitrust enforcement. As I have argued elsewhere, there are four dimensions along which competition can occur and which argue in favor of a more decentralized system:<sup>29</sup> 1) yardstick competition, which enables the performance of one agency to be measured against its peers; 2) regulatory competition, which pressures legislators to compete for votes by offering more attractive regulatory regimes; 3) innovation competition, in which competitive pressures may move maverick players to experiment, forcing dominant players to copy successful experimental outcomes; and 4) norms competition, in which the presence of different enforcement views helps insure

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<sup>28</sup>See William E. Kovacic, *Toward A Domestic Competition Network*, in COMPETITION LAWS IN CONFLICT, *supra*, at 321-22.

<sup>29</sup>See Statement of Harry First Before the Antitrust Modernization Commission, *supra*, at 10-16.

the vigorous policy debate which has been so critical in shaping antitrust enforcement norms.

I think that the empirical record supports not only the theoretical case for competition, but also generally favors the broader arguments in favor of diversification. I say this recognizing that each side of the debate generally has its own specific examples and counter-examples, and recognizing that some aspects of the debate are simply unproved (scale economies in enforcement and uncertainty costs connected to regulatory diversity, for example).

## 2. Recent state efforts

Of course, the empirical record is never closed, so it may be useful to review some of the more recent state efforts, which occurred after the AMC's hearing on state enforcement.

### a. *Microsoft*

The on-going saga of the *Microsoft* litigation, currently in its remedial phase, must now be seen as a demonstration of the beneficial effects of diversity in antitrust enforcement, and, specifically, of state participation. I refer here to Judge Kollar-Kotelly's January 2008 decision to extend parts of the remedy decree entered in the states' case, *New York v. Microsoft Corp.*

The final judgments originally entered in the states' case, as well as the final judgment entered in the Justice Department's case, had been set to expire five years after their entry, that is, on November 12, 2007. In May of 2006, all the parties agreed to a two-year extension of part of the decree dealing with server-to-desktop protocols because Microsoft had still not developed the protocol disclosures.<sup>30</sup> In October of 2007 some (but not all) of the state plaintiffs filed motions to extend the entirety of the state judgments until November 12, 2012. The Justice Department not only did not join this motion, but it did not even join Microsoft and the moving states in seeking a three-month stay of the expiration of the decree to permit the court sufficient time to decide the full extension motion and it filed an amicus supporting Microsoft's position opposing the extension.<sup>31</sup> As a result, a substantial part of the decree in the United States' case—dealing with issues such as retaliatory conduct, API

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<sup>30</sup>The history of Microsoft's non-compliance with the protocols disclosure requirement is set out in Harry First & Andrew I. Gavil, *Reframing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641, 700-02.

<sup>31</sup>See Brief of the United States as Amicus Curiae in Opposition to the Motions to Extend the States' Final Judgments, *New York v. Microsoft Corp.*, Civ. Action No. 98-1233 (CKK) (Nov. 9, 2007), available at <http://www.usdoj.gov/atr/cases/f227500/227585.pdf>

disclosure, desktop icon placement, and end-user defaults—lapsed on November 12, 2007.<sup>32</sup> But these sections did not lapse in the states' judgments.

Judge Kollar-Kotelly ultimately decided to grant a two-year extension of the full decree (not the five years the states sought, however) on the ground that the decree had to be fully operable in all its provisions if the decree were ever to have a chance of achieving its potential of lowering the barriers to entry into the desktop operating system market. Microsoft's "inexcusable delay" in complying with the protocols disclosure requirements "deprived the provisions of the Final Judgments the chance to operate together as intended [and] is entirely incongruous with the original expectations of the parties and the Court."<sup>33</sup> The "parties," of course, would include the Justice Department even though the Department was no longer in Court to speak up in favor of the remedial decree to which it had agreed.

What is significant is not just that without the states' participation the remedial decree would never have been extended. More to the point are the provisions of the decree that Judge Kollar-Kotelly singled out for praise. One was the "Technical Committee" established under the consent judgments and which has been deeply involved in compliance issues: "In the Court's view, the TC has truly become one of the most successful aspects of the Final Judgments, because it has been invaluable in facilitating the Plaintiffs' enforcement efforts."<sup>34</sup> The other is the protocols disclosure requirement, which the judge described as "the cornerstone of the Court-ordered and Court-approved remedies and, as the Final Judgments' most forward-looking provision, was the basis on which the parties and the Court aspired to have the applications barrier to entry broken down over time."<sup>35</sup>

The states were primarily responsible for the inclusion of these provisions. Had it not been for their insistence, particularly with regard to the protocols disclosure, these provisions would not have been in the original settlement to which the Justice Department, Microsoft, and the nine settling states agreed in 2001. Score one for diversity in enforcement and for the states' effort in particular.

#### b. Other cases

State enforcers continued their litigation against branded pharmaceutical companies for a variety of anticompetitive actions intended to keep generics out of the market. In 2006 all 50 states and the District of Columbia settled

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<sup>32</sup>See *New York v Microsoft Corp.*, slip op. at 42 (filed Jan. 29, 2008).

<sup>33</sup>See *id.* at 38, 52.

<sup>34</sup>*Id.* at 26.

<sup>35</sup>*Id.* at 71.

proprietary claims for \$14 million.<sup>36</sup> Three suits (involving eleven states) were filed against insurance companies for their practice of complementary bid rigging, two of which were settled.<sup>37</sup> In *Leegin* the states filed an amicus brief and participated quite usefully in oral argument. The states have also filed a brief in opposition to reopening the FTC's decree enjoining Nine West from engaging in resale price maintenance and have filed an amicus in support of the FTC's decision in *Rambus*. New York has opened an investigation into Intel's pricing practices, an investigation that may implicate some of the same concerns as the *Microsoft* litigation in light of a similar proceeding underway in the European Commission and the potential for FTC action.

Not every case has gone well. Claims for damages for price fixing DRAMs have not been treated favorably in the early stages of that litigation, with the district court dismissing parts of forty states' claims involving indirect purchases and parts of New York's claims on behalf of state agencies.<sup>38</sup>

#### B. Making the Best of A Good Situation

The AMC's Report points out what everyone knows about state enforcement—it is under-resourced. Exact budgetary numbers are not really available, but the Commission was able to refer to one study presented to it by the U.S. Chamber of Commerce.<sup>39</sup> According to this study, in 2005 California had the largest state budget, but it was only \$6 million with 23 FTEs, in contrast to a combined DOJ/FTC budget of nearly \$140 million and more than 1100 FTEs. What these numbers hide, though, is the extent to which the budgets include general overhead allocations and the FTEs include clerical personnel. Both are true in California, for example, thus reducing their actual enforcement

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<sup>36</sup>See *Maryland v. SmithKline Beecham Corp.*, No. 2:06-cv-01298-JP (E.D.Pa Mar. 27, 2006).

<sup>37</sup>See *New York v. Liberty Mutual Holding Co.* (state court) (2006), [http://www.naag.org/antitrust/search/viewCivilLitigation.php?trans\\_id=465](http://www.naag.org/antitrust/search/viewCivilLitigation.php?trans_id=465); *In re Prudential Settlement* (New York; \$16.5 million in restitution to policy holders, \$2.5 million civil penalties), [http://www.naag.org/antitrust/search/viewCivilLitigation.php?trans\\_id=489](http://www.naag.org/antitrust/search/viewCivilLitigation.php?trans_id=489); *Texas v. American International Group Inc.*, No. D-1-6v-08-000197 (98th Dist. 2007) (\$13 million settlement involving claims by ten states), [http://www.naag.org/antitrust/search/viewCivilLitigation.php?trans\\_id=510](http://www.naag.org/antitrust/search/viewCivilLitigation.php?trans_id=510).

<sup>38</sup>See *California v. Infineon Techs. AG*, 2007 U.S. Dist. LEXIS 67475, 2007-2 Trade Cas. (CCH) ¶75,889 (N.D. Cal. 2007); *In re Dynamic Random Access Memory Antitrust Litigation*, 2007 U.S. Dist. LEXIS 67948, 2007-2 Trade Cas. (CCH) ¶75,873 (N.D. Cal. 2007).

<sup>39</sup>See Letter from Chamber of Commerce of the United States of America to Antitrust Modernization Comm'n at 6 (Nov. 8, 2005), [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/exclus\\_conduct\\_pdf/051108\\_US\\_Chamber\\_of\\_Comm-Enforc\\_Inst.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/exclus_conduct_pdf/051108_US_Chamber_of_Comm-Enforc_Inst.pdf).

resources even below even what the study reports. Indeed, further inquiry would show that beyond a lack of financial resources, no state other than New York has had any economists on staff in recent years (and even New York has been without one for more than a year, having difficulty filling the position after its former economist resigned).

The Commission took these resource limitations as a given, however. The only apparent mention of increasing state resources was a Staff Memorandum suggestion of some centralized NAAG office with lawyer and economist experts to assist in merger review, but this proposal was not mentioned in the AMC Report.<sup>40</sup> Even this suggestion was limited to merger enforcement, likely reflecting more a concern with “improper” merger decisions that do not take adequate account of current economic views than with a desire to increase state capacity to bring more merger cases.

This failure to discuss ways to improve and increase state antitrust enforcement is consistent with the general “temper the rigor” approach of the Commission. But a true agenda for modernization need not be so limited. Rather, it would accept the “good situation” of multiple enforcement and try to make it better.

Improvement of state enforcement requires consideration of at least three issues: centralization, planning, and resources.

State enforcement is now too decentralized. Although there are good arguments for decentralization as a general matter, units can also be too small to be efficient. The states have dealt with this to some extent through multistate actions in which one or several states take the lead in the litigation, allowing lesser-resourced states to contribute something to the litigation while getting the benefit of the broader effort. Multistate actions have high coordination costs, however, and it is difficult to engage in projects beyond immediate litigation. The states could retain the benefits of individual state action (much state litigation is done this way) but centralize more resources for litigation and planning. Doing it through NAAG is the most obvious solution, but there is no reason to limit these functions to merger enforcement.

The second is planning, development, and evaluation. This is a challenge for all enforcement agencies. The easiest way for regulators to set agendas is to be reactive to issues as they arise. This is particularly true when much of an agency’s mission is enforcement, an *ex post* task. Even that task, however, need not be a passive one. All enforcement agencies spend some resources looking for areas to investigate and antitrust is no different. As with multistate actions, the states have found some mechanisms for planning and development but, as a general matter, state agencies have lacked the time and resources to engage in this effort on an on-going basis.

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<sup>40</sup>See Staff Memorandum, *supra*, at 18-19.

Planning an enforcement agenda poses some particularly important challenges for state enforcers. State enforcers have made an effort to articulate enforcement principles that vary somewhat from the orthodoxy of the federal agencies, but it is sometimes difficult to discern how those principles inform current practice. When the states' analytical framework differs from the federal agencies, better articulation could allow the states to increase their contribution to antitrust development, even if only in the policy space. But it may be that the problem is not whether the states analyze cases under some framework that differs from the federal agencies—mergers might be an example where state enforcers really don't use a different framework—but how the states choose their enforcement targets.

Optimizing the states' use of resources should sometimes lead to bringing cases with large economic impact. But it could also lead the states to think more closely about why smaller cases make sense. In particular, the states could consider the distributional effects of antitrust enforcement and concentrate more resources on helping consumers who need help the most. The AMC's idea for a state enforcement agenda is that states should concentrate on local matters. Planning an enforcement agenda could get the states to think about why (and how much) that might be so.

Centralization and planning require resources, which the states generally lack and which are in particularly short supply for other than litigation. As in the other two areas, the states have engaged in some creative efforts. One is the "State Center," an independent organization that provides some support to state antitrust enforcement, funding, for example, the services of a panel of three economists who have provided consulting services for some of the states' litigation efforts.<sup>41</sup> The other is to try to get some part of their recoveries in *parens patriae* cases set aside for state antitrust enforcement, which the states have done in the past. But such recoveries are subject to the vagaries of settlements, judicial discretion, and the uncertainty of an appropriate receiving entity.

The last major injection of funding to state antitrust enforcement came in 1976 when Congress appropriated \$21 million in "seed money" for state antitrust enforcement. That seems unlikely today, not only as a budgetary matter but as a matter of "seeding." Better would be to build on the states' ad hoc use of *parens patriae* settlements and amend Section 4E of the Clayton Act to require courts to distribute part of the monetary recovery obtained in *parens patriae* cases to the states for use in their enforcement efforts (or at least make clear that this is an appropriate aspect of a *parens patriae* recovery). Not only would this help the states to do a better job of antitrust enforcement. If done on some percentage basis, it would also help align state incentives with consumers'. A double win.

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<sup>41</sup>For a description, see [www.statecenterinc.org](http://www.statecenterinc.org).

#### IV. Conclusion

The AMC's recommendations ended up doing no harm, but doing little good as well. The former was a relief, in my view, the latter perhaps predictable in light of the Commission's original charge.

I think that the real modernization challenge is to improve state enforcement and embrace its diversity. The goal should be a state enforcement effort that is better resourced, that takes account of distributional concerns (even within an efficiency paradigm), and that continues to serve as a watchdog over weak federal enforcement. This would make state enforcement an even more significant part of our modern antitrust enforcement system.