Department of Justice

State and Federal Antitrust Enforcement:

Prospects for the Partnership

Remarks by

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I am delighted to have this opportunity today to speak to so many of you on the front lines of antitrust enforcement. This antitrust conference is itself good evidence that a healthy partnership has developed between the state governments and the federal government in antitrust. Today, I'd like to take a look at this partnership -- not only where it has been, but perhaps more importantly, where it is headed.

The belief in the logic, the need, and the importance of state antitrust is growing. Three years ago, Congress established a program of grants in aid of state antitrust enforcement against the background of a myth that antitrust was inherently a federal legal responsibility.

The track record of state antitrust at that time could do little to counter this myth. In the legislative debate over passage of the measure, North Carolina's Senator Morgan focused on the inadequacy in the staffing of state antitrust units -- only 112 attorneys in total (of which 32 were part-time). Less than twenty-five states had established separate antitrust units, and even among these states, funding was generally inadequate.

Recognizing that there could be many ways to achieve the same ends, Congress established a flexible program so that approved grants would fit the particularized needs of each state. It remained for each state to give substance and form to its own antitrust effort.

In the late summer of 1977, the Antitrust Division got its first look at your plans. We received applications for a first round of awards totalling $11 million dollars. They revealed a rich diversity of approaches, but shared a number of important goals. Foremost was general antitrust enforcement, with particular emphasis on local services and distribution industries, but also with considerable attention to state proprietary and parens patriae actions under federal law. This came as no surprise. Congress clearly conceived of local enforcement as an objective of the grant program. In addition, Title III of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, which provided for parens patriae actions by Attorneys General, was now law. You grasped the significance of Congress' choice to bestow this important responsibility not on federal enforcers, but rather on designated state officials.

Your efforts towards accomplishing this first goal are promising. Your staff has been nearly doubled. Much of your enforcement activity, as ours, is directed to the hard-core antitrust violations such as price-fixing, bid-rigging, and territorial allocation. You are increasingly taking the responsibility for these kinds of cases in situations that probably could not be reached by the federal government for lack of jurisdiction or resources. Over the last eighteen months we have formally referred over 30 cases of more localized violations to State Attorneys General in areas of commerce including radiator repair shops, institutional food sellers, oil drilling, banking, orthodontists, and many others. In just the first year of the program you filed over 75 cases based on state law -- cases that might never have been brought were it not for your efforts. We continue to see significant increases in your case loads as the assessment reports come in from your offices for the second year of the program. The increase is not surprising -- you reported opening close to 750 investigations during the first year of the program. More and more of these are beginning to bear fruit as the states gain experience and refine their investigative techniques.

These numbers indicate something more important -- citizens and small businessmen victimized by antitrust violations may now look to their local government, instead of to distant federal authorities, for protection of vital interests. Most businesses in this country are still small businesses, with limited hopes and horizons, but also embodying important values we all wish to protect and conserve. Smaller cases -- small by national standards, but large enough to dig deeply into the pockets of individual citizens -- 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 judgment 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 costs 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 significant contribution at a time when more and more citizens fear that governments at all levels care little for their welfare.

Because states are also purchasers and consumers of goods and services, and thus potential victims of antitrust violations, your programs have laid considerable emphasis on state proprietary actions. When a public works contract or commodity -- such as bread or milk for school children -- is price-fixed, scarce tax dollars are stolen. Antitrust enforcement can recoup them. As a group, the states in this program have filed about 150 civil damage actions in federal court 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. Without your help, too many illegally gained dollars will remain unrecovered from the purses of antitrust violators.

Though you have reported to us a substantial increase in the number of your proprietary investigations, there has not been a significant increase in the number of cases filed. Surely one significant factor in the relatively modest increase in federal damage actions is the Supreme Court's decision in Illinois Brick Co. v. State of Illinois. Because consumers generally do not purchase from antitrust violators, this decision has crippled your ability to sue as an indirect purchaser as well as to use the *parens patriae* remedy which so many of you set out as a goal of your program. Nowhere has the state and federal partnership in antitrust enforcement been clearer than in the efforts still underway to effect legislation reversing Illinois Brick. Your National Association of Attorneys General, and many of you personally, have participated actively and effectively with those of us in the Department of Justice seeking passage of this legislation. Despite some setbacks, we are hopeful that responsible legislation will be enacted by this Congress. The effort to achieve this will continue to be one of our highest legislative priorities. We cannot afford in this country to shut the courthouse door to businesses and individuals who have been injured by provable antitrust violations. If there are technical procedural problems, let us address them, but we do not do justice if we -- as a matter of official policy -- forget the injured and weaken antitrust deterrence.

We in the Antitrust Division were most pleased to see regulatory reform emerge as a major goal in well over half of your programs. In examining your own regulatory schemes, you have discovered that state regulators are no less susceptible than their federal cousins to capture by the industry and subsequent manipulation as de facto cartel managers. What I will propose to you today is an agenda for action, action for joint federal-state efforts to build upon the initiatives we have already taken.

I believe that it is crucial for the states to be a part of this effort. There are simply more state regulators than federal regulators. State occupational licensing alone involves more regulation (in terms of the number of people involved and economic impact) than all federal regulation combined. States regulate other vital sectors at the core of the economy -- banking, insurance, public utilities, communication and transportation. State regulation affects even the most basic personal needs. Whether our citizens will have safe, decent housing at a price they can afford is influenced by zoning laws, building and housing codes, and rent control. Whether all can afford decent health care is influenced by the regulation of practitioners, the certification of hospitals and nursing homes, and the regulation of health insurance. Even whether they may obtain wholesome food for their families depends, in part, on agricultural regulation. In short, as citizens and consumers, we cannot leave unexamined a process that has enormous impact not only on our pocketbooks, but on the kind of society in which we live.

Most of you have begun your regulatory reform programs with an examination of state occupational licensing. As of 1969, something like 10 percent of national income originated in occupationally licensed labor markets. Originally conceived as protection for the public against inferior, fraudulent or dangerous services, regulation of trades and professions has often defeated the very purpose it was intended to serve, sometimes with tragic results. A recent study of the effects of state regulatory programs suggested that even if licensing sometimes improves the quality of services sold in the marketplace, the increase in price may cause some buyers to do without the service altogether, or to try do-it-yourself remedies, thereby reducing the overall quality of service. */ They found, for example, that strict licensing of electricians was correlated with greater numbers of accidental deaths by electrocution and that strict licensing of veterinarians was correlated with the underdiscovery of animal diseases,

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*/ Carrol and Gaston, Occupational Licensing, at 2 (1977).

with a resulting increase in the risk of infection to healthy animals and people. Clearly, such licensing procedures need close re-examination.

Moreover, regulation has been extended to occupations that, at most, only minimally affect public health and safety. States license cosmetologists, auctioneers, weather control practitioners, taxidermists, sod layers, and weather vane installers, among others. Even where some sort of licensing is arguably related to public protection, studies have shown that delegation of regulatory powers to the provider group itself can lead to restrictions protecting not the public interest, but the profit margins of providers.

The high costs of regulation are not limited to the licensed trades and occupations. Before the CAB and Congress loosened the regulatory grip, a study pegged the cost of air transport regulation at a staggering $2 billion annually. The cost of ICC trucking regulation may be in the tens of billions, and the cost of the federal milk marketing order system, only one small part of farm regulation, may be in the hundreds of millions of dollars.

The public should not have to tolerate a costly regulatory system that unjustifiably shelters select groups from the same profit and loss risks that most citizens face every day in the competitive system. The states have played a significant role in redressing this imbalance through innovative approaches to deregulation. In many important instances, the states have been first, have been most innovative, and have provided extremely useful guidance to federal regulators and deregulators. California and Texas showed that competition could work in the intrastate passenger airline industry, evidence that proved persuasive when the question came before Congress and the regulatory agencies. New Jersey and Maryland made a similar contribution through the success of their more competitive regulatory treatment of the trucking industry.

The efforts of state antitrust units have given a real boost to state regulatory reform. State Attorneys General are playing a role -- similar to that of the Justice Department at the federal level -- as a voice speaking up for competition in regulatory proceedings. For example, the State of Alaska's Antitrust Unit recently completed a comprehensive review of its occupational licensing boards. Five boards were told that they had rules in conflict with the antitrust laws -- and that therefore had to be repealed. The unit plans to work with these boards to see that more competition is added to the regulatory process. The Minnesota Attorney General's Office has also undertaken a similar program. It persuaded its State Board of Cosmetology to delete a minimum fee schedule. Filings were also made with the State Dentistry and Accounting Boards. A complete review of all state agency rules is now underway with an eye toward eliminating unnecessary anticompetitive regulations.

With the momentum that has already been generated, with the joint efforts of federal, state, and local authorities, and with the high priority the public will assign the reglatory reform agenda, real dollars-and-cents progress across a broad front is well within reach. But several important tasks need to be completed. States must continue to undertake an industry-by-industry re-examination of regulatory schemes. I recently served as Chairman of the Presidential Commission that developed three analytical questions that states should ask when looking at regulatory departures from competition. First, the study of a particular regulatory system should begin by considering the historical and economic context in which the system was created. What problem did the policy-makers believe they were solving when the system was created? Second, compared to the original assumptions, what have the results been? Have conditions changed? Were the original expectations for regulation correct? Third, what costs and benefits have been associated with the regulatory scheme? The answer to this question involves several specific inquiries. Are innovators being exlcuded from the marketplace? Can we compare the performance in the regulated industry to that in some unregulated market? Are customers of the industry working to escape or eliminate the regulations? In many cases answers to these questions will indicate that all regulation should be eliminated. In other cases regulation may continue to be necessary. Regulation, however, is not an all-or-nothing proposition. In many instances competition is a vital part of an overall regulatory solution. The goal should be to achieve the necessary regulatory goal in the least anticompetitive manner. This will reduce the costs of regulation without unduly hindering important social goals.

The second major remaining task is completing reform of the process of regulation. In each state, mechanisms need to be established to focus attention during the regulatory process on the cost and benefits of regulation and the effects of regulation on competition. More members of the public need to become aware of regulation and the regulatory process. Membership on regulatory boards can no longer be limited to members of the affected industry and industry experts. More states need to adopt a law like California's Public Member Act, which provides for public members on all industry boards. All these types of regulatory reforms will enable state and local governments to decide whether any regulation should be adopted, and if so, to adopt a statute that is fair to both consumers and practitioners. Such reforms will also promote accountability and public confidence in administrative structure.

A third major goal that your programs have advanced is the promotion of competitive bidding for state and local procurement, and the development of improved techniques for spotting violations. Efficiency in government -- doing more with fewer tax dollars -- is the goal of competitive procurement. Unfortunately, your reports to us indicate that the employment of competitive procurement is haphazard at best in many communities. Smaller communities in particular are simply unaware of the need to let bids competitively, to retain records, and to recognize and report collusive practices to your offices. For example, in one small New England town, bid monitors seeking bids on fire hoses visited the local fire department and were told that the chief makes the fire hose and sells it to the department. Here, some gentle advice would probably suffice. In some other locales, your investigators have reported what may turn out to be serious institutionalized corruption where criminal indictments and convictions may result.

Your efforts to train state officials to alert them to signs of collusive behavior, and perhaps even more importantly, to establish lines of communication to encourage them to report suspicious patterns to you, are important. Some of you are developing a variety of computerized bid monitoring projects. This kind of experimentation is excellent, and will certainly produce useful lessons and insights for all of us.

Looking further down the road, I see the possibility going beyond mere defensive efforts aimed at protecting the competitive procurement process against collusion. Government procurement could be employed to achieve affirmative competitive goals. For instance, might it be possible to shift government purchasing towards smaller firms to permit them to achieve economies of scale closer to the dominant firms in the market? Or towards firms that promise to employ innovative production processes? Alternatively, we may wish to consider shifting purchases away from firms displaying anticompetitive market conduct. These are all options that are still in need of thorough examination. But these are the kinds of things we should be thinking about as we go about the day-to-day tasks of antitrust law enforcement.

You have done remarkably well in achieving a fourth major goal, the passage of modern antitrust statutes. The past year saw the passage of comprehensive antitrust statutes in five states -- Massachusetts, Rhode Island, Delaware, New Mexico and Utah. Several other states passed important refinements to existing state laws. Some other state units sought, but failed to achieve, such passage. To these, I would like to offer our continued cooperation in bringing before your legislature the importance of effective antitrust legislation. There is no longer a good excuse for any state, much less one of our most populous and industrialized states, not to have a modern, flexible and workable antitrust statute, with effective enforcement powers.

A very important area of state-federal cooperation is the sharing of our investigative work. Well over 100 requests have been made for our investigative files under new Clayton Act section 4(F). Our position with respect to disclosures under 4(F) is being formulated to maximize the value of 4(F) 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. We wish to support the overall effectiveness of antitrust enforcement, whether through state or federal actions, and the idea behind our procedures is to strike a balance between disclosure and confidentiality that best achieves these twin goals. In some instances, our response to 4(F) requests has not been as full or as prompt as you would wish. There are bound to be disputes when we get down to particular cases. You are becoming aware that there are both legal and practical constraints on our ability to get these materials to you as quickly and fully as we would like. For example, your requests often come in when a case is about to go to trial. Lawyers on the eve of trial just are going to back-burner these requests, and I can't quarrel with their priorities. In addition, Rule 6(e) of the Federal Rules of Criminal Procedure requires a court order to permit disclosure. There are other legal restraints relating to civil investigative demands, confidential business information, and confidential informants to be considered. We have, and will continue to, support you in your 6(e) motions in appropriate circumstances, and hope to provide you with all the investigative materials we responsibly can. I look forward to working with you in assuring that 4(F) provides the broad avenue for federal and state cooperation that Congress intended.

The Antitrust Grant program is now drawing to a conclusion, and it is time for the states to assume the financial support for this important work. But I do not see in that fact a weakening overall of antitrust enforcement. Instead I see a strengthening of it at all levels. The seeds have been planted. Collectively, you have demonstrated a dedication and competence that gives me high hopes for the active future of the state antitrust effort.

Our agenda in the world of antitrust law enforcement is a crowded one. But these are real pocketbook issues of great concern to all of us as consumers and as citizens. Looking back, we see that the Congressional sponsors of the Grant Program were expressing a belief in the importance of state antitrust. Your efforts have given shape to this belief. Looking ahead, I see the possibility of even greater, more innovative contributions from both of us towards the growing state and federal partnership in antitrust.

At a time of inflation, energy shortages, excessive government regulation, and loss of faith in the system, it is crucial for us in the world of antitrust -- as advocates for competition, as proponents of initiative, and entrepreneurial venture, and innovative solutions -- to speak out loudly and directly and effectively -- to speak to the defects of structure and conduct that give rise to the major economic problems of our time. Through enforcement, policy advocacy, legislation, deregulation, and all the weapons in our arsenal, we must make our voices heard. We in the Antitrust Division look forward to sharing with you this challenge and this opportunity.