

**STATE ATTORNEYS GENERAL AND OUR CONCURRENT SYSTEM OF
ANTITRUST ENFORCEMENT:
THEIR ROLE IN PROTECTING
CONSUMER INTERESTS**

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Panel 7

Patricia A. Conners©

(Delivered by Emily Myers, NAAG)

Before I start, of course, I need to make the usual disclaimer that these remarks represent only my views and not those of the Attorney General of Florida, of any other Attorney General, or of NAAG.

The overall focus of this workshop has been on the good and the bad wrought by class actions and what can be done to better protect consumer interests in class actions. As the notice for this program indicates, "class actions can be an effective way to remedy competitive injury and deter corporate wrongdoing." But, as others in this workshop have pointed out, there are instances where class actions clearly fail to meet this intended goal.

My own view is that class actions are a necessary and important part of our concurrent system of antitrust enforcement. There are too many diverse competitive and consumer interests involved in any one antitrust

violation to leave the resolution and remedy of the matter to a single government enforcer. And, without class actions, significant commercial and consumer interests would clearly go unrecompensed.

Of course, state attorneys general do occasionally appear, intervene, or join in class actions to ensure that their states' individual consumer interests are adequately protected. The Attorneys General share concerns over the adequacy of some class notices, pure coupon settlements, or settlements where much of the settlement fund ends up with class counsel as fees and costs. But we can also attest to many instances in which we have joined with class counsel in state and federal antitrust cases and achieved the best results possible for our consumers and public entities with minimal duplication of effort or expense.

In discussing antitrust enforcement in the United States, I prefer the term "concurrent enforcement" to "multiple enforcers" because it more accurately describes how our system has evolved. State attorneys general and the class action bar do not merely "fill gaps" in antitrust enforcement left by federal enforcers. Rather, it is more accurate to view our system as one in which four distinct and different sets of enforcers are represented. In

these remarks, I'm going to discuss concurrent enforcement and the specific role state attorneys general play in protecting consumer interests in both our own cases and class actions, including the kinds of cases state attorneys general have typically initiated or become involved in and their relationship to private antitrust counsel.

The four enforcement groups are, of course, the Federal Trade Commission, the U.S. Department of Justice Antitrust Division, the private class action bar, and the state attorneys general.

While the interests of these four groups may occasionally overlap, in practice, each of the four parts of our system approaches enforcement of the antitrust laws from different, but complementary, jurisdictional and remedial premises. This means that all perspectives regarding a potential violation of the law are independently and appropriately considered and acted upon for the benefit of consumers and competition.

The Department of Justice Antitrust Division has exclusive authority at the federal level to bring criminal antitrust prosecutions as well as civil enforcement jurisdiction. The Federal Trade Commission's primary jurisdiction under Section 5 of the Federal Trade Commission Act generally

allows the FTC to pursue antitrust matters civilly to obtain what is usually nonmonetary equitable relief.

Class actions, the third part of our system, are routinely filed as follow-on or parallel cases to federal or state antitrust cases, but the private bar also has, for a number of years, regularly initiated many of their own actions that would otherwise never have been brought and which, in some cases, won or lost, have had a profound effect on antitrust jurisprudence in the United States. *GTE Sylvania* comes to mind.

State attorneys general are the fourth part of our concurrent system of enforcement. The attorneys general have always focused their efforts on seeking monetary as well as injunctive relief on behalf of their consumers or public entities under both state and federal antitrust laws as well as state consumer protection laws. In so doing, the state attorneys general have also had their unique impact on antitrust jurisprudence in this country. *California v. Hartford Insurance* and *California v. ARC America* are just two examples.

Section 4C of the Hart-Scott-Rodino Act provides state attorneys general with express statutory *parens patriae* authority to recover treble

damages on behalf of natural persons for violations of the federal antitrust laws. This grant of authority was premised on the recognition by Congress that neither of the federal enforcement agencies had the jurisdiction to represent natural persons to recover money damages, and, more importantly, that neither was the best representative of consumers seeking such remedies. Instead, Congress believed that state attorneys general were the enforcement agencies most capable of representing natural persons *parens patriae* in federal antitrust matters.

In this capacity, state attorneys general have actively pursued federal antitrust violations for more than two decades. They have originated many actions both individually and together, usually seeking damages on behalf of consumers *parens patriae* under Section 4C or on behalf of public entities both as direct or indirect purchasers under state and federal law. Attorneys General have brought many actions on behalf of state public entities, for example, Florida's bid-rigging civil antitrust case against school milk processors in 1992 that resulted in a \$34 million recovery for Florida's school boards. Other cases from Florida alone include actions against chlorine processors, carbon dioxide producers, highway construction contractors,

commercial tissue manufacturers, and infant formula makers. This last case was initiated by Florida in 1991 and the resulting multidistrict litigation on behalf of all direct purchasers of infant formula eventually yielded a \$240 million national settlement.

Cases originated by state attorneys general on behalf of natural persons *parens patriae* include New York's *Mitsubishi, Keds and Reebok* resale price maintenance cases; Florida and New York's *Nine West* and *Compact Disc* vertical restraint cases; the recent *Taxol* litigation, and the *Disposable Contact Lens Antitrust Litigation*, a boycott case, started by Florida in 1994 and ultimately settled on behalf of consumers in 2001 for \$80 million.

In addition to cases that attorneys general originate, there are also many that they undertake as parallel or follow-on cases to the federal enforcement agencies' efforts so that consumers and public entities who may have been harmed may be recompensed. In some cases, the federal agencies follow on state cases, for example, the school milk bid-rigging cases and the *Taxol* case. An example of a matter undertaken by state and federal enforcers in parallel fashion is the *Mylan* case, which was litigated

and settled jointly, with the FTC taking the lead in discovery and the states taking the lead in the settlement negotiations.

Then, there are those cases where the states and the federal agencies have unknowingly initiated parallel investigations of the same industry, as occurred in *Nine West* and the *CDs* case, where Florida and New York pursued their own independent multistate investigations based on information they developed independently from the FTC.

These cases demonstrate the effective government enforcement scheme created by Congress with the *parens patriae* provisions of the Hart-Scott-Rodino Act. No matter whether the states or the federal enforcement agencies have been the first to initiate an antitrust matter, the result has generally been the same. The DOJ has obtained its criminal fines and sentences or civil injunctions, the FTC has achieved effective injunctive or other equitable relief, and the states have, where appropriate, recovered damages on behalf of natural persons and public entities.

Nonetheless, our system of enforcement would not be as effective or comprehensive if the role of “private attorneys general” in our class action bar did not exist. Besides initiating cases that would not otherwise be

brought, the class action bar is the only one of the four parts of our system that regularly represents the interests of commercial entities in antitrust cases. These entities are typically not represented in any direct fashion by the state attorneys general or the federal enforcement agencies. The class action bar is important from the perspective of natural person consumers as well. The size and extent of the resources available to the class action bar to initiate antitrust actions means that more consumers nationally are likely to obtain redress for damages incurred as the result of an antitrust law violation.

However, overlapping representation can and does occur when both the class action bar and the state attorneys general seek to recover damages on behalf of natural persons. When that happens, the state attorneys general and private plaintiffs' counsel have often worked together creatively and effectively to reduce duplication of effort and of remedies, usually with excellent outcomes.

Overlapping representations between the states and class counsel can arise in at least four ways: State attorneys general have an ongoing investigation and class actions are filed; state attorneys general file

an action and class actions are filed as follow-on cases; state attorneys general may intervene in or join ongoing class actions; and state attorneys general may be invited by the parties to participate in a class action.

In the first type of case, the state attorneys general can have an ongoing confidential investigation under way, unbeknownst to class plaintiffs, who then file their own class action lawsuits against the same entities for antitrust damages. In order to salvage the time and expense put into their investigation and ensure that consumer interests are protected, state attorneys general will often file their own *parens patriae* or governmental purchaser lawsuits and join in the class actions. This occurred in the *CDs* case, for example, where the states had initiated their investigation into the defendants' Minimum Advertised Pricing policies well before any private class actions were filed, but, once the FTC announced it had obtained consent judgments against the five major CDs distributors, private class actions were filed all over the country. The attorneys general of forty-two states and territories ultimately filed their own multistate action and were joined with the private class actions in multidistrict proceedings in Maine. The presence of the attorneys general resulted in a quicker

settlement than would otherwise have been the case because their ability to represent consumers in 42 states and territories *parens patriae* largely removed class certification as an obstacle to resolving the case. The matter settled within two years of the initial filing of the state complaints.

The second way in which overlapping representation can occur is when a state or states file litigation in federal court representing consumers and, upon learning of the filing, the class action bar as well as other state attorneys general file their own actions. A recent example of this is the *Disposable Contact Lens Antitrust Litigation*. There, following an investigation that lasted more than two years, the State of Florida filed an antitrust case on behalf of Florida consumers in federal district court in Jacksonville. The state alleged that the major makers of disposable replacement contact lenses conspired with the American Optometric Association and others to boycott alternative, potentially less expensive channels of distribution for the same replacement lenses. Florida's case was followed by several private class actions, filed on behalf of consumers in other states, and then, eventually, following their own extensive investigations, by 32 state attorneys general, on behalf of the same

consumer classes as those represented by class counsel. Although, from Florida's perspective as the first filer, there was significant delay in the litigation caused by the private class action certification process, class counsel and the state attorneys general worked very well together throughout the discovery process and through the five weeks of trial prior to successful settlement.

A third way overlapping representation between the states and class counsel can occur is when class counsel have already initiated a lawsuit on behalf of consumers whose interests the state attorneys general also wish to protect and the states intervene in or join the ongoing litigation. This has occurred most recently in pharmaceutical cases, like *Cardizem*, where, as a matter of policy, state attorneys general have entered on-going private class action litigation to ensure the best settlement possible on behalf of their consumers and public health agencies.

A fourth and final way overlapping representation can occur is when the class action bar or defense counsel actually invites the state attorneys general into an existing class action in an effort to achieve a comprehensive, global settlement. The best example of a situation where both defendants

and the private plaintiffs' counsel did the inviting is the *Vitamins* case.

There, desiring global peace, the defense counsel asked the private plaintiffs' counsel in the indirect purchaser cases to invite the state attorneys general to the settlement table. The states then participated equally with the private plaintiffs' counsel in the settlement negotiations even though the states had not yet formally entered the litigation. The result was an enhanced national settlement on behalf of indirect purchasers and a separate settlement fund for state governmental entities.

Defense counsel can also directly invite the state attorneys general to the settlement table, which is what happened in *Nine West* after a class action was filed in the midst of a confidential multistate investigation. In that case, both the FTC and the state attorneys general were separately investigating potential resale price maintenance allegations against Nine West. Neither investigation was public, when a New York Times article spawned the filing of private class actions. The matters were eventually consolidated in federal district court in New York. Defense counsel acted quickly to avoid the unnecessary expense of protracted litigation. Nine West counsel first negotiated a consent judgment with the FTC that called for non-

monetary injunctive relief, but then declined to sign the consent until it had negotiated consumer monetary relief with the states. After three months of intense negotiations, Nine West and all 56 attorneys general resolved the *parens* case on behalf of consumers for \$34 million. Nine West then executed the FTC consent and sought preliminary approval of its settlement with the state attorneys general in the court where the private class actions were pending. Ultimately, the judge accepted the states' settlement, finding that it was a fair and reasonable settlement of both the states' case and the nascent federal class actions. Nine West then negotiated attorneys fees and costs with the private class counsel separately and what could have become quite a protracted proceeding was ultimately resolved in less than a year.

These are but a few examples of the ways in which state attorneys general have effectively worked through issues raised by overlap with class actions and have enhanced or shortened the litigation or ensured better, more effective settlements on behalf of consumers. Many of these examples also illustrate how, where appropriate, the class action bar and the state attorneys general have used their individual strengths in situations of overlapping representation and have worked together to better coordinate

and more effectively litigate complex multidistrict matters in which they are both involved. In the end, consumers have benefitted and the system has worked in the public interest to preserve competition.