

July 22, 2008

Rapporteur's Summary of Third Meeting Between State Enforcers and Private Bar

The AAI and the State Center for Antitrust and Consumer Protection jointly sponsored a third meeting of a group of state assistant attorneys general, private plaintiffs' antitrust lawyers, and academics to discuss issues of mutual concern involving private/state antitrust enforcement. These notes summarize the discussion at the meeting, which was held in Washington, DC on March 28, 2008. Notes of prior meetings are available at www.statecenterinc.org and www.antitrustinstitute.org.

The program began with introductions by Steve Houck and Bert Foer, who explained the purpose of the meeting – to have a frank exchange of views to promote mutual cooperation – and the ground rules of the discussion. Among the subjects discussed were the application of *Associated General Contractors (AGC)* to state law claims, some general principles for improving coordination and the potential for coordination on legal issues.

The discussion of *AGC* focused on a recent decision by Judge Hamilton in the federal district court for the Northern District of California who found that indirect purchasers of DRAM that is incorporated into personal computers did not have standing to sue for damages under various states' *Illinois Brick* repealers. She concluded that these states would follow the law on standing under the Clayton Act, as set forth in the so-called "*AGC* factors," which supposedly barred standing for purchasers of products containing price-fixed components, because such purchasers did not "participate" in the cartelized market. That decision is currently on appeal to the Ninth Circuit. The ruling is one of the consequences of CAFA, which puts state law questions in the hands of federal district judges who may be skeptical of private enforcement. Other federal courts have also interpreted state law to follow the restrictive *AGC* standing factors. The discussion considered ways to get state Supreme Courts to decide these questions, to get state Attorneys General to intervene in private actions that raise these issues, possible enactment of "*AGC* repealers," and the development of "proximate cause" standards that could be advocated where the price-fixed product is a component or ingredient in the end product purchased by the indirect purchaser.

The discussion of possible "best practices" considered whether there were principles for allocating responsibility between the states and the private bar for bringing certain kinds of cases, for representing certain interests, or for seeking certain kinds of relief. The ability of states to conduct precomplaint discovery was mentioned as an important corrective to *Twombly*. The discussion also considered standards that might be agreed to for the states or private plaintiffs to get involved when the other has already brought suit, as well as prefiling cooperation, information sharing, cooperation on economic experts, and cooperation at the settlement stage. The extent to which competition among plaintiffs' firms impairs cooperation with the states was also discussed. It was suggested that a research paper that documents successful instances of private/state cooperation would be helpful.

The session on mutual assistance on legal issues discussed ways that private and state enforcers might counter the current unfavorable climate for private enforcement, such as writing law review articles and amicus briefs, and participating in conferences, as the defense bar and Chamber of Commerce do to promote their views. The possibility of a list serve or brief bank (with unpublished opinions included) was considered, perhaps sponsored by AAI. Whether state AGs should be getting involved to write amicus briefs in private cases, getting involved at the district court level, and getting involved in cases in other states was also discussed.