

# 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 anti-trust 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,<sup>2</sup> or injunctive relief based on injury to the state’s general economy.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

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](https://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee/multistate_task_force.php) (last visited May 19, 2019).

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.<sup>6</sup> 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.<sup>7</sup> 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.

### 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> The lawsuit sought to prohibit the companies from engaging in further anticompetitive behavior and disgorge them of their profits.

<sup>6</sup> See generally ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE STATUTES (3d ed. 2004).

<sup>7</sup> 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>.

<sup>8</sup> 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).

<sup>9</sup> 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/>.

<sup>10</sup> 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](https://ag.ny.gov/sites/default/files/gdms_complaint_final_12_15_16.pdf).

<sup>11</sup> *Id.*

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.<sup>12</sup> 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.<sup>13</sup> By December 2018, the lawsuit expanded even further, to 47 plaintiff State AGs and allegations regarding 300 generic drugs.<sup>14</sup>

Federal antitrust enforcers, meanwhile, continued to pursue the criminal investigation. The pharmaceutical executives charged in December 2016 entered guilty pleas shortly thereafter.<sup>15</sup> 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.<sup>16</sup> Although there was speculation that additional indictments were forthcoming in mid-2018, such indictments have not been reported and the federal criminal investigation appears to have fallen silent as of the time of this writing.<sup>17</sup> 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.<sup>18</sup> The court denied the motions to stay discovery and allowed certain targeted discovery.<sup>19</sup>

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.<sup>20</sup> The CRT manufacturers ultimately settled with the state for \$29 million.<sup>21</sup> 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.<sup>22</sup> The DOJ also indicted six individuals in connection with the alleged conspiracy.<sup>23</sup>

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.<sup>24</sup> 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

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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/agnv.gov/Content/News/PR/PR\\_Docs/2017/2017-10-31\\_State.AGs\\_ProposedAmendedComplaint.PV.pdf](http://ag.nv.gov/uploadedFiles/agnv.gov/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](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.

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](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>.



system from restricting health insurers from promoting innovative health benefit plans and more cost-effective healthcare services.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> 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.

## **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."<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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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/atrim-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](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](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.*

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](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](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](https://www.ftc.gov/system/files/documents/closing_letters/nid/161_0220_valero_plains_closing_letter_to_counsel_for_valero.pdf).

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.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup> Attorney General Becerra did not allege violations of federal antitrust law, and no federal authorities brought an antitrust action against Sutter Health.

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.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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."<sup>40</sup> 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.<sup>41</sup>

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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](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](https://oag.ca.gov/system/files/attachments/press_releases/Sutter%20Complaint.pdf).

36 *Id.*

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](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](https://www.washingtonpost.com/technology/2018/11/05/amazon-facebook-google-are-all-being-looked-antitrust-violations-trump-says/?utm_term=.40819fbee65a).

## 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 21<sup>st</sup> 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.”<sup>42</sup>

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.<sup>43</sup> State AGs will continue to apply antitrust principles to emerging markets and new players.

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

<sup>43</sup> 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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