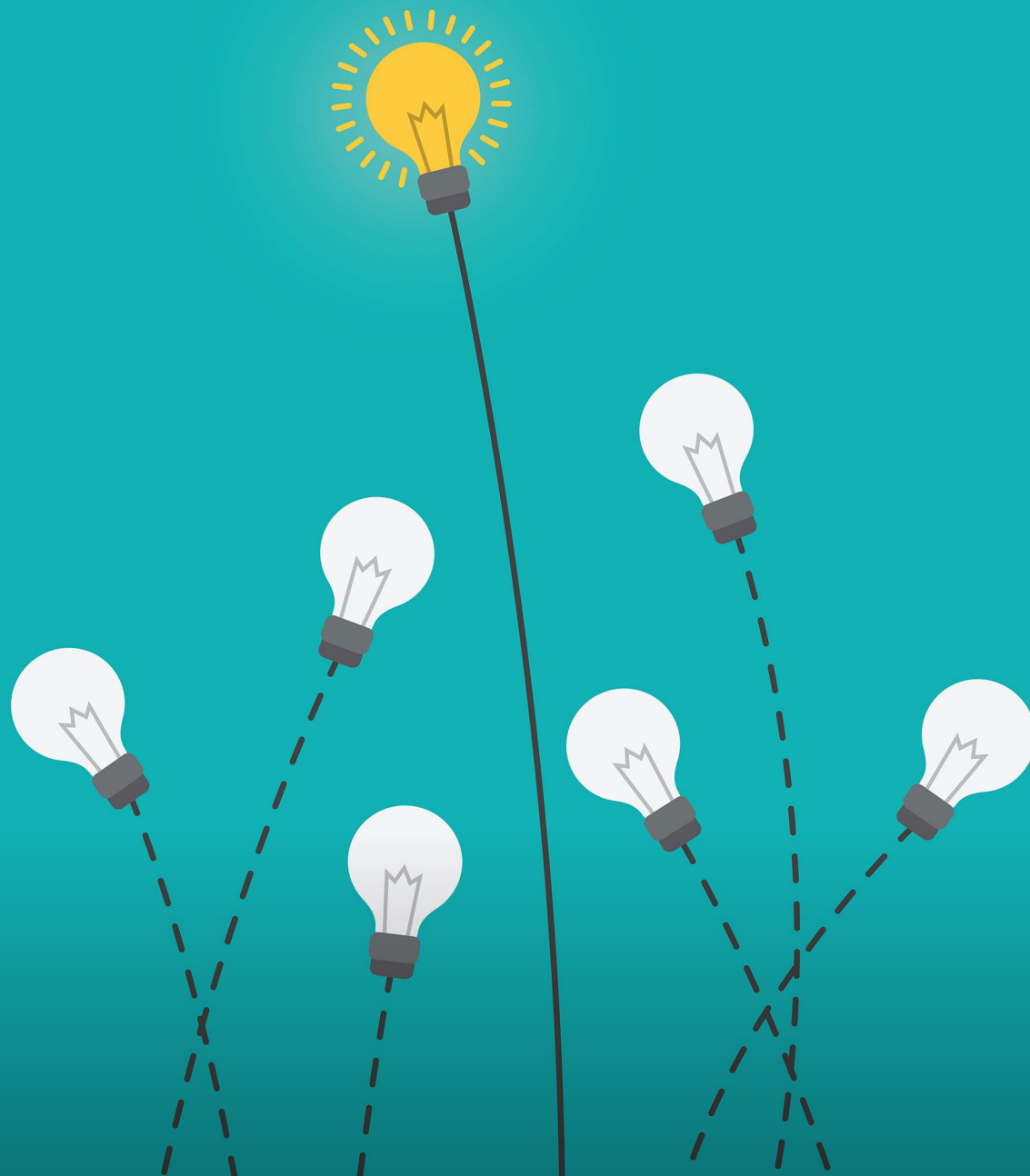
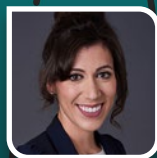


RECENT TRENDS AND INSIGHTS IN STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT



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Recent Trends and Insights in State Attorney General Antitrust Enforcement

By Milton A. Marquis, Ann-Marie Luciano & Gianna Puccinelli

State attorneys general (“State AGs”) continue to play a significant role in enforcing antitrust laws to promote competition and protect consumers. This takes the form of both collaboration between states in multistate enforcement actions and increasing enforcement within state borders. We predict that recent developments at the federal level will also lead to increased co-enforcement and parallel activity between state AGs and their federal counterparts. This article analyzes recent trends in state AG antitrust enforcement and provides insight as to what we can expect to see from state AGs going forward in this space.

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I. INTRODUCTION

State Attorneys General (“State AGs”) continue to play a significant role in antitrust enforcement through collaboration with other states in multistate enforcement activities and increasing enforcement within their state borders. With the Federal Trade Commission (“FTC”) seeking to collaborate more with State AGs after losing its authority to seek restitution resulting from a recent loss at the U.S. Supreme Court, and the Biden Administration’s recent executive action making antitrust enforcement a top priority, there is a marked shift in focus in State AG co-enforcement activity with their federal counterparts. This article analyzes recent trends in State AG antitrust enforcement authority and provides insight into targeted industries and what this means for the future of state antitrust enforcement.

II. BACKGROUND ON STATE ATTORNEY GENERAL ANTITRUST AUTHORITY

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 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 the 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 the National Association of Attorneys General (“NAAG”) Multistate Task Force.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 lack authority to enforce federal criminal antitrust statutes, the U.S. Department of Justice (“DOJ”) Antitrust Division encourages state prosecution of antitrust violations with primarily local impacts. In 1996, the DOJ issued a Criminal Protocol 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

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’y’s 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’y’s Gen., *Multistate Task Force*, <https://www.naag.org/issues/antitrust/multistate-task-force/> (last visited August 24, 2021).

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. RECENT TRENDS AND INSIGHTS IN STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT

The developing trend over the course of the past several years towards increased and expanded State AG antitrust enforcement continues unabated. In an age when bipartisan alignment in priorities is a rarity, State AGs⁸ have taken a discernable bipartisan shift towards heavier enforcement against certain industry targets in the technology, data, and social media sectors (“Big Tech”) and the pharmaceutical industry. Whether it be partnering with the federal government to bring investigations and enforcement actions, working together in multistate activity, or acting independently to advance the states’ own antitrust agendas, State AGs continue to bring enforcement actions designed to address perceived anticompetitive conduct and the resulting harm to consumers.

A New Era for Increased Parallel and Co-Enforcement Actions by State AGs and Federal Enforcers

The U.S. Supreme Court’s recent decision in *AMG Capital Management, LLC, et al. v. FTC*,⁹ which eliminated the FTC’s ability to seek equitable monetary relief (such as restitution and disgorgement) under Section 13(b) of the FTC Act, will likely have an impact on FTC and State AG coordination beyond the consumer protection context. Beginning in 2012 with an affirmative change in its policy, the FTC has increasingly pursued equitable monetary relief for antitrust violations, particularly in actions against pharmaceutical companies. Those efforts have now been stymied by the *AMG* decision.

In this post-*AMG* landscape with FTC curtailed power, we are likely to see the FTC collaborate with State AGs both in the consumer protection and antitrust contexts. In the majority of states, State AGs are expressly authorized by statute to seek restitution. With state budgets suffering due to the COVID-19 pandemic and the attendant diversion in enforcement resources to address issues faced by consumers as a result of the pandemic, State AGs may be motivated to rely more on the resources of the FTC. In their amicus brief in support of the FTC in *AMG*, the State AGs emphasized why such federal collaboration on enforcement is important:

[T]he amici States’ own enforcement efforts are fortified by having a strong federal partner in the FTC. Although the States play a vital role in policing anticompetitive, unfair, and deceptive trade practices, the FTC is an important partner in those efforts. Stripping the FTC of its authority to seek restitution under Section 13(b) would weaken its efforts to combat unfair and deceptive practices, which, in turn, would frustrate federal-state collaboration and require States to divert resources away from other consumer-protection efforts to perform the duties previously fulfilled by the FTC.¹⁰

The FTC already has signaled its intention to continue collaborating with State AGs. On May 11, 2021, then Acting Chairwoman of the FTC, Rebecca Kelly Slaughter, informed NAAAG that the FTC remains hopeful that Congress will pass legislation restoring the FTC’s Section 13(b) authority, but in the meantime, the FTC will be looking to partner “more frequently and more enthusiastically” with state AGs.¹¹

Against this backdrop of a new impetus for the FTC to collaborate with State AGs, President Biden’s July 9, 2021 *Executive Order on Promoting Competition in the American Economy* (the “Executive Order”)¹² further demonstrates the ushering in of a new era of aggressive government antitrust enforcement. The Executive Order, consisting of 72 separate initiatives by over a dozen federal agencies, underscored the Biden Administration’s goals to “enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly

⁸ The vast majority of State AGs are elected. State AGs are appointed by the Governor in Alaska, Hawaii, New Hampshire, New Jersey, Puerto Rico, the U.S. Virgin Islands, and Wyoming. In Tennessee, the Tennessee Supreme Court appoints the State AG and in Maine the legislature elects the State AG. See Attorney General Elections, NAT’L ASS’N OF ATT’YS GEN. (MAY 18, 2021), <https://www.naag.org/news-resources/research-data/attorney-general-elections/>.

⁹ 141 S. Ct. 1341 (2021).

¹⁰ Amicus Brief at 2, *AMG Capital Management, LLC, et al. v. FTC*, Case No. 19-508 (Dec. 7, 2020), <https://11i23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2020/12/AMG-Capital-v.-FTC-brief-of-31-States.pdf>.

¹¹ Allison Grande, *FTC to Lean on State AGs After High Court Ruling, Head Says*, LAW360 (May 11, 2021), <https://www.law360.com/articles/1383697/ftc-to-lean-on-state-ags-after-high-court-ruling-head-says>.

¹² Exec. Order No. 14036, *Promoting Competition in the American Economy* (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

affected by foreign cartel activity.”¹³ With this new vigor to aggressively pursue antitrust enforcement in these markets, we will likely see State AGs with similar enforcement priorities seize on the opportunity to collaborate with their federal counterparts in these areas, particularly in pursuing anticompetitive activity in the healthcare markets and consolidation.

1. Big Tech in the Crosshairs

State AG collaboration with federal enforcers against the Big Tech industry is a trend we will continue to see unfold, particularly due to the bipartisan alignment to aggressively pursue the industry. Big Tech has become a central target for state and federal enforcers due to the interplay between perceived anticompetitive and exclusionary practices and the effects on consumer data privacy. The aggressive pursuit of Big Tech recently has been met with setbacks in court, and it remains to be seen whether such losses will deter future enforcement activity.

For example, on December 9, 2020, a bipartisan coalition of 48 State AGs brought suit against Facebook in the United States District Court for the District of Columbia for violations of the Sherman Act and Clayton Act. The lawsuit alleged that “over the last decade, the social networking giant illegally acquired competitors in a predatory manner and cut services to smaller threats — depriving users from the benefits of competition and reducing privacy protections and services along the way — all in an effort to boost its bottom line through increased advertising revenue.”¹⁴ The same day, the FTC brought its own lawsuit in the District Court for the District of Columbia, seeking a permanent injunction and other equitable relief under the FTC Act, 15 U.S.C. § 53(b), based on the same conduct as the lawsuit by the State AGs.¹⁵ Both suits stemmed from an investigation by the FTC’s Technology Enforcement Division, “whose staff cooperated closely with a coalition of attorneys general, under the coordination of the New York State Office of the Attorney General.”¹⁶ Recently, both suits were dismissed by the District Court, with the State AGs’ case dismissed with prejudice. The District Court dismissed the States’ complaint on two grounds, finding that the “States’ Section 2 and Section 7 attacks on Facebook’s acquisitions are barred by the doctrine of laches, which precludes relief for those who sleep on their rights,” and determining that “there is nothing unlawful” about Facebook’s policy preventing interoperability with competing apps.¹⁷

In some cases with a common target, State AGs will bring parallel actions as well as join their federal counterparts. For example, in October 2020, the DOJ first filed an antitrust action against Google, alleging that Google “unlawfully [maintained] monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices”¹⁸ Eleven states joined that action.

Months later, on December 16, 2020, ten states, including states that joined the DOJ’s lawsuit,¹⁹ filed suit against Google in the Eastern District of Texas, alleging that Google “monopolized or attempted to monopolize products and services used by advertisers and publishers in online-display advertising on third-party sites” and “engaged in false, misleading and deceptive acts while selling, buying and auctioning on-line-display ads.”²⁰

The next day, a coalition of 38 states, including states who had joined the DOJ and Texas actions, brought suit against Google for its alleged monopoly over search engines and search advertising markets, going beyond the allegations in the DOJ’s case by alleging a three-pronged scheme to maintain its dominance in the market: (1) limiting the number of consumers who use a Google competitor; (2) using its Search

¹³ *Id.* at § 1.

¹⁴ Attorney General James Leads Multistate Lawsuit Seeking to End Facebook’s Illegal Monopoly, N.Y. STATE OFFICE OF THE ATT’Y GEN. (Dec. 9, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-leads-multistate-lawsuit-seeking-end-facebooks-illegal>.

¹⁵ Compl. for Injunctive and Other Equitable Relief, *FTC v. Facebook, Inc.*, Case No. 1:20-cv-03590-JEB (D.D.C. Jan. 13, 2021), ECF No. 51, https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf.

¹⁶ *FTC Sues Facebook for Illegal Monopolization*, FTC (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

¹⁷ *State of New York, et al. v. Facebook, Inc.*, Case No. 20-3589, at *2-3 (D.D.C. June 28, 2021).

¹⁸ Compl. at 2, *U.S. v. Google, LLC*, Case No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), ECF No. 1, <https://www.justice.gov/opa/press-release/file/1328941/download>.

¹⁹ Additional states joined the lawsuit in March 2021. See Diane Bartz & Paresh Dave, *More U.S. states join Texas-led antitrust lawsuit against Google*, REUTERS (Mar. 16, 2021), <https://www.reuters.com/article/us-tech-antitrust-google/more-u-s-states-join-texas-led-antitrust-lawsuit-against-google-idUSKBN2B82E8>.

²⁰ *Texas, et al. v. Google, LLC*, NAT’L ASS’N OF ATTORNEYS GENERAL, <https://www.naag.org/multistate-case/texas-et-al-v-google-no-420-cv-00957-e-d-tex-dec-16-2020/>; see also Compl., *Texas, et al. v. Google, LLC*, Case No. 4:20-cv-00957-SDJ (E.D. Tex. Dec. 16, 2020), ECF No. 1, https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216%20COMPLAINT_REDACTED.pdf.

Ads 360 service — which is widely used by advertisers to purchase and compare search advertising — to limit the tool's interoperability with competitors; and (3) preventing consumers from bypassing its general search engine and going straight to a specialized vertical provider, such as an online travel agency.²¹ Continuing to demonstrate their aggressive and thorough pursuit of Google, recently 37 states filed suit against Google in the Northern District of California, alleging that Google had used exclusionary agreements with phone manufacturers to monopolize the smartphone application market in violation of state and federal antitrust laws.²² We are likely to continue to see these type of follow on actions by State AGs with Big Tech targets.

2. State AGs' Pursuit of Federal Antitrust Support

In addition to demonstrating their commitment to enforcing state and federal antitrust laws through parallel and co-enforcement litigation, AGs have demonstrated their prioritization of antitrust enforcement in a bipartisan fashion by petitioning Congress for additional federal funding and soliciting support for the State Antitrust Enforcement Venue Act of 2021. In doing so, they have also revealed their particular enforcement priorities against Big Tech and the pharmaceutical industry.

On May 10, 2021, a bipartisan group of 45 State AGs sent a letter to the chairs and ranking members of the Subcommittee on Competition, Policy, Antitrust, and Consumer Rights, seeking additional federal funding for state antitrust enforcement.²³ Noting the continuing discussions in Congress regarding additional funding for the DOJ's Antitrust Division and the FTC's Bureau of Competition, the State AGs argued that similar consideration should be given to providing financial support to the states for their own antitrust enforcement activities, pointing to the increased complexity and need for resources posed by antitrust enforcement in today's economic environment, combined with the budgetary difficulties caused by the COVID-19 pandemic, as the reason for their request for funding. Notably, the State AGs highlighted the states' investigations of and eventual lawsuits against Big Tech as evidence of the types of antitrust cases that they are currently pursuing.

A month later, a bipartisan group of 52 State AGs signed a letter to the chairs and ranking members of the Subcommittee on Competition, Policy, Antitrust, and Consumer Rights expressing their support for the State Antitrust Enforcement Venue Act of 2021.²⁴ Under the current statutory scheme, defendants can transfer antitrust enforcement actions brought by State AGs to a multidistrict litigation, where they may be subject to significant delays and joinder with suits brought by private plaintiffs. The State Antitrust Enforcement Venue Act would disallow such transfers, as with federal antitrust enforcement actions.²⁵ Should the Act pass, the State AGs will gain a significant advantage over the targets of their enforcement actions because they will be able to litigate matters in their own states, with jury pools drawn from the body of citizens that the enforcement action seeks to protect.

21 Compl., *Colorado, et al. v. Google*, Case No. 1:30-cv-03715 (D.D.C. Dec. 17, 2020), ECF No. 1, <https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf>.

22 Compl., *Utah, et al. v. Google*, Case No. 3:21-cv-05227 (N.D. Cal. Jul. 7, 2021), ECF No. 1, <https://attorneygeneral.utah.gov/wp-content/uploads/2021/07/Utah-v-Google.1.Complaint-Redacted.pdf>.

23 Letter to Sen. Amy Klobuchar, *et al.* (May 10, 2021), <https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2021/05/Support-for-Antitrust-Federal-Funding-Final-NAAG-Letter-2.pdf>.

24 Letter to Sen. Amy Klobuchar, *et al.* (June 18, 2021), <https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2021/06/Final-State-Antitrust-Enforcement-Venue-Act-Endorsement.pdf>.

25 See 28 U.S.C. § 1407(g).

Increased Multistate Antitrust Enforcement

State AGs continue to work in multistate coalitions to investigate and bring enforcement actions against antitrust violators. We expect this trend to continue, as the sharing of enforcement resources grows in importance with increased litigation.

1. Pursuing Big Pharma

Within the last several years, State AGs — independently of any federal agency — have joined together to bring antitrust lawsuits against the pharmaceutical industry. On June 10, 2020, a coalition of 51 State AGs, led by Attorney General William Tong of Connecticut, filed a civil suit in the United States District Court for the District of Connecticut, alleging that 26 pharmaceutical companies and 10 individuals had fixed the prices of approximately 80 dermatology drugs.²⁶ The complaint alleges that “the larger and more prominent topical manufacturers . . . had long-standing agreements over the course of several years not to compete for each other’s customers and to follow each other’s price increases.”²⁷ This case is the latest in a series of three cases that the State AGs have brought against generic drug manufacturers for artificially increasing the price of generic drugs, all of which are consolidated in multidistrict litigation.

State AGs have also used amicus briefs to advance their antitrust enforcement agenda. For example, on October 13, 2020, a group of 20 states submitted an amicus brief in support of the Plaintiffs-Appellants in the case *UFCW Local 1500 Welfare Fund, et al. v. AbbVie Inc., et al.*, Case No. 20-2402 (7th Cir.), seeking to overturn a United States District Court for the Northern District of Illinois decision which had negative implications for their ability to prosecute pharmaceutical companies for violations of antitrust laws.²⁸

Citing their interest in enforcing antitrust laws — and enforcing them against pharmaceutical companies in particular — the State AGs submitted an amicus brief arguing that the lower court’s decision immunizing AbbVie’s patent settlements with its competitors from antitrust scrutiny constituted a misapplication of the Supreme Court’s ruling in *FTC v. Actavis*.²⁹ They argued that, rather than categorically permitting all patent settlements that were not reverse-payment settlements, the *Actavis* decision required a case-by-case analysis to determine whether the settlement agreement could have anticompetitive purposes or effects. They also noted that the lower court’s decision would “encourage further artful collusion among drug companies without generating any procompetitive benefits.”³⁰ Such language — not to mention the intervention of the State AGs in this case to begin with — signals that the State AGs will continue to evaluate enforcement actions in the pharmaceutical industry.

2. Merger Enforcement

The State AGs have also been active in challenging major acquisitions. On June 11, 2019, a coalition of State AGs, which at one point grew to 18 states, brought suit against T-Mobile and Sprint in New York in an ultimately unsuccessful attempt to block the merger. Weeks later, on July 26, 2019, the DOJ, initially joined by five states (with ten additional states later joining),³¹ entered into a settlement agreement with T-Mobile, Sprint, and their affiliates approving the merger with certain conditions, citing Sprint’s commitment to divesting Sprint’s prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to DISH Network Corporation (“DISH”), and DISH’s commitment to build a 5G network to compete with the merged T-Mobile and Sprint.³²

²⁶ Complaint, *Connecticut, et al. v. Sandoz, Inc., et al.*, Case No. 3:20-cv-00802 (D. Conn. Jun. 10, 2020), ECF No. 1, https://portal.ct.gov/-/media/AG/Press_Releases/2019/FINAL-Redacted-Public-Derm-Complaint.PDF.

²⁷ *Id.* at 2.

²⁸ Amicus Brief, *UFCW Local 1500 Welfare Fund, et al. v. AbbVie Inc., et al.*, Case No. 20-2402 (7th Cir. Oct. 13, 2020), ECF No. 62, <https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/UFCW-Local-1500-Welfare-Fund-v.-AbbVie-amicus-brief.pdf>.

²⁹ 570 U.S. 136 (2013).

³⁰ See Amicus Brief, *supra* note 29, at 13.

³¹ See Press Release, DEP’T OF JUSTICE (Oct. 28, 2019), <https://www.justice.gov/opa/pr/justice-department-welcomes-colorado-joining-t-mobilesprint-settlement>.

³² [Proposed] Final Judgment, *U.S., et al. v. Deutsche Telekom, AG, et al.*, Case No. 1:19-cv-02232 (D.D.C. Jul. 26, 2019), ECF No. 2-2, <https://www.justice.gov/opa/press-release/file/1187706/download>.

IV. FUTURE TRENDS IN STATE AG ANTITRUST ENFORCEMENT

Based on their recent activity and public statements, we anticipate State AGs will continue to be active in the antitrust space, both in coordination with their federal counterparts as well as in multistate activity. In particular, we expect to continue to see State AGs continue to aggressively pursue Big Tech and the pharmaceutical industry, as well as identify opportunities for federal partnership where interests and efficiencies align. In their letter to Congress for increased funding, the bipartisan group of 45 State AGs explicitly foretold their antitrust enforcement priorities in this new enforcement era:

We recognize that antitrust policy is at a pivotal moment, and a bipartisan consensus is growing in Congress and beyond that more robust antitrust enforcement across a multitude of markets is needed. At the forefront of this consensus is Big Tech where we are confronted daily with the effects of extreme concentrations of market power amassed by firms in technology industries. Among other competition-related matters, state attorneys general have opened multiple investigations of Big Tech firms, some of which are ongoing, and some resulted in pending lawsuits alleging antitrust violations.³³

If successful in their pending enforcement actions against Big Tech, State AGs will achieve an extraordinary feat demonstrating the power of state antitrust enforcement.

³³ Letter to Sen. Amy Klobuchar, *et al.* (May 10, 2021), <https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2021/05/Support-for-Antitrust-Federal-Funding-Final-NAAG-Letter-2.pdf>.

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