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**The Role of States Attorneys General in the CD Minimum Advertised Price Antitrust Litigation**

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Introduction

When the Federal Government seeks enforcement of federal and state antitrust laws and effectively polices federal and state antitrust violations, what role, if any, should the States Attorneys General assume? If private lawsuits seek compensatory damages for federal and/or state antitrust law violations, is involvement by the States Attorneys General a superfluous and wasteful exercise? This Paper addresses the role of States AGs in the Compact Disc Minimum Advertised Price Antitrust Litigation, and their decision to flex their *parens patriae* powers and sue on behalf of the residents within their respective states, a decision made first and foremost in the shadows of a settlement between the Federal Trade Commission and the industry's largest distributors that suspended the industry's pricing-fixing scheme, and secondly a decision made with full knowledge of the initiation of more than 40 private lawsuits nationwide.

This Paper answers two questions: (1) from a theoretical perspective, should the States AGs expend valuable resources in an antitrust litigation that already involves the Federal Government and private parties? and (2) should the States AGs have gotten involved in the Compact Disc Minimum Advertised Price Antitrust Litigation, specifically in light of the fact that the FTC Settlement had a questionable effect on music retailers and retail consumers, and given that CDs are merely luxuries seemingly of lower priority than more demanding issues before State AGs?

Part I of this Paper discusses federal and state antitrust law. Part II discusses the FTC investigation, private class action, and States AGs collective action against the music industry.

This Part focuses on the similarities and differences between the FTC Final Settlement and the proposed Settlement reached by the private party plaintiffs, State AG plaintiffs and defendant distributors and retailers now before the District Court in Maine. The proposed Settlement is scheduled for a “Fairness Hearing” on May 2, 2003.<sup>1</sup> Part III posits that there is a substantive and important role for States AGs in litigations that involve both the Federal Government and private parties. Despite an affirmation of State AG involvement, however, given the specific facts of the CD price fixing case, the decision by State AGs to involve seems somewhat suspect.

### I. Antitrust Enforcement Rights

The States have broad, statutory authority to police antitrust violations. Since President Reagan’s era of unenforcement, the States have more vigorously pursued antitrust matters, both individually and in collective concert with other states and private class actions. Distinctions between federal and state enforcement abound and are worth noting. Unlike the DOJ or FTC, both of which can only seek injunctive relief for violations of federal antitrust law, the States, pursuant to the Hart-Scott-Rodino Act, have the statutory right to seek compensatory damages on behalf of their respective citizens, in addition to injunctive relief under § 16 of the Clayton Act. The Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>2</sup> provides AGs statutory *parens patriae* power to represent their residents as *parens patriae* and recover treble damages on behalf of the citizens within their respective states.<sup>3</sup> The States have traditionally focused on the financial impact that antitrust violations have on their citizens, and hence, AGs are mainly concerned with returning to consumers overcharges that result from vertical price-fixing schemes. Given the States’ power to seek restitutionary damages on behalf of consumers

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<sup>1</sup> “Consumers in CD Settlement May Get Money,” *Associated Press*, March 12, 2003.

<sup>2</sup> 15 U.S.C. § 15(c). See also State Antitrust Enforcement by Thomas Greene and Robert L. Hubbard.

harmful by price-fixing schemes that inflate retail prices above market value, it is unlikely AGs will be content with settlement agreements emerging from FTC or DOJ investigations, as neither federal agency has the ability to seek restitutionary redress on behalf of individual consumers.

Aside from federal and state antitrust claims, many states have Unfair and Deceptive Practices Acts, which forbid unfair, unlawful or deceptive trade practices. A violation of state antitrust law can also be a violation of these acts “on the theory that consumers are entitled to assume that prices and other conditions of sale have been determined by competitive market forces. Therefore, price fixing or other restraints of trade would be unfair and deceptive.”<sup>4</sup>

The debate is not whether the States AGs have the power or right to sue companies whose business practices pose a violation of antitrust law, but rather whether AGs *should* sue a company whose business practices violate antitrust law where (1) the Federal Government has taken a clear position by either abstaining from prosecution or reaching a settlement with the alleged violator and (2) private litigations are at work seeking compensatory damages for harmed consumers.

From a purely legal perspective, clearly the States AGs have a statutory right to involve themselves in an antitrust violation irrespective of whether there is an ongoing private class action lawsuit pending, or the FTC has already resolved the matter with a settlement, or the DOJ has decided that the alleged violation of federal antitrust law does not amount to a violation worth prosecuting. In State of California v. American Stores Co., the Ninth Circuit affirmed the right of the States, as private parties, to object to a proposed merger, even in light of the FTC’s express approval of such a merger. The circuit cites a Supreme Court opinion from 1954, United States v. Borden Co., in holding that a prior consent decree with the FTC did not bar the present

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<sup>3</sup> Id.

civil action. The circuit said: “[P]rivate and public [Clayton Act] actions were designed to be cumulative, not mutually exclusive . . . . California may have different interests than does the FTC in protecting its citizens from antitrust violations.”<sup>5</sup> In American Stores, the California AG brought the antitrust action in his capacity as *parens patriae* of the consumers in his state subsequent to the FTC’s consent order. Thus, even where the FTC has resolved an antitrust violation to its particular liking, a State still holds the legal power to initiate an antitrust proceeding pursuant to his or her *parens patriae* authority.

Another example of a litigation where the States moved forward with a state action despite prior federal disposition is Toys R Us, Inc. v. FTC, where the Seventh Circuit found Toys R Us guilty of antitrust violations and ordered the company to stop trying to keep manufacturers from doing business with discount stores.<sup>6</sup> This decision affirmed an earlier finding by the FTC, which held that the toy company muscled other toy companies into restricting their offerings to warehouse clubs, thereby preventing consumers from choosing among market competitive prices.<sup>7</sup> In the shadow of the FTC resolution, 44 AGs achieved a \$56 million settlement comprised of \$20 million in cash consideration and \$36 million in the form of shipments of toys distributed to needy children. As in American Stores and Toys R Us, where AG action followed the FTC consent decree, the AGs who sued the five largest CD distributors and certain music retailers initiated their lawsuit in the shadow of a settlement between the FTC and the distributors.

## II. The FTC, Private, and State Actions Against Minimum Advertising Pricing (“MAP”)

### What is MAP?

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<sup>4</sup> Id.

<sup>5</sup> State of California v. American Stores Co., 872 F.2d 837, 843-844 (9<sup>th</sup> Cir. 1989).

<sup>6</sup> Toys R Us, Inc. v. FTC, 221 F.3d 928 (7<sup>th</sup> Cir. 2000).

MAP is an agreement between the major record labels, in this case between Universal Music and Video Distribution, Sony Corporation of America, Time-Warner Inc., EMI Music Distribution and Bertelsmann Music Group, and large-scale retailers like Tower and Virgin, whereby the retail outlets agree to offer CDs at a certain price in exchange for promotional and advertising funds from the labels. The agreed-to price for new titles has averaged around \$17.98.<sup>8</sup> Music retailers who balked at fixing CD prices were threatened by the five major distributors with withholding promotional budgets from those stores refusing to adhere to the MAP imposed by the distributors.<sup>9</sup> Given the distributors' market power – they effectively accounted for 85% of all CDs purchased and sold domestically, a market valued in the spring of 2000 at \$15 billion<sup>10</sup> – the retailers had no choice but to fall in line.<sup>11</sup>

The major distributors decision to impose a MAP policy was, in large respect, a reaction to a trend beginning in the early 1990s. Many new music retailers, including major consumer and discount stores including Wal-Mart, Circuit City, Best Buy and Kmart, started selling CDs at low prices to in an effort to gain customers and market share.<sup>12</sup> MAP was a response in the early 1990s to non-music chains like Circuit City and Wal-Mart and Target offering new releases at a loss in order to gain market share. The resulting price war forced many independent stores out of business.<sup>13</sup> These independent stores had as much to lose, if not more, as the major distributors, and in part pressured the record companies to impose the MAP policies.<sup>14</sup> The non-music chains could afford setting prices for CDs as low as \$8.98 in large part because they were

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<sup>7</sup> Id. See also “7<sup>th</sup> Circuit: Toys R Us guilty of antitrust,” United Press International, August 4, 2000.

<sup>8</sup> Id.

<sup>9</sup> “CD makers aim to be small targets for trustbusters,” Frank Pellegrini, CNN.com, May 11, 2000.

<sup>10</sup> “CD makers aim to be small targets for trustbusters,” Frank Pellegrini, CNN.com, May 11, 2000.

<sup>11</sup> “FTC Chair Says Agreement Could Cut CD Prices,” Rob Evans, LiveDaily.com, May 11, 2000.

<sup>12</sup> Id.

<sup>13</sup> “CD makers aim to be small targets for trustbusters,” Frank Pellegrini, CNN.com, May 11, 2000.

<sup>14</sup> “States target record labels with price-fixing suit,” John Borland, CNET News.com, August 8, 2000.

well diversified and did not depend solely on CDs sales for profitability. Traditional retailers fought back by lowering their prices in reply. To halt the price erosion, the major distributors instituted what the FTC termed as “unlawful” MAP policies in the mid-1990s. The FTC alleged that these illegal advertising policies that resulted in an inflated price for CDs cost domestic consumers \$480 million from 1997 through 2000.<sup>15</sup> By extinguishing the price war among retailers, and affecting a price floor for retail prices retailers charged to consumers, the major music distributors were able to raise their own wholesale prices.<sup>16</sup>

#### Why the FTC chased down MAP

In 1995, the average CD price was \$13.98.<sup>17</sup> In 2000, when the FTC announced its landmark settlement with the five major music distributors, the price of a CD was \$16.98.<sup>18</sup> In the period between, the FTC detected a connection between rising CD prices and the major music labels’ price-fixing policy. Upon investigation the five major music distributors, the FTC concluded that the major music distributors had violated Section 5 of the Federal Trade Commission Act<sup>19</sup> by impeding competition in the wholesale and retail markets. According to the Commission,

the arrangements entered into by the five largest distributors . . . violate[d] the antitrust laws in two respects. First, when considered together, the arrangements constitute practices that facilitate horizontal collusion among the distributors, in violation of Section 5 of the Federal Trade Commission Act. Second, when viewed individually,

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<sup>15</sup> “CD makers aim to be small targets for trustbusters,” Frank Pellegrini, [CNN.com](#), May 11, 2000. See also “FTC v. BMG, EMI, Sony, Time Warner, and Universal,” [The American Lawyer](#), July 2000 (“[A]greements with the recording industry’s five largest companies . . . will put a stop to minimum advertised price (MAP) programs.”)

<sup>16</sup> “Record Companies Settle FTC Charges of Restraining Competition in CD Music Market,” May 10, 2000.

<sup>17</sup> “FTC Settlement May Not Lower CD Prices,” Andrew Dansby, [Rolling Stone](#), June 1, 2000.

<sup>18</sup> Id.

<sup>19</sup> 15 U.S.C. § 45

each distributor's arrangement constitute[d] an unreasonable vertical restraint of trade under the rule of reason.<sup>20</sup>

In support of its determination, the FTC found that (1) “the distributors’ MAP policies prohibited retailers from advertising discounts in *all* advertising, including television, radio, newspaper and signs and banners within the retailers’ own stores, and *even including advertising paid for entirely by the retailer*, (2) the MAP policies applied to in-store advertising, excepting only the smallest price labels affixed to the product, and (3) a single violation of a distributors’ MAP policy carried severe financial penalties, resulting in the loss of all MAP funds for all of the retailer’s stores for 60-90 days.<sup>21</sup>

Because retailers were not forced to sell their products at a specified price, the FTC was most reluctant, according to Chairman Pitofsky, to conclude that “compliance with the MAP policies by retailers constituted *per se* unlawful minimum resale price maintenance, because we cannot say that there is sufficient evidence of an agreement by retailers to charge a minimum price.”<sup>22</sup> In its determination, the FTC relied on the decision In the Matter of American Cyanamid Co., which held that cooperative advertising cases should be adjudged pursuant to the rule of reason, so long as the dealer’s rights to discount below the advertised price and to advertise at any price when the dealer pays for the advertisement are not impinged. While the

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<sup>20</sup> “Statement of Chairman Pitofsky and Commissioners Anthony, Thompson, Swindle, Leary,” File No. 971-0070, May 10, 2000. The Commission considered whether the anticompetitive vertical restraints should be evaluated under a *per se* rule or a rule of reason. The Commission has employed the rule of reason to examine advertising program that restrict reimbursements for the advertisement of discounts due to the fact that they may be procompetitive or neutral. Id.

<sup>21</sup> Id. See “Record Companies Settle FTC Charges of Restraining Competition in CD Music Market,” May 10, 2000.

<sup>22</sup> Id.

FTC refused to rule the MAP policies per se illegal,<sup>23</sup> it nevertheless concluded the policies unlawful under a rule of reason deliberation. According to Chairman Pitofsky:

The five distributors together account for over 85 percent of the market, and each has market power in that no music retailer can realistically choose not to carry the music of any of the five major distributors. The MAP policies were adopted by each of the distributors for the purpose of stabilizing retail prices. The MAP policies achieved their purpose and effectively stabilized retail prices with consequential effects on the wholesale prices, ending the price competition that previously existed in the retail marketplace and the resulting pressure on the distributors' margins. Compliance with the MAP policies – which was secured through significant financial incentives – effectively eliminated the retailers' ability to communicate discounts to consumers. *Even absent an actual agreement to refrain from discounting, this inability to effectively communicate discounts to consumers meant that retailers had little incentive to actually sell products at a discount.*<sup>24</sup>

In short, the MAP policies implemented by the five major music distributors effectively eliminated the ability of dealers to sell products at a discount.<sup>25</sup> While the minimum advertised price agreements were not, in themselves, illegal under antitrust law, antitrust law may nevertheless be violated if the pricing arrangements barred stores from engaging in discount advertising of their own.<sup>26</sup> This violation, according to the FTC, in effect took place.

At the press conference announcing the settlement between the Federal Trade Commission (“FTC”) Chairman Robert Pitofsky and the five major music distributors on May 10, 2000, Chairman Pitofsky said that CD prices could fall anywhere between two and five dollars per disc. “Today’s news should be sweet music to the ears of all CD purchasers,” said Chairman Pitofsky. The three-year price-fixing binge that cost consumers \$480 billion was over.

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<sup>23</sup> According to Chairman Pitofsky, and relying on the court’s decision in Business Electronics Corp. v. Sharp Electronics Corp., “a vertical restraint is not illegal per se unless it includes some agreement on price levels.”

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> “FTC Slams Record Labels on CD Sales Practices,” Bloomberg News, May 10, 2000.

### Terms of the FTC Settlement

The agreements between the FTC and major distributors required the music companies to discontinue their MAP programs completely for seven years. The terms of the settlement included: (1) the five distributors agreed to stop linking promotional funds to the advertised prices of retailers for a period of seven years, (2) after seven years from the date of this settlement, the distributors will be prohibited, for a period of 13 years, from conditioning promotional money on the prices contained in advertisements for which they do not pay, and (3) the distributors are generally prohibited from severing relationships with retailers over disagreements regarding retailers' pricing.<sup>27</sup> The agreements with the five distributors ended a two-year industry-wide investigation.

Noticeably absent from the settlement with the FTC were a lack of admission of wrongdoing on the part of the music distributors and no punitive or compensatory money damage.<sup>28</sup> With the afterglow of Chairman Pitofsky's press conference still present, the major distributors did not budge from what had emerged years earlier as their battle chant, effectively described as follows: "We believe MAP serves a valid business purpose for our customers and the consumer and is an appropriate and lawful practice."<sup>29</sup> And while one might think that the settlement between the FTC and the gang of five would lower CD prices by eliminating price-fixing practices, thereby benefiting retail consumers, not everyone in the industry subscribed to such a view. Said Patrick Amory, general manager of the New York independent label Matador Records, "[e]verybody loves to vilify the major labels – we certainly do it as well. But in this

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<sup>27</sup> "CD makers aim to be small targets for trustbusters," Frank Pellegrini, [CNN.com](http://CNN.com), May 11, 2000. See also "Record Companies Settle FTC Charges of Restraining Competition in CD Music Market," May 10, 2000.

<sup>28</sup> Tom Egan, a reporting covering consumer technology, was not sold on the FTC's belief that CD retail prices would go down<sup>28</sup> due to the fact that the distributors did not have to pay a fine, nor even repay the nearly half-billion dollars in overcharges.

instance, they were on the side of the good guys. What they're doing may be illegal, but it's good."<sup>30</sup> According to John Kunz of Waterloo Records and Video, an influential independent store in Austin, "[w]ith MAP in place, the consumer perhaps was paying higher prices in the short term. But in a non-MAP world, more and more competition gets driven out, and the prices are going to go back up, perhaps even higher."<sup>31</sup> It is important to realize, then, that it remains somewhat unclear whether consumers would have been spared the \$480 million dollars in excess retail charges had the distributors' MAP policies not been implemented. While consumers across the board obviously would benefit from lower prices, one must wonder whether the music retail scene would be "Blockbusted"<sup>32</sup> as a result of a price war that subsequently bludgeons independent and alternative music retailers, leaving only discount retailers as the providers of CDs to consumers, thus stifling more creative music outlets from reaching consumers.

Smaller type independent music retailers favored MAP policies, as it set a price floor on CDs, thereby ensuring a set profit margin and preventing larger non-music retailers from entering the market and undercutting the agreed-to price. Consumers benefited from being able to choose from among many music retailers, and not solely from discount retailers. Even a layman recognizes the streamlining of music choice that would result from driving many independent and alternative music retailers out of business. Major industry executives seized on this point in their defense of MAP policies by declaring that they were "trying to protect small record stores from large chains that slash prices in an attempt to drive the independents out of business."<sup>33</sup> In response to the subsequent state AG suit against the distributors, Warner Music

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<sup>29</sup> "FTC Forces Music CD Pricing Reform," John F. Butland, The Mail Archive, May, 10, 2000.

<sup>30</sup> "FTC Settlement May Not Lower CD Prices," Andrew Dansby, Rolling Stone, June 1, 2000.

<sup>31</sup> Id.

<sup>32</sup> This term has been coined by the author of this paper.

<sup>33</sup> "Compromise, Hell!" Shawn Zeller, The National Journal, November 18, 2000.

spokesman Will Tanous, responded: “We continue to believe that (the minimum price policy) served a valid business purpose and benefited consumers by substantially furthering retail competition, and that it was an appropriate and lawful practice.”<sup>34</sup> Thus, if MAP did inflate prices over the long-term, one must, at the very least, recognize the negative effects to music choice that would result from a retail market that sacrificed diversity for profit margins. By imposing MAP policies, the major distributors helped small record stores compete against giant chains such as Kmart or Target. And despite imposition of MAP policies, the chain stores were not prevented from selling CDs below the price floor, but rather were only precluded from receiving the retail marketing subsidies traditionally provided for by the music distributors. In short, one must view questionably any decision by the AGs to get involved, and specifically Pitofsky’s statement at the press conference announcing the settlement: “There was no plausible business justification for this other than to get the prices up.”<sup>35</sup>

#### Enter the Private Parties and States Attorneys General

The discontent with the FTC settlement agreement is largely associated with its lack of bite. That the major distributors were not required, pursuant to the FTC settlement agreement, to pay the almost half billion in retail overcharges was seen as a sell-out.<sup>36</sup> And here is where the private lawsuits and state AGs filled the gap.

A class-action lawsuit filed in 1996 alleged that the actual cost of manufacturing a CD was less than a dollar and that the wholesale prices charged by the distributors represented a markup of as much as 2,000 percent over the manufacturing cost.<sup>37</sup> On July 8, 1996, two CD buyers sued EMI Music Distribution, Sony Music Entertainment, Warner Elektra Atlantic Corp.,

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<sup>34</sup> “States target record labels with price-fixing suit,” John Borland, CNET News.com, August 8, 2000.

<sup>35</sup> “FTC Slams Record Labels on CD Sales Practices,” Bloomberg News, May 10, 2000.

<sup>36</sup> “Who Are They Calling Music Pirates?” Tom Egan, techtomorrow, May 23, 2000.

UNI Distribution Corp. and BMG. The two plaintiffs won immediate class-action status, thereby allowing other aggrieved CD consumers to join. The class-action lawsuit initially limited each individual claim to \$5,000.<sup>38</sup> Alleging that the companies propped up retail CD prices despite the fact that improvements in manufacturing had cut the costs of making CDs from \$3 in 1983 to less than \$1 in 2000, the lawsuit mirrored the parallel action on the part of the FTC against the major distributors. The claimants in the private class action argued that the manufacturers forced retailers into keeping prices high through unlawful MAP policies.<sup>39</sup> The lawsuit was filed on behalf of any consumer who bought CDs from any of the companies after June 26, 1992.<sup>40</sup> Unlike the FTC action, the private class action raised the possibility that the major distributors would be required to fork over considerable money damages to the plaintiffs.<sup>41</sup>

On August 8, 2000, three months after the FTC settlement with the major music distributors, 30 state attorneys general collectively sued the major distributors and several domestic retailers, claiming that they illegally conspired to prop up the prices of CDs, thereby violating state and federal antitrust law. The number of states would increase by ten at the time the parties settled more than two years later. Unlike the FTC and private class-action, the AG suit, filed by New York State AG Eliot Spitzer on behalf of the state attorneys general, claimed that the five major record companies *and several large music retailers* conspired to overcharge consumers for CDs, thereby costing consumers hundreds of millions of dollars.<sup>42</sup> The AG suit

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<sup>37</sup> Id.

<sup>38</sup> “Class Action Alleges Six Firms Propped Up Prices Even As Manufacturing Costs Fell,” Associated Press, July 10, 1996.

<sup>39</sup> Id. As in the FTC’s Complaint against the major distributors, the private plaintiffs claimed that manufacturers kept retailers in line by suspending advertising assistance.

<sup>40</sup> Id. This suit bridged the gap between consumers and the manufacturers sued by claiming that the manufacturers forced retailers into keeping prices high.

<sup>41</sup> Id.

<sup>42</sup> “States Sue Record Labels Over Price Fixing,” from <http://gareth.membrane.com/leflawnet/cdprice>

was originally filed in the Southern District of New York, before being transferred pursuant to § 1407 to the District Court of Maine.

While the AG claim mirrored those of the FTC and private consumers in that it alleged that the MAP policies of the major distributors increased CD prices in violation of state and federal antitrust law, it fundamentally differed in its inclusion of several major retailers as co-defendants to the distributors.<sup>43</sup> According to Jon Zahlaway of LiveDaily.com, the large retailers included Musicland, Sam Goody, and Tower Records.<sup>44</sup> By suing several retailers, the AG suit claimed that illegal agreements, i.e. “a long-standing conspiracy,”<sup>45</sup> between the labels and the retailers resulted in fixed minimum CD prices.<sup>46</sup>

In announcing the suit, New York AG Spitzer said: “[w]hen there is illegal activity to fix prices – as was the case here – the consumer is always the loser.”<sup>47</sup> Of importance is the fact that the AG suit follows on the heels of the FTC investigation and settlement with the five major distributors whereby the music distributors agreed to halt the industry implemented MAP policies for seven years.<sup>48</sup> In effect, the AG lawsuit echoes the FTC’s findings by claiming that the five major record companies and a number music retailers developed a MAP system that

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[fixing.html](#). “Because of these conspiracies, tens of millions of consumers paid inflated prices to buy CDs,” said Spitzer.

<sup>43</sup> “Lawsuit Accuses CD Distributors, Retailers of Overcharging Consumers,” Jon Zahlaway, [LiveDaily.com](#). The allegations of price fixing by the state AGs are identical to those filed by the FTC and subsequently settled by the FTC and five major distributors in May 2000.

<sup>44</sup> Id. The state AGs alleged that the five major record companies and music retailers named in the lawsuit developed a MAP system that forced other discount retailers such as Circuit City, Best Buy and Target to charge a fixed price for CDs.

<sup>45</sup> “States target record labels with price-fixing suit,” John Borland, CNET News.com, August 8, 2000.

<sup>46</sup> Lawsuit Accuses CD Distributors, Retailers of Overcharging Consumers,” Jon Zahlaway, [LiveDaily.com](#).

<sup>47</sup> “States target record labels with price-fixing suit,” John Borland, CNETNews.com, August 8, 2000.

<sup>48</sup> Id.

forced discount retailers such as Circuit City, Target and Best Buy to charge an inflated price for CDs.<sup>49</sup>

#### Where the FTC settlement and the AG action diverge

While the claims made by the FTC and AGs are similar in law, their focus is different in reality. By naming retailers as co-defendants in their lawsuit, the AG action focused on a so-called “conspiracy” between distributors and retailers, as opposed to the FTC’s sole focus on the major distributors. This difference illuminates a larger policy difference: where the FTC focused on the antitrust violation of the major distributors, the AGs were largely concerned about the net effect on the consumers, and hence broadened the scope of their investigation to include retailers engaged in the fix. This makes sense, given that the FTC settlement was not about returning dollars to overcharged customers, whereas the AG (and private actions) central goal was providing restitution to the overcharged public.

#### The Defendants’ Response to the AG suit

The major distributors continued, even after their settlement with the FTC ordered the distributors to abandon their MAP policies, to espouse the benefits of the MAP system. In their response to the Private Complaint and State Complaint, the CD distributors and retailers contended that their actions were “lawful, unilateral decisions by the various distributors and retailers.”<sup>50</sup> Their response to the AG suit was collective dismissal. According to Will Tanous, the spokesman for Warner Music, “Warner Music Group believes the [AG] suit lacks any merit. We continue to believe that the minimum price policy served a valid business purpose and benefited consumers by substantially furthering retail competition, and that it was an appropriate

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<sup>49</sup> Lawsuit Accuses CD Distributors, Retailers of Overcharging Consumers,” Jon Zahlaway, [LiveDaily.com](http://LiveDaily.com).

and lawful practice.”<sup>51</sup> And in a statement issued by BMG: “We still believe that MAP was a legitimate and appropriate practice and we are confident that the courts will reach the same conclusion.”<sup>52</sup>

The Class Action and AG Process: From New York to Maine; From Maine to Settlement

On October 20, 2000, the Multi-District Litigation panel transferred 41 private actions to the Federal District of Maine;<sup>53</sup> the state action involved a consolidated complaint on behalf of 42 State Attorneys General suing in their *parens patriae* capacity under the Clayton Act implicating both music distributors and retailers as defendants.<sup>54</sup> The consolidated complaint filed by the private consumer plaintiffs sought class action status to represent both individual purchasers in eight states and the District of Columbia and entity purchasers everywhere in the United States.<sup>55</sup> Thus, the litigation was geographically diverse, national in scope, with ten actions in the Central District of California, eight actions in the Southern District of New York, four actions each in the Southern District of Illinois and Eastern District of New York, three actions in the Eastern District of Pennsylvania, two actions in the District of Connecticut, Northern District of Illinois and Eastern District of Louisiana, and one action in the Northern District of California, Southern District of California, District of Columbia, Middle District of Florida, District of Massachusetts and Eastern District of Texas.<sup>56</sup> Since all the actions in this litigation involved common questions of fact concerning the allegations that the defendant

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<sup>50</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Mar. 28, 2001) (Memorandum and Order on Motion to Dismiss).

<sup>51</sup> “States target record labels with price-fixing suit,” John Borland, CNET News.com, August 8, 2000.

<sup>52</sup> Lawsuit Accuses CD Distributors, Retailers of Overcharging Consumers,” Jon Zahlaway, LiveDaily.com.

<sup>53</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Oct. 20, 2000) (transfer of actions by Judicial Panel on Multidistrict Litigation).

<sup>54</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Jan. 26, 2001) (order appointing lead and liaison counsel).

<sup>55</sup> Id.

distributors and retailers engaged in vertical and horizontal restraint of trade, both groups of defendants and the individual plaintiff parties all jockeyed for centralization of the litigation in favorable jurisdictions. Since there was no single distinct district that stood out as the geographic focal point of the litigation, the panel transferred all the lawsuits to the Honorable D. Brock Hornby in the District Court of Maine, a judge who had the time and experience to consolidate all the lawsuits and adjudge both the private and state claims against the music distributors and retailers.<sup>57</sup>

It is important to note that the private parties filed a separate complaint from the state AGs. While both claimed that the distributors and retailers unlawfully fixed CD prices, only the private plaintiffs sought to extend the statute of limitations on the basis of fraudulent concealment.<sup>58</sup> Aside from this obvious difference between the two complaints, a subtler difference between the private and state actions existed as to the nature of the collusion. Where the State Complaint alleged “separate agreements *between* particular retailers and particular distributors”,<sup>59</sup> the Private Complaint alleged “an agreement generally *among* distributors as well as *among* retailers.”<sup>60</sup> In other words, both complaints alleged vertical agreements in violation of federal and state antitrust laws, whereas only the Private Complaint alleged horizontal agreements in violation of antitrust laws.<sup>61</sup> While the court held that the Sherman Act claims and state law claims met the “acceptable level of probability” to withstand the defendants’ motion to dismiss, Judge Hornby dismissed the Private Complaint’s fraudulent concealment

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<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Mar. 28, 2001) (defendants’ motion to dismiss denied except with respect to the fraudulent concealment claim).

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Id.

claim on the ground that there was no factual basis for the claim.<sup>62</sup> And in denying the defendants' motion to dismiss the complaints, the court did not hold the plaintiffs' claims to a higher standard given the FTC's previous investigation and the state AG's subsequent access to the FTC's findings.<sup>63</sup>

Consolidating state and federal private actions and trying the private and state actions in the same district court had the advantage of more easily coordinating pretrial discovery to prevent duplicative efforts.<sup>64</sup> For example, requests for documents in the federal litigation before Judge Hornby in Maine (the "MDL Proceeding") were provided for in the coordinated state actions. The "Joint Coordination Order" enabled state court proceedings involving the same subject matter as the MDL Proceeding to coordinate discovery so as to prevent duplication of discovery and undue burden on all parties and achieve both a just and efficient result in all proceedings.<sup>65</sup> In addition, Judge Hornby set a deadline, January 12, 2001, for disclosure of FTC

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<sup>62</sup> Id. The Private Complaint alleged that the defendants' scheme was self-concealing and that the distributors fraudulently concealed the scheme. For a fraudulent concealment scheme to survive a motion to dismiss, the complaint must plead (1) wrongful concealment, (2) failure of the plaintiffs to discover the concealment, and (3) plaintiffs' due diligence in discovering the concealment. In short, plaintiffs must, and failed in this litigation, to show that they exercised due diligence in discovering the defendants' MAP scheme and that they relied on the defendants' concealment. Id.

<sup>63</sup> Id.

<sup>64</sup> See In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, 2001 U.S. Dist. LEXIS 11043 (D. Me. May 8, 2001) (Joint Coordination Order coordinating state-court proceedings with the federal proceeding before Judge Hornby in the District Court of Maine (the "MDL Court")).

<sup>65</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. May 8, 2001) (Joint Coordination Order relating to All Cases). See also Joint Coordination Order, dated Jan. 5, 2001. One of the important benefits of coordination and consolidation of the actions in the Maine federal court was orderly and effective appointment of counsel by Judge Hornby. When the consolidated complaint was filed on behalf of the private plaintiffs, for instance, 80 law firms were listed on the complaint. Part of effectively managing this antitrust litigation required Judge Hornby to appoint lead and liaison counsel for both the private action and state action. See In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Jan. 26, 2001) (order appointing private counsel). See also Pretrial Orders delineating duties of lead counsel in the private civil actions and the state AG civil actions, February 8, 2001.

documents and AG documents.<sup>66</sup> In Judge Hornby’s “Scheduling Order,” dated February 15, 2001, he ordered the production by the distributor defendants of documents previously produced to the FTC in their MAP investigation.<sup>67</sup> In his “Order on Discovery,” dated April 17, 2001, Judge Hornby ordered that state jurisdictions can join the federal litigation, and where they do, any discovery disputes will first be heard in the federal forum, i.e. before Judge Hornby himself in Maine.<sup>68</sup> Finally, in his Stipulated Protective Order<sup>69</sup> regarding documentation related to the litigation, the court held that the order does not affect the state AGs from using information previously obtained by the states from the FTC. In short, the purpose of coordination and consolidation in the District Court of Maine was to maximize party efficiency, maintain an orderly process by which to adjudge the private and state claims, but enable the parties to leverage prior investigations pursuant to the FTC proceeding against the music distributors.

#### Terms of the AG and Class Action Settlement

The litigation between the plaintiff states, plaintiff class action and defendant distributors and defendant retailers was never litigated. On October 25, 2002, Judge Hornby gave preliminary approval to a proposed Settlement of the CD litigation, and ordered a Fairness Hearing for May 22, 2003, to consider “the fairness, reasonableness and adequacy of the proposed settlement.”<sup>70</sup> The Settlement binds the five largest CD distributor defendants, three retailer defendants, the plaintiff States on their behalf “and as parens patriae on behalf of all

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<sup>66</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Nov. 29, 2000) (initial pretrial order).

<sup>67</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Feb. 15, 2001) (Scheduling Order).

<sup>68</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Apr. 17, 2001) (Order on Discovery).

<sup>69</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Jan. 5, 2001).

natural persons residing therein”<sup>71</sup> who purchased CDs from retailers between January 1, 1995 and December 22, 2000, and the “Plaintiff Settlement Class.”<sup>72</sup> The only plaintiffs not bound by the terms of the Settlement are those persons “who after notice of the Settlement timely and validly request exclusion from participation in the Settlement.”<sup>73</sup> In effect, the Settlement ends both the private lawsuit and AG action begun more than two years ago. Along with the FTC settlement in May, 2000, this settlement effectively precludes future litigation against the major CD distributors and retailers engaged in the music industry’s minimum advertised pricing scheme during the mid and late 1990s. “The proposed Settlement reached by the parties to the Litigation settles and resolves the Litigation against the Defendants in its entirety and was granted preliminary approval by the Court on October 21, 2002.”<sup>74</sup> In addition, Judge Hornby ruled that

once the Court enters an order finding the proposed settlement fair, adequate and reasonable and all appeals have been resolved or all appeal periods have expired, those Plaintiffs who have not timely requested exclusion from this Litigation shall be deemed to have and by operation of the Judgment shall have fully, finally and forever released, relinquished and discharged all Released Claims as set forth below.<sup>75</sup>

The settling defendants have agreed to pay \$143,075,000, comprised of \$67,375,000 in cash and \$75,700,000 in non-cash consideration.<sup>76</sup> The cash payments are to be deposited in the

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<sup>70</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Oct. 25, 2002) (Notice of Pendency and Proposed Settlement of Parens Patriae Consumer and Class Action Lawsuits).

<sup>71</sup> Id.

<sup>72</sup> The “Plaintiff Settlement Class” includes all persons in Colorado, Georgia, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, South Dakota, the District of Columbia, the U.S. Territories of Guam and American Samoa, and all non-natural persons or entities in the United States and its Territories who purchased CDs from one or more retailers between January 1, 1995 and December 22, 2000.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Id.

Settlement Fund, while the non-cash consideration consists of roughly 5.5 million music CDs to be distributed to the plaintiff States.<sup>77</sup> Subject to Judge Hornby's final approval, the distributor defendants will pay the following amounts:

- (1) EMD<sup>78</sup> will pay \$6,500,000 in cash and \$8,500,000 in non-cash CD distribution
- (2) WEA<sup>79</sup> will pay \$13,650,000 in cash and \$15,750,000 in non-cash CD distribution
- (3) Universal will pay \$18,850,000 in cash and \$21,750,000 in non-cash CD distribution
- (4) Sony will pay \$12,523,500 in cash and \$14,701,500 in non-cash CD distribution
- (5) BMG will pay \$12,776,500 in cash and \$14,998,500 in non-cash CD distribution

The retailer defendants will pay the following amounts:

- (1) Trans World will pay \$800,000 in cash
- (2) Musicland will pay \$2,000,000 in cash
- (3) Tower Records will pay \$275,000 in 12 consecutive monthly installments.<sup>80</sup>

In addition to compensatory relief, the Settlement imposes injunctive relief on the distributor defendants and retailer defendants.<sup>81</sup> The injunctive relief proposed by the Settlement mirrors that imposed by the FTC Settlement in May, 2000. The distributors are prevented from adopting or threatening to adopt "any policy practice or plan which makes receipt of any cooperative advertising or other promotional funds contingent on the price or price level at which any

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<sup>77</sup> Id. The CDs are valued at 20% less than CD manufacturer's suggested retail price. Id.

<sup>78</sup> Capital Records, Inc. d/b/a/ EMI Music Distribution, Virgin Records America, Inc., and Priority Records LLC (collectively, EMD).

<sup>79</sup> WEA consists of Time Warner, Inc., Warner-Elektra-Atlantic Corp, WEA, Inc., Warner Music Group, Inc., Warner Bros. Records, Inc., Atlantic Recording Corporation, Elektra Entertainment Group, Inc., and Rhino Entertainment Company.

<sup>80</sup> If Tower merges with or is acquire by another company, or if it sells or transfers a controlling percentage of its capital stock to another company, or if it sells at least 70% of the fair market value of its US assets to another company, then Tower is required to pay only \$325,000, less any cash payments previously made to the Settlement Fund. Id.

<sup>81</sup> Id.

product is advertised or promoted.”<sup>82</sup> Unlike the FTC Settlement, which focused solely on the CD distributors, the proposed Settlement herein imposes injunctive relief upon the CD retailers. In effect, retailer defendants will be prohibited “for a period of five years from soliciting, demanding, requesting, advocating or encouraging any distributor or wholesaler of music product to adopt or implement any policy practice or plan which makes receipt of any cooperative advertising or other promotional funds contingent upon the price or price level at which any music product is advertised, promoted, offered or sold.”<sup>83</sup>

With respect to the distribution of the Settlement cash proceeds, all funds will be distributed directly to persons who purchased CDs between January 1, 1995 and December 22, 2000.<sup>84</sup> Anyone who files a valid and timely claim for payment will *not* receive a payment greater than \$20.<sup>85</sup> Irrespective of how many CDs a consumer purchased, he or she may only file one claim. If the number of claims filed results in refunds of less than \$5 per claimant, there will be no cash payment to individual consumers;<sup>86</sup> should this occur, the cash portion of the Settlement will be distributed to not-for-profit, charitable, governmental or public entities to be used for music-related purposes.<sup>87</sup> All claims must be submitted no later than March 3, 2003.<sup>88</sup> In December, an online claim filing process was added to allow Settlement Group members the ability to file a claim electronically.<sup>89</sup> Regarding the non-cash compensation in the distribution of CDs to the States, the CDs will be distributed to non-for-profit corporations and/or charitable

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<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id. Note that prior to distributing funds to the victims of the inflated CDs prices, administrative costs and fees and costs associated with the litigation and settlement will first be paid.

<sup>85</sup> Id.

<sup>86</sup> From <http://www.musiccdsettlement.com/mainpage.htm>.

<sup>87</sup> Id.

<sup>88</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Oct. 25, 2002) (Notice of Pendency and Proposed Settlement of Parens Patriae Consumer and Class Action Lawsuits).

organizations, “with express conditions ensuring that the CDs [will] be used to further music-related purposes or programs reasonably targeted to benefit a substantial number of the persons who purchased” CDs from retailers.<sup>90</sup> The amount of the non-cash consideration each state receives will be in proportion to that state’s percentage of total population of the US.<sup>91</sup> Only residents of the plaintiff States or members of the Plaintiff Settlement Class can receive the benefits of the proposed Settlement.<sup>92</sup>

#### A Comparison of the AG Settlement with the FTC Settlement

News of the proposed Settlement between the AGs and distributor and retailer defendants broke on October 1, 2002. Unlike the FTC Settlement more than two year previous, the proposed Settlement included restitutionary relief for consumers who purchased CDs between 1995 and 2000. According to New York AG Spitzer, “This is a landmark settlement to address years of illegal price-fixing. Our agreement will provide consumers with substantial refunds and result in the distribution of a wide variety of recordings for use in our schools and communities.”<sup>93</sup> In addition, the FTC Settlement did not address the collusive role that retailers had in the implementation and enforcement of the MAP scheme.<sup>94</sup> Despite the Settlement,

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<sup>89</sup> From <http://www.musiccdsettlement.com/mainpage.htm>.

<sup>90</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Oct. 25, 2002) (Notice of Pendency and Proposed Settlement of Parens Patriae Consumer and Class Action Lawsuits).

<sup>91</sup> From <http://www.musiccdsettlement.com/mainpage.htm>.

<sup>92</sup> In Re: Compact Disc Minimum Advertised Price Antitrust Litigation, MDL No. 1361 (D. Me. Oct. 25, 2002) (Notice of Pendency and Proposed Settlement of Parens Patriae Consumer and Class Action Lawsuits).

<sup>93</sup> “New York Settles Price-Fixing Case Against Major Distributors of Compact Discs,” Press Release, Office of New York State Attorney General Eliot Spitzer, September 30, 2002.

<sup>94</sup> Id.

however, neither the plaintiffs nor the defendants expected the settlement to result in lower CD prices.<sup>95</sup>

In strikingly similar fashion to their reaction in the FTC Settlement, however, none of the distributor or retailer defendants were required to admit to wrongdoing as part of the Settlement.<sup>96</sup> According to Universal, its MAP policies “were procompetitive and geared toward keeping more retailers, large and small, in business” and “would have been found by the court to be legal and in complete compliance with both state and federal antitrust laws”<sup>97</sup> BMG reacted accordingly: “[R]eaching a settlement was the best way to resolve this matter” even though the company believed it engaged in no wrongdoing.<sup>98</sup> According to retailer Trans World, “We’ve always felt that we’ve been wrongly accused.”<sup>99</sup> In short, the distributor and retailer defendants to this day presume their policy’s lawfulness despite two settlements against their pricing policies.

### III. An Appropriate Role for the States Attorneys General?

#### The Argument Against Multistate Enforcement and Why It Fails in the CD Litigation

A safe, though not bulletproof, presumption is that antitrust enforcement by AGs *on a multistate level* presumes antitrust violations interstate in nature; otherwise, why would a whole bunch of States band together to address a purely local concern? Issues that mobilize a large number of diverse states invariably involve national policy. Many argue, including Judge Posner of the Seventh Circuit, that efforts to combat antitrust violations requiring this coordination of multiple states might best be left to the Federal Government. Judge Posner argues for the

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<sup>95</sup> “Suit Settled Over Pricing of Recordings at Big Chains,” Claudia H. Deutsch, New York Times (October 1, 2002).

<sup>96</sup> “Labels, retailers reach \$143M CD settlement,” Joyzelle Davis, Tribune-Review (October 1, 2002).

<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> Id.

elimination of all state public antitrust enforcement and the repeal of state antitrust law, never mind rescinding state power to enforce federal antitrust violations. His views regarding antitrust enforcement by the States emerged in light of his failed attempt at mediating the Microsoft Corp. antitrust case. Upon the breakdown of negotiations, Posner “blasted state antitrust enforcement and questioned whether regulators and judges have the technical expertise to handle complicated cases in the New Economy.”<sup>100</sup> Said Posner: “I would like to see states forbidden to bring antitrust suits,” unless they are proprietary claims.<sup>101</sup> In short, Posner would like to see the elimination of the States’ *parens patriae* power under federal antitrust law, and only allow the states to sue companies that have directly harmed the actual state, an example being a company fixing the prices of goods purchased by the state itself. Posner’s position emerges from his belief that (1) States are mere free-riders on federal antitrust litigation, and complicate the resolution process and (2) States are too heavily influenced by interest groups “that may represent a potential antitrust defendant’s competitors,”<sup>102</sup> placing a State in the back-pocket of a competitor of the defendant, thereby further frustrating resolution.

Posner’s position falls flat when applied to the CD price-fixing litigation. The States were anything but free riders in the litigation. Despite the fact that the AGs’ claims were mostly synonymous with the FTC’s claims, the AGs sued certain music retailers alleged to have implemented, maintained and enforced the minimum advertised pricing schemes, and the AGs sought compensatory damages for their harmed citizenry. This supports the contention that the AGs performed a distinct role from that of the FTC. In response to Posner’s second point that

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<sup>100</sup> “Microsoft Suit Mediator Rues State Antitrust Role,” John R. Wilke, The Wall Street Journal, B15, Sept. 19, 2000.

<sup>101</sup> Id.

<sup>102</sup> Id. Posner argues that this is a particular concern when the defendant is located in one state and one of its competitors is located in another state, and the competitor lobbies his AG to bring suit. Says Posner:

States AGs should be precluded from filing suit because they might be subject to intense special interest pressure, that argument precludes any government agency, state or federal, from enforcing violations of antitrust law. State government enforcement agencies and personnel are no more influenced by special interest groups than federal government agencies. If anything, the ability of a multi-faceted approach to antitrust enforcement, whereby state governments and the federal government can enforce violations of federal and state antitrust law, would seem to better combat the influence of special interest groups.

### The Argument For Multistate Efforts

Professor Harry First opposes the Posner position by recognizing the benefits of a multi-faceted, nonhierarchical enforcement process whereby States AGs, the DOJ or FTC, and private parties work side-by-side enforcing antitrust violations.<sup>103</sup> First supports the contention that states not only fill a vital role beside federal antitrust enforcement, but that there is an important role for States AGs even in the case where federal enforcement is coupled with private class action litigation. In short, First argues that AGs fill a role between private litigation and federal policing.<sup>104</sup> The role of States AGs is summarized by First as follows: States focus much of their efforts on obtaining monetary recoveries for consumers and state agencies pursuant to their *parens patriae* powers, recoveries that the Federal Government cannot get and that private counsel might not get.<sup>105</sup> In support of an active role for States AGs despite the federal action and private class action, First posits that the AGs have certain advantages over federal enforcement and the private class action. In comparison to federal enforcement, the States have

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“A situation in which the benefits of government action are concentrated in one state and the costs in other states is a recipe for irresponsible state action.”

<sup>103</sup> Harry First, Symposium: Pyrrhic Victories? Reexamining the Effectiveness of Antitrust Remedies in Restoring Competition and Deterring Misconduct: Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 Geo. Wash. L. Rev. 1004 (October / December 2001).

<sup>104</sup> Id.

jurisdictional remedies that exceed those available to the federal antitrust enforcement agencies.<sup>106</sup> For instance, federal law prevents suits for damages to the U.S. Government as an indirect purchaser. In addition, there are no civil penalties available for antitrust violations at the federal level.

With respect to private class action enforcement of antitrust violations, it is clear that the States have stronger jurisdictional tools. “[A]lthough the federal *parens patriae* claim for damages under the Hart-Scott-Rodino Act has procedural protections similar to those provided under Federal Rule 23 for class members, *parens patriae* actions need not meet Rule 23’s requirements, such as commonality of claims or adequacy of representation. These issues are, of course, major problems in antitrust class actions.”<sup>107</sup> The benefits of state AG action over private class actions extend to injunctions and investigations. With respect to the former, according to First, “standing presents no problems for the states when they are seeking to protect either their economy in general, or the interests of their consumers; private litigants, however, may still face hurdles.”<sup>108</sup> Regarding the latter, States have broad power to use compulsory process to investigate alleged antitrust violations prior to filing a suit, a power similar to that used by the DOJ or FTC, a power not available to private plaintiffs.<sup>109</sup>

First argues that States play a vital role in policing violations of antitrust law. They complement federal enforcement and private class action suits by bringing to the table an acquired knowledge of the local impact of an alleged violation and provide a potentially different policy perspective to a litigation that involves private class action and the federal government.<sup>110</sup>

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<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

The mutually exclusive roles of the States and the Federal Government was vividly on display in the Vitamins Indirect Purchaser Litigation, where 21 AGs represented the indirect purchasers of vitamins and successfully settled for \$225 million under state antitrust law against an international cartel of six vitamin manufacturers who inflated vitamin prices. Though federal antitrust law was violated, the indirect purchasers only had a valid claim in state law. This case serves as an example of the instrumental role that AGs play when federal relief is unavailable, or perchance the Federal Government decides against seeking relief for alleged violations of antitrust law.

Harry First fully supports the role played by the States AGs in the CD price-fixing antitrust litigation, where the States sought compensatory damages in addition to the injunctive relief already obtained by the FTC against the major CD distributors, in addition to broadening the investigation and defendant class to include certain CD retailers enforcing and benefiting from the minimum advertised pricing scheme. First argues that in its *parens patriae* capacity, the States AGs in no way conflict with federal enforcement.<sup>111</sup> With respect to their overlap with private class action lawsuits, First argues that the advantages of *parens patriae* suits outweigh whatever tension may arise between the state action and private lawsuit;<sup>112</sup> the state *parens patriae* claims help avoid significant class certification issues. Another benefit with AG actions addresses distribution of compensation. Says First: “[S]tate attorneys general can be presumed to be acting in the interests of those they represent, the citizens of their state. This can be most critical in cases where damage awards must be distributed on a *cy pres* basis because it is uneconomic to provide small individual recoveries directly to numerous injured consumers.

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<sup>111</sup> Id.

<sup>112</sup> Id.

States not only have experience in making these distributions, they are also publicly accountable for ensuring that the payments go to groups that will benefit those harmed by the violation.”<sup>113</sup>

#### The Suspect Role of the States AGs in the CD Litigation

Despite the fact that the states bring a unique and vital perspective to the antitrust enforcement table, the States’ decision to sue the five largest CD distributors and three music retailers is suspect for reasons apart from antitrust doctrine. The Compact Disc Minimum Advertised Price Antitrust Litigation is about CDs. Not food. Not heat. Not clean water. CDs. In light of the fact that the FTC put a stop to MAP policies in May, 2000, and given the numerous private lawsuits pending around the country, why would the AGs from over 40 states expend valuable resources on the inflated price of a luxury? Clearly the States’ entrance into the litigation afforded the private parties the ability to come together as a class without having to climb the legal hurdles to form a plaintiff class action. Nevertheless, in light of the fact that suspension of MAP schemes had a conflicting effect on the marketplace, coupled with the fact that the FTC, and later on the States, affirmed that the prices of CDs might not fall due to the FTC Settlement and proposed AG Settlement, in addition to having a questionable effect on independent and traditional music retailers, it seems suspect why the States would allocate resources to this case.

While the States are known for rigorous policing of vertical price maintenance, in light of the ambivalent effect of the FTC Settlement, the States might have been better off fighting another fight. This position is merely an opinion, and does not deflect from the larger issue of whether or not the states should play an active role in antitrust enforcement. Despite the fact that the price of CDs has not fallen due to the FTC Settlement and the proposed AG Settlement, the

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<sup>113</sup> Id.

fact remains that the state Settlement achieved a compensatory benefit for overcharged consumers, and only a cynic's cynic would argue that this is an undesirable outcome.

In conclusion, the world is better in a multi-headed manner. Federal antitrust law presumes overlapping jurisdiction for federal and state authorities. Those arguing in support of stripping States AGs of their power to sue on behalf of their constituents harmed by vertical price-fixing schemes need look no farther than the CD Minimum Advertised Price Antitrust Litigation to comprehend the vital role that the AGs play. Without the effort undertaken by the States AGs, overcharged consumers would have had little, if any, redress. And while the AGs decision to enter the fray in the CD minimum advertised price scheme is somewhat suspect in light of the fact that CDs are not tied to an individual's existence and, collectively, a state's social welfare, the role that States AGs play in policing the business practices of large companies is fundamental to the protection of their constituents.