Interview with Patricia Conners, Chair, NAAG Multistate Antitrust Task Force

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Patricia Conners

Ed. Note: *It's a rare day that does not include a report of the states' involvement in major antitrust litigation and enforcement activity.* Microsoft, Vitamins, Mylan, Cardizem*—the states are front and center in a large number of high-profile antitrust matters.*

To give us the insider's view of these cases and other enforcement initiatives, we interview here Patricia Conners, who is particularly well-positioned to discuss these issues in her dual role as Chair of the NAAG Multistate Antitrust Task Force and as Chief of the Antitrust Section for the Florida Attorney General's Office. As Florida's chief antitrust attorney since 1995, Ms. Conners is responsible for implementing and overseeing the Attorney General's state and federal antitrust enforcement efforts. Prior to this, she was an Assistant Attorney General in the Antitrust Section, working on such notable cases as Florida v. Borden, Inc.*, the 1989 school milk bid-rigging case that resulted in a $36 million recovery for Florida school boards and* Florida v. Abbott Laboratories, Inc.*, the first of the so-called* Infant Formula *cases.*

Last fall, Ms. Conners was appointed Chair of the NAAG Multistate Antitrust Task Force, in which capacity she coordinates multistate antitrust enforcement efforts and ensures the implementation of NAAG Task Force initiatives and policy. Prior to becoming Chair of the Antitrust Task Force, Ms. Conners served the Task Force as Vice Chair from 1999 to 2001 and as the Southeast Regional Vice Chair from 1996 to 1999.

Ms. Conners is a member of the advisory board of the American Antitrust Institute and Vice Chair of the Florida Bar's recently established Antitrust Certification Committee. She received both her undergraduate and J.D. degrees from the University of Florida.

ANTITRUST SOURCE: What does the Chair of the NAAG Multistate Antitrust Task Force do?

CONNERS: Well, that's an interesting question because we've actually been revisiting that a little bit with the new head of the Antitrust Committee, Hardy Myers, the Attorney General for the State of Oregon. The NAAG Antitrust Task Force has been in existence for about twenty years and we forget sometimes that we have newcomers who come in—new Attorneys General and new Assistant Attorneys General—who do not have the institutional knowledge of those of us who have been there from the very beginning. And so we've tried to more specifically define the role of the Chair and the Vice-Chair and tweak the organizational structure a bit. The Chair's principal duties are threefold: to coordinate multistate task force litigation and investigation working groups by providing a forum within the Task Force for the exchange of ideas regarding enforcement policy and investigative priorities; to convene regular multistate task force meetings to facilitate coordination of multistate antitrust enforcement, including policy and litigation; and to be a liaison, as necessary, with the federal enforcement agencies to ensure effective state-federal cooperation and coordination wherever possible. Now, it's important for me to emphasize with respect to the first primary duty I've listed that my role as chair is only to assist in the facilitation of coordination between working groups, not to coordinate the tasks for the working groups themselves. Neither the Task

Force nor the Task Force Chair actually engages in the coordination of multistate investigations or litigation. These are conducted by individual states or by working groups formed by states interested in pursuing a particular matter. Each state retains its sovereignty in these matters, with the Task Force simply providing a forum for the discussion of ideas and investigative priorities.

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My current emphasis is on streamlining and improving upon case coordination among the states in antitrust matters, especially with respect to the various indirect purchaser cases that have cropped up recently as a new dynamic in multistate antitrust enforcement. A second priority is to serve as a liaison more with federal agencies with whom we already have an excellent relationship. Finally, we're going to make an effort to coordinate better with the private plaintiffs bar as they're in just about every case in which we get involved, whether by way of overlapping representation of consumers or by way of representation of different sets of plaintiffs.

ANTITRUST SOURCE: What is the relationship between the Chair of the Antitrust Committee that you mentioned and the Chair of the Task Force?

CONNERS: The Chair of the Task Force is selected by the Chair or Co-convener of the Antitrust Committee. Every year or two the National Association of Attorneys General Antitrust Committee selects a Chair, just as they do with the other NAAG committees. Last summer, Oregon Attorney General Hardy Myers was selected as Chair, along with two co-conveners, Eliot Spitzer of New York and Joseph Curran of Maryland. Together, they oversee generally various antitrust initiatives and effectuate antitrust policies significant to multistate antitrust enforcement. The policies and initiatives established by the Antitrust Committee are effected by the Chair of the Multistate Task Force, and the Chair of the Task Force keeps the Antitrust Committee leadership apprised of multistate matters generally and, of course, consults with the Antitrust Committee leadership on policy issues and cases of significance to the multistate Task Force.

ANTITRUST SOURCE: You mentioned that one of the objectives was to streamline and coordinate among the states in their enforcement activities, specifically with respect to indirect purchaser actions. How are you planning to do that?

CONNERS: Well, with respect to indirect purchaser cases, we already have two templates that are outstanding examples of what we can do to improve case coordination. One is the *Vitamins* case and the other is the *Mylan* case. In the *Vitamins* case, we were forced into state court because that is where the class action cases were already pending. We had to quickly learn to adapt to the idea of coordinating multiple state court proceedings in parallel fashion. Ultimately, one court, the District of Columbia Superior Court, became the forum that provided the foundation from which all the other state court proceedings were coordinated. Once the master settlement agreement was finalized and submitted to the D.C. Court and various procedures were agreed upon, the settlement and all related papers were submitted for approval in all the other state courts where *Vitamins* cases were pending. Coordination on preliminary approval and final approval of the individual state court proceedings using the D.C. Court proceedings as the prototype has worked out extremely well thus far. A lot of credit, I think, goes to David Boies III, the private plaintiff lawyer who helped coordinate between the private plaintiffs, the states, and the defendants.

The *Mylan* case provides an excellent example of a case where the states filed jointly in a

single federal court, alleging both direct claims and indirect purchaser claims. In *Mylan*, the different states had varying state law remedial postures that made for a very difficult litigation and settlement process, but we got through it. I'm proud to say I participated in the settlement negotiations, along with Meredyth Andrus of Maryland and Mitch Gentile of Ohio, and I believe we were able to obtain an excellent settlement for consumers. *Mylan* is a nice template for streamlining multistate actions not only for litigation but also for settlement negotiations, claims administration, and claims distribution.

ANTITRUST SOURCE: How will you coordinate more closely with the private plaintiffs bar? Will that include drafting private plaintiffs to actually represent the states' interests?

CONNERS: There are some private plaintiff firms that are representing state attorneys general in particular actions, but that's not the norm. It's more likely that we will conduct our own investigation into a matter to determine whether we want to file a lawsuit. In some cases, it may be that the private plaintiffs have already filed their own class actions before we file ours. In other instances, we are the first to file and the class plaintiffs must rely on what they learn about the case from what the government is doing. So, depending on where we are in the posture of things, coordination with the private plaintiffs is extremely important. If it's at the beginning of the case, it's more likely that the states will move forward and there might be more limited, at least initially, coordination with the private plaintiffs bar. But, typically, if the class action bar is already out there in some way, before we complete our investigation, as was the case, for example, in many of the generic drug cases, then, we will join the litigation and move to coordinate immediately in an effort to avoid any unnecessary delay. The desire—ours and the private plaintiffs' counsel—is to coordinate and effectuate the best possible litigation strategy—and settlement strategy, if needed. My priority is to build upon that mutual interest and continue to improve upon our working relationship with the private plaintiffs bar so that those that we represent receive the most effective and efficient representation—and result—possible.

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ANTITRUST SOURCE: Let me ask you some questions about *Microsoft*. One of the things you mentioned earlier was that you were attempting to coordinate more closely your enforcement activities with the federal agencies. In the *Microsoft* settlement, of course, the DOJ's settlement was adopted by some states and rejected by others, leaving the states that rejected it to pursue their own remedies. How do you think the *Microsoft* settlement will affect the way states and federal agencies work together in the future?

CONNERS: I don't believe it will have any negative effect at all. It may have a very positive one. We saw that case go through two administrations, and in both instances, both in the trial phase under the previous administration, and in the mediation phase leading to the settlement under the current administration, we had unprecedented cooperation and coordination. It had never been that close and the access had never been so open. So, I don't really perceive the split between DOJ and some of the states at the remedies phase as having had any kind of negative effect. Currently, the dialogue remains open and there continues to be interaction between state and federal agencies—and it's extremely good at this point. I think the antitrust bar benefits from the give and take that goes on between state and federal agencies, and I think the federal agencies appreciate that and I know the states do. So, I think state-federal coordination is a very important thing to develop. I think it's a very important priority for both Tim Muris and Charles James,

and I know they intend to move forward with it, as do we, to continue to build on what has been an excellent working relationship.

ANTITRUST SOURCE: From the *Microsoft* experience, are there any lessons learned, or anything that you would say you might do differently in approaching that case?

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CONNERS: Well, I was not privy to a lot of the discussions that went on, but obviously to the extent that we could have foreseen some of the things that unfolded quickly and how we had to deal with them, it would have been nice to have had another experience prior to *Microsoft* that might have taught us better ways to interact and deal with each other on certain issues. But, I think what ultimately happened and the way it happened was perfectly appropriate for the situation. As some at DOJ have said, when certain state attorneys general decided to continue with the litigation, that was their prerogative as plaintiffs. As with any private litigation, there are separate sets of plaintiffs, and some may settle before others. That's all that happened here. I don't think that what happened in *Microsoft* is going to cause a great stir down the road, nor really should it have at the time. Rather, I think, the fact that we experienced differences and our positive relationship and cooperative effort survived unscathed means that our relationship is solid and that we have a firm foundation in place for continued cooperation and coordination.

ANTITRUST SOURCE: To what extent do you think it matters, or should matter, to the states whether a federal antitrust agency has made a clear decision on what national policy should be in a particular enforcement scenario?

CONNERS: Setting national antitrust policy is not within the exclusive realm of the federal enforcement agencies. That is not how our system of concurrent enforcement works. Under our system, any plaintiff in any antitrust matter may affect national antitrust policy through the development of case law, whether the plaintiff is a federal enforcement agency, a private plaintiff or a state attorney general. It's well settled that state attorneys general have the ability to bring multistate matters or even single-state matters that, in effect, have an impact on national policy. And to the extent that private plaintiffs can do it, and have done it, the states likewise should be able to do it without causing a lot of pause out there. In the Reagan years, of course, the state attorneys general were the ones bringing antitrust cases of national impact because the federal agencies were taking a passive approach to antitrust enforcement. So, to the extent that a national policy exists, even if the policy is one of non-enforcement, I think it's obviously important for a state to take that into account in approaching its own views on antitrust issues. To the extent that there is no policy out there, then a state or set of states should have no compunction nor be disinclined to pursue cases that establish national policies. That's in essence what happened in *Microsoft*, and there was absolutely nothing inappropriate about it.

ANTITRUST SOURCE: Can you think of examples where either the states or private litigants have made national policy through litigation?

CONNERS: Obviously with respect to injunctive relief provisions and the ability for a plaintiff to sue for divestiture after a merger has been consummated, *California v. American Stores* is an important case. As far as laying a foundation for what has become the functional repeal of *Illinois Brick*, there's the *California v. ARC America* case. Finally, there is *California v. Hartford Fire*

Insurance, which not only re-defined "boycott" but became the seminal case the Department of Justice relies on to sue members of international cartels in federal district court. There's also been a number of cases brought by private plaintiffs, where no federal agency was involved, that ended up reversing prior case holdings; *GTE Sylvania*, which overruled the holding in *Schwinn*, comes to mind, as does *State Oil v. Khan*. There's a small example out of Florida—the *Lee Memorial* case, where the FTC chose to challenge the acquisition by a public hospital of another hospital in the area, and we actually came out against the FTC and submitted an *amicus* in the 11th Circuit which resulted in some clarification of when state action is applicable and when it isn't in the 11th Circuit. The point is that state attorneys general, private plaintiffs, and the federal agencies all have had a hand in setting national antitrust policy through litigation. It is not the domain of one enforcer, nor should it be.

ANTITRUST SOURCE: What is the role of the NAAG Task Force Chair in attempting to build a consensus for a particular enforcement outcome or strategy, either in the terms of settling or prosecuting a case?

CONNERS: The role of the Chair is to effectuate generally the best coordination and cooperation possible among the states overall. But, when it comes to specific cases, it becomes the responsibility of the lead states handling the daily oversight of the investigation or litigation in any particular working group to make a recommendation to the larger group as to how to proceed. Our structural approach is to have a working group of states who have signed onto an investigation or joined in a particular litigation who, then, in turn, are led by a core group of states that handle the daily case management. Each state takes on various tasks, not unlike how the class action bar organizes itself in multidistrict litigation. For example, there's a discovery committee, an experts committee, and a settlement committee. So, depending upon where we are in a given matter, those individuals who are intimately involved in the matter are the individuals the other working group members look to for recommendations regarding enforcement, litigation, or settlement strategies.

ANTITRUST SOURCE: Do you see it as part of your function to try to get agreement from the various states that are involved if the consensus seems to be to settle? Or is it up to the individual states and you don't feel like you need to play a role in persuading them to join a settlement?

CONNERS: Certainly, the Chair can be of assistance, depending on the circumstances. Typically, though, the states that are taking the lead are the ones that will send out the information regarding the settlement to the states that are in the litigation and offer the opportunity to states who may not be in the litigation to join the settlement. We encourage global settlements and we've been very, very effective in obtaining global peace in cases where some people thought it was not possible. *Mylan* was one of them, and it was a very difficult set of circumstances. We ultimately succeeded in getting all fifty states involved in the settlement. It's a wonderful settlement for consumers as a result.

ANTITRUST SOURCE: Do you think there are too many antitrust enforcers in this country?

CONNERS: The short answer is "no, I don't think so." While there's occasional overlap in the remedies that are sought, the bottom line is that most of the time each antitrust enforcer is seeking a

different kind of relief and usually all of them can be reconciled. The FTC, for example, typically brings administrative proceedings which result only in injunctive relief, and the Department of Justice often deals only in criminal enforcement outside of the merger context. State attorneys general typically represent their consumers and public entities for damages. And, of course, the private class action bar may overlap with us a little as they often represent consumers, but other times, they represent only the direct purchaser commercial entities. So, the focus of each antitrust enforcer is different and all of these perspectives are important to ensure that all who are harmed by the illegal conduct are properly redressed. Additionally, I think cases generated by this kind of concurrent enforcement, when it is concurrent, are a good thing. It makes the law more predictable because there is more law out there upon which to base decisions involving matters with antitrust implications. Moreover, there is no one enforcement agency that has a monopoly on antitrust enforcement that might otherwise preclude the initiation by others of cases that should be brought. This makes for a broader-based approach to antitrust law that's not dependent upon the policies of any one agency. And I think that's a good thing. And, finally, all enforcement is conducted pursuant to general common legal principles within a very integrated court system, so even if a state attorney general goes off and sues on a particular hospital matter which might be considered very local, if he gets his head handed to him in court, that ruling has general application in other contexts of enforcement. It's not lost on the other enforcement agencies.

ANTITRUST SOURCE: How do the states decide on which cases to bring? What are your case selection criteria?

CONNERS: It doesn't differ too much on a multistate basis from what it would be on a state-by-state basis, other than the fact that, obviously, multistate cases are of broader reach. First, for those states with criminal enforcement authority, it goes without saying that criminal antitrust cases are always a priority. Bid-rigging cases, for example, are ones that when brought to state attention, we act on very rapidly. These cases, of course, tend to be handled by individual states and would not likely be multistate matters because they generally deal with the rigging of bids on local public entity contracts within states.

Regarding civil antitrust matters, the case selection criteria for a multistate matter are pretty much the same as they are for an individual state matter. The first question is, who's been harmed by the illegal conduct. If the potential class of victims is consumers or public agencies then, of course, it's more likely that state attorneys general will be interested in bringing a case. Another factor is whether an antitrust violation has local or regional impact or is only national in effect. State attorneys general are often more interested in pursuing cases that have a unique impact in their local area or region rather than those with a uniform national impact. If the case also has a national impact, that is often tangential to whether there is a particular adverse impact locally or regionally. The third factor is whether the case is one that is in the public interest, and if it is, is the ground already being plowed adequately or sufficiently by the private class action bar or otherwise. The presence of the private plaintiffs bar sometimes, but not always, plays a role in how aggressive state attorneys general are going to be in a particular matter. Another very important consideration is whether the primary purpose of bringing a case is to attain some sort of complex, injunctive relief as opposed to perhaps seeking monetary damages. If strong injunctive relief is the primary goal, then the case is less likely to be pursued by the private bar and, therefore, it is the kind of case that state or federal enforcers are more likely to take on. Finally, taking all of these other factors into account—I know this is true in my state and I think it's true across the board—the ques-

tion is, is it the right thing to do? Is this the kind of case that needs to be brought, after weighing everything, the difficulties and risks of litigation, resource expectations, and all the other things that you might normally be concerned about in making a decision to litigate. And, if the answer is "yes," invariably, that's the case we're going to bring.

ANTITRUST SOURCE: How important is the factor that you mentioned—that other people are prosecuting the same case? Either the private plaintiffs bar or the federal antitrust agencies, or both?

CONNERS: I think it depends on the remedies being sought, who's being represented, and how far along the litigation is. Also important is whether the litigation is being pursued in a manner that will likely attain a result similar to what we would anticipate obtaining if we were bringing the case. So, the presence of existing private plaintiffs' litigation or federal agency enforcement initiatives is important but may not necessarily foreclose state attorneys general from acting. The generic drug cases are a perfect example. While the FTC, in some of the cases, has obtained injunctive relief, and the class plaintiffs bar has filed numerous lawsuits on behalf of direct and indirect purchasers in various courts, the state attorneys general have joined in the existing multidistrict matters, representing state public agencies and consumers, seeking damages and civil penalties, among other things. There are some thirty states in the *Cardizem* case pending in federal district court in Michigan. We have around thirty-four in the *Buspar* case. We're in these cases because they are important policy cases for the state attorneys general to bring on behalf of their constituents and their various state and local agencies, and we would be in them whether or not the class action lawyers were involved in the process.

Another example is the coordinated *Vitamins* multiple state court cases, where indirect purchaser cases were already filed all over the country on behalf of consumers by the private plaintiffs bar and the federal government had obtained record criminal fines by the time the state attorneys general became involved on behalf of consumers and state agencies. The coordination with the private bar in that case was remarkable and the result fantastic, and neither was dramatically affected by the subsequent arrival of the state attorneys general to the litigation and settlement negotiations. In fact, the result ultimately achieved was more attainable once the attorneys general were in the litigation because our presence enhanced the defendants' prospects of obtaining global peace, which is clearly what they wanted.

ANTITRUST SOURCE: Can you tell me what your priorities are for the multistate antitrust task force for the next few years under your leadership?

CONNERS: Primarily there are three priorities. One is to improve upon case coordination among the states in antitrust matters whether they be in state or federal court. We work quite well together, but there is always room for improvement and there's always room for better coordination. The second priority is to improve upon our already excellent relationship with the federal agencies, including streamlining the merger review process, and continuing the dialogue, which has been very frank and open, with the federal agencies. This latter priority includes rekindling an interagency working group we had in place a few years ago called the Executive Working Group for Antitrust. Members included representatives from the Federal Trade Commission and the Department of Justice Antitrust Division at the executive level, as well as the state attorneys general who lead the NAAG Antitrust Committee and the Chair and Vice Chair

of the Multistate Task Force. Currently, then, the working group would include FTC Chairman Muris, DOJ Antitrust Division Assistant Attorney General Charles James, Oregon Attorney General and NAAG Antitrust Co-convener Hardy Myers, Co-convener Attorney General Eliot Spitzer of New York, Co-convener Joseph Curran of Maryland, my national Vice Chair for the Task Force Jim Donahue of Pennsylvania and myself. Even though we are all fairly new in our federal, NAAG, or Task Force positions, we've already met to discuss increased federal cooperation and coordination. Finally, my third priority is to improve coordination with the private plaintiffs, especially in the settlement context. We have a wonderful working relationship with the private plaintiffs bar and I'd like to see that continue in the myriad of matters that we're handling now, as well as in the future.

ANTITRUST SOURCE: You mentioned streamlining merger review by the states. Can you tell us what that would involve?

CONNERS: There are essentially two different levels of coordination when the states do merger reviews. One is among the states and the other is between the states and the federal agency conducting the review at the federal level. At both levels, we already have in place an excellent working relationship, but the coordination and cooperation can always be improved upon and better streamlined. With respect to state coordination, we have the NAAG Voluntary Compact, which, whether or not formally invoked by the merging parties, has served as a template for ensuring effective coordination and the avoidance of duplication by the states in a joint merger review. Each merger brings a new and different set of circumstances which may require re-tooling the states' approach to merger reviews from time to time. As a result, states are constantly improving on the ways in which they share, review, and code documents; conduct interviews and depositions; coordinate experts and coordinate interaction with the merging parties and their counsel. We are actively discussing within the Task Force ways of streamlining our approach to merger reviews, including acquiring uniform litigation support software capable of handling voluminous documents and data and establishing teams of assistant attorneys general experienced in merger reviews within a particular industry who will put together model pleadings and other pertinent information for use by their colleagues in other states when confronted with a merger in an industry with which they may not be familiar.

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On the federal level, we have the 1998 Merger Protocol, an agreed upon set of procedures to effectuate coordination between the federal agencies and the states when conducting merger reviews. [Antitrust Trade Reg. Rep. (CCH) ¶ 13,420 (1998)]. The Protocol has been an effective tool and both the states and the federal agencies feel very strongly about continuing to implement it in our parallel reviews. The antitrust bar can only benefit from this kind of coordinated effort. The Protocol is a great prototype to work from to improve upon the coordination of our merger review process with the federal agencies so that the antitrust bar and the merging parties can benefit from the efficiencies of such a coordinated relationship.

ANTITRUST SOURCE: Are the states generally supportive of the FTC and DOJ when they are asserting equitable remedies like disgorgement and restitution in cases where the states could obtain direct and indirect damages under state or federal law?

CONNERS: My read of the Task Force on this issue is that the states are very supportive of equitable remedies such as disgorgement and restitution. After all, as was demonstrated in the *Mylan*

case, many states have these very same remedies available to them under state law. Disgorgement and restitution are strong deterrents, in my view—especially in conjunction with other remedies. Clearly, though, while remedies like disgorgement are available to state and federal agencies in some instances, that doesn't foreclose states or private plaintiffs from bringing cases seeking damages. Disgorgement and damages are two separate and distinct remedies. So, regardless of what the federal agencies may seek to obtain as an equitable remedy, the states are still going to be out there seeking damages for our public entities and consumers who were harmed by the same unlawful conduct.

ANTITRUST SOURCE: What role do you think the states have to play in the area of high technology matters, including the evolving relationship between antitrust and intellectual property law, the latter of which is, in large part, the province of federal law?

CONNERS: I think the states have the same role that they would have in any other matter involving antitrust. High technology matters, while they involve a new lingo and a new set of circumstances, raise the same antitrust issues as any other industry. The fact that intellectual property is sometimes involved does not mean that the antitrust analysis is typically going to be any different than if it wasn't. All the states need to do is to move up the learning curve needed to understand the particulars of the industry, and we're doing that.

ANTITRUST SOURCE: Are states, do you think, in a good position to balance the sometimes competing interests of patent law, which is obviously not a subject of state law, and antitrust?

CONNERS: Oh, sure, I think you've seen that in spades in the generic drug cases. We have several folks in those cases who have become immersed in patent issues and understand the interface between patent law and antitrust better than some patent attorneys, I would venture to guess, and certainly better than some antitrust lawyers. I believe that we have a firm, firm grasp on that particular component. It's a fascinating area and an important one to pursue, especially now in the context of the generic drug cases we've brought on behalf of our consumers and public entities.

ANTITRUST SOURCE: Let me ask you about another specific enforcement area. What is your perception of the view of the federal agencies toward hospital mergers and multispecialty physician mergers? How does that perception affect the states' view of these transactions?

CONNERS: I think there is no doubt that federal agencies have had a tough time with hospital and health-care related mergers. Of course, I point out that where they've had some successes, state attorneys general have been involved— in the *Poplar Bluff* trial phase, for example, and in Florida, in the Morton Plant/Mease Hospital matter. In the latter case, Florida is a co-plaintiff with the Department of Justice on a consent decree involving a joint venture, which is still in effect today. It was negotiated back when Anne Bingaman was the Assistant Attorney General in charge of the Antitrust Division, so it goes back a bit. In those situations, where state attorneys general have partnered with the federal agencies, there have been more successes than failures. A state attorney general can bring a local perspective to a merger challenge and perhaps lend more credibility to the federal agency's litigation. Having said that, I don't think that the federal agency's recent track record with hospital mergers and health-care related mergers means that

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they've abandoned the field by any stretch—I'm sure they're just more careful to pursue the cases that they think are important to pursue. That has not changed, by the way, the perception of states that pursue these deals. The states remain involved and active in merger reviews and have challenged proposed mergers or joint ventures where they've felt it necessary to do so, whether or not the federal government has acted. One example is the *Poughkeepsie* case in New York, where the federal agencies took a pass on a proposed joint venture and the New York Attorney General challenged and prevailed. Another was the *Summit Hospital* case in California, where the FTC passed on the proposed merger and the California Attorney General challenged the merger and lost. So, there is hardly any feeling from the states' point of view that these deals, which involve local markets with which states are often intimately familiar, should not be challenged when they appear to be anticompetitive, regardless of what the federal agencies may determine.

ANTITRUST SOURCE: On the subject of coordination, I'm interested in the effect that the multiplicity of enforcers with potentially different agendas has on parties' attitudes in negotiating with the government about a dispute. The states often announce at the beginning of settlement negotiations that the negotiating states will only recommend settlements to their individual attorneys general, and that each state makes a sovereign decision whether to join or not. What assurance can a multistate litigating group give to a defendant that it can receive global peace as a result of negotiation?

CONNERS: Well, I think our record speaks for itself. The states have been extremely successful in getting global peace, or near-global peace, in several of our cases—the *Mylan* case is one such case; the *Nine West* resale price maintenance case is another one. And, of course, the *Vitamins* indirect proceedings are a remarkable example. Obviously, we can't guarantee global peace in every instance so we have to make the representation at the beginning of settlement negotiations that while we can't guarantee a global settlement, we can always recommend to individual attorneys general that they accept the result of our settlement negotiation. There is always a possibility that a particular state may decide that it doesn't wish to be part of the results of a settlement negotiation, but that's unlikely for a number of reasons. First of all, states join multistate litigation to, among other things, benefit from the resource and cost-sharing that wouldn't otherwise be available if the individual state was forced to bring a case on its own. And so, it's unlikely that a state that has joined the matter for this reason would not then turn around and participate in a result. Secondly, there routinely is terrific coordination between the litigating states at all the levels of litigation, but in particular at the settlement level. Every aspect of a settlement is vetted with the larger group, so the states have every opportunity to talk about issues that concern them, including how to work around potential problems or sticking points for various states. Finally, I think that the reality is that everyone eventually wants to see these cases settle, and to the extent that the defendants are willing to sit down and work through all the various issues that might come up with respect to statutory nuances, for example, or other unique components with respect a particular state, it always works out. Having been involved in my share of multistate settlement negotiations, especially recently, I am always very confident that if a matter is meant to settle, it will always work out.

ANTITRUST SOURCE: I want to ask you a question about vertical cases generally. Do you have any plans to update NAAG's vertical restraints guidelines to take account of things like the *Khan*

decision on maximum resale price maintenance?

CONNERS: The Task Force doesn't have any plans to update the guidelines. Obviously, the law has changed, in particular with the *Khan* decision, and so the guidelines could be tweaked to acknowledge the change. But, to my knowledge, no state has ever brought a maximum price fixing case, so the *Khan* decision doesn't really, in my view, provide us with enough of a basis for updating the guidelines. *Khan* is recognized law and will be dealt with by states accordingly. Of course, as Chair, I'm always open to comments or suggestions from anyone interested in providing them regarding updating these guidelines or any other guidelines.

ANTITRUST SOURCE: Do you think that states consider themselves bound by *Khan* in terms of their state law?

CONNERS: I don't know the answer to that with respect to every state. I think that's an individual case-by-case determination, and I'm not versed in all of the various state laws. Some of them may, in fact, somewhat contradict *Khan*. It's an interesting question that I doubt will ever really be answered because, again, I don't think states typically bring those kinds of cases. Our focus has been in the minimum price-fixing area and we've had great success there, and that's probably where our focus will stay.

ANTITRUST SOURCE: Going back to the topic of coordination of states' enforcement activities and the federal government's enforcement activities, now that the leadership has changed at both agencies, do you expect the level of cooperation with the states to increase or decrease or stay the same?

CONNERS: My experience so far with the new administration tells me that the level of cooperation will increase. Currently, cooperation is excellent, and I think that the federal agencies are committed to ensuring that federal-state cooperation continues to be a priority. We have, as I mentioned, already revamped the small group that we call the Executive Working Group for Antitrust and we've already had one meeting with representatives from both agencies. It was a very productive meeting that I believe will be an excellent launching point for expanding upon the dialogue regarding state-federal cooperation and coordination. We've had discussions about the 1998 Merger Protocol and how to proceed there and how to work together on non-merger civil cases in a more effective manner. The federal agencies each have federal-state liaison positions that are extremely active. The FTC's liaison position is currently held by a veteran staff member, Karen Berg. She's been in the liaison position for the last year or so. Gail Kursh, formerly of the DOJ health care task force at the Department of Justice, is now the liaison for state-federal cooperation for the Division. I've known her for years and I have tremendous respect for her. I think she will bring a very positive and open-minded attitude to our dialogue. So, the message has already been sent by the new administration that this is an important issue to them, they know it's an important issue to us, and it should be a very important issue to the antitrust bar to ensure that we effectively work together, speak often, and cooperate as much as possible so that matters can be coordinated effectively and efficiently for the good of everyone involved in an antitrust review.

ANTITRUST SOURCE: At the federal level, the two enforcement agencies have recently entered into an agreement to allocate the review of merger matters according to the industry that the merg-

er is occurring in. Have the states ever given any consideration to dividing responsibility for certain kinds of matters along industry or subject-matter lines to increase efficiency?

CONNERS: Actually, yes, and it's interesting you ask that question, because one of the things we've been tweaking with Attorney General Myers and others is the idea of garnering all the expertise that we have with respect to various industries and organizing this wealth of knowledge and experience by industry to be tapped as needed by states or groups of states that find themselves faced with an antitrust matter involving industries they've perhaps never dealt with before. Throughout the country, there are a number of state assistant attorneys general who have years of experience with respect to particular industry matters. For example, they may have dealt with merger after merger involving the same industry, like oil and gas or banking, or they may have been very, very involved in health care antitrust matters for their state over the years. So, we've taken what was already in place—this knowledge and understanding of a particular industry-and created industry working groups, which an individual state attorney general or groups of state attorneys general can go to, if they don't have the expertise, to enhance their knowledge and deal appropriately and effectively with the matter at hand. Our industry working groups include banking, telecommunications, petroleum products, energy, pharmaceuticals, airlines, and health care, and they're headed up by assistant attorneys general experienced in each industry. These individuals can provide not only a wealth of experience with respect to the industry, but also model documents and pleadings to help any state at anytime get started on industry matters involving similar issues.

ANTITRUST SOURCE: Would that span more than just merger review but also non-merger investigations or enforcement?

CONNERS: Both. It just happens to fit better into the merger context because of the learning curve that is involved in, say, understanding banking and understanding oil and gas or whatever the industry involved in the merger might be. But certainly, it would extend to the civil non-merger context as well. Take health care as an example. There are a lot of cases involving health care antitrust matters that are non-merger related that the states have dealt with over the years and, we have compiled a compendium of health care cases and information for other states to access if they need it, information the states may not otherwise have known about that they can use to their benefit in their own states.

ANTITRUST SOURCE: Aren't the AGs just way too political to be making antitrust enforcement decisions?

CONNERS: No. I think that's a major misperception of state attorneys general, if it's out there. First of all, antitrust enforcement typically is handled at the staff level at such detail that state attorneys general don't get involved in it. Of course, the state attorneys general each make the ultimate decision as to whether to bring a case or whether to settle the case or not, but the politics of the situation, if there are any, don't enter into it. The ultimate decision in bringing a case is whether it is the right thing to do. A prime example of that truly is the *Microsoft* case. *Microsoft* was a case that a lot of states were reluctant to get into, but they got into it in the beginning because, at the time, it did not appear as though the Department of Justice was going to be bringing a broader action. When the DOJ did ultimately file, some states chose to file with the Department of Justice and some

chose not to, but those that chose to join believed it was in the best interest of their constituents as well as the preservation of competition to do so—they thought it was the right thing to do. It goes back to the way we weigh cases and examine them, and politics is not one of the elements. ●