Department of Justice

THE FEDERAL GOVERNMENT AND THE STATES:

A PARTNERSHIP FOR COMPETITION

Remarks by

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A myth has developed that antitrust is inherently a federal legal responsibility requiring million-dollar budgets and almost infinite resources to fight almost endless legal battles. This myth has been perpetuated by the press, the bar, and sometimes even by the speeches of Assistant Attorneys General for Antitrust. I am not going to try to press that myth upon you today -- most of you know it is not true. Rather, I would like to talk to you today about why I believe it to be critically important that state authorities continue to be involved in this activity, and how we in the Department of Justice can assist you.

The need for effective state antitrust laws and their vigorous enforcement is very real. Most businesses in this country are small businesses, with limited hopes and horizons but also embodying important values we all wish to protect and conserve. A vast portion of our gross national product is generated by firms and in markets that are essentially regional, state-wide, often local.

Federal resources are simply not sufficient to enable us to investigate and prosecute all the violations that experience leads us to believe are occurring. The Antitrust Division frequently uncovers violations involving only a few communties and a few million dollars of commerce annually. Unfortunately this kind of conduct is still far too prevalent.

In direct impact on the lives and pocketbooks of the citizens of any particular state, local conspiracies are probably as much of a problem as nationwide conspiracies. Smaller cases -- small by national standards, but that dig deeply into the pockets of local residents -- require the attention and diligence that state enforcement authorities can bring.

Perhaps the most important -- and difficult -- part of my job is to allocate the Antitrust Division's few resources on a nationwide basis according to our best judgement of enforcement priorities at the federal level. For instance, is it in effect better to attack a huge violation that costs each of 220 million Americans only a few cents or dollars each, or a smaller local conspiracy that cost a comparative handful of people a great deal more? The answer is evident -- if we do not prosecute the larger case, there is no one else who can.

You, however, as state officials, are able to direct antitrust enforcement resources to those areas where, from a state rather than federal perspective, the need is greatest. You have a familiarity, indeed an intense interest, in the business and economic affairs of your own state which cannot be matched at the federal level. This gives you both the opportunity and the responsibility to make a tremendous contribution to the preservation of competition in your state.

Much of your enforcement activity, as ours, is directed to the hard-core antitrust violations such as price-fixing, bid-rigging and territorial allocation cases. You are increasingly taking the responsibility for these kinds of cases in situations that probably could not be reached by the federal government either for jurisdictional reasons or because of resource limitations. I would note that in the last year alone, we have referred some 30 cases of more localized violations to the Attorneys General of 13 states.

Of course, the states have antitrust roles other than as protector of their citizens under state antitrust laws. States are also purchasers and consumers of goods and services, and thus are potential victims of antitrust crimes. When a public works contract or commodity -- such as bread or milk for school children -- is price-fixed, scarce tax dollars are stolen. States can, and do, file civil damage actions to recover for their own account overcharges paid as a result of antitrust violations. This is a function that cannot, and should not, be performed by the federal government. It is the legitimate and increasing province of State Attorneys General to protect the revenues of the states in this fashion. Without your active participation, too many illegally gained dollars will remain unrecovered from the purses of these violators.

In addition to this role, Title III of the Hart-Scott-Rodino Antitrust Improvement Act of 1976 provides for parens patriae actions under the federal antitrust laws by State Attorneys General. It permits a State Attorney General to sue in federal court not only on behalf of the state directly, but also on behalf of individuals, and consumers throughout the state. It is imporant to note that Congress chose to bestow this significant responsibility not on federal law enforcers, but rather on designated state officials. These suits are intended to allow truly effective recovery of damages sustained by reason of a violation of federal antitrust law -- primarily price-fixing. We have high hopes that this set of remedies will prove useful additions to the antitrust arsenal.

Unfortunately, however, because consumers generally do not purchase from antitrust violators, the Supreme Court's decision in Illionis Brick Co. v. State of Illinois[1] crippled your ability to use the parens patriae remedy, as well as your state's ability to sue as an indirect purchaser. Nowhere has the state and federal partnership in antitrust enforcement been clearer than in the efforts still under way to effect legislation reversing Illinois Brick. Your National Association of Attorneys General, and many of you personally, have participated actively with those of us in the Department of Justice

in seeking passage of this legislation. We narrowly failed in the last session of Congress. But we are hopeful that responsible legislation will swiftly be enacted in the next Congress. I have made that effort one of our highest legislative priorities, and I look forward to renewing our legislative alliance, this time for a successful result.

Let me now tell you about another opportunity for cooperation, one that also produces successes. As you probably know, the Antitrust Division has been a vigorous proponent of regulatory reform at the federal level for several years. Now the deregulation trend is very much accepted in Washington. Real dollars-and-cents progress is being made. The President has recently signed into law a comprehensive airline deregulation bill. The Congress has initiated a wholesale revision of the 1934 Communications Act aimed at deregulating substantial parts of the FCC's constituency. The Administration is planning a major effort for surface transportation. Even the ICC has now proposed to reform portions of its generally outmoded and anticompetitive trucking regulation.

As significant as we believe our efforts are, we are quite aware that there are many more state regulators than federal -- the states regulate things that the federal government hasn't yet heard of. For example, occupational licensing alone almost certainly involves

more regulation (in terms of number of people involved) at the state level than all federal economic regulatory programs put together. I doubt that state regulatory agencies are any less susceptible than their federal cousins to capture by the industry and subsequent manipulation as de facto cartel managers.

The public is sick and tired of unneeded regulation. Federal regulation is visible, so that is where most of the anger and frustration has been directed thus far. But if the public were aware -- and it will be shortly -- of how often state regulation made even the ICC look rational, some of the energy now directed at Washington would focus instead on your capital.

This is where all of you come in. You can help respond to, even anticipate, the public outcry against needless and anticompetitive government regulation by acting as advocates for competition and regulatory reform in your own government. An example of one such experience occurred recently in West Virginia. In National Society of Professional Engineers v. United States,[2] the Department of Justice challenged a rule prohibiting competitive bidding contained in the Code of Ethics of the NSPE. The NSPE argued all the way to the Supreme Court that its rule was not an antitrust violation because it was sound policy for a number of health and safety reasons -- essentially that if engineers had to compete on price,

buildings would collapse as the result of the shoddy work resulting from price competition.

The Supreme Court unanimously rejected this defense:

> "Exceptions of the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute . . . In sum, the rule of reason does not support a defense based on the assumption that competition itself is unreasonable."

In West Virginia, the local rule, almost identical to the rule of the national association, was phrased so broadly that it could conceivably be construed as prohibiting an engineer from giving a prospective client any indication of the fee that would be charged. The continued existence of such state rules would obviously undercut the principle established by the Supreme Court's opinion. The West Virginia State Attorney General's Office was familiar with the problem, conducted an investigation into into West Virginia's rule and notified the Board of Registration for Professional Engineers that the rule was no longer valid, would not be enforced, and needed to be be repealed. The simple, clear result is that West Virginia's consumers stand to receive very significant benefits from that innovative action. With this kind of effort in all fifty states, the combined impact on consumer welfare could be enormous.

Support for deregulation can be given in a number of ways. In many states, the Office of the Attorney General serves as a legal counsel to the numerous state agencies. This makes the remedy rather direct -- tell your offending agencies, in effect, that you are no longer their lawyer if they need your help to enforce their anticompetitive rules, and perhaps more ominously in view of the City of Lafeyette[3] decision, you won't defend them if they are sued. I should point out that this approach can work wonders in very short order. West Virginia held a workshop where they gave the bad news not only to the engineers, but to the accountants, chiropractors, embalmers, optometrists, landscape architects, surveyors and pharmacists as well.

Even when you are not counsel to the offending agency, you can still effectively advocate competition through appearances and filings before independent regulatory agencies. The Division frequently makes such appearances before agencies such as the FCC, ICC, and CAB. These agencies in the past five years have become infinitely more sensitive to competition policy issues, and considerably more amenable to workable competitive options than, say, a decade ago. You may have similar success in your own state. One fertile

area would be state banking regulations -- too many needlessly restrict branching and other forms of competitive behavior. Another might be public utility regulation -- the light bulb exchange program struck down by the Supreme Court in Cantor v. Detroit Edison[4] is a good example of needless, anticompetitive regulation. And finally, I needn't point out how many friends you could make, perhaps even within your own office, by attacking alcoholic beverage control regulations which keep the price of these prized commodities artificially high.

The cause of regulatory reform must also be taken to the state legislature -- most state regulation starts with an enabling statute, and all too often the enabling legislation allows the regulators too much leeway to defeat competition.

You've already demonstrated a good deal of success in getting the most basic kind of regulatory reform through your legislatures -- the passage of modern antitrust statutes. Since 1970, over ten new state antitrust statutes have been passed, and I expect that there will be more good news on this front in the near future -- over a dozen of your members either have proposals before their legislature, or are preparing

proposals for legislative action. At their request, I have testified before legislative committees in Vermont, Ohio, and Pennsylvania concerning proposed state antitrust initiatives, and I would like to offer the Division's continued assistance in bringing before your legislature the importance of effective antitrust laws.

We look forward to cooperating with you in other ways as well. We are already engaged, through new Section 4(F) of the Clayton Act, in sharing with you much of our investigative files and materials. As you know, Section 4(F) directs us to notify you of any action which we believe may entitle you to bring an action for damages under the Clayton Act, and to make available to you relevant investigative files and materials upon request. Already close to 50 requests have been made under 4(F). The Division is currently in the process of drafting guidelines for disclosure and notification under 4(F). Although the guidelines are not yet final, I would like to give you a brief outline of the factors that we are considering.

It is our view that Section 4(F)(a) of the Act contemplates more than routine notice to the states of federal antitrust actions. Instead, it requires the Antitrust Division to make a judgement on the appropriate-

ness of notification along certain lines. Among the factors we will consider will be: the factual circumstances of the alleged violation, the posture of the state as a potential damage claimant under existing law and generally, the likely effect of the alleged violation on cognizable state interests.

Section 4(F)(b) is also a valuable aid. Our guidelines are being drafted to maximize the value of 4(F)(b) to you, while at the same time recognizing that the conduct of our prosecutions was not intended to suffer from premature or inappropriately broad disclosure or dissemination of investigative files and materials. Our goal is to support the overall effectiveness of antitrust enforcement, whether through state or federal actions, and the idea behind our guidelines is to strike the required balance between disclosure and confidentiality that best achieves this. There may be disputes when we get down to particular requests but it is my hope that the promulgation of these guidelines and our continued consultations with you will allow 4(F)(b) to provide the broad avenue for federal and state cooperation that Congress intended.

4(F)(b) clearly directs us to disclose the maximum amount of material we responsibly can when a State Attorney General makes a request. It is also very clear, though, that it is

not intended to serve as a general discovery device for parties other than the states. To make sure that it serves the purpose which Congress intends, we ask that requests for investigatory material be made by a State Attorney General or his designee who must also be a state official, for example, the Assistant Attorney General in charge of the state's antitrust unit. When we receive a request from you or a designated state official, our Director of Operations will indicate to you the general nature of the proposed disclosure and limitations which may be imposed upon it.

The broad and general principles that will likely be reflected in the guidelines are outlined for your consideration. I invite your comment.

First, where a Division investigation and any resulting prosecution are over, and no grand jury was convened, we can, within certain limits, supply you with just about everything we've gathered, provided that disclosure is lawful. The exceptions would probably relate to civil investigative demands, premerger notification material, confidential business information and confidential informants.

Grand jury materials are often of greatest use to you, but also require the most careful handling by us. We interpret Rule 6(e) of the Federal Rules of Criminal

Procedure to prohibit the disclosure of grand jury materials without a court order. However, if our investigation or any resulting prosecution has been terminated, we will usually join in an application by the State Attorney General to the court for their disclosure under 4(F)(b).

In circumstances where our grand jury investigation is completed but a resulting prosecution is still pending, we would perfer to defer disclosure of investigatory materials until the prosecution is over. On occasion, we may support a 6(e) request by the state even though our prosecution is still pending when we can put appropriate and reliable limitations on use and further disclosure.

When we get a request for materials from an open investigation, we will generally resist disclosure. The confidentiality of our investigations and their effectiveness is potentially compromised by making materials prematurely available in these circumstances. As a practical matter, I believe this will always be the case in pending grand jury investigations. In other pending investigations, we will take into account the facts and circumstances peculiar to the case to determine whether, and in what circumstances, disclosure should be made. It is important to keep in mind that I am talking here about the timing of release, as distinguished from the fact of release in due course.

The Hart-Scott-Rodino bill is not the only important piece of legislation that has led to improved cooperation between the Division and the States. Today one of the most significant areas of federal and state cooperation is the Grant Program to Aid State Antitrust Enforcement, authorized by Congress in Section 309 of the Crime Control Act of 1976 as a three-year "seed money" program of assistance in grants to states to improve their antitrust enforcement capabilities. Congress appropriated $1 million under this program for FY-77, $10 million for FY-78, and a final $10 million for FY-79. The FY-77 and 78 appropriations were awarded in the first round of grants, based on a population formula that was worked out with the active assistance of the National Association of Attorneys General. The population formula, adopted to comply with statutory mandate in Section 309(d) that the Attorney General "prescribe basic criteria for the purpose of establishing equitable distribution of funds received under this section among the States," is being used once again for the allocation of funds. It should be emphasized, however, that the population formula is for allocation, and does not necessarily compel the actual award of that precise amount of funds. States will only be entitled to receive the allocated funds if they submit an acceptable application meeting the requirements of Section 309(b). In reviewing your FY-79 application, we intend to

look closely at the narrative assessment you submit of your program under the prior grant. In general, we will be looking to see that your program is functional and active. I am pleased to hear that for the most part this so. In those few instances where we see problems with a state's program, we are going to do all that we can to assist that state in getting its program on track, and will work closely with that state in ensuring that the grant funds are put to best use.

I would like to give you a brief profile of how the first $11 million dollars was used. Forty-four states, the District of Columbia, and our host, Puerto Rico, chose to participate. The actual grants ranged in size from $130,000 for the least populous states, to $412,500 for the most populous states. A total of $10,944,379 was awarded.

For about twenty-five states, federal funding meant the creation of an antitrust office for the very first time. In some instances, these new antitrust units consist of only two or three attorneys. Other states were already deeply involved in antitrust before the grant program, and have used the grant money to improve the sophistication of their efforts by updating their data retrieval systems for litigation support, computerized bid monitoring, and advanced word processing systems, for example.

Overall, the state budgets called for hiring 267 new people for antitrust efforts -- more than doubling the number employed prior to the program. As might be expected, the fifteen more populous states are spending proportionately less of their grant money on personnel than the others. Hiring started off somewhat slowly, particularly in those states where there had been no significant antitrust practice. Also, because of the time it takes antitrust cases to develop, some states prudently withheld full hiring until their cases and investigations were further advanced. However, at this point, the state antitrust programs are pretty much fully staffed, and I am looking forward to seeing the impact of this energetic core of new attorneys.

I am also gratified, for the reasons I expressed earlier, to see that well over half the states are gearing their efforts towards bringing principles of competition into the process of state regulation. These efforts have included appearances before state regulatory boards to advocate competitive principles, training for state regulatory officials on the basic principles of antitrust, and finally the issuance of Attorney General Opinions concerning the nonenforceability of state regulatory rules which conflict with either state or federal antitrust laws. This is one area in which the smaller states appear to have

had somewhat of an edge over the larger states -- state regulatory rules and regulations which occupy probably just a few file cabinets in Chauncey Browning's office require a complex computerized microfilm retrieval system to catalog in Illinois. The complexity of the task varies from state to state, and it rather interesting to note the different approaches taken by the states in tackling this important problem. We will continue to observe your efforts with great interest as the program continues.

Another area where different states are trying different approaches to achieve a common goal is in the promotion of competitive bidding for state and local government procurement. The efforts in the states once again vary in terms of the sophistication needed to handle the state's problem. In some states, promotion of competitive bidding is taking the form of training sessions for state purchasing officials to alert them to the signs of possible antitrust violation -- and perhaps even more importantly, to establish lines of communication that encourage these officials to report any suspicious patterns to the state antitrust unit.

Other states have taken an approach that relies on computer analysis of bid patterns. Massachusetts is developing a bid monitoring program which it hopes to expand into a New England regional bid monitoring

program. This system will monitor the bids of a very wide variety of commodities that are purchased by hundreds of local municipalities. Other states focus on only one commodity, which yields a more sophisticated analysis of the bidding pattern for that commodity. This kind of variation and experimentation is excellent, and will certainly produce useful lessons and insights on enforcement for all of us. I think it might be a good idea to have either a nationwide conference or a series of regional conferences in which the designers of these computer programs can get together and exchange their experience -- we needn't re-invent the wheel in each state. Our people in the Division are also working on similar projects and would be glad to share and learn from the experience of those of you in the states.

The forty-six grant recipients allocated over $200,000 for training. The State of West Virginia was recently awarded a grant to develop a series of four regional and perhaps one national conference to train state antitrust personnel on antitrust investigation and trial techniques. We stand ready to continue our full cooperation in sharing with you our training opportunities. As you know, the Department of Justice's Advocacy Institute offers periodic seminars. To date, 36 attorneys from the offices of 32 State Attorneys General have participated in a mock price

fixing trial in Washington, D.C. Our training efforts, both for ourselves, and for such attorneys as you wish to have participate with us will continue.

I have touched only a few of the ways that state and federal antitrust enforcers can work together. The Justice Department is committed to nurturing that partnership so that together we can help competition work better in our economy. I have high hopes for this partnership. The agenda is a crowded one, but these are true pocketbook issues, vital to all of our citizens. It will demand the close attention of all of us. The Department of Justice is fully committed.

NOTES

1. 431 U.S. 720 (1977).

2. __ U.S. __, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978).

3. City of Lafayette v. Louisiana Power & Light Co, 435 U.S. ___, 98 S. Ct. 1123 (1978).

4. 428 U.S. 579 (1976).