

# States and the Antitrust Modernization Commission

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The Antitrust Modernization Commission (Commission or AMC) has embarked on its examination of the federal antitrust laws and its consideration of whether any of those laws should be modified or eliminated. In its work to date, the Commission has focused on certain aspects of state antitrust law and enforcement as among the topics that should be reviewed. This work has prompted state antitrust enforcers to respond in various ways. In particular, the attorneys general from forty-two jurisdictions submitted comments to the AMC in October 2004, and the attorneys general, under the auspices of the National Association of Attorneys General (NAAG), unanimously adopted a resolution on state antitrust enforcement in March 2005. In addition, states have taken other steps that relate to or might have an impact on the Commission's work. This article describes each of these activities.

## Formation of the AMC

The legislative history of the statute creating the Commission<sup>1</sup> and the process for choosing commissioners concerned state enforcers. Although the legislation does not specify what topics should be reviewed by the Commission, and does not mention state enforcement, the legislation's sponsor, Representative F. James Sensenbrenner, prominently mentioned state enforcement in his initial press release about the legislation as one of three antitrust topics that merited study.<sup>2</sup> Representative Sensenbrenner's comments about states at the Commission's first public meeting were more elaborate. He expanded his list of topics for review and characterized state enforcers as "vital," while worrying about "divergent and sometimes inconsistent antitrust standards."<sup>3</sup>

State attorneys general responded in a number of ways, focusing both on the composition and substantive work of the AMC. As presently constituted, the Commission does not include any commissioner with a state enforcement background. Various state attorneys general, including

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<sup>1</sup> The Antitrust Modernization Commission Act, Pub. L. No. 107-273 §§ 11051–11060, 116 Stat. 1856 (2002), available at [http://www.amc.gov/pdf/statute/amc\\_act.pdf](http://www.amc.gov/pdf/statute/amc_act.pdf).

<sup>2</sup> Press Release, F. James Sensenbrenner, Jr., Sensenbrenner Introduces Antitrust Study Commission Legislation (July 27, 2001) (on file with *The Antitrust Source*). Representative Sensenbrenner is Chair of the House's Committee on the Judiciary. His initial press release stated, in part: "Three areas in particular that Chairman Sensenbrenner would like the commission to address are: (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>3</sup> Representative Sensenbrenner's comments on state antitrust enforcement at the Commission's first public meeting on July 15, 2004, were as follows: "Fourth, the 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/transcript\\_040715.pdf](http://www.amc.gov/pdf/meetings/transcript_040715.pdf).

NAAG's officers and the leaders of NAAG's Antitrust Committee, expressed concern about this fact, both before all commissioners were nominated and when Commissioner Deborah Majoras became Chairman of the Federal Trade Commission and a replacement commissioner was to be named.<sup>4</sup>

In addition to a concern about the composition of the AMC, Maine Attorney General G. Steven Rowe wrote letters to Maine's governor and congressional representatives about the substantive work of the Commission. Those letters emphasized that state enforcement and state laws allowing recovery to "indirect purchasers" would be considered by the Commission, and referred to substantial benefits for Maine businesses, consumers, and the state itself secured by state enforcement and Maine's "indirect purchaser" statute.<sup>5</sup>

Staff attorneys responsible for antitrust issues in the offices of the state attorneys general also focused on the Commission. For example, how the Commission should view state enforcement was the subject of a panel jointly sponsored by NAAG and the ABA Antitrust Section's State Enforcement Committee at NAAG's 2004 Antitrust Seminar.<sup>6</sup> That panel focused on state enforcement generally and on how other nations addressed antitrust enforcement, as well as on how the United States addresses other enforcement regimes.

The NAAG Multistate Antitrust Task Force also formed a committee to address the work of the Commission. The members of that multistate committee drafted and secured approval for the states' comments to the Commission that are discussed in more detail below. The chair of NAAG's Antitrust Committee, Attorney General Mark Bennett of Hawaii, actively participates in the work of that multistate committee.

### Suggested Topics for AMC Study

The topic of state antitrust enforcement was proposed in response to the Commission's broad-based request for suggested topics. The American Antitrust Institute, for example, suggested that the Commission probe how state enforcement can be made more effective; the Cato Institute suggested that state enforcers be stripped of their *parens patriae* authority; the leadership of the Senate Subcommittee on Antitrust, 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."<sup>7</sup> The extensive comments of the ABA Antitrust Section suggested state enforcement as a

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<sup>4</sup> The officers of the National Association of Attorneys General and the leadership of NAAG's Antitrust Committee urged that people with state enforcement experience be appointed to the Commission in three separate letters: 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 and Bill Frist, and Representatives Tom DeLay and Nancy Pelosi (Mar. 4, 2004), available at <http://www.abanet.org/antitrust/committees/state-antitrust/advocacy.html#oa>.

<sup>5</sup> 10 M.R.S.A. § 1104. The letter to Governor Baldacci and the letter to Senator Snowe, which is representative of the letters delivered to all of Maine's congressional representatives, are available at <http://www.abanet.org/antitrust/committees/state-antitrust/advocacy.html#oa>.

<sup>6</sup> The materials for this programs are available at <http://www.abanet.org/antitrust/committees/state-antitrust/pubs.html#wm>.

<sup>7</sup> The American Antitrust Institute, Comments of the American Antitrust Institute on the Issues to Be Included on the Commission's Agenda, to the Antitrust Modernization Commission 6 (Sept. 30, 2004), available at <http://www.amc.gov/comments/aai.pdf>; 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>; Letter from Mike DeWine, Chairman, and Herb Kohl, Ranking Member, Subcommittee on Antitrust, Competition Policy and Consumer Rights, to Deborah Garza, Chair, Antitrust Modernization Commission, and Jonathan Yarowsky, Vice Chair, Antitrust Modernization Commission 4 (Oct. 1, 2004), available at <http://www.amc.gov/comments/senatesubcomm.pdf>.

topic meriting study and mentioned state enforcement in connection with its discussion of remedies, merger enforcement, and related topics.<sup>8</sup>

The states also submitted comments to the Commission. In this regard, the states did not limit their suggested study topics to state enforcement. Rather, states suggested that the AMC study antitrust federalism, remedies, regulated industries, and merger review.<sup>9</sup> The states' views on these topics can be summarized as follows:

- **Antitrust Federalism:** The states emphasized that separate enforcers independently exercising judgment leads to powerful synergies if the judgments are similar or the same and, even if the views diverge, potential benefits can be derived from a diversity of views.
- **Remedies:** The states urged the Commission to probe whether (1) monetary remedies matched the remedies' objectives, (2) the disparate and inconsistent treatment of the claims for "indirect" purchasers can be solved by repealing *Illinois Brick*,<sup>10</sup> and (3) injunctive remedies are efficient and effective, particularly in rapidly changing markets.
- **Application of Antitrust Laws to Regulated Industries:** The states specifically mentioned the Telecommunications Act of 1996, the Federal Energy Regulatory Commission, and the Surface Transportation Board as examples of legislation that should be reviewed.
- **Merger Enforcement:** Recognizing continuing criticism of their merger enforcement efforts, the states discussed their efforts to investigate mergers efficiently and effectively, including formal and informal steps to minimize duplication, burden, and delay. The states urged the Commission to consider how to (1) modify merger review procedures to improve effectiveness and minimize burden, (2) streamline confidentiality procedures among enforcement agencies and the parties, and (3) enhance predictability.

### AMC Study Topics and Work Plans

Not surprisingly, the Commission included certain aspects of state antitrust enforcement as topics for study. In its published list of issues selected for study, made available on January 13, 2005, the Commission asked two questions focused specifically on state antitrust 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?<sup>11</sup>

The Commission also listed other topics that the states had included in their comments, including remedies and the application of the antitrust laws to regulated industries.

On February 25, 2005, the Commission released a list of six study groups. The first study group was for "Enforcement Institutions." That group will focus on (1) dual federal enforcement (FTC and DOJ), (2) Harmonization of FTC/DOJ rules/procedures, and (3) state attorneys general. Other

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<sup>8</sup> Report of the Section of Antitrust Law of the American Bar Association from Richard J. Walis, Chair, Section of Antitrust Law 2004–05, to the Antitrust Modernization Commission (Sept. 30, 2004), available at <http://www.amc.gov/comments/abaantitrustsec.pdf> and <http://www.abanet.org/antitrust/comments/2004/modernizationcommission.html>.

<sup>9</sup> American Modernization Commission, Amended Comments of Commission Issues for Study 1, 2 available at <http://www.amc.gov/comments/stateags.pdf> and [http://www.abanet.org/antitrust/committees/state-antitrust/final\\_amended\\_comments\\_10-01-04.pdf](http://www.abanet.org/antitrust/committees/state-antitrust/final_amended_comments_10-01-04.pdf).

<sup>10</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>11</sup> Antitrust Modernization Commission, Issues Selected for Study 1, 2, available at [http://www.amc.gov/pdf/meetings/study\\_issues.pdf](http://www.amc.gov/pdf/meetings/study_issues.pdf). Expanding on the merger question, the Commission posed the question of whether "merger enforcement [should] be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to multiple private and government enforcers?"

*The work plan for the enforcement institutions . . . intends to probe the foundations of state enforcement. For both merger and nonmerger enforcement, the Commission asks for specific examples and evidence of the “burdens, benefits, delay, and/or uncertainty” flowing from state enforcement.*

study groups will focus on other topics that states suggested be studied, such as remedies and merger enforcement.<sup>12</sup> Originally expected in March, the Commission’s work group plans were posted on May 6.<sup>13</sup> The work plan for the enforcement institutions working group provides that the Commission intends to probe the foundations of state enforcement. For both merger and non-merger enforcement, the Commission asks for specific examples and evidence of the “burdens, benefits, delay, and/or uncertainty” flowing from state enforcement.<sup>14</sup>

### State Antitrust Resolution

The Commission’s work was also the impetus for the unanimous adoption in March 2005 of a NAAG resolution on the principles of state antitrust enforcement.<sup>15</sup> The most recent prior NAAG resolution on an antitrust issue was adopted in 1994,<sup>16</sup> predating most of the current attorneys general. To address the Commission’s work, and to focus the current group of attorneys general on state antitrust enforcement issues, Attorney General Bennett presented the resolution.

The basis for the resolution is established with a series of “whereas” clauses addressing federalism, federal-state cooperation, indirect purchaser statutes, merger review and enforcement, and antitrust exemptions. State sovereignty is identified as inherent in the Constitution’s principles of federalism, which Congress has endorsed in antitrust jurisprudence and the Supreme Court has repeatedly reaffirmed. The resolution notes that cooperation between state and federal antitrust enforcers is both mandated by Congress and implemented in various formal and informal ways. In addition, the resolution points out that state statutes permitting antitrust recovery for purchasers date from the 19th century, about 75 percent of public purchases are “indirect,” and federal law significantly limits those claims. The resolution states that the Supreme Court rejected the argument that state statutes permitting recovery by “indirect” purchasers were preempted and accepted the view that recovery helps deter anticompetitive behavior.

In the case of mergers, the “whereas” clauses identify (1) the jurisdiction and authority of attorneys general to investigate mergers and obtain divestiture as a remedy, (2) the local knowledge that states bring to joint investigations, and (3) the efforts to work efficiently and productively with the federal agencies. Finally, the resolution notes that antitrust exemptions for specific industries have been consistently opposed by NAAG.

Based on these whereas clauses, the attorneys general unanimously resolved that NAAG:

1. Opposes any federal preemption of any state antitrust statutes, including state “indirect” purchaser statutes;

<sup>12</sup> The Commission’s list of study groups is available at [http://www.amc.gov/pdf/meetings/list\\_of\\_study\\_groups\\_rev.pdf](http://www.amc.gov/pdf/meetings/list_of_study_groups_rev.pdf). The list of study groups includes a designation of which issues are assigned to each group.

<sup>13</sup> Commission Study Plans for Enforcement Institutions, Exclusionary Conduct, Immunities & Exemptions, International, Merger Enforcement, New Economy, Regulated Industries, Remedies, and Robinson-Patman Act are available at [http://www.amc.gov/commission\\_documents.htm](http://www.amc.gov/commission_documents.htm).

<sup>14</sup> The work plan for the enforcement institutions working group is available at [http://amc.gov/pdf/meetings/enforcement\\_institutions\\_study\\_plan.pdf](http://amc.gov/pdf/meetings/enforcement_institutions_study_plan.pdf).

<sup>15</sup> NAAG 2005 Spring Antitrust Resolution, available at <http://www.abanet.org/antitrust/committees/state-antitrust/pdf/naag-sp2005-res.pdf>.

<sup>16</sup> NAAG antitrust resolutions are available at <http://www.naag.org/issues/issue-antitrust-resolutions.php> and <http://www.abanet.org/antitrust/committees/state-antitrust/advocacy.html#naag>.

2. Supports increased cooperation between the federal agencies and state attorneys general through mechanisms such as the Merger Protocol;<sup>17</sup>
3. Supports the reversal of the *Illinois Brick* decision and supports the enactment of federal legislation that would permit the recovery of antitrust damages by any purchasers suffering such damages;
4. Reaffirms its strong opposition to legislation that weakens antitrust standards for specific industries.

The states remain committed to monitoring and participating in the work of the Antitrust Modernization Commission. The states recognize the Commission both as a potential threat to their authority and as a means to improve antitrust enforcement by eliminating federal limitations on recovery by “indirect” purchasers and various antitrust exemptions. The Commission’s first hearing on specific working group topics—specifically, the issue of “indirect” purchasers—is scheduled for June 27. Watching how this plays out should be interesting. ●

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<sup>17</sup> The Merger Protocol is available at [http://www.naag.org/issues/pdf/at-state\\_fed-protocol.pdf](http://www.naag.org/issues/pdf/at-state_fed-protocol.pdf) and <http://www.abanet.org/antitrust/committees/state-antitrust/mrgprotocol.pdf>.