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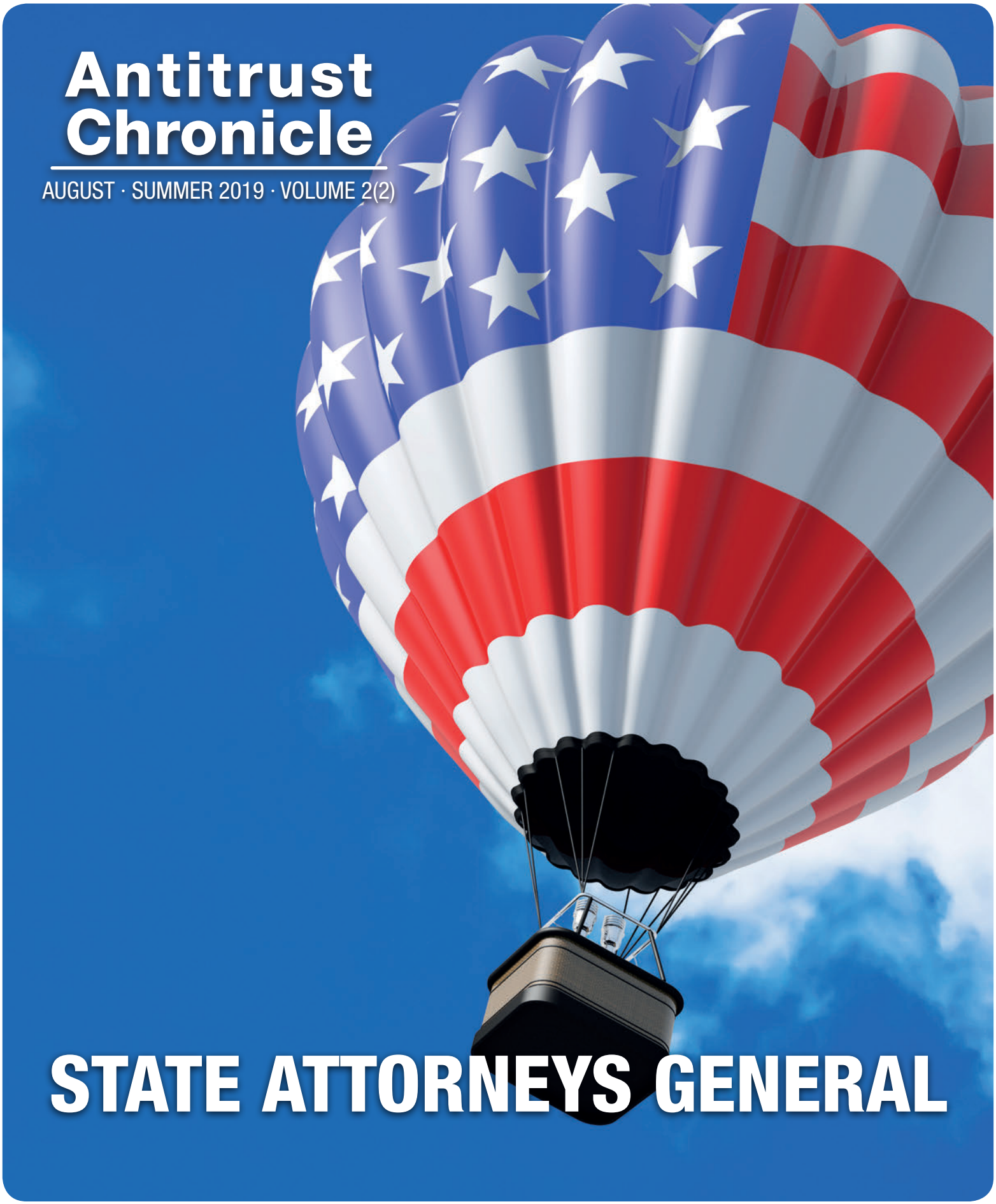

STATE ATTORNEYS GENERAL

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

CPI is pleased to present our second Antitrust Chronicle for August 2019 focusing on recent developments from state attorneys general. We kick things off in this edition with a CPI Talks… interview with Sarah Oxenham Allen, Chair of the National Association of Attorneys General Antitrust Taskforce and Senior Assistant Attorney General and Antitrust Unit Manager at Office of the Virginia Attorney General.

States have made significant impacts on the overall direction of the antitrust laws across the United States. Antitrust enforcement at the state level is very active and presents a rich subject matter covering a variety of topics. We hope to make this state attorneys general edition of the CPI Antitrust Chronicle an annual edition.

Topics covered in this edition include *parens patriae* standing of attorneys general, hybrid welfare standards, and healthcare markets among others.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

CPI Talks…

…with Sarah Oxenham Allen

In this month's edition of CPI Talks we have the pleasure of speaking with Sarah Oxenham Allen. Ms. Allen is Chair of the National Association of Attorneys General Antitrust Taskforce and Senior Assistant Attorney General and Antitrust Unit Manager at the Office of the Virginia Attorney General.

The U.S. Department of Justice Antitrust Division and State Attorneys General

By David J. Shaw

The United States Department of Justice Antitrust Division ("DOJ") frequently collaborates with state attorneys general in enforcing the federal antitrust laws. While always ensuring appropriate confidentiality protections, there are several different pathways by which DOJ and state attorneys general collaborate, including state attorneys general approach DOJ and DOJ approaching specific state attorneys general. The collaboration itself has two distinct phases. During the investigative phase, DOJ will often be in frequent contact with an executive committee of state attorneys general. The enforcement phase requires a delicate balance of DOJ's need for heightened confidentiality with state attorneys general need for information as independent decision makers. In the past year, DOJ has worked, in one form or another, with over thirty state attorneys general on various investigations. DOJ is committed to collaborating with the state attorneys general where doing so is necessary to protect competition for the benefit of the American consumer.

Parens Patriae Standing of Attorneys General: A Case of Mistaken Identity

By Jennifer L. Pratt

This article explores the standing of state attorneys general to bring actions to protect the quasi-sovereign interests of their states and citizenries. Known as *parens patriae*, this form of standing is unique to the sovereign and began as a strictly common law concept, but has been codified in state and federal statutes alike. The article explores the historical development of *parens patriae*, and the test for determining whether an asserted interest is "quasi-sovereign" as articulated by the United States Supreme Court in *Alfred L. Snapp & Son, Inc., v. Puerto Rico*, 458 U.S. 592 (1982). The article concludes by offering some practical suggestions for avoiding the pitfalls that often arise when settlement negotiations – especially those arising out of antitrust cases and investigations – address the issue of *parens patriae* authority.

The Case for Employing Hybrid Welfare Standards in Antitrust Matters

By Schonette J. Walker

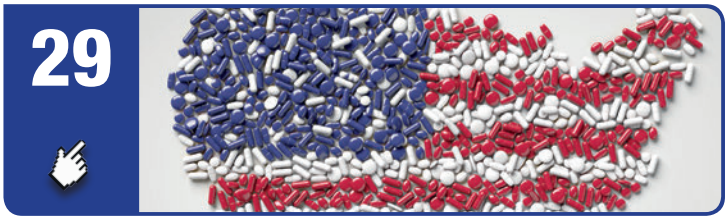
The Consumer Welfare Standard ("CWS") is the main analytical framework employed in current antitrust analysis. CWS places the consumer and the consumer's welfare, in the form of lower prices, higher product quality and output, at the center of antitrust consideration. Sometimes however, consumer concerns on their face do not predominate. When that happens antitrust should focus on more than consumer advantages and consider combining different priorities to create hybrid forms of antitrust analysis.

SUMMARIES

States and the Development of the Antitrust Laws

By Jonathan Mark

This article examines some of the ways in which the states have contributed to important developments in the antitrust laws, both historically and in the present. Although they are resource constrained, the states have made a significant impact on the overall direction of the antitrust laws, by bringing a consumer-centric analysis to anticompetitive conduct and legislation. While the states often work cooperatively with the federal enforcers, there are many examples throughout history, and recently, where states have acted independent of the federal agencies. The article concludes that concurrent jurisdiction of the antitrust laws is beneficial and produces the best outcomes for consumers.



State Attorneys General Use all of the Tools in Their Toolkits to Protect the Public in Healthcare Markets

By Tracy W. Wertz & Abigail U. Wood

Healthcare markets operate very differently than other markets and state attorneys general are uniquely situated to monitor and enforce antitrust laws in these local markets. Since healthcare markets are unlike other markets, state attorneys general think outside the box and use their unique tools to protect the public. State attorneys general bring cases both on their own and also in coordination with federal antitrust authorities asserting claims under state and federal antitrust law. This article discusses recent actions by state attorneys general in healthcare markets and how they use all of the tools in their toolkits to tackle complex issues of concentration and competition.

State Attorney General Antitrust Enforcement: Trends and Insights

By Milton A. Marquis, Ann-Marie Luciano & Keturah S. Taylor

State attorneys general continue to play a growing role in wielding their antitrust authority on a national scale through multistate action and co-enforcement activity with their federal counterparts. Whether acting alone, as a multistate coalition, partnering with federal antitrust enforcers, or intentionally diverting from federal enforcement strategies, state attorneys general have a significant impact on local and national antitrust enforcement. Going forward, state attorneys general are expected to continue to use multistate action and federal co-enforcement to pursue new players and target emerging industries, particularly those in the "Big Data" space.

WHAT'S NEXT?

For September 2019, we will feature Chronicles focused on issues related to (1) **LeadershIP EU**; and (2) **MFN, Loyalty Programs & Fidelity Rebates**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES OCTOBER 2019

For October 2019, we will feature Chronicles focused on issues related to (1) **CRESSE**; and (2) **EU Competition Reports**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…with Sarah Oxenham Allen[1]

In this month's edition of CPI Talks we have the pleasure of speaking with Sarah Oxenham Allen. Ms. Allen is Chair of the National Association of Attorneys General Antitrust Taskforce and Senior Assistant Attorney General and Antitrust Unit Manager at the Office of the Virginia Attorney General. As Chair, she is the antitrust representative of the States with the ABA, the federal agencies, and the private bar.

Thank you, Ms. Allen, for sharing your time for this interview with CPI.

1. You are currently Chair of the NAAG Antitrust Taskforce. Can you please outline some of the taskforce's work, committees, and amicus writing?

The National Association of Attorneys General ("NAAG") formed the Antitrust Taskforce in 1983 to facilitate large antitrust multistate enforcement actions among states with limited antitrust staff and resources. The Attorneys General who serve as co-chairs of the NAAG Antitrust Committee select the Chair of the Taskforce for a three-year term. Externally, the Chair serves as the liaison to the ABA Antitrust Section, the FTC, and DOJ, and is often asked to speak at conferences and webinars about the states' enforcement efforts. Internally, the Chair manages the agenda on bi-weekly Taskforce calls and helps develop the priorities of our committees.

At our 2018 Fall Taskforce Meeting in Denver, right after I took over as Chair, we took a look at our existing committees and determined that some were out of date and that we needed to add a few more. Most of our current committees are organized around antitrust issues in the following markets or subject areas: Agriculture, Healthcare Providers, Intellectual Property, Labor, PBM/Insurer, Petroleum Products, Pharmaceutical, and Technology Platforms/Big Data. We also have a State Action Committee to help with the challenges our offices face when counseling state agencies and boards on potential competitively risky decisions by these entities. Finally, we have a Multistate Writing Committee that has expanded beyond traditional amicus briefs into coordinating any written advocacy being offered for multistate sign-on by our attorneys general.

The committees operate as think tanks about certain issues, as well as a case-generation mechanism. For instance, our multistate product hop case against Indivior and Aquestive Therapeutics over the opioid treatment drug Suboxone came out of our Pharmaceutical Industry Working Group. On our committee calls, we usually track cases by the federal enforcers or private actions, as well as discuss relevant federal and state legislation. We may have guest speakers on certain issues or discuss the antitrust allegations we might make if we brought a case. Our Healthcare Provider Committee is currently working with the Mergers IV shop at the FTC to provide training for our attorneys on the analytical framework the FTC uses in its hospital merger challenges and how healthcare providers interact with insurers and patients. This helps decrease the knowledge disparity between our newer and more experienced attorneys, and helps the states be better partners with the FTC or DOJ during joint enforcement efforts. The training also can help states identify potentially problematic local mergers among healthcare providers that might fall below the Hart-Scott-Rodino reporting threshold, especially in states that have statutes requiring notification of the disposition of nonprofit health care assets.[2]

1 The views and opinions expressed by Ms. Allen in this discussion are her own and do not necessarily reflect the views of the National Association of Attorneys General, the Antitrust Taskforce, or the Office of the Attorney General of Virginia.

2 See, e.g. Disposition of Assets by Nonprofit Health Care Entities, Va. Code Ann. § 32.1-373 *et seq.*

In October 2018, 31 states submitted an amicus brief to the Supreme Court in *Apple v. Pepper*.[3] Although the States' brief took no position on the merits of the underlying case, the states urged the Court to overturn the ban on indirect purchaser damages recovery from its 1977 opinion in *Illinois Brick v. Illinois*,[4] arguing that at least 35 states have legislation or judicial precedent that allows indirect purchasers to recover damages. The Amici States also pointed out that current economic analysis has become sophisticated enough to determine how much of the overcharge a direct purchaser passes on to its customers in the supply chain. Although the Court decided the case without accepting the Amici States' plea to overturn *Illinois Brick*, the brief was mentioned by the justices during oral argument and has continued to generate discussion since the decision was announced.

The states also submitted two different sets of written comments to the FTC in connection with its Hearings on Competition and Consumer Protection in the 21st Century. Our Technology Industry Working Group is co-chaired by Texas and Utah, and it facilitated discussions that led to comments primarily drafted by Texas that 43 states joined and submitted to the FTC on June 11, 2019.[5] Our Labor Committee is co-chaired by Maryland, New York, and Pennsylvania, and it facilitated discussions that led to comments primarily drafted by the District of Columbia that 18 states joined and submitted to the FTC on July 15, 2019.[6] Both sets of comments detailed the states' interest and involvement in antitrust enforcement in these areas and concluded with recommendations about how to analyze these markets going forward.

2. Although you likely cannot go into too much detail, please discuss the *T-Mobile/Sprint* merger case and the involvement of the state attorneys general.

States are considered "persons" for purposes of the Clayton Act,[7] and therefore have jurisdiction to sue to block mergers and gain other injunctive relief, including divestitures,[8] under Clayton Act Section 16 and to seek treble damages and attorneys' fees and costs under Clayton Act Section 4. Although it is more common for state attorneys general to coordinate with our federal antitrust enforcement partners, *T-Mobile/Sprint* is not a unique case.

For example, in 1988, the FTC conducted an investigation of the proposed acquisition of Lucky Stores, the largest grocery store chain in California, with American Stores, a larger national grocery store chain, but only the fourth-largest chain in California. The FTC eventually filed a complaint alleging that the merger violated Section 7 of the Clayton Act simultaneously with its filing of a consent order that allowed the merger to proceed subject to certain conditions, including the divestiture of several designated supermarkets. The State of California filed suit to block the merger, and the Supreme Court upheld a state's right to seek divestiture as a remedy against threatened loss or damage from an anticompetitive merger. In this case, the "divestiture" was actually the severing of the Lucky stores from the American stores, because the merger had been consummated by the FTC's approval, subject only to an FTC Hold Separate Order and the California district court's preliminary injunction.[9]

More recently, California again sought to challenge a merger that the FTC declined to take action to prevent.[10] Valero Energy Corporation sought to purchase two petroleum storage terminals from Plains All American Pipeline, which the California Attorney General alleged would allow Valero to control the last independently operated gathering line with excess capacity in the Northern California pipeline system. Although the federal judge denied California a temporary restraining order and a preliminary injunction, he agreed that the company could hurt consumers. Valero and California eventually settled for a prior notice provision to the Attorney General if Valero seeks to acquire either of the two petroleum storage terminals within the next 10 years.

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3 Brief of Texas, Iowa, and 29 Other States as Amici Curiae in Support of Respondents, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204).

4 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

5 Public Comments of 43 State Attorneys General, Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, June 11, 2019, available at regulations.gov/document?D=FTC-2019-0031-0003.

6 Public Comments of 18 Attorneys General on Labor Issues in Antitrust, Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, July 15, 2019, available at regulations.gov/document?D=FTC-2019-0032-0028.

7 *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

8 *California v. Am. Stores Co.*, 495 U.S. 271, 281-82 (1990).

9 See *id.*

10 *California v. Valero Energy Corp.*, No. 3:17-cv-03786, 2017 WL 4122830 (N.D. Cal. Sept. 17, 2017).

The attorneys general often have required additional relief beyond that negotiated by the federal enforcement agencies. Most recently, Colorado negotiated a settlement with UnitedHealth Group and DaVita, Inc., addressing its concerns about the merger of physician groups owned by the two companies in the Colorado Springs area. The Colorado Attorney General believed that the combination would have vertical anticompetitive effects by allowing the merged physician groups to raise their rates to UnitedHealth's competitors providing Medicare Advantage insurance, and thereby harming seniors who would have to pay higher costs for Medicare Advantage or face reduced plan options.[11] This settlement supplemented the FTC's settlement with the same parties, which only provided relief in Nevada.[12] Notably, two of the FTC's Commissioners stated that they would have also challenged the merger in Colorado, but "[f]ortunately, the Attorney General of Colorado has taken action in an effort to address some of the harmful effects of the merger in a separate action. We hope all state attorneys general actively enforce the antitrust laws to protect their residents from harmful mergers and anticompetitive practices."[13]

While an independent investigation by the states of a proposed merger is somewhat unusual, a challenge of the merger by the states is not unprecedented, even when one of the federal enforcement agencies has negotiated a settlement that it believes addresses all of its competitive concerns with the merger. The states have equal enforcement authority to the federal agencies under the Clayton Act to sue to block mergers and to be awarded injunctive relief and damages, including the costs of the challenge. The ability of our consumers to have affordable and innovative wireless competition in both urban and rural markets in our states for devices that are so important and ubiquitous to our consumers is of vital importance to our attorneys general.

It is also worth noting that DOJ, the 6 states that signed on to DOJ's consent, and the 16 litigating states in *T-Mobile/Sprint* all agree that the merger would be anticompetitive without some kind of relief. The disagreement is about whether the parties' commitments to the FCC and DOJ are sufficient to outweigh the merger's anticompetitive effects.

3. Is there a "void" of antitrust enforcement at the federal level? And what have, or can, state attorneys general do to take steps to fill that "void" across different sectors such as financial services, healthcare, telecommunications, and technology?

I do not believe there is a void of antitrust enforcement at the federal level. Both federal agencies have announced antitrust investigations of companies in technical platform/Big Data markets, and both agencies have remained busy with healthcare-related matters. The FTC, in particular, has been on a hot streak with its hospital merger challenges, and has paired successfully with each state attorney general's office in which the merger was proposed.[14] DOJ also worked efficiently with several states during both of its recent insurer mergers in *Anthem/Cigna* and *Aetna/Humana*.[15]

In my opinion, the biggest differences between the federal agencies and the states right now are in tone and priorities rather than about whether anyone is shirking its enforcement responsibilities. About 20 states have been active in trying to increase our understanding of potential antitrust causes of action in labor markets, and Washington, in particular, has expanded on the FTC and DOJ's joint guidance on no-poach, non-compete, and wage-fixing issues in labor contracts[16] and has led the national fight in decreasing no-poach clauses in franchise agreements. The interest in exploring the dominance of Big Data companies is bipartisan and has attracted the attention of dozens of attorneys general, leading to a recent meeting on this topic between a representation of attorneys general and General Barr at DOJ. Connecticut started the price-fixing investigation in the generic drug industry, leading to two multistate complaints against 27 corporate defendants and 17 individuals, implicating over 100 medications, but DOJ is also working on other aspects of this huge alleged conspiracy, including potential criminal prosecutions.

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11 *Colorado v. UnitedHealth Group, Inc., et al.*, Case No. 2019CV31424 (El Paso County District Court, June 19, 2019).

12 *In the Matter of UnitedHealth Group, Inc., et al.*, FTC Decision and Order, Dkt. No. C-4677 (August 22, 2019).

13 Statement of Commissioners Rebecca Kelly Slaughter and Rohit Chopra, *In the Matter of UnitedHealth Group and DaVita*, Commission File No. 181-0057 (June 19, 2019) available at https://www.ftc.gov/system/files/documents/public_statements/1529359/181_0057_united_davita_statement_of_cmmrs_s_and_c.pdf.

14 See, e.g. *Fed. Trade Comm'n v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019) (joining with North Dakota) ; *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016) (joining with Pennsylvania); *Fed. Trade Comm'n v. Advocate Health Care*, No. 15 C 11473, 2017 WL 1022015 (N.D. Ill. Mar. 16, 2017) (joining with Illinois); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.,* 778 F.3d 775, 782 (9th Cir. 2015) (joining with Idaho).

15 Twelve states joined DOJ in its Complaint in *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017), and nine states joined DOJ in its Complaint in *United States v. Aetna Inc.,* 240 F. Supp. 3d 1, 9 (D.D.C. 2017).

16 DOJ/FTC Antitrust Guidance for Human Resource Professionals, Oct. 20, 2016, available at ftc.gov/system/files/documents/public-statements/992623/ftc_doj_hr_guidance_final_10-20-16.pdf.

The states' Suboxone product hop litigation initially was a joint investigation with the FTC, but after the FTC got bogged down in a protracted privilege dispute with Indivior, the states went forward with their litigation, added Aquestive Therapeutics as a defendant, and are now finished with expert discovery and headed for trial in 2020. I expect to see these dynamics continue, where the states and the federal agencies partner with each other on some matters and pick up where the others let off in other areas of enforcement. The synergies created by multiple antitrust enforcers keeps antitrust enforcement efforts moving and helps to create new analytical frameworks through which to bring these cases. I fully expect the states to be an integral part of both thought and case generation in the next several years.

THE U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION AND STATE ATTORNEYS GENERAL

BY DAVID J. SHAW[1]

1 David J. Shaw serves as Counsel to the Assistant Attorney General in the United States Department of Justice Antitrust Division. His portfolio includes managing relations with state attorneys general.

I. INTRODUCTION

The United States Department of Justice Antitrust Division ("DOJ") frequently collaborates with state attorneys general in enforcing federal antitrust laws. While DOJ is the federal executive branch agency responsible for enforcing the antitrust laws, Congress gave the state attorneys general the authority to bring federal civil antitrust suits in both their proprietary and *parens patriae* capacities through the Clayton Act.[2] As a result, DOJ looks for opportunities to work with state attorneys general when doing so would protect competition more effectively and efficiently.

DOJ typically works with state attorneys general through the National Association of Attorneys General Antitrust Task Force.[3] While DOJ most often collaborates with state attorneys general in merger investigations, it also works with state attorneys general in other civil, non-merger matters. DOJ will also occasionally refer criminal matters to state attorneys general. This paper outlines DOJ's approach to collaborating with state attorneys general and highlights some recent successful collaborations.

II. CONFIDENTIALITY

DOJ takes confidentiality seriously. Outside of the national security context, non-public information related to antitrust enforcement, especially merger enforcement, is some of the most sensitive information within the government. The information DOJ obtains in the course of an investigation is almost invariably competitively sensitive; in the wrong hands, it could distort the competitive process. Moreover, information related to the status of an antitrust investigation itself can be highly sensitive, even market-moving. Accordingly, before DOJ collaborates on an investigation with a state attorney general, there are two prerequisites related to confidentiality that must be met.

The first is that the state attorney general must obtain confidentiality waivers from the parties under investigation and, if necessary, from any relevant third parties. Non-public information that DOJ obtains in the course of an investigation is typically subject to statutory confidentiality protections, and DOJ generally has no authority to share, or even discuss, such information with a state attorney general.[4] The party that produces the information, however, can waive those confidentiality protections. Parties are typically motivated to grant waivers because they have an incentive to avoid responding to overlapping and uncoordinated federal and state investigations. Parties under investigation also have an interest in both DOJ and any investigating state attorney general coming to the same conclusion and, if appropriate, remedy in any matter which they both investigate.

The second prerequisite is that the state attorney general must sign a confidentiality agreement with DOJ. This agreement helps ensure the integrity of the investigation, including protecting the existence and status of the investigation. DOJ takes these confidentiality agreements seriously.

III. INVESTIGATIONS AND ENFORCEMENT ACTIONS

A. Initial Pathways to Collaboration

There are two main paths by which state attorneys general participate in DOJ investigations. First, state attorneys general often approach DOJ about known investigations and express an interest in collaborating with DOJ. The state attorney general may know about the investigation because of news coverage or simply because it affects a market with which the state attorney general is familiar. Barring a major breach of trust with a particular state attorney general, DOJ usually accommodates a request to collaborate in a civil investigation.

Second, if the relevant geographic markets are concentrated in specific states, or if state or local entities are significant customers, then DOJ will often approach the relevant state attorneys general and solicit their involvement. State attorneys general often possess comparative advantages through their familiarity with local markets and relationships with state entities.[5] DOJ often seeks to use this expertise to enforce the law more effectively and efficiently.

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2 15 U.S.C. § 15c(a)(1); 15 U.S.C. §26.

3 National Association of Attorneys General: Antitrust Committee, https://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee.php (last visited June 17, 2019).

4 15 U.S.C. § 18a(h) (2018).

5 Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 680–84 (2003).

Additionally, from time to time, a state attorney general will discover a potential antitrust violation and bring it to DOJ's attention. Depending on the nature of the violation and the state attorney general's preference, DOJ may consult with the state attorney general or, in certain circumstances, take an active role in the investigation.

B. Collaboration in Practice

There are two distinct phases to any collaboration with a state attorney general. The first is the investigative phase. During an investigation, it is common for many state attorneys general to be involved. When an investigation involves a large group of state attorneys general, the state attorneys general typically select an executive committee to organize their efforts and serve as a single point of contact for DOJ staff. Throughout the investigation, DOJ staff will often have weekly or biweekly calls with the state attorneys general to discuss the substance and status of the investigation. While the level of participation varies depending on the particular investigation, state attorneys general often play an important role. They may participate in interviews, issue follow-along subpoenas to gain access to the same documents produced to DOJ staff, and assist DOJ staff in document review. Additionally, state attorneys general often assist DOJ in preparing for depositions by consulting with DOJ staff and attending the depositions.

At the end of an investigation, if warranted, DOJ will bring an enforcement action or negotiate a settlement embodied in a consent decree. This second phase — the enforcement phase — raises special challenges in the DOJ-state attorney general relationship. During the time surrounding the final decision of an investigation, DOJ requires a heightened level of confidentiality. Any disclosure, even if inadvertent, could undermine an enforcement action or derail a settlement necessary to preserve competition. At the same time, however, state attorneys general require adequate information to make their own, independent enforcement decisions. Successful collaborations balance these competing needs with trust, communication, and forbearance.

The enforcement phase is typically when DOJ and state attorneys general enter into a common interest agreement and begin exchanging written work product in anticipation of litigation, including draft pleadings.

IV. RECENT COLLABORATIONS

DOJ has a long history of collaborating with state attorneys general. Over twenty years ago, the United States went to trial with state attorneys general for the first time in *United States v. Microsoft*.[6] More recently, numerous state attorneys general participated in the 2016 Aetna/Humana and Anthem/Cigna health insurance investigations and trials.[7]

In the past year, DOJ has worked, in one form or another, with over thirty state attorneys general on various investigations. Some recent highlights include:

- ***United States and the States of California, Florida, Hawaii, Mississippi, and Washington v. CVS Health Corp.***, 1:18-cv-02340 (D.D.C.): In October 2018, the attorneys general from California, Florida, Hawaii, Mississippi, and Washington State joined DOJ in requiring CVS Health Corporation and Aetna Inc. to divest Aetna's Medicare Part D prescription drug plan business for individuals in order to allow the parties to proceed with their $69 billion merger.[8] The merger would have combined two of the leading sellers of individual prescription drug plans, eliminating valuable competition. The proposed merger would have resulted in increased premiums and increased out-of-pocket expenses paid by Medicare beneficiaries, higher subsidies paid by the federal government, and a lessening of service quality and innovation. The divestiture preserved competition in the market for individual prescription drug plans. DOJ worked closely with the state attorneys general throughout the investigation and settlement, and this cooperation continues to this day. The state attorneys general recently filed papers in support of the consent decree in ongoing Tunney Act proceedings.[9]

6 Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case,* 11 Geo Mason L. Rev. 37, 51 (2002).

7 Complaint, *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017) (No. 17-5024); Complaint, *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017) (No. 16-1494).

8 Complaint, *United States v. CVS Health Corp.*, No. 1:18-cv-02340 (D.D.C. Oct. 10, 2018).

9 Plaintiff States' Statement of Support and Request to Address the Court, *United States v. CVS Health Corp.*, No. 1:18-cv-02340 (D.D.C. May 15, 2019).

- ***United States and the State of North Carolina v. Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System***, 3:16-cv-00311-RJC-DCK (W.D.N.C.): In November 2018, DOJ and the North Carolina Attorney General settled a lawsuit with Atrium Health (formerly known as Carolinas HealthCare System) prohibiting it from using anticompetitive steering restrictions in contracts between commercial health insurers and its providers in the Charlotte, North Carolina metropolitan area.[10] The settlement resolved over two years of civil antitrust litigation challenging Atrium's use of steering restrictions that prevented health insurers from promoting innovative health benefit plans and more cost-effective healthcare services to consumers. DOJ worked closely with the North Carolina Attorney General throughout the litigation.[11]

- ***Securus/ICS***: In April 2019, Securus Technologies Inc. abandoned its plans to acquire Inmate Calling Solutions LLC ("ICS"). DOJ had informed the parties that it had serious concerns that the merger would eliminate important competition in the market for inmate telecommunications services. Competition between the parties has yielded significant benefits for correctional facility customers, many of which are the state departments of correction and individual counties that operate these facilities. DOJ worked closely with the attorneys general from Colorado, Illinois, Massachusetts, Minnesota, Nevada, and Ohio on the matter.[12]

- ***Stromberg v. Qualcomm Inc.***, No. 19-15159 (9th Cir.): In June 2019, for possibly the first time ever, state attorneys general joined the United States on an amicus brief.[13] *Stromberg* raises questions over the interaction of federal and state antitrust law. The Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), held that only direct purchasers could seek damages under the federal antitrust laws. Several states, including California, passed so-called *Illinois Brick* repealers, allowing indirect purchasers to seek damages under relevant state antitrust laws. Other states have chosen to take a variety of differing policy positions. In *Stromberg*, the federal district court certified a nationwide class of indirect purchasers under California law. In an appeal by the defendant, DOJ and the attorneys general for Louisiana, Ohio, and Texas filed an amicus brief urging the Ninth Circuit to reject the certification. Both the United States and the state attorneys general have an interest in the correct application of the federal antitrust laws. Moreover, the attorneys general for Louisiana, Ohio, and Texas have an interest in the proper application of their state antitrust law. Accordingly, in the brief, the United States, Louisiana, Ohio, and Texas argued that states have an interest in applying their law to class members who reside in their state. Doing so vitiates policy choices made at both the federal and state levels to disallow recovery from indirect purchasers.

- ***United States and the States of Kansas, Nebraska, Ohio, Oklahoma, and South Dakota v. Deutsche Telekom AG, T-Mobile US Inc., SoftBank Group Corp., and Sprint Corporation***, No. 1:19-cv-02232 (D.D.C.): In July 2019, DOJ and the Attorneys General of Kansas, Nebraska, Ohio, Oklahoma, and South Dakota reached a settlement with T-Mobile and Sprint regarding their proposed merger. The settlement requires a substantial divestiture package in order to enable a viable facilities-based competitor to enter the market. Further, the settlement will facilitate the expeditious deployment of multiple high-quality 5G networks for the benefit of American consumers and entrepreneurs. Under the terms of the proposed settlement, T-Mobile and Sprint must divest Sprint's prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to Dish Network Corp., a Colorado-based satellite television provider. The proposed settlement also provides for the divestiture of certain spectrum assets to Dish. Additionally, T-Mobile and Sprint must make available to Dish at least 20,000 cell sites and hundreds of retail locations. T-Mobile must also provide Dish with robust access to the T-Mobile network for a period of seven years while Dish builds out its own 5G network. DOJ worked closely with state attorneys general throughout the investigation.

V. CONCLUSION

Both DOJ and state attorneys general play a role in enforcing federal antitrust laws. DOJ is committed to collaborating with the state attorneys general where doing so is necessary to protect competition for the benefit of the American consumer.

10 Final Judgment, *United States v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d 720 (W.D.N.C. 2017) (No. 3:16-cv-00311-RJC-DCK).

11 See Press Release, Department of Justice, Antitrust Division, Atrium Health Agrees to Settle Antitrust Lawsuit and Eliminate Anticompetitive Steering Restrictions (Nov. 15, 2018).

12 See Press Release, Securus Technologies Abandons Proposed Acquisition of Inmate Calling Solutions After Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 3, 2019).

13 Brief of the United States of America and the States of Louisiana, Ohio, and Texas as Amici Curiae in Support of Appellant, *Stromberg v. Qualcomm, Inc.*, No. 19-15159 (9th Cir. June 10, 2019)

PARENS PATRIAE STANDING OF ATTORNEYS GENERAL: A CASE OF MISTAKEN IDENTITY

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I. INTRODUCTION

In a strange way, the *parens patriae* standing of the states to bring actions – through their attorneys general – on behalf of their citizenry is like a person who has the misfortune of being a "dead ringer" for a wanted criminal. Like the misidentified innocent party, *parens patriae* standing is often mischaracterized in litigation, especially in settlement negotiations. In either situation, a mistaken identity problem can result in confusion, inefficiency, and other negative consequences.

In this article, I discuss what *parens patriae* is, and perhaps more importantly, what it is not. I offer tips for private litigants designed to assist them in avoiding common misidentification errors in settlement negotiations where *parens patriae* standing is at issue.

II. BACKGROUND: WHAT IS *PARENS PATRIAE?*

No case of mistaken identity can ever be remedied without delving into the true identity of the innocent victim of the mistake. Here, that task requires at least a brief excursion into several centuries of legal history.

Translated from the Latin, *parens patriae* means "parent of the country." The concept originated in England, where it was the prerogative of the monarch to act as guardian for persons with the legal disabilities of age or mental incapacity, and to oversee all "charitable uses" in the country.[2] The focus was on the power of the national sovereign to care for those unable to care for themselves. When the concept was adopted into the legal system of the United States, it underwent some significant changes. First, the authority to act was invested not in a *national* governing body or person, but rather in the individual states through their chief legal officers – the attorneys general.[3] Some courts have opined that this grant of authority to the states was made as compensation for the authority that the states ceded under the federal system.[4] Second, the United States' version of *parens patriae* made a significant shift away from the guardianship concept of its English roots.

Beginning in the early 1900s, attorneys general used *parens patriae* predominantly to protect the general population from harm caused by environmental issues.[5] Pollution and riparian rights were the most common subjects of these cases, which were most often brought to protect the citizens of the plaintiff state against those of another (usually neighboring) state.[6]

Today, the leading statement on the states' *parens patriae* standing is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). In *Snapp*, Puerto Rico's Attorney General filed suit against Virginia apple producers that had advertised for temporary labor to help harvest their current fruit crop, but refused to hire most of the Puerto Rican citizens that applied for those jobs. Acknowledging the Commonwealth's authority to bring this action, the Court expressly rejected the idea of *parens patriae* as a means to care for those who cannot act on their own behalf. Rather, the Court held, a state has *parens patriae* standing to act on behalf of its citizens if it can allege an injury to a quasi-sovereign interest, rather than simply litigating the personal claims of the individual citizens.[7]

Snapp defines a quasi-sovereign interest as an interest affecting a "sufficiently substantial segment" of the state's population, not merely an "identifiable group of individual residents."[8] Quasi-sovereign interests fall into two general categories: the physical and/or economic health and well-being of the state's residents, and the state's interest in guarding against discriminatory denial of its rights within the federal system.[9] Early twentieth century *parens* cases alleging air or water pollution or the wrongful diversion of water provide clear examples of injury to the physical well-being of the populace. Another case from that era, *Louisiana v. Texas*, 176 U.S. 1 (1900), illustrates *parens patriae* standing on the basis of injury to economic welfare. There, Louisiana challenged Texas's moratorium on imports from Louisiana businesses. Louisiana alleged that the stated public health rationale for the import ban was a subterfuge designed to conceal Texas's true desire to give the City of Galveston

2 George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DePaul L. Rev. 895, 896-98.

3 But see *id.* at 911 n. 71 (United States as *parens patriae* in disposition of Native American lands).

4 See *D.C. v. ExxonMobil Oil Corp.,* 172 A.3d 412, 420 n.11 (D.C. 2017) (citing *Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332, 337 (1st Cir. 2000)).

5 Jay L. Himes, *State Parens Patriae Authority: The Evolution of the State Attorney General's Authority*, The Inst. for L. & Econ. Policy Symposium, 3 (2004).

6 See, e.g. *Missouri v. Illinois,* 180 U.S. 208 (1901) (discharge of sewage into the Mississippi River); *Kansas v. Colorado,* 206 U.S. 46 (1907) (diversion of water from the Arkansas River).

7 *Snapp,* 458 U.S. at 607.

8 *Id.*

9 *Id.* at 609-10.

a commercial advantage over the City of New Orleans. While the case ultimately failed on jurisdictional grounds, the Court acknowledged that states have *parens patriae* standing to bring actions to prevent economic harm to their "citizens at large."[10]

The *Snapp* case illustrates the second category of quasi-sovereign interest: the state's interest in ensuring that federal statutes, programs, and benefits are administered equitably to its citizens *vis-à-vis* the citizens of other states. Courts, however, do not permit states to use *parens patriae* standing to challenge the *validity* of federal laws, only their *enforcement*.[11]

III. *PARENS PATRIAE* STANDING IN FEDERAL AND STATE ANTITRUST CASES

Although *parens patriae* is, at its core, a common law concept, no discussion of this topic (especially in the context of U.S. antitrust enforcement) would be complete without a mention of the interplay between *parens patriae* principles and the federal and state antitrust statutes. Sections 4 and 16 of the Clayton Act empower "any person" to sue for damages and/or injunctive relief, respectively, for injury suffered as a result of an antitrust violation.[12] Is a state proceeding in its capacity as *parens patriae* such a "person"?

In 1945, the United States Supreme Court considered the Georgia Attorney General's claim that he had not only the authority to bring a price-fixing action under the Sherman Act against allegedly colluding railroads on behalf of the state in its proprietary capacity, but also that he had standing as *parens patriae* to bring claims for injunctive relief and damages for harm to the general economy of Georgia.[13] The Court held that the state had standing to proceed as *parens patriae* under Section 16 of the Clayton Act for injunctive relief, finding the results of price-fixing to be "matters of grave public concern."[14] It found nothing in the Act's legislative history that indicated that Congress meant to restrict the ability of state attorneys general to bring civil antitrust suits to those solely based upon proprietary interests.[15]

But the Court in *Pennsylvania R.R.* addressed only the issue of *parens* standing to seek injunctive relief, leaving damages for another day. That day came in 1972 in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Hawaii's complaint sought injunctive relief and damages against allegedly colluding oil companies that it claimed had injured the state through loss of tax revenue, curtailment of manufacturing opportunities, and acts that held the economy in a "state of arrested development."[16] Taking up where it had left off in *Pennsylvania R.R.*, the Court addressed whether harm to the general economy could form the basis of *parens* standing to sue for damages under Section 4 of the Clayton Act. The key consideration, it found, was whether the injury alleged was to a person's "business or property."[17] Under that analysis, the Court held that because states can sue for proprietary damages, and natural person consumers can sue for harm to their "business and property," to allow suits by states for damages to the general economy would mirror harm to individual citizens and cause duplicative recovery.[18]

The final piece of the statutory *parens patriae* structure was added in response to the Ninth Circuit decision the following year in *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973). There, the State of California attempted to recover damages under Section 4 of the Clayton Act as *parens patriae* on behalf of consumers who purchased snack foods subject to a price-fixing scheme. The Court rejected the attempt, saying that the state was attempting to revert to the English common law version of *parens patriae* in acting as a guardian for citizens who could not take care of themselves.[19] If attorneys general were to be permitted to sue for damages on behalf of consumers under Section 4, it said, the legislature would have to give them that permission. Three years later, Congress responded by passing Section 4C of the Clayton Act, authorizing any state attorney general to bring a civil *parens* action for damages on behalf of "natural persons" in that state.[20]

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10 *Id.* at 603.

11 *Kansas ex rel. Hayden v. United States,* 748 F.Supp. 797 (D.Kan. 1990) (Kansas attorney general's challenge to FEMA denial of benefits was appropriate use of *parens* standing because the challenge was to the enforcement, not the validity, of federal law).

12 Section 4 of the Clayton Act, 15 U.S.C. §15; Section 16 of the Clayton Act, 15 U.S.C. §26.

13 *Georgia v. Pennsylvania R.R.,* 324 U.S. 439 (1945).

14 *Id. at 451.*

15 *Id.* at 447.

16 *Hawaii*, 405 U.S. at 255-56.

17 *Id.* at 264-65.

18 *Id.* at 260-64.

19 *Id.* at 776.

20 15 U.S.C. §15c.

Many states have enacted statutes that contain express authorization for their attorneys general to bring actions as *parens patriae* under the state's antitrust law.[21] In the absence of statutory authorization, however, states' abilities to utilize *parens* standing in cases under state antitrust law are the subject of conflicting decisions. One such opinion authorized *parens patriae* standing because the continued integrity of the marketplace is a fundamental quasi-sovereign interest.[22] On the contrary, another state court held that if the state legislature had wanted the attorney general to be able to pursue damages on behalf of the state's citizens in antitrust cases, it could have done as Congress did in enacting Clayton Act Section 4C.[23]

IV. AVOIDING THE *PARENS PATRIAE* MISTAKEN IDENTITY PROBLEM IN SETTLEMENT NEGOTIATIONS

As the foregoing discussion illustrates, *parens patriae* sits perched precariously at the intersections of common law and statutory enactments, of federal and state law enactments, and of standing and jurisdiction. It is little wonder that the concept is frequently misinterpreted, and that the case law in this area is full of nuance and at least apparent inconsistencies.

A. Settlements of Government Investigations or Litigation

When government enforcers and the private parties that are the targets of their investigations or the defendants in an enforcement action reach an agreement in principle to resolve the dispute, the real work is just beginning. Because the "devil is in the details," the process of reducing the parties' (presumed) mutual understanding to writing can be arduous.

One common sticking point is the language of the release that the state attorney general will give in exchange for the settling party's payment, promises, or other consideration. While private litigants have only their own private rights to surrender in settlement, attorneys general frequently litigate in multiple capacities, and thus have multiple rights with which to bargain. For example, an attorney general might bring an antitrust action as: (1) the chief enforcer of the antitrust laws of the state, (2) the attorney for the state in its proprietary capacity (i.e. the state as purchaser of the goods or services at issue), and (3) *parens patriae* for natural persons residing in the state, or any combination of the three.

In the foregoing example, the attorney general can clearly agree to forego the right to bring (or continue) an action for injunctive or other equitable relief under the attorney general's law enforcement authority. The attorney general can release the state's proprietary claims as well. But what about the frequent request by defendants and investigative targets that the state release "*parens patriae* claims"? Although that phrase has found its way into settlement agreements in the past, it is a troubling and inartful way of describing what is truly being surrendered.

As described above, *parens patriae* is not a type of claim, but rather it is a procedural vehicle that allows the state to pursue an interest that exists in natural persons residing in that jurisdiction. In describing the *parens patriae* standing of attorneys general under Clayton Act Section 4C, the Supreme Court emphasized that the statute "did not establish any new substantive liability," but rather merely created "a new procedural device to enforce existing rights of recovery."[24] In other words, *parens patriae* standing allows a state to pursue only those rights its citizens already possess.

While *parens patriae* is not a claim that can be released, it does have a legitimate place in settlement agreements that resolve state enforcer actions. State attorneys general can covenant not to pursue or to cease pursuing the claims of citizens of the state as *parens patriae* for those citizens. This approach will accomplish the goals of the settling defendant or target far more effectively than asking a state to release a "claim" that it does not possess.

21 See, e.g. Conn. Gen. Stat. §35-32; 6 Del. C. §2108; Md. Code Ann., Com. Law §11-209; Ohio Rev. Code §109.81.

22 *State of Michigan v. Detroit Lumberman's Ass'n, Inc.,* 1979-2 Trade Cas. (CCH) ¶ 62,990 (Mich. Cir. Ct. October 29, 1979).

23 *State of Tennessee v. Levi Strauss & Co.,* 1980-2 Trade Cas. (CCH) ¶ 63,558 (Tenn. Ch. September 25, 1980).

24 *Kansas v. Utilicorp United, Inc.,* 497 U.S. 199, 218-19 (1990).

B. Settlements of Private Litigation

It may seem curious to discuss the release of *parens patriae* authority in the context of strictly private litigation. On occasion, however, the settlement negotiations of private parties stray into this area when defendants seek to secure for themselves the most complete release possible of the claims that plaintiffs might bring against them. In their quest for thoroughness, defendants at times ask that private plaintiffs release their "*parens patriae* claims." As discussed above, this phrase is an inaccurate description of what is truly being sought. "*Parens patriae*" is not an adjective that can legitimately modify "claim."

But such a request made in the context of strictly private litigation is problematic for a more fundamental reason. Even though the underlying entitlement to recover damages for harm inflicted – the "claim" – belongs to the private plaintiff, the authority to file an action to redress such harms suffered by members of the public by using *parens patriae* standing belongs solely to the state. At least two federal district courts have ruled that any language inserted in a private settlement by private parties cannot, under any logical interpretation, extinguish the power of the state to exercise *parens patriae* authority.

In one such decision, *In re Am. Investors Life Ins. Co. Annuity Mktg & Sales Practices Litig.*,[25] the court held that regardless of the breadth or wording of the release language in a private settlement, the release can have no impact on the ability of a state attorney general to bring an action as *parens patriae*. The court emphasized that the "attorneys' general law enforcement powers are not claims the plaintiffs have," and thus those powers cannot be released or restricted by a private settlement.[26]

In *Zepeda v. PayPal, Inc.*,[27] the litigants sought final approval of a nationwide class action settlement that defined "Released Claims" as those that have been or could be "asserted in any individual, class, private attorney general, representative, parens patriae or any other capacity…"[28] The court flatly rejected an objector's assertion that the release language extinguished states' powers to bring claims as *parens patriae* on behalf of injured citizens, saying that "[s]ince class members do not possess the State's parens patriae power, it is axiomatic that they cannot release such claims."[29]

It is important to note that the proposed release language in *Zepeda* correctly identified *parens patriae* as a "capacity" under which class members' claims could be asserted in the future. Such language, therefore, extinguishes the right of class members who remain in the class upon consummation of the settlement to recover in any subsequent *parens* action filed by the state. It does not foreclose the filing of such an action.[30] For cases brought by a state attorney general under Clayton Act Section 4C, this extinguishment of a settling class member's right to participate in a later *parens patriae* recovery is consistent with (although arguably somewhat broader than) the language of §4C that requires a court to exclude from the award "any amount of monetary relief… which duplicates amounts which have been awarded for the same injury…"[31]

V. CONCLUSION

The *parens patriae* concept is the subject of frequent mischaracterization. This problem is due, in large part, to the twists and turns of its development – from centuries-old English common law, to its import into the American legal system, to its current status as a creature of both common law and statute. Its identity problem manifests itself in many ways, but one of the most problematic is the confusion it causes in connection with settlements of antitrust enforcement actions and private class action settlements.

These thorny problems, however, can be eased by condensing this nuanced and complex concept down to two simple points. (1) *Parens patriae* is a vehicle for bringing a claim; it is not the claim itself, and (2) An individual or group of individuals may release their claims (and thus alter or eliminate their ability to participate in a future *parens* recovery), but they cannot release or extinguish the authority of the attorney general to bring a future *parens patriae* action.

25 *In re Am. Investors Life Ins. Co. Annuity Mktg. &. Sales Practices Litig.*, 263 F.R.D. 226 (E.D. Pa. 2009).

26 *Id.* at 241.

27 *Zepeda v. PayPal, Inc.*, 2017 U.S. Dist. LEXIS 43672 (N.D. Cal. 2017).

28 *Id.* at *54 n.18 (quoting the settlement agreement).

29 *Id.* at *55.

30 *Id.*

31 15 U.S.C. §15c(a)(1). I contend that the set-off provision of §4C would reduce a *parens* recovery only to the extent that it was duplicative of amounts distributed in the class action settlement.

THE CASE FOR EMPLOYING HYBRID WELFARE STANDARDS IN ANTITRUST MATTERS

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I. INTRODUCTION

A key goal of antitrust law in the United States is to protect economic freedom by promoting fair and competitive markets.[2] Over the years, many lawyers, economists, and scholars argued that the promotion of economic efficiency was the dominant reason why antitrust laws were passed.[3] Today, however, such argument lies at odds with current thinking regarding antitrust. In fact, one is hard pressed to find "economic efficiency" for its own sake being articulated as a primary goal by antitrust practitioners, commentators, or courts reviewing antitrust matters.

On the contrary, antitrust's current articulated goal is, at a basic level, "to protect consumers from paying higher prices to firms that have unfairly gained or maintained market power."[4] The majority of federal court decisions in recent decades have held the protection of consumers as the *overarching goal* of the antitrust laws.[5] The U.S. Supreme Court clarified that goal in 1979 when it said antitrust laws are a "consumer welfare prescription," thereby espousing a focus almost entirely directed towards the consumer.[6] This consumer focus has taken center stage in modern antirust analysis.

Antitrust practitioners and scholars have proposed other focal points — many falling under the broad umbrella of a "welfare" standard. This article describes and discusses some of these alternatives, identifying the "consumer welfare standard" ("CWS") as the predominant mode of thinking in modern antitrust analysis. CWS however, has its shortcomings, particularly in instances where consumer harm is not apparent over the long term and price increases or potential price increases do not rise to anticompetitive levels. Hybrid welfare analyses could address these shortcomings for non-price or non-consumer-focused market issues and also in cases where CWS fails to accurately predict impacts on certain input and output markets.

II. WELFARE STANDARDS

Over the years, antitrust scholarship has addressed various approaches to analyzing potentially anticompetitive conduct. Many paradigms or welfare standards have evolved along the way, and a quick look at some will provide useful context. They include: (1) total welfare;[7] (2) consumer choice;[8] (3) worker welfare;[9] (4) "structural" welfare;[10] and (5) the current standard-bearer, consumer welfare.[11]

The total welfare or aggregate economic welfare standard attempts to measure the effect of a transaction or some conduct on the totality of welfare of all market participants, not just consumers. This standard focuses on the aggregate value created in the market and disregards distribution of gains and losses among participants.[12] Under this standard, conduct is condemned only if it decreases the sum total welfare of consumers (buyers) and producers (sellers) as a whole, with no regard to any wealth transfers — efficiencies can therefore trump consumer injury.[13]

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2 *Mission*, U.S. Dep't of Just. Antitrust Division, https://www.justice.gov/atr/mission (last visited July 15, 2019).

3 John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191, 192 (2008).

4 *Id.* at 196.

5 John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 Fordham L. Rev. 2425, 2443 (2013).

6 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Robert H. Bork, The Antitrust Paradox 66 (1978)).

7 Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 8 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.

8 *Id.*

9 Clayton J. Masterman, Note, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 Vand. L. Rev. 1387, 1414 (2016).

10 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 737 (2017).

11 *The Consumer Welfare Standard, 40 Years Old & Under Fire*, Law360 (Jan. 25, 2019, 6:51 PM), https://law360.com/articles/1122472/prnt?section=competition.

12 Wilson, *supra* note 7, at 12.

13 See Steven C. Salop, *Question: What Is The Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 337 (2010).

The consumer choice standard sees antitrust's role as that of ensuring a competitive marketplace, such that producers provide worthwhile options available to consumers, and the range of options is not impaired or distorted by anticompetitive practices.[14] Further, under the consumer choice standard, antitrust laws should see to it that the economy responds to aggregate consumer demand, not to government directives or the preferences of individual businesses.[15]

The worker welfare standard reasons that because some employer restraints have the potential to decrease prices, a focus solely on consumer effects in output markets might erroneously inflate perceived pro-competitive benefits.[16] Antitrust laws, it argues, have no methodology to compare the welfare of different groups of consumers, e.g. customers and employees, in different markets when their interests are not aligned.[17] Therefore, under this standard, consideration of the welfare of all consumers (customers and workers) and a focus on the competitive effects of a restraint only in the market where it has *a direct effect*, is key.[18] If a conduct directly impacts workers, even though prices may decrease, the emphasis should shift to labor market welfare. In this scenario courts should consider worker welfare first, and consumer welfare only if workers experience *de minimis* harm related to the alleged anticompetitive conduct.[19]

A "structural welfare" standard broadly seeks to evaluate economic activity as competitive or anticompetitive in the context of the "underlying structure and dynamics of markets."[20] This paradigm observes that markets composed of a small number of large firms will tend to be less competitive than markets composed of a large number of small to medium sized firms, and will analyze conduct and transactions through that lens.[21]

III. THE CONSUMER WELFARE STANDARD

The dominant standard, CWS, is firmly entrenched in modern antitrust thought — generally prohibiting practices that lower output and increase prices for consumers.[22] Under CWS "business conduct and mergers are evaluated to determine whether they harm consumers in any relevant market. Generally speaking, if consumers are not harmed, the [enforcers] do not act."[23] CWS, as used today, considers the welfare of consumers as consumers, pure and simple.

Much ink has been spilled discussing the virtues and disadvantages of CWS. Some say it falls short at the intricate task of weighing all the relevant factors to determine if conduct is anticompetitive or pro-competitive, particularly when price is not involved. Indeed, many currently argue, "the undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends — including our interests as workers, producers, entrepreneurs, and citizens. It also mistakenly supplants a concern about process and structure (i.e. whether power is sufficiently distributed to keep markets competitive) with a calculation regarding outcome (i.e. whether consumers are materially better off)."[24]

Others seem to believe that CWS, when used properly, does what it is supposed to do.[25] Still others rest somewhere in the middle — recognizing CWS's shortcomings while remaining reluctant to discard it for a different, perhaps equally imperfect paradigm. Amid such variance, courts and enforcers could identify matters where CWS may not be an entirely appropriate analytical framework and consider hybrid welfare

14 Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antirust,* 62 U. Pitt. L. Rev. 503, 504 (2001).

15 *Id.* at 503.

16 Masterman, *supra* note 9, at 1414.

17 *Id.* at 1401.

18 *Id.* at 1414.

19 *Id.*

20 Khan, *supra* note 10, at 717.

21 *Id.* at 718.

22 Professor Herbert Hovenkamp uses the term consumer welfare principle ("CWP") to mean essentially the same as the consumer welfare standard: "[A]ntitrust policy should encourage markets to produced two things for the benefit of consumers: (1) output that is as high as is consistent with sustainable competition and (2) prices that are accordingly as low." Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, Wharton Pub. Pol'y Initiative Issue Brief, Sept. 2018, at 1.

23 Wilson, *supra* note 7, at 1.

24 Khan, *supra* note 10, at 737.

25 See Elyse Dorsey et al., Consumer Welfare & the Rule of Law: The Case Against the Populist Antitrust Movement 3-4 (2019).

analyses that preserve the existing goals of CWS, but also add the best features of other standards. This hybrid approach could provide new frameworks capable of properly evaluating the varied complexities encountered in antitrust today.

IV. WHEN NEITHER PRICE NOR CONSUMER ISSUES PREDOMINATE

There are countless examples where price is not a predominant factor, yet competitive concerns nonetheless exist. The technology sector provides illustrations for how competition concerns may arise in non-price ways — myriad potential anticompetitive issues may exist in the context of "free" online products and services, like privacy issues, harm to innovation, the squashing of nascent competition, etc.[26] And, in the market for bulletproof vests, for instance, price is likely *not* the key competitive factor.[27] Indeed, in this market, a low-priced product may be the complete opposite of what consumers want.

When consumers are not adversely impacted, CWS is inadequate and artificial. The recent case *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation* provides a good example.[28] In this case, student athletes brought a class action antitrust suit against the NCAA and certain of its conferences. They alleged that NCAA rules limiting their compensation for athletic services, as set and enforced by the NCAA and its members, violated antitrust laws.[29] The relevant market was defined as comprising national markets for the students' *labor* in the form of athletic services in men's and women's Division I basketball and FBS ("Football Bowl Subdivision") football wherein each class member participates in his or her sport-specific market.

NCAA makes clear that CWS is not the optimal tool to analyze a labor market antitrust violation. When consumers are discussed in this case, it is in the context of their demand for the athletes' labor and how certain NCAA rules regarding payment to the students might impact their demand for the Division I contests. The crux of the case was not whether *consumers* of sports contests would be harmed but rather the harm to the student athletes "because the rules deprive them of compensation" they would have otherwise received.[30]

This case focused almost entirely on labor. Notwithstanding the Supreme Court's pronouncement decades ago that antitrust laws are a "consumer welfare prescription,"[31] this recent NCAA case reminds us that consumers are not the whole story. In fact, when antitrust analysis is narrowly circumscribed to contextualize all issues within the bounds of the unitary CWS box, it can become difficult to think outside of that box. But when labor, technology, or non-price issues predominate, thinking outside of the box is exactly what is needed. CWS's contours should be expanded and complimented lest antitrust appear as a one-trick pony. Indeed, if the antitrust toolkit contains only a "consumer welfare hammer," then every potential antitrust issue will look like a "consumer harm nail." To properly analyze today's complex competition issues outside of the imperfect consumer-centric framework, the all-purpose hammer will not suffice: Antitrust needs screwdrivers, awls, and wrenches, too.

This is not to suggest that the hammer is obsolete, only that it is less than ideal when there is wood to be cut or bolts to be tightened, and different tools are necessary. Courts and antitrust practitioners should begin to embrace the other tools in the antitrust toolkit. Do labor issues predominate although there are related consumer concerns as well? If so, then perhaps a hybrid "CWS-worker welfare" standard that takes into account a fulsome labor market analysis makes more sense. Will a merger/acquisition lead to significant negative labor impacts in the name of efficiency? Again, additional "welfares" may need to be considered alongside CWS. Antitrust analysis choice is not binary — antitrust is flexible enough to engage with more than one standard concurrently when evaluating today's complex antitrust issues.

V. CONCLUSION

Antitrust analysis should not be confined to a single standard. While CWS works well for certain conduct and transactions, for many others, it is less than optimal. Antitrust is indeed flexible enough to incorporate multiple paradigms at the same time to reach its ultimate analytical goals.

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26 For fuller discussion of these examples *see* Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, *Public Comments of 43 State Attorneys General* 6-15. (June 11, 2019), https://www.regulations.gov/document?D=FTC-2019-0031-0003.

27 The example of quality competition being paramount in this market, as opposed to price competition, is discussed in Lande, *supra* note 14, at 515.

28 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Ca. 2019).

29 *Id.* at 1097.

30 *Id.* at 1098.

31 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Robert H. Bork, The Antitrust Paradox 66 (1978)).

STATES AND THE DEVELOPMENT OF THE ANTITRUST LAWS

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I. INTRODUCTION

Upon hearing any mention of the word "antitrust," most casual observers will immediately turn their thoughts to the federal government.

And certainly, for good reasons. Decades of enforcement, competition advocacy, business review letters, workshops, and scholarship, have cemented the Antitrust Division of the Department of Justice and the Federal Trade Commission as the quintessential stewards of the development of the federal antitrust laws.

But the picture would not be complete without a proper account of the role state antitrust enforcement has played in shaping the progression of the antitrust laws. Indeed, the states' willingness in many cases to step outside the parameters of the federal antitrust laws and to act under state law, has plowed a road for the pervasiveness of the antitrust laws in the everyday lives of our casual observers. This article explores some of the reasons the states have left an indelible mark on competition enforcement.

II. HUMBLE BEGINNINGS

For decades, the bedrock of antitrust enforcement has been the Sherman Act. Yet, it is a common misconception that the Sherman Act, enacted in 1890, was the first antitrust statute in the United States. In fact, the first codification of the antitrust laws came from the states a year before the enactment of the Sherman Act, with Kansas codifying the first state antitrust statute in March 1889. Texas legislation followed shortly thereafter.

It makes sense that the states were the first to act; at the turn of the 20th century, trade regulation was the unique province of the states. Through the common law doctrine of restraint of trade and corporation laws, states had several tools available to regulate corporate behavior. The states utilized these tools in a variety of actions to dissolve corporations for illegally creating a monopoly and engaging in illegal combinations. Although the realities of a global economy and the resources required to litigate antitrust cases have fueled the development and reach of the federal antitrust, one can see how the historical development of the antitrust laws set the stage for our system of antitrust federalism – and the states have seen fit to chart their own course at the appropriate times.

III. INDIRECT PURCHASERS

Perhaps one of the most significant developments in the antitrust laws has been the disparate treatment of direct and indirect purchasers. In *Illinois Brick*, the United States Supreme Court closed the courthouse doors to indirect purchaser plaintiffs seeking monetary recovery as a result of a Section 1 violation. And when recently presented with an opportunity to revisit or at least debate the wisdom of *Illinois Brick*, the Court held firm to its prior precedent. The wall of bricks remains intact.

Illinois Brick set the stage for a dramatic course correction under the state antitrust laws. In response to the Supreme Court's decision, states began enacting "*Brick*-repealer" statutes; laws that were intended to give indirect purchasers an avenue for recovery under state antitrust laws. When the constitutionality of these statutes was challenged, the Supreme Court, in *California v. Arc America*, 490 U.S. 93 (1989), made clear that the states were free to enact *Brick*-repealer statues because Congress had not preempted state regulation of anticompetitive conduct.

States have taken a variety of approaches to this issue over the years. Some states grant a private right of action to indirect purchasers.[2] Other states, like WA, permit indirect purchaser recovery, but only through an action by the State Attorney General (an "AG-only state").[3] In some states, the authority is statutory, while in other courts have interpreted state law to permit indirect purchaser actions.

Antitrust federalism indeed. By electing to depart from the federal antitrust law's bar on indirect purchaser recovery, the states re-affirmed a core principle of their role in a system of concurrent antitrust enforcement: consumers are of paramount concern for the states. The states are often the first, and in many cases the only, resources for consumers to bring their complaints to. The States have both common law and statutory authority to represent their consumers as *parens patriae* – a distinct form of a lawsuit that is an exercise of sovereignty, and generally not subject to the same procedural requirements of certifying a class.

2 See, e.g. California Cartwright Act, Cal. Bus. & Prof. Code §16700 et seq.

3 See RCW 19.86.080.

As an AG-only state, representing our indirect purchaser consumers is a core and crucial function of the Washington State Attorney General's Office. In the last several years, the Antitrust Division has vigorously represented indirect purchaser consumers, recovering over $100 million for consumers and state agencies harmed through cartel conduct, and intervening in actions to protect our right to exclusively represent our indirect purchaser consumers.

IV. ANTITRUST AND LABOR

Over the last several years, there has been significant attention on the intersection of the antitrust laws and labor markets. While the antitrust analysis of labor markets is by no means a new or controversial subject – whether in a downstream or an input market, the antitrust laws play an important role in safeguarding competition on the merits – the states have been at the forefront of renewed interest in this space, both legislatively, and through enforcement actions.

In early 2018, the Antitrust Division of the Washington State Attorney General's Office initiated a review of no-poach clauses appearing in fast-food franchise agreements. No-poach provisions prohibit employees from moving among stores in the same franchise chain. Economists studying the use of no-poach provisions in franchise agreements have concluded that they reduce job opportunities for low-wage workers, put downward pressure on wages, and limit workers' ability to improve their working conditions. Our office determined that the use of these provisions has been pervasive in franchise agreements and over the course of the investigation, it expanded beyond fast-food and quick-serve franchises, to a broad array of business, including automotive services, child care, parcel services, tax preparation, to name a few.

As a result of this investigation, since early 2018, the Attorney General's Office has reached agreement with over 60 national franchisors requiring them to (1) immediately stop enforcing no-poach clauses in their existing franchise agreements; (2) refrain from including no-poach provisions in any new franchise disclosure documents; and (3) immediately amend existing franchise agreements in WA to remove these provisions. It is estimated that these agreements have benefitted over tens of thousands of workers at more than 2,500 locations nationwide.[4] In addition, in October 2018, we filed the first suit by a State Attorney General against a franchisor that refused to enter into a legally binding agreement regarding its use of no-poach provisions.[5] In early 2019, the judge denied a motion to dismiss the lawsuit, ruling that it could proceed on a *per se* and quick look theory.[6]

The States have continued to press these issues. Recently, as part of the Federal Trade Commission's workshops on Antitrust and Consumer Protection in the 21st century, a collation of 18 states sent a comment to the FTC on antitrust and labor issues. In that comment, the States have provided a series of recommendations on developing further insight into analyzing labor markets under the antitrust laws, including incorporating labor monopsony concerns into merger review, the potential use of non-compete agreements to entrench monopoly power, and possible use of the FTC's Section 5 authority to prohibit no-poach and non-compete agreements.

On a separate front, many states have enacted or are actively considering legislation specifically targeting anticompetitive conduct in labor markets. For example, in the last three years, at least five states, including Washington, have passed laws banning or limiting the use of non-compete agreements, and at least two are actively exploring it.

The chapter on antitrust and labor issues is still being written, with much work left to do. We will likely continue to see new and significant developments in this rapidly evolving area.

4 Washington State Office of the Attorney General, News Release, *AG Ferguson's Initiative Ends No-poach Clauses at Five More Corporate Chains Nationwide* (May 14, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-ends-no-poach-clauses-five-more-corporate-chains.

5 Washington State Office of the Attorney General, News Release, *AG Ferguson announces major milestones in initiative to eliminate no-poach clauses nationwide, files lawsuit against Jersey Mike's* (October 15, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-major-milestones-initiative-eliminate-no-poach-clauses.

6 Washington State Office of the Attorney General, News Release, *Judge rejects Jersey Mike's motion to dismiss AG Ferguson's no-poach lawsuit* (January 28, 2019), https://www.atg.wa.gov/news/news-releases/judge-rejects-jersey-mike-s-motion-dismiss-ag-ferguson-s-no-poach-lawsuit.

V. ACTING SEPARATELY FROM THE FEDERAL ENFORCERS

As sovereigns, the states retain authority to act independent of one another and the federal government. The states have the authority to enforce the federal antitrust laws, and virtually every state has enacted some form of antitrust or competition law. Their potential to do so is particularly potent and meaningful as antitrust enforcers and the states have a long history of acting independently of the federal enforcers when necessary.

A. The Microsoft Litigation

While the *Microsoft* case has been described as a model of federal-state cooperation, it is also an important example of the states' willingness and ability to litigate cases without the federal enforcers. Our casual observer from earlier will almost certainly remember that the federal government sued Microsoft to break up their monopoly on the browser market. That same casual observer might express surprise at being told that 20 States also sued Microsoft on the very same day in a separate complaint, based on a largely separate investigation designed to allow the states to proceed independently if DOJ did not file litigation. That casual observer might also be surprised to learn that, in 2008, when a portion of the Final Judgment was due to expire, the states filed a motion to extend the Final Judgment, which was opposed by the DOJ and Microsoft. The Court granted the States' request to extend the consent decree by an additional 18 months, and it was enforced solely by the states for the remainder of the decree period.

B. California v. Valero.

In June 2017, the State of California filed suit in the Northern District of California to enjoin Valero's proposed acquisition of two Northern California petroleum storage and distribution terminals from Plains All America Pipeline. Among other things, California alleged that the transaction was anticompetitive because it would result in several critical petroleum terminals being operated by refiners that could reduce competitor access to the terminal hub, resulting in increased fuel prices. Although the judge denied California's request for a preliminary injunction, in a written order, the judge largely agreed with California's competitive concerns and expressed skepticism over Valero's claims. After several months, the parties announced that they were abandoning the proposed transaction.

Notably, the *Valero* matter began as a joint investigation between California and the Federal Trade Commission. The FTC ultimately decided to close its investigation with no action, leaving California with the choice of whether to follow suit or to proceed further on its own. Faced with a transaction that raised significant local competitive concerns, California opted to take action, and was ultimately successful. *Valero* is but one example of state enforcers bringing cases when the federal agencies decline to do so.

C. State of Washington v. Franciscan

In August 2017, the Washington State Attorney General's Office filed suit against CHI Franciscan, alleging that two non-HSR-reportable, consummated healthcare transactions violated federal and state antitrust laws.

In 2016, CHI Franciscan acquired WestSound Orthopaedics, a seven-physician orthopedic practice, and entered into a Professional Services Agreement ("PSA") with The Doctors Clinic, a multi-specialty practice with more than 50 physicians, under which The Doctors Clinic remained a separate entity but joined CHI Franciscan's payer contracts in seven locations throughout the relevant geographic market. Washington alleged that the acquisition of WestSound Orthopaedics substantially lessened competition in orthopedic physician services, and that the PSA constituted a price-fixing agreement because it amounted to joint negotiation of reimbursement rates between competitors. The parties resolved the litigation 5 days before trial through a Consent Decree providing for both retrospective and prospective relief to remedy the anticompetitive effects alleged in the state's complaint.

Like California's *Valero* case, *Franciscan* is a recent example of state enforcers proceeding without the involvement of the federal agencies. Indeed, and in contrast to *Valero*, the transactions at issue in *Franciscan* were non-reportable, and there was no involvement from the federal agencies at any point.

D. T-Mobile-Sprint Merger Lawsuit

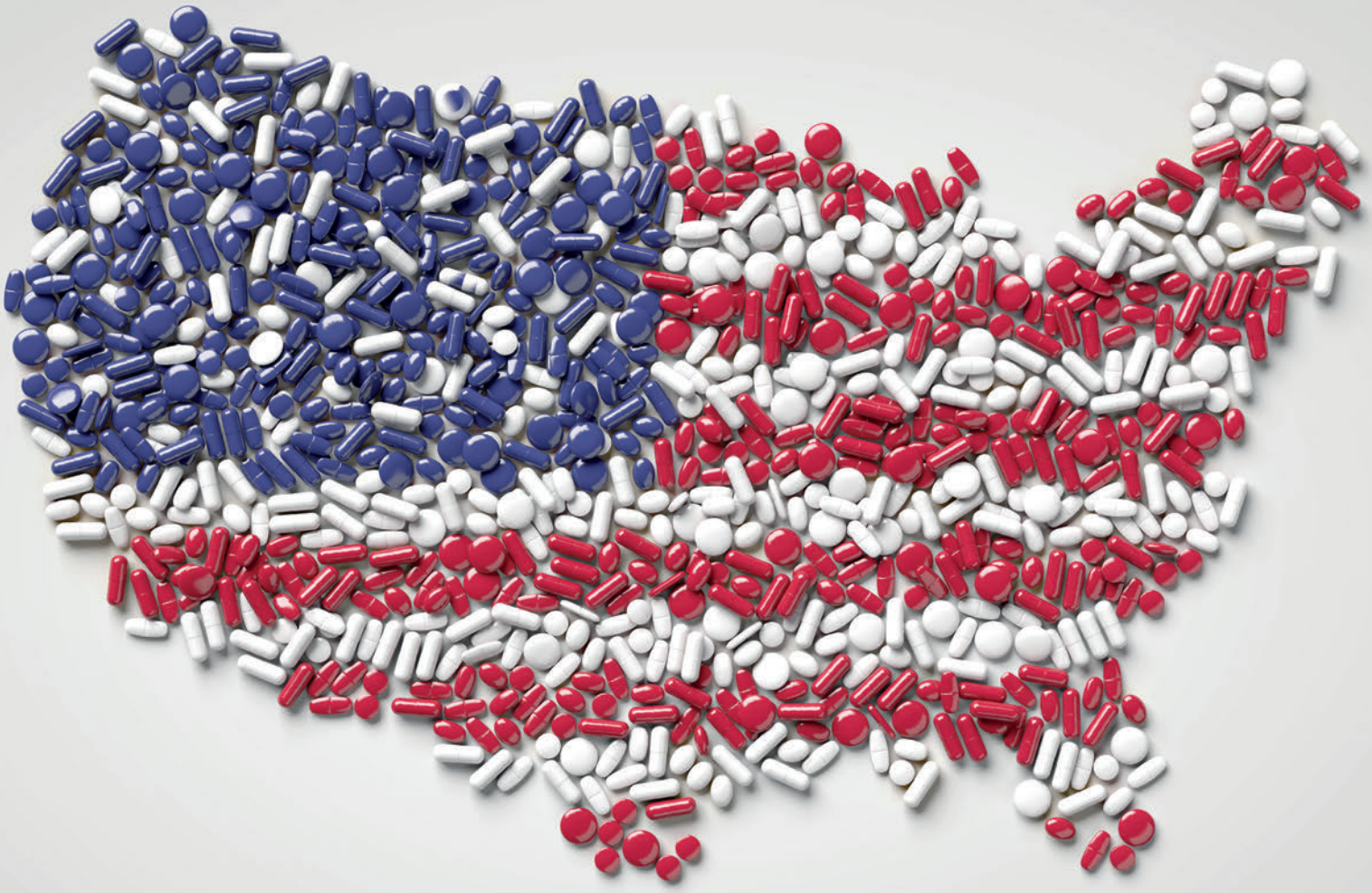
Finally, the ability of the States to act independent of the federal enforcers is currently on full display in the recently-filed challenge to the proposed T-Mobile Sprint merger. On June 10, 2019, a group of 9 states and the District of Columbia, led by NY and CA, filed suit in the Southern District of New York seeking to enjoin the proposed action. Shortly thereafter, the complaint was amended to add four additional states. Regardless of how the litigation plays out, the lawsuit is a potent reminder of the state's authority to act independently of the federal government, even in mergers with nationwide impact.

At a minimum, these cases are an important reminder of the importance to engage with state antitrust enforcers early and often, just as parties do with the federal enforcers. Being proactive about understanding and addressing a state's competitive concerns may mean the difference between a transaction that clears or an enforcement action.

VI. CONCLUSION

It is no mystery that state antitrust enforcement faces obstacles that the federal government does not share. Nevertheless, as the brief sampling of matters in this article demonstrate, state antitrust enforcement remains vibrant, and states are prepared to bring enforcement actions when appropriate, whether acting jointly through coordinated investigations and litigation, or on their own, to obtain the appropriate competitive relief. This is a desirable result, and very much the intended outcome of Congress's intentional design for dual enforcement of the antitrust laws. The United States has long been viewed as a model for effective competition law enforcement, and advancing the development of the antitrust laws. Although the currents of concurrent antitrust enforcement have been rocky at times, history proves that the states have successfully charted a course that balances cooperative and complementary enforcement with the responsibility to act in the best interests of their state and consumers.

STATE ATTORNEYS GENERAL USE ALL OF THE TOOLS IN THEIR TOOLKITS TO PROTECT THE PUBLIC IN HEALTHCARE MARKETS



BY TRACY W. WERTZ & ABIGAIL U. WOOD[1]

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I. INTRODUCTION

Healthcare markets operate very differently than other markets, and state attorneys general are especially positioned to monitor and enforce antitrust laws in these distinct markets. For example, consumers often utilize healthcare services whether they want to or not and sometimes on an emergency basis. They also trust and rely on physicians and other providers to guide them on what services they need and where they should obtain them. Further, most consumers do not pay directly for healthcare services, but rather use a third party to negotiate access and payment. The prices for the services are not transparent and are often unknown until the services are provided and payment is made by the third party. Services for hospital care are frequently provided by non-profit providers who have been funded by the community, and in return have a mission to provide high quality affordable healthcare services. Consumers also obtain healthcare services locally, wherever possible, so they can avoid the time and expense of travel, remain close to home, and have support of family and friends. Given the importance, complexities, and local nature of healthcare services, state attorneys general pay close attention to their markets and are active enforcers.

Antitrust enforcement in healthcare markets requires state attorneys general to think outside the box and use their unique set of tools to protect the public. State attorneys general, unlike their federal counterparts, wear many hats and focus not only on protecting competition, but also on protecting charitable assets and the health and welfare of the public. They also work alongside other state agencies to ensure high quality healthcare services are available to consumers. Recent actions by state attorneys general discussed below exemplify just how active state attorneys general are in healthcare markets and how they use their unique tools to tackle complex issues of concentration and competition.

II. RECENT STATE ATTORNEYS GENERAL ANTITRUST CASES IN HEALTHCARE MARKETS

State attorneys general bring cases on their own and also in coordination with federal antitrust authorities. They assert claims under both state and federal antitrust laws. For example, in March 2018, in a state-only action under state law, the California Attorney General filed a civil action[2] with the Superior Court of San Francisco against Sutter Health alleging violations of California's Cartwright Act. The California Attorney General asserts three causes of action under the Cartwright Act: price tampering and fixing; unreasonable restraint of trade; and combination to monopolize. In his complaint, the California Attorney General seeks injunctive relief and disgorgement of overcharges to restore competition in healthcare markets in California. The action was consolidated with a previously filed action[3] by the UFCW and Employers Benefit Trust ("UBET") against Sutter Health.

Sutter Health is a non-profit corporation and the largest and most dominant health care provider in Northern California, with at least 24 separately licensed hospitals; physician organizations with more than 5000 members; medical research facilities; region-wide home health, hospice and occupational health networks; and long-term care centers. In 2016, Sutter Health controlled 4311 acute care beds.[4] Sutter Health obtained its dominance through a series of mergers and acquisitions beginning in 1990 and continuing through the year 2000, including its merger with Summit Hospital in 2000, which California challenged unsuccessfully under Section 7 of the Clayton Act.[5]

The California Attorney General alleges Sutter Health used its market dominance in Northern California to engage in anticompetitive contractual practices, which have resulted in higher healthcare costs in Northern California than in other areas of the state.[6] A 2018 study found unadjusted inpatient procedure prices are 70 percent higher in Northern California than Southern California, corresponding to hospital market concentration being 110 percent higher in Northern California than in Southern California.[7] The Attorney General alleges the increased healthcare costs have negatively impacted the general economy of Northern California and the state as a whole.[8] Higher costs for employers have been passed through to employees in the form of higher premiums, deductibles, co-insurance, and other out of pocket costs.[9] The alleged anticompetitive contractual practices include requiring that all Sutter Health Hospitals and healthcare providers throughout Northern California be included in health plan networks; prohibiting health plans from giving incentives to patients that encourage them to use the healthcare facilities of Sutter

2 Complaint, *People of the State of California v. Sutter Health*, No. CGC-18-565398 (Cal. Super. Cnty. S.F. March 29, 2018).

3 Complaint, *UFCW & Employers Benefit Trust, et al. v. Sutter Health, et al.*, No. CGC-14-538451 (Cal. Super. Cnty. S.F. April 2014)

4 Complaint, *People of the State of California v. Sutter Health*, No. CGC-18-565398 (Cal. Super. Cnty. S.F. March 29, 2018), ¶ 46.

5 *Id.* ¶¶ 47-49

6 *Id.* ¶ 9.

7 *Id.* ¶ 8.

8 *Id.* ¶ 38.

9 *Id.* ¶ 5.

Health's competitors – even when said competitors could offer higher quality healthcare and/or lower pricing; and requiring that health plans not disclose Sutter Health's inflated prices for its healthcare services to anyone before the services were utilized and billed.[10]

The California Attorney General also claims Sutter Health's ability to impose anticompetitive contract terms in all of its agreements with health plans and its ability to charge supra-competitive prices to self-funded payors on a system-wide basis is direct evidence of Sutter Health's market power and obviates any need for further analysis of competitive effects in defined markets, being a *per se* violation of the Cartwright Act.[11] Nonetheless, the Attorney General defines the relevant product market as a cluster of general acute hospital services (including inpatient and outpatient services) as well as ancillary services made available for purchase by health plans and self-funded payors.[12] The relevant geographic markets are those areas in which health plans must have one or more general acute care hospitals with sufficient capacity to reasonably handle the anticipated healthcare requirements of the health plan enrollees located in the region.[13]

On March 14, 2019, the court denied Sutter Health's motion for summary adjudication of Count 1, which alleged price tampering and fixing in violation of the Cartwright Act, finding vertical price tampering may be actionable under the Cartwright Act and doesn't need to rise to the level of price fixing. It also denied summary adjudication of Count 3, which alleged combination to monopolize in violation of the Cartwright Act, finding that combination to monopolize under the Cartwright Act does not require specific intent as would be required for a monopolization claim under Section 2 of the Sherman Act. Noting that the Cartwright Act is not derived from the Sherman Act, but rather from the laws of other states and that they differ in wording in scope, the court held an agreement to monopolize under the Cartwright Act is prohibited if it constitutes an unreasonable restraint of trade.[14] On June 13, 2019, the court denied Sutter Health's Motion for Summary Judgment with respect to Count 2 and Counts 1 and 3.[15] A three month trial is currently scheduled to begin September 4, 2019.

In another state-only case, in August 2017, the State of Washington filed a complaint[16] against Franciscan Health System ("CHI Franciscan"), The Doctors Clinic, A Professional Corporation, and WestSound Orthopaedics, P.S. The complaint resulted from an investigation of complaints filed by consumers about price increases on the Kitsap Peninsula. In its complaint, Washington brought claims under the Sherman Act Section 1, Clayton Act Section 7, and the Washington State Consumer Protection Act ("CPA"). This case differed from other healthcare challenges because not only did Washington bring a conduct case, it was also challenging a consummated merger and requesting the unwinding of the transaction as part of its relief. The unique geographic market of the Kitsap Peninsula, which requires ferries to cross the sound, made market concentration particularly concerning to the State of Washington.

The complaint alleged that WestSound, The Doctor's Clinic and CHI Franciscan were each other's closest competitors for orthopedic services before their respective deals. In July 2016, CHI Franciscan acquired the assets of WestSound Orthopaedics, a seven-physician practice based in Silverdale.[17] Just two months later in September 2016, CHI Franciscan established an affiliation with The Doctors Clinic ("TDC"), a multispecialty practice with over 50 physicians, based in Silverdale with seven other locations throughout Kitsap.[18] These two deals resulted in a combination of the three largest providers of orthopedic physician services in the Kitsap Peninsula orthopedic physician services market. The affiliation agreement between TDC and CHI Franciscan allowed TDC to receive CHI negotiated reimbursement rates with payors, and CHI acquired certain ancillary services from TDC.[19] The parties still remained as separate entities. In Washington's complaint they cite an email between CHI Franciscan executives that said the WestSound acquisition would allow CHI Franciscan to grow its surgery cases, which was the "fastest way to increase its bottom line."[20] The complaint further highlights contracts between CHI Franciscan and a major payor that allege what appear to be double-digit percentage price increases for arthroscopic shoulder, ACL, and knee surgeries post acquisition.[21]

10 *Id.* ¶ 35.

11 *Id.* ¶¶ 73-75.

12 *Id.* ¶ 77.

13 *Id.* ¶ 91.

14 Order, *UFCW & Employers Benefit Trust v. Sutter Health*, No. CGC-14-538451 (Cal. Super. March 14, 2019).

15 Order, *UFCW & Employers Benefit Trust v. Sutter Health*, No. CGC-14-538451 (Cal. Super. June 13, 2019).

16 Complaint, *State of Washington v. Franciscan Health System, et al.*, No. 3:17-cv-05690 (W.D.WA Tacoma August 31, 2017).

17 *Id.* ¶ 75.

18 *Id.* ¶ 75.

19 *Id.* ¶¶ 44-45.

20 *Id.* ¶ 88.

21 *Id.* ¶ 87

The TDC Affiliation and the WestSound Acquisition established market power in the Kitsap Peninsula, including the Bainbridge and Fox Islands ("KP/BI") market, for Orthopedic Physician Services, with a combined market share of over 63 percent in TDC's 75 percent service area, and a combined market share of over 55 percent in KP/BI.[22] The geographic market definition here was incredibly unusual because Kitsap is a peninsula, a visit to competing providers required consumers to drive a longer distance and incur a toll to visit providers across the Tacoma Narrows Bridge, or endure the waiting, sailing time, and expense of a round-trip ferry voyage to visit providers.[23]

CHI Franciscan asserted two main defenses: failing or flailing firm, and single entity. The court ruled that the failing firm defense could apply to Section 7, but not to a Section 1 *per se* claim, noting that there is a high evidentiary burden to satisfy the defense.[24] The court did conclude under a Section 1 rule of reason analysis, that defendants may put forth the flailing firm evidence as part of their burden to show procompetitive effects, justifying otherwise anticompetitive conduct. After Washington won the partial motion for summary judgment on the Section 1 claim,[25] they were successful in negotiating a consent decree with CHI Franciscan.[26] The consent decree entered by Washington has some unique provisions. It requires CHI Franciscan to pay $2-$2.5M which will be put into *cy pres* funds that healthcare entities such as FQHCs, Planned Parenthood, and free clinics can apply for to provide consumer access to healthcare on the Peninsula.[27] TDC is allowed to remain in a PSA with CHI Franciscan, but payors can elect to contract separately for TDC's orthopods, and adult PCPs and can re-open current contracts.[28] The decree allows TDC physicians to receive quality incentive payments. CHI is required to sell a majority interest in the ASC; if unable, Washington may seek appointment of a divestiture trustee.[29] Physicians in Kitsap have to notify patients of other lab/imaging options available outside of CHI Franciscan.[30] Finally, there is a prohibition on future contracts with physician groups in Kitsap that have physicians in the same specialty, except for hospital-based physicians.

In November 2018, in another state-only action, the Massachusetts Attorney General's Office resolved its concerns over the merger of two major Massachusetts health systems, Beth Israel Deaconess Medical Center and Lahey Health System through a settlement filed in the Massachusetts Superior Court.[31] The Attorney General's investigation raised concerns that the effect of the transaction may be to substantially lessen competition in the sale of health care services in certain geographic areas of the Commonwealth, increase total health care costs in the Commonwealth and have an adverse effect on access to healthcare services, particularly for vulnerable populations.[32] Beth Israel Deaconess Medical Center was an 8 hospital system serving communities around Boston, while Lahey Health was a 5 hospital system serving communities in eastern Massachusetts. The merger was also reviewed by the Massachusetts Health Policy Commission, which issued a report finding that the merger would increase market concentration substantially, and that the merged entity would have significantly enhanced bargaining leverage with commercial payers enabling it to substantially increase commercial prices.[33] The Health Policy Commission referred its report to the Massachusetts Attorney General which, after its own investigation, entered into a 10-year settlement with the parties. The settlement provides for a 7-year price constraint that guarantees price increases will stay below the Commonwealth's set goal to control the cost of total medical spending and avoid more than $1 billion in potential cost increases. It also provides that all facilities currently participating in MassHealth[34] must continue to do so, demands $70 million in funding for various public health initiatives over an eight-year period, and requires an independent monitor for 10 years to ensure compliance with the settlement.

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22 *Id.* ¶ 72.

23 *Id.* ¶ 38.

24 Order on Defendants' Motion for Partial Summary Judgment, *State of Washington v. Franciscan Health System, et al.*, No. 3:17-cv-05690 (W.D.WA Tacoma March 1, 2019).

25 *Id.*

26 Consent Decree, *State of Washington v. Franciscan Health System, et al.*, No. 3:17-cv-05690 (W.D.WA Tacoma May 13, 2019).

27 *Id.* ¶ 78.

28 *Id.* ¶¶ 53-56.

29 *Id.* ¶ 67.

30 *Id.* ¶ 74.

31 Assurance of Discontinuance, *Commonwealth of Massachusetts v. Beth Israel Lahey Health, Inc.*, No. 2018-3703 (Mass. Sup. Ct. November 29, 2018).

32 *Id.* ¶ 2.

33 *Id.* ¶ 3.

34 The health coverage programs administered by the Massachusetts Executive Office of Health and Human services to benefit low- and moderate-income people in the Commonwealth of Massachusetts, including the Medicaid Program and Children's Health Insurance Program.

In June 2017, after eight months of investigation, the North Dakota Attorney General's Office jointly filed a complaint with the Federal Trade Commission challenging Sanford Health's proposed acquisition of Mid Dakota Clinic.[35] After two years and favorable decisions for enforcers in the District Court and the Eighth Circuit Court of Appeals, Sanford Health abandoned the proposed acquisition of Mid Dakota Clinic and the challenge to the transaction was dismissed. This case was significant to North Dakota because the Bismarck-Mandan area was already a highly concentrated market. In this market Sanford Health and Mid Dakota Clinic ("MDC") were the two largest providers of adult primary care physician ("PCP") services, pediatric services, OB/GYN services, and general surgery physician services. Sanford operated one of only two general acute care ("GAC") hospitals in the Bismarck North Dakota area, the other being CHI St. Alexius Health. Yet Sanford viewed MDC as its "main clinical competitor" in the Bismarck-Mandan area.

Sanford Health, a not-for-profit, was a 217-bed hospital employing 160 physicians and 100 advanced practice providers. MDC operated six clinics in Bismarck and employed 61 physicians and 19 advanced practice practitioners. Sanford was the largest private employer in the Bismarck-Mandan area, which is true for many large healthcare systems in smaller communities and often a challenging factor for state enforcers. Post-Transaction, Sanford would control 75 percent of the market for PCP services, over 80 percent of the market for pediatric services, over 85 percent of the market for OB/GYN services, and 100 percent of the market for general surgery physician services. The resulting Herfindahl-Hirschman Index value ("HHI") far exceeded the 2,500-point threshold and 200-point change that lead to a presumed likelihood of enhanced market power — and presumptive illegality.[36]

Sanford asserted two main defenses; powerful buyer and ease of entry. Initially Sanford argued that the presence of Blue Cross Blue Shield of North Dakota ("BCBSND"), a dominant buyer, should be considered when defining the market. The court disagreed, stating that the presence of BCBSND could only be used as defense.[37] The court further noted that "[although BCBSND has a statewide share of 55-65 percent of the commercial health insurance market, its market share has declined in the last several years. Significantly, evidence showed that BCBSND does not consider CHI a viable alternative to either Sanford Health or Mid Dakota, and, most importantly, that BCBSND could not construct a marketable health plan in the Bismarck-Mandan area without the merging entity.]"[38] The court was unpersuaded that BCBSND would circumvent any resulting anticompetitive effects from the merger. The court stated that, "Sanford was unable to meet either common applications of a "powerful buyer defense" — (1) a buyer's ability to use its leverage to sponsor entry or vertically integrate; or (2) where there are alternative suppliers post-merger, a buyer is able to obtain lower prices from suppliers."[39] This is despite Sanford's claim that they "promise" not to demand higher reimbursements rates from BCBSND post transaction. This was another argument the court found unpersuasive and unsupported by caselaw as something to be considered in the analysis.

In launching its second defense, Sanford argued that CHI would be motivated to introduce new competition for the physician service lines at issue and this would counteract the anticompetitive effects of the proposed merger.[40] Sanford contended that CHI, then the fourth-largest healthcare system nationwide, would be a "much stronger competitor" to Sanford than MDC was currently.[41] The court, while noting that a decline in referrals may incentivize CHI to add physicians in the four service areas, found the evidence did not establish that the Bismarck-Mandan area's population is sufficient to support a significant increase in the total number of physicians for these service lines.[42] Ultimately, the court did not find that Sanford had established that entry by CHI would be timely, likely, or sufficient to counteract the near-monopoly resulting from the proposed transaction.[43] Sanford asserted that the transaction would create significant efficiencies, and most of these savings would be derived from the 340B drug program because Sanford would switch from a Disproportionate Share Hospital ("DSH") to a Rural Referral Center ("RRC") under the 340B program.[44] The FTC argued that the 340B savings should not be considered because it was not within the relevant market, while Sanford

35 Complaint, *Federal Trade Commission and State of North Dakota v. Sanford Health, et al.*, No. 1:17-cv-00133 (D.N.D. June 23, 2017).

36 *Id.* ¶ 38 "The change in HHI for PCP services was 2,793, for pediatric services it was 3,333, for OB/GYN services it was 3,391, and for General Surgery Physician Services it was 4,800."

37 Opinion ¶¶ 9, 17, *Federal Trade Commission and State of North Dakota v. Sanford Health*, et al., No. 1:17-cv-00133 (D.N.D. December 15, 2017).

38 *Id.* ¶¶ 103-104, 111.

39 *Id.* ¶¶ 39.

40 *Id.* ¶ 139.

41 *Id.* ¶ 140.

42 *Id.* ¶ 149.

43 *Id.* ¶ 152.

44 *Id.* ¶ 89.

countered this by claiming that market-specific efficiencies make no sense when the merger involves integrated healthcare systems.[45] The court did not directly address whether efficiencies need to be specific to the relevant market, instead focusing on the Merger Guidelines commenting that "the lesser the adverse competitive effects, the greater the weight ascribed to efficiencies," to support its' decision that the monetary and quality efficiencies are insufficient for overcoming the presumption of illegality.[46]

In another case brought jointly with a federal partner, the State of North Carolina and the Department of Justice ("DOJ") filed a joint complaint[47] against Carolinas Healthcare System ("CHS")[48] for a Section 1 conduct violation in June 2016, with the final judgment entered in April 2019.[49] The complaint alleged that CHS used its market power in negotiations with insurers to contract for clauses that restricted steering and tiering to comparable lower cost providers or higher quality alternatives within the health plan designs.[50] This resulted in insurers' inability to offer narrow network plans that included only CHS competitors or offer tiered networks that featured hospitals that compete with CHS in the top tiers.[51] CHS was and is a dominant hospital system in Charlotte, North Carolina, and the largest healthcare system in North Carolina.[52] In addition it is one of the largest non-for-profit healthcare systems in the United States.[53] CHS operated nine other general acute-care hospitals in Charlotte and owned, managed or had strategic affiliations with more than forty hospitals in the Carolinas allowing it to exert market power in its dealings with commercial health insurers.[54] CHS was claimed to have used this market power to negotiate higher reimbursement rates that were above the rest of the market, limit the number of insurance offers, and restrict consumer choice.[55]

In addition to requirements to limit steering and tiering, CHS also allegedly imposed restrictions in its contracts with insurers that limited insurers from providing truthful information to consumers about the value (cost and quality) of CHS's healthcare services compared to CHS's competitors.[56] The Complaint alleged that these restrictions regarding transparency were an indirect restriction on steering that circumvented patients from obtaining information that would allow them to make healthcare choices based on available prices and quality information.[57] CHS maintained and enforced steering restrictions in its contracts with Aetna Health of the Carolinas, Inc., Blue Cross Blue Shield of North Carolina, Cigna Healthcare of North Carolina, Inc., and United Healthcare of North Carolina Inc.[58] These insurers, combined, provided coverage to 85 percent of the commercially insured residents of the Charlotte area.[59] In some instances, the contract language prohibited steering outright.[60] For example, CHS secured a contractual obligation from one insurer that it "shall not directly or indirectly steer business away from" CHS.[61] In other instances, the contract language gives CHS the right to terminate its agreement with the insurer if the insurer engages in steering, providing CHS the ability to deny the insurer and its enrollees access to its dominant hospital system unless the steering ends.[62] CHS argued that steering restrictions were beneficial and procompetitive, that CHS's prices were higher due to a superior product and consumer loyalty, that insurance companies were still able to steer, that no insurance companies had asked to remove steering restrictions from contracts, and CHS had never refused to eliminate these provisions.[63]

45 *Id.* ¶ ¶ 32-33.

46 *Id.* ¶ 36.

47 Complaint, *U.S. and North Carolina v. Charlotte-Mecklenburg Hospital Authority*, No. 3:16-cv-00311 (W.D.NC Charlotte Division June 9, 2016).

48 The health system changed its name to Atrium Health during the almost three-year litigation.

49 Order, *U.S. and North Carolina v. Charlotte-Mecklenburg Hospital Authority*, No. 3:16-cv-00311 (W.D.NC Charlotte Division April 24, 2019).

50 Complaint, *U.S. and North Carolina v. Charlotte-Mecklenburg Hospital Authority*, No. 3:16-cv-00311 (W.D.NC Charlotte Division June 9, 2016), ¶¶ 3, 12.

51 *Id.*¶ 7.

52 *Id.*¶ 2.

53 *Id.* ¶¶ 1-3.

54 *Id.*

55 *Id.* ¶¶ 11-12.

56 *Id.* ¶ 13.

57 *Id.*

58 *Id.* ¶ 16.

59 *Id.* ¶ 15.

60 *Id.* ¶ 16.

61 *Id.*

62 *Id.*

63 CHS Motion for JP

In CHS's Motion for Judgment on the Pleadings, it didn't contest the existence of a contract, combination, or conspiracy, instead it argued that there was no unreasonable restraint of trade imposed. The court applied a rule of reason analysis weighing all the factors of the case to determine whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.[64] The court found that DOJ and North Carolina had alleged direct evidence of market harm with enough specificity that their claim for a violation of Section 1 is plausible and that they sufficiently alleged facts that plausibly could support the conclusion that CHS's steering restraints are an unreasonable restraint on trade.[65] Some of the key findings by the court were that CHS had significant market power citing to their almost 50 percent market share, that an insurer selling insurance in the Charlotte area must have CHS as a participant in at least some of its networks to have a viable product in the area, and that there are significant barriers to entry for new hospital systems.[66]

The Final Judgment entered in April 2019 by the parties is for a term of ten years with an exception for termination in five years, given notice to the court that the Final Judgment is no longer necessary.[67] It includes specifics about prohibited conduct and permitted conduct. As part of the Judgment, CHS is not allowed to enforce or attempt to enforce language in existing insurer contracts that would restrict insurers from steering patients, using tiered networks, and providing transparency about cost and value.[68] The only time CHS could use the language would be to protect against Carve-outs.[69] It included a prohibition on CHS's prior approval of an insurers new benefit plan unless Co-branded.[70] The Judgment also prohibits CHS from requiring inclusion in the most preferred tier of benefit Plans unless Co-branded.[71] Finally, CHS cannot penalize, or threaten to penalize, an Insurer for (i) providing (or planning to provide) Transparency; or (ii) designing, offering, expanding, or marketing (or planning to design, offer, expand, or market) a Steered Plan.[72]

III. CONCLUSION

Consolidation and concentration continue in healthcare markets. Given the importance, complexities and local nature of healthcare, state attorneys general will continue their active enforcement in healthcare markets. They will use all the tools in their toolkits to ensure consumers have access to high quality affordable healthcare services at reasonable prices.

64 Order, *U.S. and North Carolina v. Charlotte-Mecklenburg Hospital Authority*, No. 3:16-cv-00311 (W.D.NC Charlotte Division March 30, 2017), P. 12.

65 *Id.* p. 14.

66 *Id.* pp. 14-15.

67 Order, *U.S. and North Carolina v. Charlotte-Mecklenburg Hospital Authority*, No. 3:16-cv-00311 (W.D.NC Charlotte Division April 24, 2019), P. 16.

68 *Id.* p. 7.

69 *Id.* pp. 7, 9.

70 *Id.* p. 7.

71 *Id.* pp. 7-8.

72 *Id.*

STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT: TRENDS AND INSIGHTS

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I. INTRODUCTION

State Attorneys General ("State AGs") have played a growing role in antitrust enforcement on a national scale through multistate efforts and co-enforcement activity with their federal counterparts. Within their own state borders, State AGs have also taken industry-specific antitrust enforcement actions, recently targeting consolidation in the health care sector and pursuing the marketing and sales practices of pharmaceutical companies. As federal enforcement priorities and engagement levels have fluctuated over time, State AG antitrust enforcement activity also has ebbed and flowed. This article analyzes State AG antitrust enforcement authority and provides insights as to how this authority has been wielded both independently and in conjunction with federal antitrust regulators.

II. FEDERAL AND STATE ANTITRUST ENFORCEMENT BY STATE ATTORNEYS GENERAL

With the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which amended the Clayton Act, State AGs were granted statutory authority to bring federal civil actions for injunctive relief and damages as direct purchasers of goods or services, as well as actions for damages on behalf of natural persons residing within their states as *parens patriae*. When acting as *parens patriae*, a State AG can seek damages under the Clayton Act on behalf of state residents,[2] or injunctive relief based on injury to the state's general economy.[3]

State AGs, as the chief legal officers of sovereign states, also possess broad powers, independent of federal regulators, to conduct antitrust investigations and challenge mergers. In addition to their authority under federal antitrust laws to assert federal antitrust claims, State AGs have enforcement authority under state antitrust statutes.[4] When alleged anticompetitive activity spans more than one state, State AGs have worked together to bring multistate antitrust actions, invoking their respective states' antitrust laws to take collective action. Such multistate efforts are often coordinated through organizations such as the National Association of Attorneys General ("NAAG") Antitrust Committee, which maintains a Multistate Antitrust Task Force for this purpose.[5]

Depending on the nature of the conduct at issue, State AGs may also pursue criminal prosecution of antitrust violators. The overwhelming majority of state antitrust statutes also allow for criminal penalties for violations of their antitrust statutes.[6] Although State AGs do not have authority to enforce federal criminal antitrust statutes, the U.S. Department of Justice ("DOJ") Antitrust Division formally encourages state prosecution of antitrust violations with local impacts. In 1996, the DOJ issued a Criminal Protocol specifically to facilitate state prosecution of state antitrust cases, which was premised on four principles: (i) the effective criminal prosecution of certain antitrust offenses with particularly local impacts shall not be compromised; (ii) the traditional role of States as the treble damages plaintiff on behalf of state and local purchasers of goods and services shall not be undermined; (iii) criminal prosecution of certain antitrust offenses having particularly local effects shall be conducted by the State AG wherever appropriate; and (iv) any transfer of prosecutorial authority shall be undertaken at the earliest practicable point in the development of that matter.[7] Certain State AG offices with large antitrust divisions and significant resources, such as those of New York and California, have been particularly active in pursuing criminal investigations and prosecution of antitrust violators.

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2 15 U.S.C. § 15c ("Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.").

3 15 U.S.C. § 26. A State AG may not seek damages in its *parens patriae* capacity for injuries to the state's general economy. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-64 (1972).

4 See Nat'l Assoc. Att'ys Gen., State Attorneys General Powers and Responsibilities 273-74 (Emily Meyers ed., 3d ed., 2013). Statutory antitrust authority varies from state to state. For example, Pennsylvania does not have a Sherman Act equivalent, but does have an anti-bid-rigging law. 62 Pa.C.S. § 4501.

5 See generally Nat'l Assoc. Att'ys Gen., *Multistate Task Force*, https://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee/multistate_task_force.php (last visited May 19, 2019).

6 See generally ABA Section of Antitrust Law, State Antitrust Practice Statutes (3d ed. 2004).

7 U.S. Dep't of Justice, Protocol for Increased State Prosecution of Criminal Antitrust Offenses (1996), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0618.pdf.

III. INSIGHTS AND TRENDS IN STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT

When interests and efficiencies align, State AGs and their federal counterparts have often exercised their authority jointly to investigate and pursue antitrust claims against alleged violators. With respect to the 53 state civil antitrust actions concluded within the past five years, 18 of them involved a federal counterpart.[8] When State AGs perceive a reduction in federal antitrust enforcement or when there is a difference in import placed on pursuing an actor, State AGs may act independently or pursue the same actors more aggressively or differently than their federal counterparts.

A. Parallel and Co-Enforcement Actions by State Attorneys General and Federal Antitrust Authorities

When anticompetitive conduct crosses state lines and priorities are aligned, state and federal antitrust enforcers may work in a coordinated, parallel fashion in order to pursue violators efficiently and aggressively. In other instances, parallel state and federal enforcement activities, timing, and priorities are misaligned, causing disruption to ongoing investigative strategies. One of the most prominent examples of such divergence occurred with respect to the recent enforcement actions taken against generic pharmaceutical manufacturers. In December 2016, the DOJ charged two pharmaceutical executives with fixing prices on two generic drugs, following a criminal investigation into the generic drug industry.[9]

One day after the federal charges were announced, 20 State AGs filed a lawsuit against six pharmaceutical manufacturers for allegedly conspiring to fix the prices of generic drugs by engaging in anticompetitive behavior in violation of the Sherman Act and state antitrust laws.[10] According to the complaint, the companies allegedly engaged in a conspiracy to fix prices for doxycycline hyclate — used to treat respiratory tract infections and other conditions — and glyburide — an oral diabetes medication — by coordinating with competitors at events, and allegedly attempted to destroy evidence once they became aware of the State AGs' investigation.[11] The lawsuit sought to prohibit the companies from engaging in further anticompetitive behavior and disgorge them of their profits.

In July 2017, an additional five State AGs filed a lawsuit against the same companies, alleging that the same conduct violated their respective state antitrust laws.[12] These efforts were combined and significantly expanded just three months later, in October 2017, when 46 State AGs — including the 25 original plaintiffs in the preceding lawsuits — filed a consolidated, amended complaint adding 12 additional pharmaceutical manufacturers and two affiliate pharmaceutical executives as defendants.[13] By December 2018, the lawsuit expanded even further, to 47 plaintiff State AGs and allegations regarding 300 generic drugs.[14]

Federal antitrust enforcers, meanwhile, continued to pursue the criminal investigation. The pharmaceutical executives charged in December 2016 entered guilty pleas shortly thereafter.[15] Some of the pharmaceutical companies implicated in the investigation disclosed in 2015 and 2016 SEC filings that they had received grand jury subpoenas, and the Federal Bureau of Investigation reportedly raided the offices of two involved pharmaceutical companies in 2016 and 2017.[16] Although there was speculation that additional indictments were forthcoming in mid-

8 See Nat'l Assoc. Att'ys Gen., *NAAG State Antitrust Litigation Database*, http://app3.naag.org/antitrust/search/ (last visited May 23, 2019) (all civil antitrust actions from January 2014 to May 2019 reviewed for federal participation).

9 Press Release, U.S. Dep't of Justice, No. 16-1466, Former Top Generic Pharmaceutical Executives Charged with Price-Fixing, Bid-Rigging and Customer Allocation Conspiracies (Dec. 14, 2016), https://www.justice.gov/opa/pr/former-top-generic-pharmaceutical-executives-charged-price-fixing-bid-rigging-and-customer. See also Kai Peters, *A Storm is Brewing: What Happened to the Generic Pharmaceutical Anti-Trust Price Fixing Criminal Investigation?*, Food & Drug L. Inst. (2018), https://www.fdli.org/2018/11/a-storm-is-brewing-what-happened-to-the-generic-pharmaceutical-anti-trust-price-fixing-criminal-investigation/.

10 See Compl., *Connecticut et al. v. Aurobindo Pharma USA, Inc. et al.* (D. Conn. Dec. 15, 2016), https://ag.ny.gov/sites/default/files/gdms_complaint_final_12_15_16.pdf.

11 *Id.*

12 See Compl., *Arkansas et al. v. Aurobindo Pharma USA, Inc. et al.* (D. Conn. July 17, 2017), https://oag.dc.gov/sites/default/files/2018-02/Release-July-18-2017-GDMS-Final-New-States-Complaint.pdf.

13 See Consol. Am. Compl., *In Re: Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724 (E. D. Pa. Oct. 31, 2017), ECF No. 3-1, http://ag.nv.gov/uploadedFiles/agnvgov/Content/News/PR/PR_Docs/2017/2017-10-31_State.AGs_ProposedAmendedComplaint.PV.pdf.

14 See Christopher Rowland, *Investigation of Generic 'Cartel' Expands to 300 Drugs*, Wash. Post (Dec. 9, 2018), https://www.washingtonpost.com/business/economy/investigation-of-generic-cartel-expands-to-300-drugs/2018/12/09/fb900e80-f708-11e8-863c-9e2f864d47e7_story.html.

15 Statement of Assistant Attorney General Makan Delrahim Before the U.S. House of Representatives Subcommittee on Regulatory Reform, Commercial and Antitrust Law (Dec. 12, 2018), https://www.justice.gov/opa/speech/statement-assistant-attorney-general-makan-delrahim-us-house-representatives-subcommittee.

16 See Peters, *supra* note 9.

2018, such indictments have not been reported and the federal criminal investigation appears to have fallen silent as of the time of this writing.[17] Significantly, the DOJ filed a motion as intervenor in the state civil litigation to stay discovery, arguing that civil discovery could harm or distract from the ongoing federal investigation.[18] The court denied the motions to stay discovery and allowed certain targeted discovery.[19]

When not conducted in parallel, State AG antitrust enforcement may serve as a precursor to later federal criminal enforcement. For example, in 2012, then-Washington Attorney General Robert McKenna filed a civil action alleging that Samsung and other electronics manufacturers violated the state Consumer Protection Act by engaging in a conspiracy to fix prices of cathode ray tubes ("CRTs") — a key component in consumer electronics such as televisions and computer monitors.[20] The CRT manufacturers ultimately settled with the state for $29 million.[21] Separately, the DOJ charged Samsung SDI Company Ltd. with a felony for allegedly participating in a global conspiracy to fix prices, reduce output, and allocate market shares of color display tubes — a type of CRT — to which Samsung pled guilty and paid a $32 million criminal fine in 2011.[22] The DOJ also indicted six individuals in connection with the alleged conspiracy.[23]

A recent area of frequent federal and state co-enforcement activity has emerged in regard to consolidation in the health care sector. In May 2018, the FTC worked in conjunction with Hawaii Department of the Attorney General to impose conditions on a merger between the only two providers of air ambulance transport services operating in the state.[24] Similarly, in November 2018, after a two year joint investigation, the DOJ and North Carolina Attorney General Josh Stein filed a lawsuit and ultimately obtained a joint order prohibiting the state's largest healthcare system from restricting health insurers from promoting innovative health benefit plans and more cost-effective healthcare services.[25] And, more recently, the U.S. Court of Appeals for the Eighth Circuit upheld a preliminary injunction obtained nearly two years prior by the FTC and North Dakota Attorney General Wayne Stenehjem against a merger of two of the region's largest health care services providers.[26]

One of the most significant results of state and federal co-enforcement authority occurred recently when a bipartisan coalition of five State AGs and the DOJ reached a settlement with two of the biggest names in health care: CVS and Aetna.[27] The state and federal authorities imposed conditions on the proposed merger of CVS and Aetna, namely, requiring Aetna to divest part of its Medicare prescription drug plan business to a competitor.[28] While the co-enforcement actions between individual State AGs and federal enforcers cause sizable impacts on local availability and costs of care in those states, the effects of this multistate-federal settlement caused national implications.

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17 See *id.*; David McLaughlin & Drew Armstrong, *Generic-Drug Companies to Face First Charges in U.S. Probe*, Bloomberg (April 24, 2018), https://www.bloomberg.com/news/articles/2018-04-24/generic-drug-companies-said-to-face-first-charges-in-u-s-probe.

18 Intervenor United States' Motion to Stay Discovery, *In Re Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724 (E.D. Pa. May 1, 2017), ECF No. 279.

19 Pretrial Order No. 44 Allowing Targeted Discovery to Proceed, *In Re Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724 (E.D. Pa. Feb. 9, 2018).

20 Compl., No. 12-2-15842-8 SEA (Wa. Sup. Ct., King Cty., May 1, 2012), http://agportal-s3bucket.s3.amazonaws.com/20120501_Complaint_WA_Bkmrkd.pdf.

21 Settlement & Consent Decree, No. 12-2-15842-8 SEA (Wa. Sup. Ct., King Cty., Sept. 14, 2018), https://agportal-s3bucket.s3.amazonaws.com/SamsungConsentDecree-signed.pdf.

22 Press Release, U.S. Dep't of Justice, No. 11-350, Samsung SDI Agrees to Plead Guilty in Color Display Tube Price-Fixing Conspiracy (Mar. 18, 2011), https://www.justice.gov/opa/pr/samsung-sdi-agrees-plead-guilty-color-display-tube-price-fixing-conspiracy.

23 *Id.*

24 See Fed. Trade. Comm'n, *FTC Approves Final Order Imposing Conditions on Merger of Air Medical Group Holdings, Inc. and AMR Holdco, Inc.* (May 3, 2018), https://www.ftc.gov/news-events/press-releases/2018/05/ftc-approves-final-order-imposing-conditions-merger-air-medical.

25 See U.S. Dep't of Justice, *Atrium Health Agrees to Settle Antitrust Lawsuit and Eliminate Anticompetitive Steering Restrictions* (Nov. 5, 2018), https://www.justice.gov/opa/pr/atrium-health-agrees-settle-antitrust-lawsuit-and-eliminate-anticompetitive-steering; N.C. Dep't of Justice, *Attorney General Josh Stein Announces Settlement With Atrium Over Healthcare Pricing* (Nov. 15, 2018), https://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Attorney-General-Josh-Stein-Announces-Settleme-(1).aspx.

26 See Blake Nicholson, *Appeals Court Upholds Blocking of Proposed Sanford-Mid Dakota Clinic Merger*, The Bismarck Tribune (Jun. 13, 2019), https://bismarcktribune.com/news/local/bismarck/appeals-court-upholds-blocking-of-proposed-sanford-mid-dakota-clinic/article_3cdfb314-d053-5188-83db-4ef36dd58bc8.html; Fed. Trade. Comm'n, *FTC and State Attorney General Challenge Physician Group Acquisition in North Dakota* (Jun. 22, 2017), https://www.ftc.gov/news-events/press-releases/2017/06/ftc-state-attorney-general-challenge-physician-group-acquisition; N.D. Att'y Gen., *Stenehjem Joins FTC in Asking Court to Pause Merger of Sanford Health and Mid Dakota Clinic* (Jun. 23, 2017), https://attorneygeneral.nd.gov/news/stenehjem-joins-ftc-asking-court-pause-merger-sanford-health-and-mid-dakota-clinic.

27 See U.S. Dep't of Justice, *Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed With Merger* (Oct. 10, 2018), https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d.

28 See *id.*

B. Independent State AG Enforcement Actions

When federal enforcers change the direction of their enforcement priorities or fail to take action against violators causing a localized impact, State AGs often will act independently. California Attorney General Xavier Becerra's recent action against the Valero Energy Corporation with respect to its proposed acquisition of two petroleum storage terminals from Plains All American Pipeline illustrates well the dynamic of State AG action in the face of shifting federal enforcement priorities.

Prior to its announcement of the proposed acquisition in 2016, Valero Energy had previously attempted in 2005 to acquire two of the same petroleum storage terminals, was investigated by the California Attorney General and the FTC, and ultimately agreed to a consent order requiring divestment of those terminals. That consent order lapsed in July 2015.

Following announcement of the pending sale, Attorney General Becerra and the FTC opened an investigation. After the joint investigation, Attorney General Becerra sought to block the transaction while the FTC declined to act. In June 2017, Attorney General Becerra filed a complaint and motion for preliminary injunction alleging that the proposed sale would have anticompetitive effects in violation of the Clayton Act and the state Business and Professions Code. As the federal judge observed in his order denying the preliminary injunction, the FTC's inaction was "possibly due to a shortage of commissioners."[29] At the time, in August 2017, there were only two FTC commissioners.

Attorney General Becerra was ultimately successful in blocking the transaction: in September 2017, Valero Energy and Plains All American Pipeline announced they were abandoning their proposed transaction, and the next month the court entered the stipulated order of dismissal and final judgment.[30] The order enjoined Valero Energy and its affiliates from acquiring or seeking to acquire the two petroleum storage terminals at issue for a period of ten years.[31] In April 2018, the FTC sent a letter to Valero Energy stating that its nonpublic investigation was closed and that it decided not to take additional action.[32]

Recently, a group of ten State AGs (expanded to 14 State AGs as of the time of publication) filed a lawsuit to block the proposed merger of T-Mobile US Inc. and Sprint Corp. while the DOJ continues to conduct its review. It was reported that the State AGs filed their lawsuit without first notifying the DOJ of their intended actions.[33] In their lawsuit, the State AGs argue that the proposed transaction would cause increased market concentration, resulting in diminished competition, higher prices, and reduced quality and innovation.[34]

A State AG will likely take unilateral enforcement action when the activity underlying an alleged antitrust violation is confined to a single state, and this has particularly been the case with respect to the ongoing consolidation in state health care markets. For example, in May 2018, California Attorney General Xavier Becerra filed suit against Sutter Health, a hospital system in Northern California, over alleged violations of the Cartwright Act — California's state antitrust law prohibiting anticompetitive activity.[35] According to the complaint, Sutter Health allegedly controlled prices and excluded competition by preventing insurance companies from negotiating contract terms or providing low-cost care alternatives to patients, setting excessively high out-of-network rates, and restricting publication of provider cost information, among other things, all of which led to higher consumer costs.[36] Attorney General Becerra did not allege violations of federal antitrust law, and no federal authorities brought an antitrust action against Sutter Health.

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29 Order Re Mot. Prelim. Inj., No. 3:17-cv-03786-WHA (N.D. Ca. Aug. 28, 2017), ECF No. 82, at 5, https://oag.ca.gov/system/files/attachments/press_releases/ORDER%20re%20Motion%20for%20Preliminary%20Injunction.pdf.

30 Stip. Order of Dismissal & Final J., No. 3:17-cv-03786-WHA (N.D. Ca. Oct. 12, 2017), ECF No. 115, https://oag.ca.gov/system/files/attachments/press_releases/2017-10-12%20FINAL%20JUDGMENT.PDF.

31 *Id.*

32 *See* Letter from Donald S. Clark, Secretary, FTC, to Sean F. Boland, Counsel for Valero Energy, *Re: Valero Energy/Plains All American Pipeline, FTC File No. 161-0220* (April 5, 2018), https://www.ftc.gov/system/files/documents/closing_letters/nid/161_0220_valero_plains_closing_letter_to_counsel_for_valero.pdf.

33 Drew Fitzgerald & Brent Kendall, *T-Mobile, Sprint Merger Challenged by State Attorneys General*, Wall St. J. (June 11, 2019), https://www.wsj.com/articles/state-attorneys-general-seek-to-block-t-mobile-sprint-merger-11560265380.

34 Redacted Compl., *State of New York, et al. v. Deutsche Telekom AG, et al.* (S.D.N.Y. June 11, 2019), https://ag.ny.gov/sites/default/files/6.11.19_new_york_attorney_general_james_moves_to_block_t-mobile_and_sprint_megamerger.pdf.

35 Compl., *California v. Sutter Health* (Ca. Sup. Ct. Mar. 29, 2018), https://oag.ca.gov/system/files/attachments/press_releases/Sutter%20Complaint.pdf.

36 *Id.*

Similarly, in late 2018, Massachusetts Attorney General Maura Healey's challenge to the proposed merger between Lahey Health System, Inc. and Beth Israel Deaconess Medical Center, Inc. resulted in a settlement under which the merger was conditionally approved.[37] Under the terms of the settlement, the merger was allowed to go forward on the condition that the merged entity operate under a price cap for seven years and provide over $70 million in support services to low-income and underserved communities in the state.[38]

A State AG also may act alone when federal enforcers are reluctant to take action due to policy or other non-jurisdictional reasons. In 2017, former Missouri Attorney General Josh Hawley opened an investigation into Google for potential antitrust violations related to "scraping" information from competitors' websites for use on its own sites, as well as potential consumer protection violations.[39] The FTC had previously reached a settlement with Google in 2012 to resolve an investigation into similar allegations, but, as Attorney General Hawley's office reportedly argued, the FTC "did not take any enforcement action against Google, did not press this forward and has essentially given them a free pass."[40] Federal enforcement priorities are subject to change with leadership, however, and antitrust authorities in the present administration have expressed interest in investigating potential antitrust violations by tech giants such as Google.[41]

IV. LOOKING AHEAD: FUTURE TRENDS IN STATE AG ANTITRUST ENFORCEMENT

Going forward, State AGs can be expected to continue to use the power and efficiency of multistate action to pursue businesses whose antitrust conduct causes anticompetitive impacts across state boundaries, particularly when federal enforcers are perceived to have differing priorities or interest. When priorities align and efficiencies are perceived, State AGs will continue to coordinate in co-enforcement with their federal counterparts. In addition, one of the most interesting new trends to watch is State AG pursuit of "Big Data" and social media companies.

In June 2019, the FTC held a roundtable discussion with State AGs and senior State AG staff as part of the FTC's "Hearings on Competition and Consumer Protection in the 21st Century." In anticipation of the roundtable, NAAG submitted comments signed by a bipartisan coalition of 43 AGs in response to four of the FTC's proposed topics. These topics included: "[t]he identification and measurement of market power and entry barriers" in technology platform markets; "[t]he intersection between privacy, big data, and competition;" "the competitive effects of corporate acquisitions and mergers;" and the FTC's "investigation, enforcement, and remedial processes."[42]

In their comments to the FTC, the State AGs argued that the issues that arise in the consumer data market merit renewed and focused antitrust attention, particularly when big data companies exhibit conduct claimed to be exclusionary, such as acquiring competitors and leveraging data market advantages to disadvantage industry rivals. This action follows on the heels of prior collaboration among the DOJ and State AGs, such as in September 2018 when then-U.S. Attorney General Jeff Sessions met with a bipartisan group of State AGs to discuss using antitrust laws to address concerns regarding the collection of consumer data by large technology companies and their alleged anti-conservative political bias.[43] State AGs will continue to apply antitrust principles to emerging markets and new players.

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37 Press Release, Off. of Attorney Gen. Maura Healey, AG Healey Reaches Settlement with Beth Israel, Lahey Health Over Proposed Merger (Nov. 29, 2018), https://www.mass.gov/news/ag-healey-reaches-settlement-with-beth-israel-lahey-health-over-proposed-merger.

38 See Assurance of Discontinuance, Mass. Superior Court, Civ. Action No. 2018-3703 (Nov. 29, 2018), https://www.mass.gov/files/documents/2018/11/29/BILH%20AOD%20Filed%202018.11.29.pdf.

39 See Summer Ballentine, *Missouri Attorney General Investigating Google*, Assoc. Press (Nov. 13, 2017), https://www.apnews.com/86215c0445ea4766b2fdf14443852c20; Jonathan Vanian, *Google Is Being Investigated by Missouri Attorney General*, Fortune (Nov. 13, 2017), http://fortune.com/2017/11/13/google-missouri-attorney-general-investigation/#.

40 Ballentine, *supra* note 39; see also Letter from David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer, Google, to the Honorable Jon Leibowitz, Chairman, FTC, *Re: Google Inc., File No. 111-0163* (Dec. 27, 2012), https://www.ftc.gov/system/files/documents/closing_letters/google-inc./130103googleletter-chairmanleibowitz.pdf.

41 See Brian Fung, *Amazon, Facebook and Google Are All Being Looked At for Antitrust Violations, Trump Says*, Wash. Post (Nov. 5, 2018), https://www.washingtonpost.com/technology/2018/11/05/amazon-facebook-google-are-all-being-looked-antitrust-violations-trump-says/?utm_term=.40819fbee65a.

42 See Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, Public Comments of 43 State Attorneys General (June 11, 2019), https://www.regulations.gov/document?D=FTC-2019-0031-0003.

43 See Jan Wolfe & Diane Bartz, *U.S. Justice Dept Meeting with State Officials Focuses on Data Privacy*, Reuters (Sept. 25, 2018), https://www.reuters.com/article/us-usa-tech-justice/u-s-justice-dept-meeting-with-state-officials-focuses-on-data-privacy-idUSKCN1M52ED.

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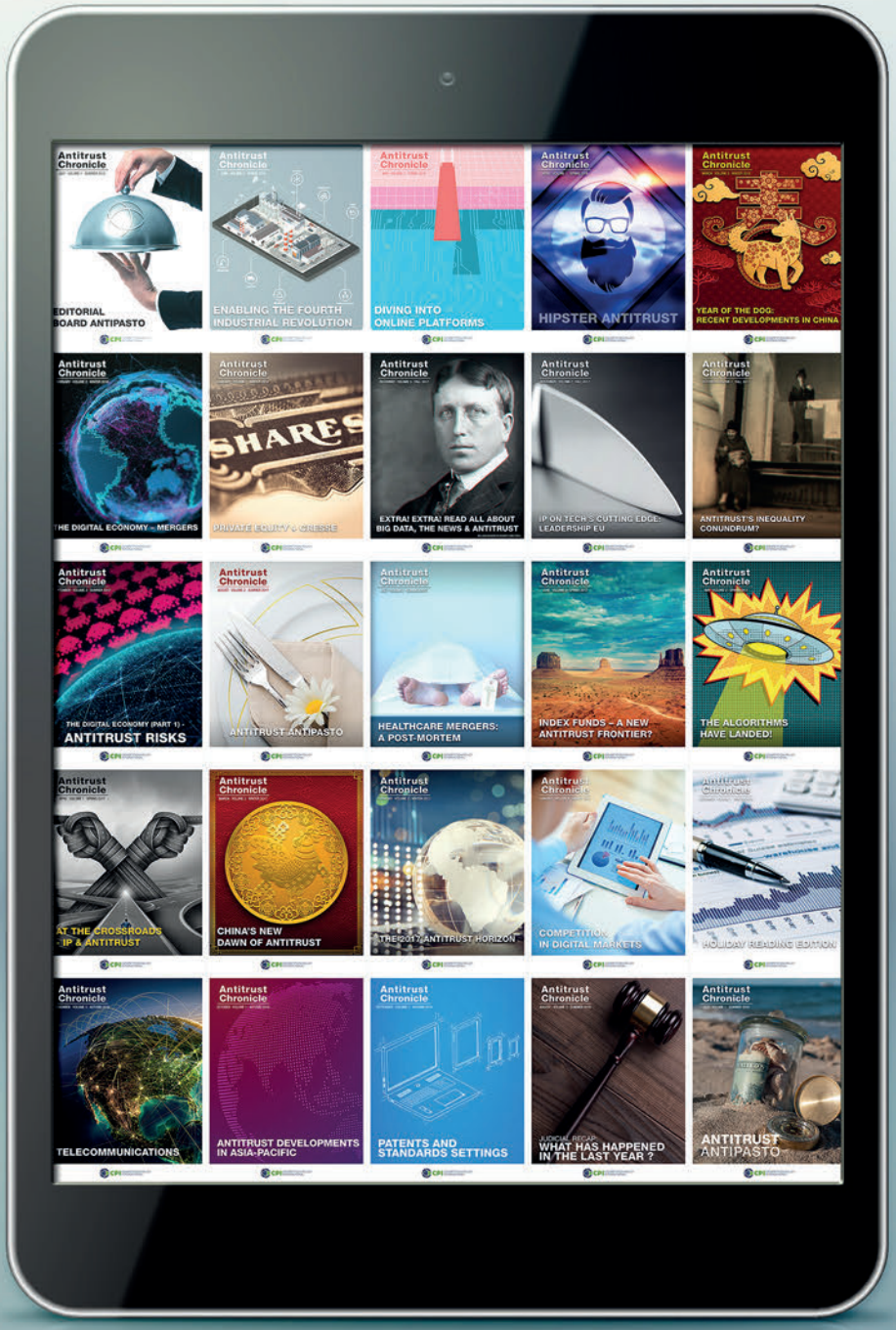

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