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in Denver, right after I took over as Chair, we took a look at our existing committees and determined that some were out of date and that we needed to add a few more.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]

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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.

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