PREPARED REMARKS OF

ROBERT M. LANGER

TO THE

NAAG EASTERN REGION MEETING

AUGUST 2, 2023

Thank you Attorney General Tong. I am honored that I have been asked to address the NAAG Eastern Region Meeting.

I was extraordinarily fortunate during my two decades in government service to have played some role in the development of multistate enforcement, including serving as Chair of the Eastern States Antitrust Committee and the NAAG Multistate Antitrust Task Force.

To be clear, I do not presume that much of what I intend to cover this morning is in fact unfamiliar to many of you, but I may be able to provide some insights regarding the

development of multistate enforcement that you may find both interesting and of some value.

Slide 2: I begin with the 1942 U.S. Supreme Court decision, *State of Georgia v. Evans*, not only because it confirmed that states in their proprietary capacity as purchasers of goods and services are in fact "persons" eligible to seek treble damages under the federal antitrust laws, but also because Justice Frankfurter emphasized that the amicus brief of thirty-four states urging the court to grant the cert petition attested to the significance of the issue.

Slide 3: Three years later, in *State of Georgia v. Pennsylvania Railroad*, the Supreme Court confirmed that states, as parens patriae, could seek injunctive relief under the Clayton Antitrust Act for injuries

to the state's economy apart from injuries directly related to the state's proprietary interests. Although the 1972 decision, *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), declared that states were not eligible to sue to recover antitrust damages for the states' citizens, as I am sure most of you are aware, Congress, in 1976, as codified in 15 U.S.C. § 15c-15h, expressly authorized state attorneys general, in the states' parens capacity, to seek antitrust damages for the states' natural persons utilizing a statistical sampling methodology rather than the methodology required in Rule 23 of the Federal Rules.

Slide 4: Slide 4 identifies a few of the proprietary antitrust cases that the states brought in the 60's and 70's. One of the hallmarks of these cases was that most states

at the time utilized “special assistant attorneys general” who were private practitioners who contracted with the office of state attorneys general. I do realize that some states in the *Tobacco* litigation in the 90’s did contract with private counsel; however, in the 70’s, that practice began to diminish significantly.

Slide 5: One of the early non solely proprietary cases was *In re Petroleum Products Antitrust Litigation*, which was first launched in 1973 as *State of Connecticut v. Amerada Hess, et al*., and *State of Florida ex rel. Shevin v, Exxon Corp., et al.*, alleging a massive antitrust conspiracy that at least initially was patterned in part on the FTC case, *In the Matter of Exxon Corporation.* When Kansas, California, Arizona, Oregon, and

Washington state subsequently filed their own suits, the cases were initially consolidated by the Judicial Panel on Multidistrict Litigation for pre-trial purposes in the District of Connecticut, but then transferred to the Central District of California. The last defendant settled in the early 90's. Although Connecticut exited the case several years earlier, some attorneys had worked on the case for two decades. I've mentioned to students in my law school classes just how antediluvian things were in the early 70's. No computers, just an IBM Selectric. One of my first assignments was to draft an opposition to a comprehensive motion to dismiss. I hand wrote what turned out to be an almost seventy-page document typed. Because there were initially twenty-four defendants, between national and local counsel, we needed more than 100 copies.

Since we did not have a collating copying machine at the time, it took almost a full workday just to assemble the document.

Slide 6: Fortunately, things changed for the better a few years later**.** The Crime Control Act of 1976 provided significant federal funding to the states to begin and/or enhance state antitrust enforcement, $10 million in 1977, 1978 and again in 1979. Many states for the first time hired attorneys dedicated to antitrust enforcement. Connecticut's Antitrust Department was the first department to purchase computers, albeit a quite rudimentary Wang OIS 115. The funds were also used to substantially enhance our library.

Slide 7: I had been appointed by Attorney General Carl Ajello to head the newly created Consumer Protection Department in

1976. Within a year, a truly seminal event occurred that fundamentally altered the nature of multistate enforcement. General Motors in 1977 had failed to disclose that it had substituted Chevrolet engines in its Oldsmobiles, as well as in a couple other of its divisions. Thus, the "Chevymobile" case was born. It may perhaps not seem like such a major issue today, but Oldsmobile featured its Rocket 88 engine in its marketing, and without exaggeration, I believe the angriest consumers with whom I dealt while with the CT AGO, were Oldsmobile owners with a Chevy engine.

Because only the Federal Trade Commission can enforce the relevant substantive provisions of the FTC Act, that is, unfair or deceptive acts or practices -- in contrast to the ability of the states to utilize the federal

antitrust laws -- the states filed separate suits in state court under their respective Little FTC Acts or Uniform Deceptive Trade Practice statutes. Under the leadership of the late Ohio Attorney General William Brown, then Chair of NAAG's Consumer Protection Committee, several states designated a representative to serve on the national negotiating team. Most of us were in our late 20's. After multiple sessions over many months, forty-four states resolved their cases culminating in the execution of the settlement document at a NAAG meeting held in San Francisco in December 1977. Other states subsequently followed suit. Since the states were acting, not for their own benefit, but for that of their respective consumers, there was I believe a general understanding that what was achieved was at least potentially

momentous. I do recognize that the actual amount of money involved in the Chevymobile settlement, which we calculated at about $40 million, is but a "rounding error" compared to *Tobacco*, and the many other major multistate cases in the past quarter-century. As a brief side note, I should mention who were some of the attorneys general who executed the settlement agreement. They included both future President, Bill Clinton of Arkansas, and future U.S. Supreme Court Justice, David Souter of New Hampshire.

Once the settlement was announced, I drafted an op-ed piece and asked Attorney General Ajello, who subsequently served as the President of NAAG, whether I could submit the article to the New York Times co-authored by both of us. Instead, Attorney

General Ajello said I should submit the article under my own name. The complete op-ed piece is on **Slide 8**. A key observation in the op-ed piece is this. "The GM settlement signals an era in which effective non-Federal consumer protection enforcement by state attorneys general may become commonplace." Indirectly, I believe it also led to the creation of the NAAG Multistate Antitrust Task Force.

Slide 9: Prior to the 2007 decision of the U.S. Supreme Court, *Leegin Creative Leather Products v. PSKS*, which had overturned the 1911 decision, *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), the NAAG Multistate Antitrust Task Force vigorously pursued resale price maintenance cases under the then prevailing per se rule of illegality. The

first two Task Force Chairs, Lloyd Constantine of New York and Michael Brockmeyer of Maryland led the way in this effort. I thought it was quite significant that 36 states plus D.C. sued *Minolta*, 49 states plus D.C. sued *Panasonic*, and all 50 states plus D.C. sued both *Nintendo* and *Mitsubishi*.

Slide 10: There have been many significant cases brought by the Task Force, and I wish to focus upon just a few this morning. The *Clozapine* litigation was in my view one of our most significant efforts because we were able to provide a significant benefit to many schizophrenic patients throughout the U.S. by significantly reducing the cost of a drug that was at the time the only drug that could successfully assist otherwise treatment-resistant schizophrenic patients to enjoy a

substantially higher quality of life. It presaged other efforts by the states involving pharmaceuticals, including the Daraprim litigation.

Slide 11: *Hartford Fire v. California* is, as I sure many of you already know, one of the most important cases construing both the McCarran-Ferguson Act, as well as the extraterritorial reach of the federal antitrust laws. McCarran is, in effect, an act of reverse preemption. The Sherman and Clayton Acts, by Congressional enactment, are both inapplicable to the business of insurance to the extent such conduct is regulated by state law, with the proviso that the Sherman Act does apply to acts or agreements of boycott, coercion, or intimidation, although a recent amendment

has modified McCarran as it applies to health insurance.

Briefly, the states' case is as follows. Several domestic insurers and reinsurers, the Insurance Services Office ("ISO"), as well as foreign reinsurers, including Lloyds of London, were sued by 19 states for allegedly engaging in a boycott to eliminate one type of commercial general liability insurance, with the aim of forcibly converting the industry to a less desirable form of insurance from the perspective of the customer. We brought the case in the U.S District Court for the Northern District of California. The District Court judge dismissed the suits, the Ninth Circuit reversed, and the Supreme Court ultimately held that the conduct alleged did constitute a boycott, and further that principles of international comity did

not preclude application of the Sherman Act to conduct occurring outside the U.S., since British law – quote – "did not require them to act in some fashion prohibited by the law of the United States." I cannot possibly do justice, pun intended, to either Justice Souter's exegesis on the extraterritorial reach of the antitrust laws, nor to Justice Scalia's explanation of the distinction between a concerted refusal to deal under the antitrust laws versus a boycott under the McCarran-Ferguson Act.

Slide 12: There is quite an interesting back story to the *Hartford Fire* litigation. Connecticut and several other states, including New Jersey, were not in the first wave of states to file suit. About half the states filed at the same time as California. We were, however, still in the process of

doing our due diligence. As expected, the suit by California generated significant publicity. The Engelhart political cartoon clearly portrays Connecticut Attorney General Joseph Lieberman in bed with the insurance industry, holding the Travelers umbrella, with Aetna on the bedpost, and lying next to the Hartford stag.

We did, of course, subsequently file suit. We concluded, by the way, that, unlike Aetna, The Hartford, and Allstate, Travelers should not be named as a defendant. The Connecticut complaint is prominently featured in the *Hartford Fire* opinion, and it turned out that my colleague, former Connecticut Assistant Attorney General, William Rubenstein, argued the case for all the states in the District Court, and the former head of New Jersey's Antitrust

Department, Laurel Price, who succeeded me as Task Force Chair, successfully argued the case for all the states in both the 9th Circuit and the U.S. Supreme Court.

Slide 13: As I am sure most of you are aware, there have been challenges to multistate initiatives, including the very existence of the NAAG Multistate Antitrust Task Force, based in part on the assertion that the Compact Clause of the U.S. Constitution, Art. I, § 10, cl. 3, required the states to have first obtained the consent of Congress. It was evident, at least to us, based on the 1978 *Multistate Tax Commission* decision, that the Task Force did not in fact implicate Compact Clause concerns, principally because the states are not exercising any powers that they could not otherwise exercise on their own. The

2002 *Star Scientific* and *Mariana* decisions, which addressed the states' Tobacco Master Settlement Agreement, provided further support for that conclusion.

Slide 14: Both *California v. ARC America*, supported by 35 states as amici, and *California v. American Stores*, supported by 32 states as amici, established two critically important principles of law that have significantly enhanced the states' multistate efforts. First, in *ARC America*, the court held that states indirect purchaser statutes are not preempted by the federal antitrust laws. Thus, *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), which held that only direct purchasers in privity with the price fixer had standing to recover antitrust damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, did not preclude the states under their

respective state antitrust laws, via statute or judicial ruling, from providing a remedy for indirect purchasers.

Second, in *American Stores*, the court held that states are authorized under Section 16 of the Clayton Act, 15 U.S.C. § 26, to seek divestiture for proposed mergers and acquisitions that are held to be in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. There is not sufficient time during this presentation to recount in any detail the divestiture efforts undertaken by the Connecticut Attorney General's Office of a consummated transaction. The Connecticut Bar Journal article cited in **Slide 16**, "Antitrust Review of Mergers by State Attorneys General: The New Cops on the Beat," co-authored by Attorney General Richard Blumenthal, Assistant Attorney

General William Rubenstein and yours truly discussed the *Wyco New Haven* case in some detail. Briefly, however, the matter involved the acquisition of heating oil terminals in New Haven harbor, a key location in the Northeast. The transaction generated a Hart-Scott-Rodino pre-merger notification filing with the federal antitrust enforcement agencies, but the parties to the transaction did not alert our Office to the transaction. The transaction was not challenged by either the Antitrust Division or the Federal Trade Commission, and indeed was granted early termination. When our Office finally learned of the consummated transaction, we launched our own inquiry considering what we understood to be the competitive significance of the transaction.

Years earlier, both the Second Circuit in *Lieberman v. FTC*, 771 F.2d 32 (2d Cir. 1985), which I had argued for the states, and the Fifth Circuit in *Mattox v. FTC*, 752 F.2d 116 (5th Cir. 1985), had held that state attorneys general were not authorized to obtain HSR materials directly from either DOJ or the FTC. The Second Circuit regrettably reversed the decision of U.S. District Court Judge M. Joseph Blumenfeld, who had ruled that the FTC did in fact possess the authority to share the HSR materials with the states. Indeed, our Office had previously routinely obtained HSR filings directly from the FTC. After the *Lieberman* and *Mattox* decisions, we worked with both agencies to develop protocols in which merging parties could grant consent for the HSR materials to be forwarded to the relevant state attorney general's office.

Frankly, this was a much-preferred approach than forcing the states to issue formal process under their respective state antitrust acts.

Now briefly back to the *Wyco* case. Our demand that the transaction be undone was met with incredulity and anger by the parties. Although it has been more than 30 years, I distinctly recall being told the following – "What business is this of yours?" and "We paid a great deal of money to our law firms to obtain permission from the federal government to complete this transaction."

Slide 15: The final group of cases are each U.S. Supreme Court decisions in which the states filed influential amicus briefs. Connecticut took the lead in *Texaco v. Hasbrouck*, a tertiary line price

discrimination case that provided important guidance on the scope of functional discounts, since our office had brought its own tertiary line price discrimination case at about the same time against four branded oil refiners. A functional discount recognizes that two competing entities, who may or may not be at the same level of distribution, and who purchase the same commodity at about the same time from the same supplier, may under certain circumstances be lawfully charged different prices, if one of the purchasers, but not the other, performs a function, such as warehousing, that saves the supplier from performing that specific function. In the Connecticut case, we found that refiners, who under Connecticut's vertical divestiture law were prohibited from owning their own retail stations, had for some considerable period of time charged

direct buying retailers $.25 to $.35 more per gallon than both vertically integrated and non-vertically integrated wholesalers. The normal differential between prices charged per gallon by refiners to wholesalers and retailers at the time was about $.05. The result was that the direct buying retailers were literally purchasing the gasoline from the refiners for more per gallon than the wholesalers' customers, retail stations, were able to resell the gasoline to end-use consumers. Considering the profound market dislocations, and the desperate pleas by direct buying retailers to our Office to do something, I recall Attorney General Lieberman asking me to find a way to sue the refiners. Although I had taught Robinson-Patman as part of my antitrust courses for year, I had never litigated a price discrimination case. Fortunately, the lower

court opinion in *Hasbrouck* had just been published, which gave me some direction. As importantly, the Connecticut Antitrust Act is materially different from its federal analogue in one critical respect. The Connecticut version of the Robinson-Patman Act deletes the word "substantially" from the effects portion of the statute, and reads, "and where the effect of such discrimination may be to lessen competition or tend to create a monopoly in any line of commerce." The trial court in *State v. Exxon*, 1987 WL 92054 (Conn. Super. Ct. 1987) denied the defendant's motion to strike, which is the Connecticut equivalent of a 12(b)(6) in federal court.

Eastman Kodak v Image Technical Services is, in my view, extremely important for two reasons. First, it established that a per se

tying arrangement could exist in a single brand market. Second, our amici brief, principally drafted by Ohio, successfully opposed the position argued by the then Assistant Attorney General who headed the Antitrust Division that the absence of market power by Kodak in the interbrand market should have defeated the tying claim.

Finally, *FTC v. Ticor Title* held that negative option tariff filings with state insurance regulators did not comport with the active supervision prong of the state action immunity doctrine. Insurers would submit their proposed tariffs for approval, and in certain states, after a specified period of time, if the states did not act affirmatively to reject the submitted rates, the filed rates would automatically go into effect. Thirty-six states, as amici, supported the position of

the FTC, including both Montana and Wisconsin, two of states whose regulatory systems were being challenged by the FTC. In fact, Kevin O'Connor, a future Chair of the NAAG Multistate Antitrust Task Force, and the Assistant Attorney General who headed the Antitrust Section in the Wisconsin Department of Justice, was counsel of record for the states and one of the principal authors of the states' brief. The court in *Ticor* expressly cited to the states' brief stating:

> Respondents contend that principles of federalism justify a broad interpretation of state-action immunity, but there is a powerful refutation of their viewpoint in the briefs that were filed in this case. The State of Wisconsin, joined by Montana and 34 other States, has filed a brief

> as *amici curiae* on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the *amici* submission.

Slides 16, 17 and 18: **Slide 16** notes two important NAAG Symposia. First is the 1989 Centennial Symposium in recognition of the passage of the Kansas Antitrust Act in 1889, the first comprehensive state antitrust law. The twenty-three articles and speeches during the Symposium were published in 1990 in the Washburn Law Journal. Second is NAAG's Centennial Celebration of its creation in 1907. The event was held in St. Louis in 2007. Emily Myers, NAAG's antitrust counsel, forwarded to me a partial uncorrected transcript of the event, which includes discussions by several attorneys

general and former chairs of the NAAG Multistate Antitrust Task Force. Both symposia contain vitally important historical information about state antitrust enforcement.

Slide 17 lists the presentations of the first seven Chairs of the NAAG Multistate Antitrust Task Force at the ABA Antitrust Spring Meetings between 1987 and 2004, each of which has been published in the Antitrust Law Journal. These “60 Minute” presentations, as they are known, provide a far more detailed history of the Task Force than I can possibly discuss this morning. Finally, **slide 18** includes links to the video interviews of six former Task Force Chairs undertaken as part of the ABA Antitrust Law Section’s Oral History Project. It is unfortunate that more Task Force Chairs

have not been interviewed. These interviews, which each run about 45 minutes, contain valuable historical information about multistate enforcement.

Before I close, I would like to briefly mention my role in creating and administering the Janet D. Steiger Fellowship Project, a consumer protection outreach initiative of the ABA Antitrust Law Section. Based on my personal experience in government over two decades, there was no one more responsible for the dramatic improvement in cooperation and coordination between state and federal consumer protection and antitrust enforcers than my dear friend, the late Chairman of the Federal Trade Commission, Janet Steiger. I was privileged to serve as Task Force Chair during her tenure, and I am not

alone in my belief that Chairman Steiger was a truly transformational figure. She was neither an economist nor an attorney, yet her influence was unparalleled. When she passed away unexpectedly in 2004, I and others in the leadership of the ABA Antitrust Law Section searched for a way to honor her legacy. After I obtained permission from her family, we established the Janet D. Steiger Fellowship Project in 2005, facilitating the placement of rising 2Ls and rising 3Ls in state and territorial offices of attorneys general and other agencies, including both NAAG and the Office of the Attorney General of Washington, D.C. We have had Steiger Fellows serve in the Attorney General's Office of the Commonwealth of the Northern Mariana Islands and with the Commonwealth of Puerto Rico Department

of Justice. The continued success of the Project is the result of feedback from every host site regarding how valuable the Steiger Fellows have been in assisting your respective offices to fulfill your consumer protection and antitrust missions. We now provide a $6,000 stipend, and for several years offered an optional travel/housing allowance for students not living at home during the summer. This summer we have 40 Steiger Fellows, and since we began the Project in 2005, the total is 537 Steiger Fellows. Many of our former Steiger Fellows have previously served, or currently serve, in state attorney general offices -- some in the very office where they served during law school. Approximately 40% of all Steiger Fellows have worked after graduation in some type of public service position.

I do hope you have found some of what I discussed of value. I would be happy to answer any questions should there be time to do so.

Thanks very much.