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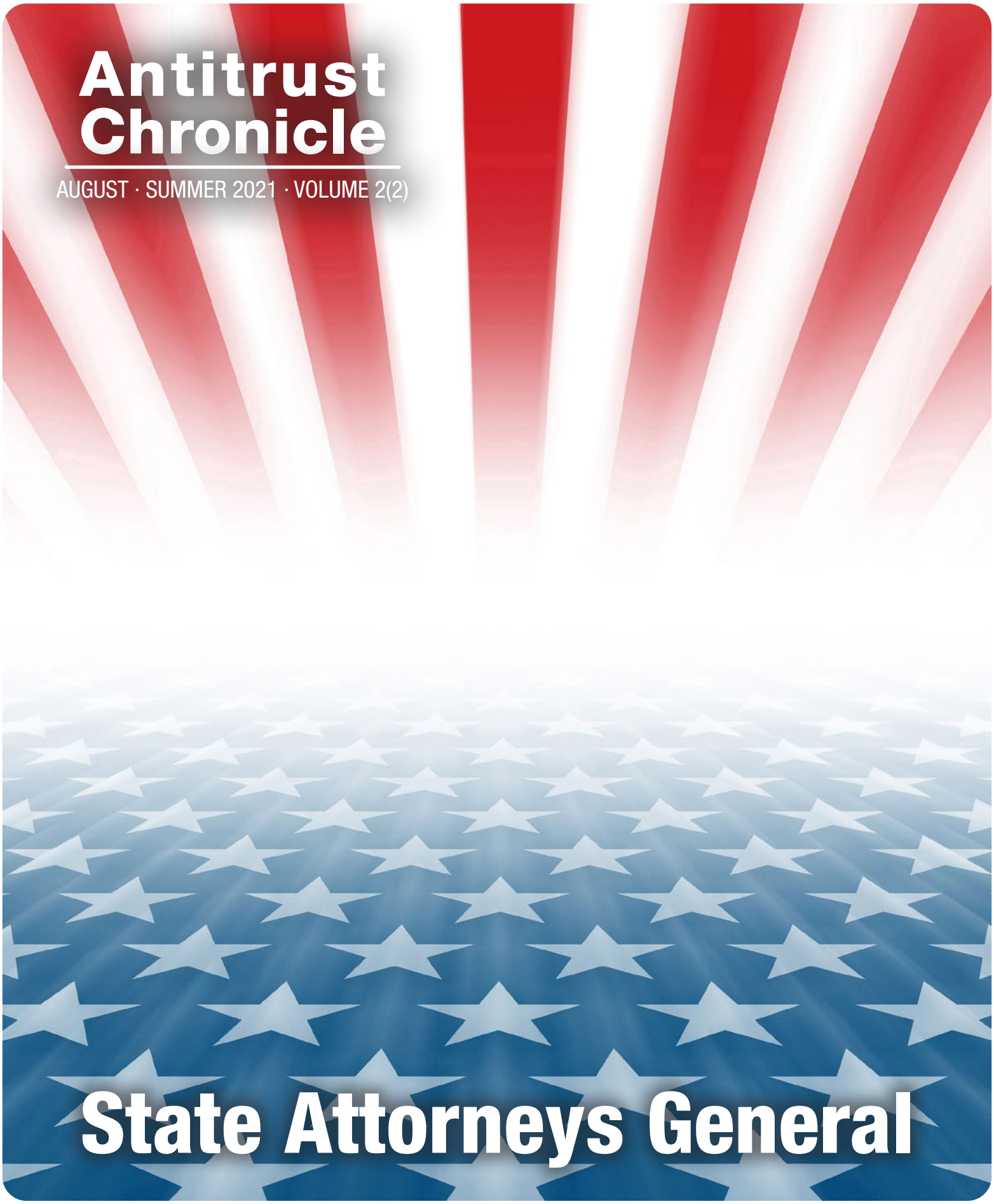

State Attorneys General

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

In this Chronicle we feature contributions from the offices of State Attorneys General from across the U.S.

The Attorneys General of the 50 States and the District of Columbia play a vital – and occasionally overlooked – role in the enforcement of both Federal and State antitrust laws.

Recently, State Attorneys General have been proving that they are a force to be reckoned with, and are increasingly addressing antitrust issues both of State, national (and, increasingly, international) concern. The last year has seen multiple antitrust initiatives by State Attorneys General, individually, in concert with each other, and in collaboration with the U.S. federal authorities.

The pieces in this Chronicle address this multi-pronged approach, featuring contributions from numerous prominent officials in the offices of Attorneys General nationwide.

Lastly, please take the opportunity to visit the CPI website to watch CPI TV — our selection of exclusive video content, featuring interviews, roundtables, and fireside chats with such esteemed interlocutors as Joseph Stiglitz, UK CMA Chair Jonathan Scott, Greek HCC President Ioannis Lianos, and many others. This is a convenient way for you, our readers, to keep up with cutting edge debate from the comfort of your homes.

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

CPI Team

SUMMARIES

SUMMARIES

Competition for Thee, but Not for Antitrust!

By Max M. Miller

Senator Mike Lee (R-UT) and other Republican senators have proposed consolidating federal antitrust enforcement under the Department of Justice. While the stated justification for the proposal is enforcement efficiency, the more likely goal is to foreclose competition to the consumer welfare standard in federal antitrust policymaking. The recent appointment of Lina Khan to the FTC Chair position and President Biden's July 9th Executive Order on Competition indicate that Neo-Brandeisian ("NB") antitrust ideas are emerging as a competitive threat to the consumer welfare perspective, and Senator Lee's proposals appear targeted at ending the threat before it gains a foothold in the antitrust marketplace of ideas. Because the current competition between consumer welfare and NB antitrust is beneficial to antitrust policy and American markets, Congress should reject these proposals.

Medal Count to Market Share: How the Olympics Remind Us What Antitrust Law Is All About

By Crystal Utley Secoy, Hart Martin & Caleb Pracht

Competition is in the spotlight, both in terms of the historic cases filed, legislative proposals made, and perhaps most notably: The Tokyo 2020 Olympics. These new spectators are asking questions like: What is competition law? Why does it matter? How does it apply here? This article will explore why big doesn't always equal bad, comparing companies that have excelled and risen to the top of their markets with one of the greatest American Olympian of all time – Jesse Owens. Competition, whether in the Olympics or law, produces excellence. Next, the article will explain where it goes wrong – when someone tries to rig the game rather than compete on the merits – using another example, Tonya Harding. Using these two figures, we will explore the purpose and the heart of antitrust law.

WHAT'S NEXT?

For September 2021, we will feature Chronicles focused on issues related to (1) **Tying & Bundling**; and (2) **Free Isn't Free?**

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2022, 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 2021

For October 2021, we will feature Chronicles focused on issues related to (1) **Imperfect Competition**; and (2) **Breaking Up Is Hard to Do?**

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 New York Attorney General Letitia James

In this edition of CPI Talks we have the pleasure of speaking with Ms. Letitia James, Attorney General of the State of New York.

Thank you, Ms. James, for taking this time to talk to CPI.

1. **Antitrust enforcement involves, by necessity, coordination between federal and State agencies. What, in your view, should be the approach to interagency cooperation in a contemporary context? How can States and Federal agencies better coordinate in the 21st Century?**

We have always worked collaboratively with our federal counterparts and continue to do so today. We often work, together, on many important cases, and frequently reach the same conclusions, as we did in our *Facebook* and *Google* investigations. But each state and each federal agency has independent enforcement authority and responsibilities. When we reach different conclusions on an antitrust matter, we may decide to exercise our independent authority by filing a lawsuit, coming to an agreement with a party, or taking another action.

One recent example is the *T-Mobile/Sprint* merger — a merger of two of the four mobile network operators in the United States. New York led a coalition of states investigating the merger, while the U.S. Department of Justice ("DOJ") conducted its own investigation. Both the States and the DOJ determined that the merger, as originally proposed, would be anticompetitive and illegal. While a small number of fixes satisfied the DOJ, we were not persuaded, and sued to block the merger. Still, yet, the fact that state and federal authorities took different positions in the *T-Mobile/Sprint* merger has not prevented us from collaborating extensively with both the DOJ and the Federal Trade Commission ("FTC") on many other matters, including an antitrust lawsuit against Daraprim, in addition to a number of other merger reviews and conduct investigations.

2. **What should be the enforcement priorities of antitrust agencies in the 21st Century? Is the technology sector rightly the focus of enforcement priorities? What other sectors merit particular scrutiny?**

The technology sector, an intrinsic part of our modern infrastructure, is certainly one of our enforcement priorities, as the conduct of internet and technology firms affects how consumers and businesses in our state live and work. But it is not our only enforcement priority.

While we look carefully at all potentially anticompetitive conduct and mergers that have an impact on New Yorkers, we are particularly focused on firms and conduct that have a nexus to the state. Certain sectors are always front and center, such as health care in all its aspects: providers, payors, pharmaceuticals, and medical devices.

We are also prioritizing antitrust enforcement in labor markets. We are investigating allegations of anticompetitive conduct affecting workers, such as no-poach and non-compete agreements, and we examine the potential effects of proposed transactions on labor markets when conducting merger reviews.

Additionally, we are constantly monitoring developments in all major sectors of the economy, with particular emphasis on those that have a special nexus to New York.

Finally, we are looking forward to passing different types of legislation to ensure our states laws reflect the market realities of the 21st century.

3. Specifically, with regard to the technology sector, in December 2020 you announced that you led a multistate Federal lawsuit against Facebook for potential violations of the Sherman Act. What are your principal allegations against Facebook? What kind of remedies do you envisage against Facebook, and how would these remedies cohere with potential legislative reforms at the Federal level?

We led this lawsuit against Facebook with two principal causes of action. First, that Facebook violated Section 7 of the Clayton Act — the provision condemning mergers that may substantially lessen competition — by its predatory acquisitions of Instagram and WhatsApp. The second is that Facebook unlawfully maintained, and still maintains to this day, its monopoly power in personal social networking through a "buy or bury" pattern of exclusionary conduct, which includes both Facebook's anticompetitive acquisitions and its open-then-closed approach to third-party developers on the Facebook platform. Additionally, our complaint details how Facebook's illegally maintained monopoly power allows it to diminish privacy protections and degrade quality for consumers, unconstrained by the competitive process.

We sought equitable remedies necessary to restore competition in the social networking space. These remedies were entirely consistent with the remedies sought by the FTC in a parallel lawsuit that the agency filed on the same day we filed our complaint.

On June 28, the judge in our case granted Facebook's motions to dismiss both our lawsuit and the lawsuit filed by the FTC, and, on July 28, we filed a notice of appeal. The judge's decision, however, has not diminished our scrutiny of anticompetitive practices in tech markets. For instance, we recently filed our second antitrust lawsuit against Google, involving anticompetitive conduct in mobile app distribution and in-app payment processing.

4. Similarly, New York is participating in a lawsuit, along with 34 other states, claiming that Google engages in exclusionary practices. Can you articulate the main claims against Google. How does this lawsuit relate to parallel suits brought against Google by another coalition of States, and the Department of Justice?

Our primary allegation is that Google unlawfully maintains, to this day, its monopoly in general search services and related advertising markets using a series of restrictive and problematic agreements and arrangements. That claim is similar to the one laid out in the DOJ's lawsuit, with which the states' case is consolidated. The key difference between the two lawsuits is that we have some additional claims. One relates to a search engine marketing tool that Google uses to impede rivals in the search market, and the other relates to Google's anticompetitive conduct — aimed at excluding competition from specialized search engines in certain vertical segments, like local, or travel.

Another group of states has brought a separate lawsuit against Google challenging its conduct in the AdTech market.

Separately, we recently co-led a multistate group in filing our second antitrust lawsuit against Google in six months. In this suit, we focus on the tech giant's illegal and anticompetitive conduct that has sought to maintain the company's monopoly power in the mobile app distribution and in-app payment processing markets. Once again, we are seeing Google use its dominance to illegally quash competition and profit to the tune of billions. Through a series of exclusionary contracts and other anticompetitive conduct in the Google Play Store, Google has deprived Android device users of robust competition that could lead to greater choice and innovation, as well as significantly lower prices for mobile apps. The company's conduct has ensured that hundreds of millions of Android users turn to Google, and only Google, for the millions of applications they may choose to download to their phones and tablets. Additionally, Google is squeezing the lifeblood out of millions of small businesses that are only seeking to compete

5. **New York State Senator Michael Gianaris recently proposed a Bill that would, among other things, set a new legal antitrust standard — mirroring EU rules — of "abuse of dominance" — and permit class-action lawsuits on this basis in New York. What is your view on this proposal? Is there a risk of disharmony between other States and Federal enforcers if differing standards are adopted at a State level?**

For over 100 years, state and federal antitrust laws have served as critical protections for consumers and small businesses from unchecked corporate power that seeks to choke off competition and limit consumer choice. New York's antitrust laws remain essential to these protections. This legislation would help to meet the needs of today's economy and the need for additional tools to combat threats to competition. We must ensure that we have the ability to effectively curtail harmful market dominance, and Senator Gianaris' legislation aims to do just that.

State and federal antitrust enforcement agencies share a common goal: to promote and protect competition. In that sense, we are totally harmonized. States may choose to legislate more broadly than Congress if they deem it necessary to ensure that their residents have the benefits that flow from competition. States and federal enforcers are still very much in sync, this may just mean that states have concluded that more aggressive enforcement or broader protections are necessary. This is not uncommon, and states often lead the way in advancing new and stronger protections for consumers and small businesses.

CPI TALKS…

…with Nebraska Attorney General Doug Peterson

In this edition of CPI Talks we have the pleasure of speaking with Mr. Doug Peterson, the 33rd and current Attorney General of the State of Nebraska.

Thank you, Mr. Peterson, for taking this time to talk to CPI.

1. Antitrust enforcement involves, by necessity, coordination between federal and state agencies. What, in your view, should be the approach to interagency cooperation in a contemporary context? How can States and Federal agencies better coordinate in the 21st Century?

Coordination between federal and state agencies is critical to ensure that we efficiently deploy our limited resources. Traditionally, there was an approach, particularly in smaller states, in which states followed the lead of our federal counterparts. There was very little appetite to independently investigate and litigate large antitrust cases — with a few notable exceptions, like *Microsoft*. That trend has been changing with recent actions against some large technology companies.

There is no single, ideal model of interagency cooperation. State enforcers, much like our federal counterparts, have a limited set of resources to tackle competition issues. As a result, our model for cooperation will depend upon how specific investigations or cases relate to state priorities.

Interagency cooperation can be broadly captured in two categories. There is the historical model of cooperation in which state enforcers join investigations and cases managed by federal enforcers. In this model, state enforcers contribute our resources, localized knowledge and relationships, and our intellectual horsepower to cases led by the U.S. Department of Justice or the Federal Trade Commission. Deploying this model allows state enforcers to pursue investigations and cases of interest to our states while relying upon the resources and experience of federal enforcers. More recently, states have developed an alternative mode of cooperation, which allows us to cooperate closely with the federal agencies while managing parallel investigations and cases. In doing so, states have greater autonomy to pursue additional claims, make strategic litigation decisions, or pursue additional remedies; however, these cases are resource intensive. As a result, states must decide which cases warrant this newfound form of coordination.

2. What should be the enforcement priorities of antitrust agencies in the 21st Century? Is the technology sector rightly the focus of enforcement priorities? What other sectors merit particular scrutiny?

Our enforcement priorities should be guided by how to mitigate private entities from securing and maintaining undue power through anticompetitive methods in our modern economy. When the Sherman Act was passed in 1890, the legislative record was populated with comments concerning the coercive effect of power – not just market power. It has become clear to me from my time as Attorney General that certain companies, particularly companies participating in our digital economy, hold an incredible amount of power over consumers, competitors, and other businesses that rely upon their services. These companies have become ubiquitous for consumers and a necessity for other companies to reach consumers. Therefore, it is right that these companies come under scrutiny for their impact on our economy and citizens and serve as a priority for antitrust enforcers throughout the country.

Of course, companies operating in more traditional industries also deserve scrutiny. These priorities are often set by local factors. For example, as Attorney General of Nebraska, our office has heard significant concerns from constituents about consolidation and conduct in the agricultural sector, which has become a priority for us locally. To be sure, there are other priorities set by individual agencies based upon constituent needs, but dominant companies in the digital economy have proven to be the one area that has garnered attention from attorneys general across the country and from federal enforcers, making it a prominent national priority.

3. What should be the focus of merger scrutiny in the contemporary economy? Are there particular sectors that merit specific scrutiny in terms of their impact on consumer welfare?

The antitrust laws have been described as "common-law statutes," which provide courts with the ability to incorporate judicial and economic learning to determine what is, and what is not, anticompetitive. This flexible approach to competition law provides courts with malleable standards to apply to evolving market dynamics. Moreover, antitrust cases tend to be fact intensive, which further justifies flexible competition laws. I fear that more rigid rules in competition enforcement could lead to rigid standards that can neither keep up with the changing economy or accommodate the unique facts to each case.

I am also concerned about representations parties make during merger reviews that are left unfulfilled. There are instances in which parties make representations about how the companies will operate once the merger is consummated that are unsatisfied once the merger is cleared. Enforcement agencies need remedies available to them if the parties fail to comply with their promises during the merger process.

4. How, in your view, is coordination working between State and Federal antitrust enforcers? You have raised specific concerns relating to certain industries, e.g. meat packing and food distribution. How can State and Federal enforcers better coordinate to ensure effective enforcement in such key industries?

Our office has had a tremendous experience coordinating with federal antitrust enforcers across industries. This includes working both with the U.S. Department of Justice and the Federal Trade Commission on a range of matters.

Perhaps most critical to improving coordination is continuing to build relationships with staff and decision makers in both agencies. The need for strong relationships is always highlighted at the outset of a new administration. A new administration will always bring with it new decision makers, priorities, and staff. The most recent transition has been particularly difficult because of challenges brought about by the COVID-19 pandemic, which has prevented the usual face-to-face meetings that would allow the enforcement community to make introductions and exchange ideas.

Most of these difficulties will resolve themselves naturally as the new administration finishes installing new decision makers to open posts and in-person meetings resume as COVID restrictions are lifted across the country.

5. You are taking the lead in an antitrust lawsuit against Google, along with several other States. Please outline the key concerns you have identified with Google's conduct. Are these concerns distinct from those raised by other States in a parallel suit, or by the Department of Justice in its lawsuit against Google?

It is worth noting that our case against Google is wholly consistent with the case brought by the U.S. Department of Justice and their state co-plaintiffs. Our complaint builds and expands upon their case in three notable ways.

First, our case includes allegations that Google has foreclosed specialized vertical providers, like Expedia and Yelp, from the most valuable portions of the search results page and deprived them of critical user traffic to their websites. While not direct competitors to Google's general search services, specialized vertical providers offer a competitive threat to some of the most valuable queries conducted on Google, such as travel or local services, and Google has undertaken a concerted effort to discriminate against these companies it perceives as a threat.

Second, our case alleges that Google forecloses Microsoft Bing from advertising dollars by creating inoperability between their product, SA360, and Microsoft Ads to the detriment of Bing and advertisers alike.

Third, our complaint includes more specific concerns about Google's effort to dominate additional search access points, such as automobiles, to make their search product even more ubiquitous.

Our complaint comprehensively examines how Google achieved, fortified, and continues to expand its dominant position in general search and corresponding advertising markets. In crafting our complaint, we thought it was not only important to establish how Google established its monopoly but also how it intends to fortify its monopoly for generations to come. In doing so, our complaint presents a broad range of remedies that we could deploy to restore competition to the market, if we succeed.

6. More generally, what, in your view, should be the role of State Attorneys General in enforcing antitrust law? How do you see the role of State-level enforcers as they elaborate their role with respect to Federal level enforcers?

State attorneys general have a significant role in antitrust enforcement that has been recognized by Congress and the courts and codified into law. States enforcers have some obvious areas of focus such as intrastate anticompetitive conduct uncovered in small communities and bid-rigging and price-fixing against state purchasers. While these cases and investigations are not frequently found on the front page of the newspapers, they are nevertheless impactful to our local communities and taxpayers. We should never forget that.

More broadly, state attorneys general hold critical resources necessary for vigorous antitrust enforcement. Antitrust enforcement is under-resourced, with market concentration rising and competition concerns multiplying. It is therefore critical that state attorneys general supplement the resources available at the federal level with our own staff. Staff working in state attorneys general offices can offer localized knowledge and relationships that are valuable to inject into national antitrust matters. By bringing additional intellectual horsepower to antitrust enforcement, state attorneys general help ensure our nation's competition laws are vigorously enforced and consumers are protected against the consolidation of power by private entities in the economy.

RECENT TRENDS AND INSIGHTS IN STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT

BY MILTON A. MARQUIS, ANN-MARIE LUCIANO & GIANNA PUCCINELLI[1]

1 Attorneys with Cozen O'Connor's State Attorneys General Practice.

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'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/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 AGs[8] 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 NAAG 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 affected by foreign cartel activity."[13] With this new vigor to aggressively pursue antitrust enforcement in these markets, we will likely see State

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://1li23g1as25g1r8so11ozniw-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/.

13 *Id.* at § 1.

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 online-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 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

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.

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.

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.

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.

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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).

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.

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]

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.

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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).

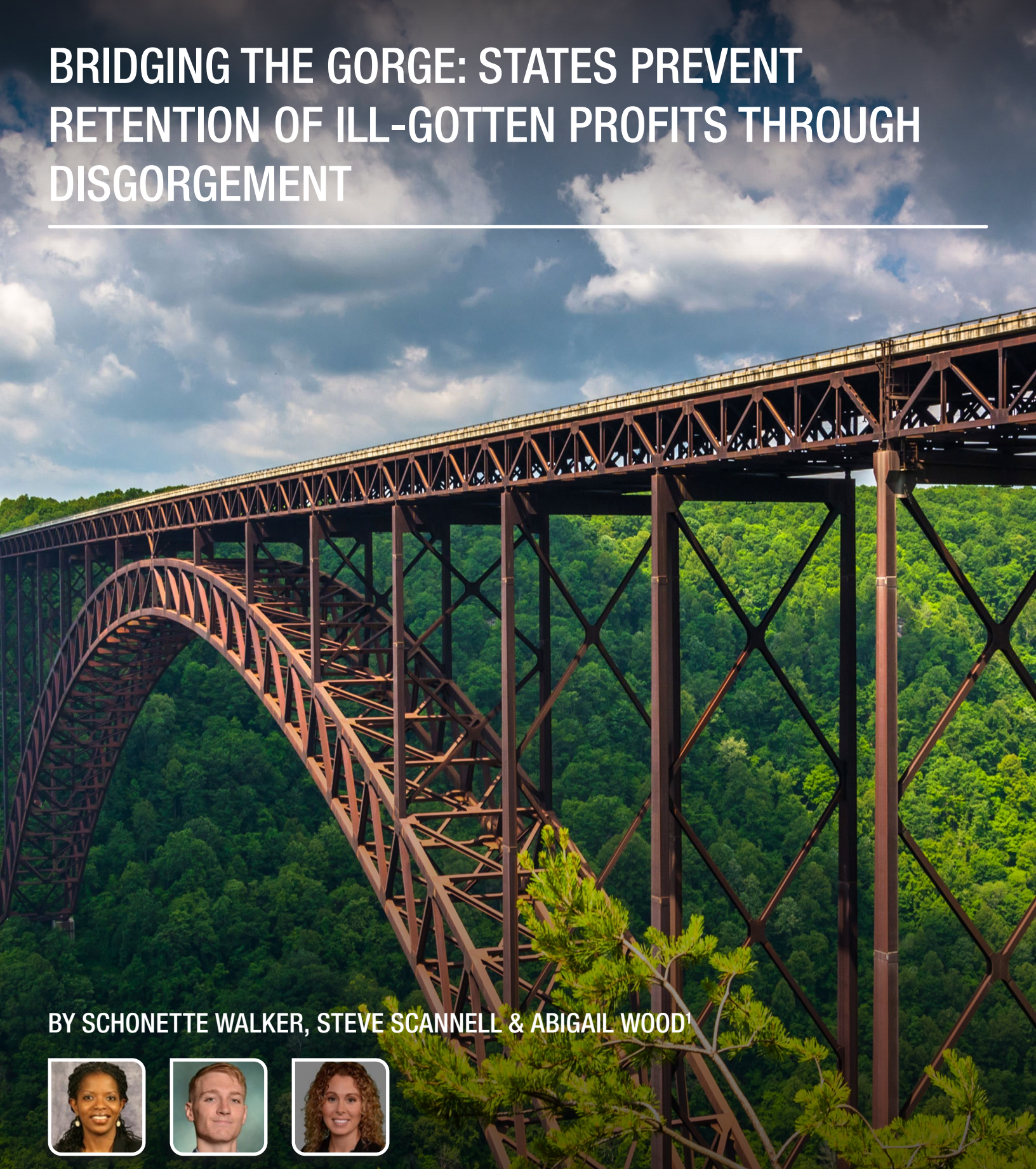
30 See Amicus Brief, *supra* note 29, at 13.

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.

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.

BRIDGING THE GORGE: STATES PREVENT RETENTION OF ILL-GOTTEN PROFITS THROUGH DISGORGEMENT



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I. INTRODUCTION

Private antitrust actions are increasingly inadequate in bringing about meaningful change among industry participants who have engaged in anticompetitive conduct. That is where the State Attorneys General must step in because their goals differ from those in the private actions. State Enforcers are looking to hold wrongdoers accountable for violations of the law, deter others from engaging in the same or similar illegal activity, and ensure that the wrongdoer does not profit from their illegal activity. These goals go beyond providing relief to any one person but seek to provide remedy to all consumers and ensure competition is maintained for everyone. The cases brought by State Enforcers are done in the interest of the public. While there are many methods to accomplish the goals above, we focus on one method in this article: disgorgement, which has become increasingly important among State Enforcers in antitrust cases because disgorgement offers a level of deterrence that damages does not.

Disgorgement is an equitable remedy, designed to deter future anticompetitive conduct. This deterrence is achieved because disgorgement deprives the wrongdoer from any profit resulting from their anticompetitive conduct. Fundamentally, disgorgement focuses on the wrongdoer, not the victims. In this way, disgorgement's strongest parallel is unjust enrichment – not restitution. Black's Law Dictionary explains, "instances of unjust enrichment typically arise when property is transferred by an act of wrongdoing…the resulting claim of unjust enrichment seeks to recover the defendant's gains." In that connection, what is sought is the "non-restitutionary" disgorgement of the wrongdoer's unlawful gains. And when defendants are faced with the prospect of forfeiting their unlawful gains, they will think twice before engaging in conduct that violates state and federal laws and harms the consuming public.

State Attorneys General have the authority and seek to do exactly this – require defendants forfeit that which they have unlawfully gained on the backs of victims in their states. And while individual victims may not find specific relief, State Attorneys General bring enforcement actions to stop anticompetitive conduct at large, deter future similar actions, and prevent unjust enrichment by defendants engaged in illegal conduct. Disgorgement accomplishes all of these goals but without complicating factors such as pass-through analysis, *Illinois Brick* standing issues, etc. that come with damages and/or restitution actions and that could ultimately leave defendants retaining some of their illegal profits.

II. DISGORGEMENT – A BRIEF OVERVIEW

As an equitable remedy disgorgement results in an action required by the court to achieve a measure of "justice" when a legal remedy would be inadequate; a legal remedy primarily focuses on a financial award such as damages. The court's order of disgorgement divests a wrongdoer of ill-gotten gains[2] and is designed to deter similar conduct.[3] Generally, federal courts have the power to order "the act of disgorgement" due to their broad equitable powers.[4] State Enforcers may seek equitable relief for federal antitrust violations under Section 16 of the Clayton Act, which entitles "[a]ny person, firm, corporation, or association," to sue for injunctive relief "against *threatened* loss or damage…when under the same conditions and principles as injunctive relief against *threatened* conduct that will cause loss or damage is granted by courts of equity."[5] According to *Porter*, and as applied in *Keyspan*, unless there is specific language which divests a court of its equitable powers, they are able to assert these powers to the fullest extent.[6] There is no language under Section 16 of the Clayton Act which divests a court of its powers to provide full equitable relief. Importantly, State Enforcers seeking disgorgement are *solely* focused on the public interest. As articulated in *Porter*, where a suit involves the public interest and not merely a private controversy, courts' "equitable powers assume an even broader and more flexible character."[7] Often, State Enforcers' seeking disgorgement of excess ill-gotten profits is the only way the public can hold accountable those engaged in dishonest and anticompetitive business practices and bring about meaningful change to a corrupt business or industry.

Moreover, it is most important to remember that disgorgement focuses on the actions of the wrongdoer while damages focuses on the harm to the victim. This is not a distinction without a difference. The damages remedy at law has been effectively eviscerated by courts over the past half-century. The Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), left most of the downstream consumers who

2 Disgorgement can result in the taking of either monetary or non-monetary gains from a wrongdoer.

3 See, e.g. *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws.).

4 See *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction, and [where] the public interest is involved…those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.").

5 15 U.S.C. § 26 (emphasis added). See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972).

6 See *U.S. v. Keyspan Corp.*, 763 F.Supp.2d 633, 639 (S.D.N.Y. 2011).

7 *Porter v. Warner Holding Co., 328 U.S.* at 398.

are *truly* affected by anticompetitive conduct without standing. The Court held that indirect purchasers did not have standing to sue for *damages* under Federal law. Premised on the fear of duplicative recovery, the Court's decision has led to crater-sized holes in the viability of vigorous antitrust enforcement. State Attorneys General have an obligation to fill these gaps in antitrust enforcement that have left consumers holding the bag; some direct purchasers pass supra-competitive costs down the supply chain, inevitably landing on the end consumer. Disgorgement is a key tool the Government has to address anticompetitive conduct and provides the most certainty that the conduct will not be repeated in the future. It is difficult to question the likely deterrent effect disgorgement has on potential defendants.[8]

In addition to authority under federal law, many state laws provide even broader equitable authority than the Clayton Act, providing the state Attorneys General with further authority to seek disgorgement through the courts. For example, the court in *In re TFT-LCD (Flat Panel) Antitrust Litig.*,[9] found that because disgorgement was authorized under the Sherman Act, and because Oregon's Antitrust Statute provided an expansive grant of authority to seek equitable relief, Oregon had authority to seek disgorgement under state law.[10] Additionally, many other states authorize broad equitable remedies, which may include disgorgement, as a remedy for anticompetitive conduct.[11] So while State Attorney's General have ample authority to seek disgorgement under federal law, state laws remain a strong complement in many cases to ensure defendants are forced to give up supra-competitive profits gained as a result of their anticompetitive conduct.

III. DISGORGEMENT PROPERLY FOCUSES ON THE CONDUCT OF THE WRONG-DOER

Disgorgement is arguably the most practical and logical enforcement remedy to utilize because it focuses on the conduct of the wrongdoer. The analysis of disgorgement asks one simple question: "how much did the wrongdoer profit from their illegal conduct?" It is truly that simple.

It is that simplicity which makes disgorgement an attractive enforcement tool. State Enforcers are distinct from private plaintiffs — we have an obligation to uphold the law, protect consumers, and hold corrupt businesses and individuals responsible for their actions. Disgorgement allows enforcers to keep the focus on the *conduct of the wrongdoer* without going down the far more complex and intricate path of damages. Additionally, unlike damages, disgorgement ensures that the wrongdoer does not profit a single ill-gotten dollar. There is in fact little disagreement among commentators about the propriety of disgorgement as an equitable antitrust remedy. *Keyspan* (citing Phillip E. Areeda et al., *Antitrust Law*, 325a (3d ed. 2007) ("[E]quity relief may include, where appropriate, the disgorgement of improperly obtained gains.")[12]; Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 Antitrust L.J. 79 (2009) ("One's first reaction might well be that perhaps the rare usage reflects some underlying insecurity about whether disgorgement really is a permissible antitrust remedy. But there is surprisingly little doubt that equitable antitrust remedies include requiring violators to disgorge any illegally obtained profits.").

Like all good attorneys the initial inclination is to take something simple and turn it into something much more complex. This fatal error often occurs when attorneys and courts conflate disgorgement with damages, which are very distinct and different remedies under the law. Sometimes it is easier to understand unfamiliar theories with simple examples. So let's look at how disgorgement worked in the infamous lemonade price fixing conspiracy.

8 See e.g. *AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021)(payday lender fought disgorgement of over $*1.3 billion* it received in deceptive loan charges arguing that disgorgement not authorized); Kokesh v. SEC, 137 S.Ct. 1635 (2017)(defendant fought SEC disgorgement of nearly $35 million in ill-gotten gains).

9 See In re TFT-LCD (Flat Panel) Antitrust Litig., 2011 WL 2790179, at *4 (N.D.Cal. July 12, 2011).

10 *Id.*

11 See e.g. a non-exhaustive list of states and their respective antitrust statutes under which they may seek disgorgement under broad equitable authority: CAL. BUS. & PROF. CODE § 16750(a) (West 2021); FLA. STAT. ANN. § 542.23 (West 2021); MD. CODE ANN., COM. LAW § 11-209 (West 2021); Mich. Comp. Laws § 445.711 (West 2021).

12 See *Keyspan* 763 F.Supp.2d at 642.

Billy and Suzie lived in the same neighborhood three streets apart. Suzie had a lemonade stand and made a killing selling her lemonade for a $1.50 a glass. Then Billy decided to open a stand around the corner selling his lemonade for $1 a glass. Suzie started losing business to Billy, and dropped her price to $1 a glass as well. Suzie realized if this competition with Billy kept going her lemonade stand wouldn't be as profitable as it was in the past. Then Suzie had a great idea—instead of competing with Billy, what if she and Billy agreed not to compete? Suzie went to Billy and posed the idea to not compete. Billy agreed and said, "Hey why don't we actually raise the prices since we are the only two lemonade stands in the neighborhood." Suzie agreed and they began selling their lemonade for $10 a glass. Eventually their lemonade price fixing scheme was discovered, and they were charged with a violation of Section 1 of the Sherman Act. Between the two of them, Billy and Suzie sold 1,000 glasses of lemonade at $10 a glass earning them $10,000. The cost per glass to sell the lemonade was ten cents. This means that the cost is $100 to make 1,000 glasses of lemonade. After subtracting the $100 cost of production Suzie and Billy were able to take home $9,900 total from their price fixing scheme.

The competitive price of a glass of lemonade in their two-lemonade stand market was $1 so Suzie and Billy *should have* made $1,000 "but for" their lemonade price-fixing scheme, leaving them with a take home of $900 after their $100 cost to make the lemonade. In determining how much to disgorge from Suzie and Billy we only have to ask one question, "how much did Suzie and Billy profit from their illegal conduct?" It is actually very simple; all we have to do is subtract the amount Suzie and Billy should have earned in a competitive lemonade stand market selling 1,000 glasses ($900) from the amount they actually made ($9,900). The difference is how much Suzie and Billy profited from their illegal lemonade price fixing scheme, which was $9,000 and should be disgorged as net ill-gotten gains.

The ultimate decision about what to do with the disgorged monies is for the judge to decide. Here the judge decided to place the $9,000 of disgorged monies into a fund that would give loans to young entrepreneurs.

It is only fair that Suzie and Billy should not keep any of the money they made from their illegal conduct. While State Enforcers could hire an expert to utilize econometric analysis to determine how much individual lemonade purchasers were damaged by this scheme, in taking this route, it is quite possible that Suzie and Billy could end up keeping some of their illegal profits depending on the distribution of the product. This is because damages only considers how each individual was harmed, not how much Suzie and Billy actually stole. Disgorgement fixes that problem.

IV. RECENT ATTACK ON FEDERAL DISGORGEMENT DOES NOT AFFECT STATE ENFORCERS

In a recent case involving the Federal Trade Commission ("FTC") and its ability to seek disgorgement under the FTC Act, the Supreme Court dealt a significant blow to that agency. In *AMG Capital Management*, the Court unanimously decided that Section 13(b) of the FTC Act does not give the FTC authority to seek disgorgement in federal courts where it had not first fully exhausted its elaborate administrative process.[13] The *AMG Capital Management* Court decided a very discrete question – does the FTC, under Section 13(b) of the FTC Act, have the authority to obtain equitable monetary relief *directly* from federal courts? In answering no, the Supreme Court really focused on the FTC's elaborate statutory structure and administrative procedures. The Court explained that the FTC's administrative process begins with the FTC filing a complaint before an Administrative Law Judge, when the FTC has reason to believe someone is engaging in anticompetitive conduct and where the ALJ may issue a cease and desist order that is reviewable by the Commission and eventually a U.S. Court of Appeals.[14] Section 13(b) however, which was at issue in *AMG Capital Management*, allows the FTC to proceed *directly* to court to seek a "permanent injunction" without first going through that administrative process, in certain circumstances.[15] Since the 1990's the FTC and courts have taken the broad view of 13(b)'s "permanent injunction" authority in antitrust cases to include the pursuit of equitable monetary relief, such as restitution and disgorgement, without the prior use of traditional administrative proceedings.[16] This Section 13(b) jurisprudence and analysis is of course unique to FTC actions.

The *AMG Capital Management* case does not address or implicate, directly or indirectly, State Attorneys General authority to seek disgorgement in federal lawsuits. Some have suggested though, that the reasoning in *AMG Capital Management* should apply with equal force to State Attorney General antitrust suits seeking disgorgement. This is wrong. State Enforcers seeking disgorgement do not raise the same concerns elicited by the FTC since State Enforcers cannot bring actions under Section 13 (b) of the FTC Act, thus these suggestions completely miss the mark. When it comes to equitable monetary remedies, like disgorgement, the State Attorneys General operate on a completely different statutory landscape. This is because, as previously noted, State Enforcers typically seek disgorgement under Section 16 of the Clayton Act (injunctive relief) and specific state laws, and not the FTC Act. When State Attorneys General seek disgorgement under Section 16 there are no concerns about

13 See *AMG Cap. Mgmt., LLC*, 141 S.Ct. at 1348-49 (Discussing the elaborate administrative process that proceeds FTC's seeking disgorgement in a court action).

14 *Id.* at 1346.

15 For example, if the FTC "has reason to believe someone is violating or about to violate" a provision of law enforced by the FTC. *Id.* at 1348.

16 *Id.* at 1347.

failing to follow any elaborate administrative regime that Congress has put into place. Section 16 has no statutory structure or administrative process analogous to Section 13(b) that plaintiffs must pursue *before directly seeking equitable monetary relief from a court*. Indeed, the analysis in *AMG Capital Management* is pertinent only to the FTC's administrative framework.

Significantly, when state antitrust enforcers pursue equitable monetary relief under Section 16 of the Clayton Act, their authority is based on the court's broad equitable powers as outlined in the Supreme Court precedents, *Porter* and *Mitchell*, which note that federal courts have broad equity jurisdiction limited only by Congress' express restriction.[17] That broad equity jurisdiction allows a court to order a defendant to disgorge ill-gotten gains so long as the language of the statute the court is interpreting, does not limit the court's equity jurisdiction. Section 16 imposes no such equity jurisdiction limitation. And, even the *AMG Capital Management* Court which struck down the FTC's ability to seek disgorgement under 13(b)'s "permanent injunctive" language, acknowledged that *similar statutory language can be interpreted to encompass equitable monetary relief [i.e. disgorgement*].[18]

The *AMG Capital Management* Court discussed *Porter* and *Mitchell* approvingly and clarified that determining whether a grant of an "injunction" in a statutory scheme provides for equitable monetary relief remains a *case-by-case interpretation*. The Court did not say that injunction cannot be monetary but that this question is evaluated on the facts and circumstances of each particular case. *AMG Capital Management* is not a wholesale bar of the disgorgement remedy in antitrust cases.

And while *Porter* and *Mitchell* clearly stand for the proposition that a court's equitable powers are broad and left undisturbed absent some limitation pronounced by Congress, there are no antitrust cases deciding if that broad charge does or does not include forcing defendants to give up ill-gotten gains via a disgorgement remedy. This was true a decade ago and is still true today.[19] There is however acknowledgement that disgorgement is in line with the established principles of antitrust law.[20] This is important because for antitrust enforcers disgorgement is useful not only to stop an antitrust violator from continuing his unlawful conduct but also to deter him *and others* from similar conduct in the future. Fewer things will strike a violator's attention better than getting hit hard in the pocketbook. And when the blow is hard enough, and the wrongdoer is not able to profit from the wrongdoing, that which is relinquished is more than just the cost of doing business. The disgorgement message comes across loud and clear — not only to the wrongdoer himself, but to other would-be wrongdoers as well. Having to give up unlawful profits, the antitrust violator surely would realize that crime does not pay and be deterred from engaging in similar conduct in the future. Indeed, deterrence is a key goal of the disgorgement remedy. The FTC extracted nearly $725 million[21] in consumer redress or disgorgement of ill-gotten gains in 2019 and, from 2010 to 2019 USDOJ recovered over $26 million[22] in disgorgement. These amounts will certainly cause anyone even considering an antitrust violation to sit up and take notice.

It is easy to see that the disgorgement remedy works to both teach the wrongdoer a lesson and to deter similar conduct in the future, by both the wrongdoer and observers. Indeed, it seems like many defendants may feel the same way. The ongoing attacks on federal and state antitrust efforts to seek disgorgement shows that it has a significant impact; if defendants did not think so, perhaps they would not attack enforcement efforts seeking disgorgement with such vigor.

17 *Porter v. Warner Holding Co, 328* U.S. 395 (1946); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

18 *AMG Cap. Mgmt., LLC*, 141 S.Ct. at 1347, 1348 (Porter's 'permanent or temporary injunction' language encompasses equitable monetary relief).

19 In 2011 the district court noted in *Keyspan* that there had actually not been any decision handed down concerning a district court's power to order disgorgement to remedy a Sherman Act violation. See Keyspan, 763 F.Supp.2d at 638 (S.D.N.Y. 2011).

20 *Id.*

21 FED. TRADE COMM'N, FISCAL YEAR 2021 CONG. BUDGET JUSTIFICATION (2020) (https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf).

22 U.S. DEP'T OF JUST., ANTITRUST DIV. WORKLOAD STAT. FY 2010-2019 (2019) (https://www.justice.gov/atr/file/788426/download).

V. WHY DISGORGEMENT IS NECESSARY FOR EFFECTIVE ANTITRUST ENFORCEMENT

Much of the hostility toward disgorgement stems from the premise that private treble damages generally provide monetary relief that goes well beyond disgorgement, so disgorgement is unnecessary.[23] Yet, the practical reality paints a much different picture. Increasingly, private actions are inadequate in bringing about meaningful change among industry participants. Many cases involve direct purchaser intermediaries (like resellers) who pass on most if not all of the anticompetitive cost downstream and may be reluctant to challenge the *status quo*. This can be due to fear of retaliation, or even because they too share in the supra-competitive profits.[24] When practices are challenged and these direct purchasers do sue, the standards for certifying antitrust class actions are increasingly difficult to meet even for the most meritorious of cases.[25]

It is imperative therefore, that State Attorneys General continue to use their authority and seek disgorgement when legal remedies (like damages) are insufficient. Consumers every day are harmed by anticompetitive conduct with no *real* recourse. Forty years later, it is clear the Supreme Court's decision in *Illinois Brick* has undercut the exact goals it sought: vigorous antitrust enforcement and avoiding duplicative recovery. Industry is often able to pass through costs incurred as a result of anticompetitive conduct down the chain, ultimately landing on everyday consumers. Under *Illinois Brick*, these same consumers, as indirect purchasers, cannot challenge the illegal profit-making scheme. In practice, sometimes the only viable suits are from those who should challenge these practices in real-time (i.e. direct purchasers), but may decide not to. Instead, they sometimes acquiesce to the supra-competitive prices and may pass the additional costs down the chain, sometimes making a profit themselves. Consumers who cannot pass on costs further downstream could bring suit in some situations (i.e. under state antitrust laws), but their stakes are usually too low to make individual lawsuits feasible given the enormous costs that accompany antitrust litigation. In practice, there is a much higher likelihood that no recovery is made by these individuals than any potential duplicative recovery. It is no exaggeration that State Attorneys General are the last line of defense for most of the general public in preventing continuance of the *status quo*, when the *status quo* harms competition and consumers in our States.

VI. CONCLUSION

Disgorgement is here to stay as an enforcement tool by the State Attorneys General. The mere fact that the defense bar has decided to focus on attacking disgorgement demonstrates the strength and power it wields at deterring illegal conduct. State Attorneys General will continue to press on in the endeavor to protect the public interest and hold those engaged in anticompetitive practices accountable through disgorgement of ill-gotten gains and not allow wrongdoers to profit from their illegal conduct.

23 See Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. No. 1 79, 82 (2009).

24 *Id.* at 83.

25 *Id.* at 83.

COMPETITION FOR THEE, BUT NOT FOR ANTITRUST!

BY MAX M. MILLER[1]

1 Max Miller is an Assistant Attorney General with the Office of the Iowa Attorney General. The views in the article are his own and do not represent the views of the Iowa Attorney General or the Office of the Attorney General.

Antitrust policy is entering a renaissance of new (and old) ideas that encourage more aggressive enforcement and shifts in legal standards that would remove obstacles for successful enforcement actions. The field is benefitting from robust debates and diverse perspectives, which are gaining audiences with practitioners, government enforcers, Congress, the courts, and most recently, the President of the United States. But not everyone is supportive of the debate and the prospect of reform. Recently, Senator Mike Lee (R-UT), reintroduced his "One Agency Act" in the Senate, which would "transfer antitrust enforcement functions from the Federal Trade Commission to the Department of Justice[.]"[2] The Tougher Enforcement Against Monopolists Act" or "TEAM Act" introduced by Senators Lee and Grassley (R-Iowa) contains a similar proposal.[3] These proposals appear designed to eliminate competition among antitrust enforcement agencies' policy perspectives and instead present a single avenue for antitrust policymaking at the federal level. It follows efforts by the previous head of the Antitrust Division, Makan Delrahim, to intervene in actions by the FTC and State Attorneys General, indicating a goal by some in antitrust enforcement is to create a single arbiter of antitrust policy. This approach is misguided in both its purpose and proposed justifications and should be rejected by Congress. The antitrust status quo is rightfully coming under intense criticism for failing to protect competition, and now, more than ever, antitrust needs competition in the most important of markets: the marketplace of ideas.

Antitrust policy in the United States is experiencing its greatest disruption since the 1970s when the "consumer welfare" movement shifted the foundations of the field to a more monopolist-friendly ideological framework. Forty years of evidence, however, have mounted against the consumer welfare approach to antitrust, and vocal reformers such as Lina Khan have not only influenced the antitrust policy discussion, but are now taking seats in key positions of power. This could radically shift federal antitrust policy in the coming years. FTC Chair Khan, with others, has led a pro-enforcement movement, informally known as "neo-Brandeisianism," (hereafter abbreviated "NB") arguing for various reforms to the law and to agency enforcement approaches. The result has been a healthy and vigorous debate that has dominated antitrust circles for the past few years. With Chair Khan's appointment and confirmation, and with President Biden's July 9th Executive Order on Competition, the NB antitrust camp will now have a stronger voice in antitrust policy circles. This shift happened because different positions on antitrust policy competed for the hearts and minds of politicians and practitioners, not only within the United States, but also around the world. State Attorneys General have also entered the debate, taking different, more aggressive, positions from their federal counterparts in the *T-Mobile-Sprint* merger and leading the way on problematic markets such as generic pharmaceuticals.

This competition among enforcers is renewing interest in antitrust and leading to more people in power adopting the pro-enforcement approach. FTC Commissioner Rohit Chopra was among the first in the United States to start introducing these NB antitrust ideas at the highest levels of federal policymaking. Now, his former legal fellow, Lina Khan, is running the FTC. On July 9, President Biden issued a sweeping, 72-point executive order on competition encompassing many of the ideas put forward by NB antitrust advocates.[4] This rapid growth in prominence of the NB antitrust movement has many frightened about the coming age of corporate accountability, and not just the usual suspects in tech and other industries.

Senator Lee's "One Agency" proposal would remove the FTC from the federal antitrust policy discussion, silencing the NB ideas that have a bright future there. It would also end any prospect of the FTC's ideological competition with DOJ, which some perceive as having a more restrained approach to antitrust enforcement. Additionally, it has the potential to sideline the states as a co-equal enforcer of the nation's antitrust laws. In an op-ed promoting his act, Senator Lee chose to label this type of competition as "regulatory turf wars" but the weakness of his arguments about the problems of the current agency set up suggests that the real reason for pushing it at this time may be to insulate the consumer welfare standard from ideological competition in other parts of government. Senator Lee, after all, claimed Chair Khan's views on antitrust are "wildly out of step with a prudent approach" to antitrust law,[5] indicating Lee would simply prefer to foreclose the continuing discussion about the future of antitrust policy.

How does Senator Lee justify his radical proposal to eliminate a co-equal antitrust enforcer at the federal level? He outlined his arguments in a *Wall Street Journal* op-ed in November 2020.[6] Lee begins by asserting that a dual-agency approach to federal antitrust enforcement undermines the objective of "effective and efficient antitrust enforcement," which he claims is "essential to maintaining free markets and protecting consumers." Setting aside the debate over what constitutes "effective" antitrust enforcement, it is interesting to claim that "efficient" enforcement

2 One Agency Act, S. 633, 117th Cong. (2021-2022).

3 Tougher Enforcement Against Monopolists Act, S. 2039, 117th Cong. (2021-2022).

4 FACT SHEET: Executive Order on Promoting Competition in the American Economy, https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

5 Press Release, Mike Lee, U.S. Senator for Utah, Sen. Lee Statement on Lina Khan Nomination (Mar. 9, 2021), https://www.lee.senate.gov/public/index.cfm/2021/3/sen-lee-statement-on-lina-khan-nomination.

6 Mike Lee, Opinion, *One Agency for Antitrust*, Wall St. J., Nov. 17, 2020, https://www.wsj.com/articles/one-agency-for-antitrust-11605653810.

is a goal of antitrust. This is especially true when this claim comes from such a staunch advocate for the consumer welfare standard. Previously, antitrust policy, as found in the case law and the DOJ's 1968 Merger Guidelines, was guided by black and white standards and bright-line rules that actually promoted efficient enforcement and adjudication of the law. These principles and policy approaches, however, were largely abandoned in favor of the much more nebulous and complicated standard of consumer welfare, requiring armies of economists to face off — hardly an efficient approach. This has caused the costs of antitrust enforcement to soar and resulted in much more highly concentrated markets than were found during the era preceding the consumer welfare standard. If efficiency of enforcement is really the goal, Senator Lee should be advocating for a return to less-complicated and less-manipulatable standards for antitrust law.

Senator Lee's reasoning for how the dual agency approach leads to inefficiency centers around the agency clearance process for merger reviews and conduct cases that Lee describes as "turf battles." He claims: "Every year government lawyers spend hundreds of hours managing these fights, wasting taxpayer money and delaying enforcement" of antitrust law. Senator Lee is grossly exaggerating the problems in the FTC/DOJ clearance process. Certainly, at times, the two agencies find themselves competing to handle a case, but the primary purpose for the clearance discussion is to determine which agency has "expertise in the product in question gained through a substantial investigation of the product within the last seven years."[7] In other words, the existence of the process and the discussion is motivated by a desire to increase the efficiency of enforcement.

While it would be desirable if every antitrust enforcer had working knowledge of every industry that might wind up in his or her case load, the truth is that antitrust markets are complicated, diverse, and numerous. As such, enforcers need time to study the way each market functions before being able to effectively perform an investigation. State enforcers often find themselves in this generalist, or "Jack/Jill of all trades" role, but federal enforcers have the ability to specialize in particular markets and bring their deep expertise not only to the agency investigation, but also to State AG offices that partner with them. If specialized expertise exists in one or the other federal agency, why would we avoid harnessing that diverse expertise through a clearance process? The hours spent engaging in the clearance process are more than offset by the hours it would take for enforcers to get up to speed on a particular industry with which they have no previous experience. If both agencies have a legitimate claim to efficient investigation because of expertise and resources, the rare "turf war" Senator Lee criticizes will hardly be a wasted endeavor as it will determine which of the two is *best* positioned to handle the matter.

Further into his argument, Senator Lee discusses what appears to be his primary concern with the existence of two antitrust agencies: the prospect of "different industries receiving different antitrust enforcement." In other words, Senator Lee is concerned about the clear differences of opinions on antitrust policy that are emerging. To justify his concern, he cites the Department's unprecedented intervention into the FTC's Qualcomm case. Senator Lee contends that this move by DOJ, which elicited head scratches and criticism from many antitrust commentators, evidences a "potential for conflicting enforcement policy." Based on his past support for the antitrust status quo in response to calls for reform, the criticism of Lina Khan's appointment to the FTC, and the decision to entrust the Department, rather than the FTC, with sole federal antitrust authority, one can conclude that Senator Lee fears the growing conflict between NB antitrust ideas and consumer welfare, and especially fears the prospect of those NB ideas winning that competition.

Senator Lee's proposed solution to curtail the debate over antitrust policy is to consolidate federal antitrust enforcement under the Department of Justice, which Lee describes as "more politically accountable to voters." This claim is suspect on its face as the control of the FTC also changes with the Presidential election, and in a time of closely divided presidential elections, the bipartisan nature of the FTC has better potential to represent the diversity of voters' views. It is plausible that Lee's real purposes for choosing the DOJ over the FTC is that the DOJ has a reputation of being less likely to pursue novel theories of antitrust liability. Some could also argue the Department has been less aggressive in its pursuit of merger control and conduct enforcement. Moreover, by eliminating the FTC as an antitrust enforcement agency, Senator Lee would effectively be eliminating what is arguably the federal government's greatest antitrust enforcement power: The FTC Act's "unfair methods of competition" and the FTC's rulemaking authority, an underutilized but potentially powerful tool under Chair Khan's leadership.

The consolidation of federal enforcement authority under DOJ could also jeopardize the beneficial synergies state enforcers have cultivated with their federal counterparts. If you were to poll state antitrust enforcers about which agency they prefer to work with, the FTC would likely come out on top. This is not to say that the states have ever had a "bad" or problematic working relationship with the DOJ, but the perception has been that the FTC is more inviting of state enforcer assistance and perspectives, and that the FTC tends to be much more candid and open with the states about their thinking, their strategy, and their plans. Like the FTC, the states have also been on the receiving end of a DOJ intervention in an enforcement action. When a group of states, led by New York and California, challenged T-Mobile's acquisition of Sprint, the

7 Antitrust Division Manual, 5th ed. p. 338-339, https://www.justice.gov/atr/file/761166/download.

DOJ filed statements of interest to intervene, first to argue for a disqualification of the states' outside counsel,[8] and second, to argue, along with the FCC, that it was not in the public interest to block the merger.[9] In the latter statement, the Department argued, "[States] do not consider the rights and interests of the nation…They have neither the authority nor the responsibility to act on behalf of the nation, and while their concerns are not invalid, they are bound by state borders."[10] From a state enforcer perspective, therefore, the consolidation of federal antitrust authority under the DOJ could present an obstacle for continued state activism on antitrust issues. This would dampen reinvigorated antitrust enforcement, which in many ways has been led by the states over the past two decades. As Michael Kades noted in his recent *State of U.S. Federal Antitrust Enforcement*: "Arguably, since 2000, state attorneys general have been more aggressive than their federal counterparts."[11]

Perhaps this is why Senator Lee is so adamant about consolidating federal antitrust authority: diverse enforcement perspectives increase the likelihood of aggressive antitrust enforcement. This is a problem for Senator Lee's donors. Since 2015, Senator Lee's campaign committee and leadership PAC have received sizeable contributions from AT&T, Google, Amazon, Facebook Microsoft, 1-800-Contacts, Comcast, General Electric, Koch Industries, T-Mobile, Cigna, and Disney, as well as a number of corporate law firms engaged in antitrust defense work and investment banks.[12] All of these entities have an interest in keeping antitrust enforcement in the United States weak and ineffective. The One Agency Act's co-sponsor, Senator Thom Tillis (R-NC), has a donor list that includes the usual tech giant suspects, as well as pharmaceutical giants like Abbvie and Pfizer and a veritable Who's Who of investment banks and corporate defense firms.[13] It may be the case that these aspiring monopolists and their defenders are not donating to these campaigns simply to get Senators Lee and Tillis to pass the One Agency Act, but it is very likely these donors are supportive of the idea of centralizing federal antitrust authority.

Senator Lee has made a talking point of enforcement "efficiency" in support of his One Agency Act, but there is one efficiency of consolidating agency decision-making that he has failed to ever mention. One agency makes it more efficient for firms to capture and derail enforcement. With multiple agencies playing a role in competition policy and each having independent federal enforcement authority, the would-be monopolists find it much more difficult to influence the political process and insulate themselves from accountability. After all, it may take only one key appointment to head an agency to jumpstart antitrust enforcement and shift policy against the monopolists. If Congress is serious about giving federal agencies the tools and resources necessary to bring about more aggressive antitrust enforcement (and the recent series of proposed bills and the appointment and confirmation of Lina Khan suggest it is), then it needs to reject Senator Lee's One Agency Act and any other attempts to centralize and consolidate antitrust policy decision-making.

Senator Lee's drastic and radical measure should be cause for concern as it attempts to foreclose the nascent threat of NB antitrust. Consumer Welfare has enjoyed near-monopoly status in the antitrust marketplace of ideas for over four decades. But, just as we see in monopolistic product markets, when an incumbent is losing market share to a growing competitor, there is a tendency to engage in anticompetitive conduct to snuff out the threat. The one agency proposal is such conduct.

When I first transitioned to antitrust, I was struck by the misplaced arrogance of consumer welfare proponents. Statements such as "we all know" and "everyone agrees" were thrown around with regularity. I perceived this as the hallmark of an ideology on the cusp of decline. Just three years ago, then-AAG Delrahim spoke to the Federalist Society and stated: "We can safely say, 'We are all consumer welfare advocates now.'"[14] But these advocates regularly advanced an argument that, unbeknownst to them, undermined their case for consumer welfare: "Just look around! Look at how great things are! Consumer welfare gave us that!"

8 Jonathan Stempel & Diane Bartz, Judge rejects U.S. move to disqualify states' lawyer in T-Mobile/Sprint lawsuit, Reuters (Nov. 21, 2019), https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile-idUSKBN1XV2K5.

9 Statement of Interest by DOJ and FCC, *New York, et al. v. DeutscheTelekom*, (December 20, 2019), https://www.justice.gov/atr/case-document/file/1347556/download.

10 *Id.* At 23.

11 Michael Kades, The State of U.S. Federal Antitrust Enforcement, Washington Center for Equitable Growth 1,16 (2019), https://equitablegrowth.org/wp-content/uploads/2019/09/091719-antitrust-enforcement-report-1.pdf.

12 OpenSecrets, https://www.opensecrets.org/members-of-congress/mike-lee/contributors?cid=N00031696&cycle=2020&recs=100&type=C.

13 OpenSecrets, https://www.opensecrets.org/members-of-congress/thom-tillis/contributors?cid=N00035492&cycle=2020&recs=100&type=C.

14 Makan Delrahim, Assistant Att'y Gen., Antitrust 40 Years After the Paradox: No Longer "A Policy At War With Itself," Remarks at The Federalist Society Conference Celebrating the 40th Anniversary of The Honorable Robert Bork's *The Antitrust Paradox* (June 22, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federalist-society-conference.

In contrast to the portrayal of consumer welfare as the only ideology in town, NB antitrust ideas, in the tradition of Louis Brandeis' perspectives on political economy, have been laughed off as "hipster" proposals underserving of serious consideration in any antitrust forum. Now, just a few short years later, the hipster-in-chief is chairing the FTC and President Biden just issued an executive order that would make Louis Brandeis proud.

This is not to say that NB ideas have definitively won the competition in the marketplace of ideas. Simply, we are settling into a "new normal" where there is actual ideological competition, not only at antitrust conferences, but also in the highest echelons of government. Because we now have real competition in the marketplace of ideas, the consumer welfare arrogance has subsided and been replaced with earnest appeals to the merits of the standard. That kind of honest and robust competition in the marketplace of ideas is good for antitrust policy and good for American markets, and we should be wary of any attempts to limit that competition.

FROM MEDAL COUNT TO MARKET SHARE: HOW THE OLYMPICS REMIND US WHAT ANTITRUST LAW IS ALL ABOUT

BY CRYSTAL UTLEY SECOY, HART MARTIN & CALEB PRACHT[1]

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I. INTRODUCTION

These days, competition is in the spotlight in terms of the historic cases filed, legislative proposals made, and perhaps most notably: The Tokyo 2020 Olympic Games.

The Tokyo 2020 Olympic Games have been a welcome reminder of the strength of the human spirit during trying times, but what can the excellence of the world's top athletes teach us about antitrust law? While the Olympics might be more entertaining, at their core, antitrust law and the Olympics are founded on the same principle: free and fair competition. From there, we then can juxtapose good and bad Olympic competitors with good and bad economic actors to reach a deeper understanding of the value of competition and the importance of protecting it.[2]

In 1914, the Olympic Congress gathered in France to plan the upcoming 1916 games, celebrate the 20th anniversary of the founding of the Olympic Movement, and to officially unveil for the first time the now iconic Olympic Rings symbol. The participants sought to establish a uniform set of rules to govern the competition, providing clarity and predictability for athletes and host countries alike.[3]

At the same time, thousands of miles away in Washington D.C., another group of distinguished statesmen were also gathered to establish rules to protect robust and fair competition. Both the Clayton Act, 15 U.S.C § 12-27, and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, were enacted in 1914 by the 63rd Congress and signed into law by President Woodrow Wilson. Each Act sought to build upon late nineteenth century "trust-busting," one by placing restrictions on anticompetitive mergers and the other by empowering a new federal agency to prevent unfair methods of competition.

The goals of the two groups were the same: to establish a playbook so that competitors could take on one another fairly and determine the best among them in a legitimate way. The Olympics are compelling entertainment, an international celebration, and a showcase of the best that competition can offer. By collectively agreeing to basic rules, the entire globe can come together to watch our best athletes compete. Similarly, by preserving free and fair competition, antitrust law allows businesses to showcase the best through innovative products and services that earn customer loyalty and market share, rather than cheating or rigging the system in their favor.

II. BACKGROUND: THE EVOLUTION OF ANTITRUST

Antitrust law does not exist in a vacuum. As the product of political, economic, and social upheaval, it has evolved over time, rising and falling in salience as it both produces and reacts to change. There have been several moments in history when antitrust law, its principles, and a common understanding of its goals have all been in flux. In general, these moments can be categorized into four distinct and cyclical eras[4]:

1) The Birth of Antitrust 1890-1920,
2) The New Deal Era 1920-1940,
3) The "Golden Era" of Antitrust Enforcement 1940-1979, and
4) The Modern Consumer Welfare Standard 1979-present.

As we enter a potential fifth era, it is important to consider that even as the methods and messages of antitrust law have changed over time, the core goal of preserving free and fair competition has remained.

"Anti-trust" law itself is somewhat of a misnomer. When the three core statutes comprising federal antitrust law were passed, public concern was focused on the "trusts," the behemoth conglomerates that controlled the means of production in several major American industries. To an early twentieth-century small businessman, consumer, or politician, "anti-trust" was a simple proxy for "pro-competition," as the absence of the former was generally known to mean the preservation of the latter.[5] In much of the world, as in the title of this publication, "antitrust" thought is known as competition law and policy. Concerned with competition, Congress drafted, debated, and passed the three core statutes of federal antitrust law: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. With the big stick of President Theodore Roos-

2 It is important to note that throughout this article we use the Olympics as a metaphor and illustrative tool, not to suggest that perfect competition is attainable. John J. Miles, *The goals of antitrust*, 1 Health Care and Antitrust L. § 1:4 (2021).

3 *VI Olympic Congress—Paris 1914*, International Olympic Committee (Aug. 16, 2021, 8:12am) Paris 1914.

4 Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, Harvard Business Review (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

5 Barak Orbach, How Antitrust Lost Its Goal, 81 Fordham L. Rev. 2253 (2013).

evelt, Standard Oil was broken up, and Justice Louis Brandeis warned of *A Curse of Bigness*. This was the era that created competition law in the United States.

Even during the New Deal Era, as times changed and different national issues took precedence over antitrust, competition remained at the forefront of economic policy. During the mid-twentieth century "Golden Era," the courts were bold in their interpretations and applications of the statutes, watching the rise of major corporations with a skeptical eye. In the modern era, courts have now adopted the consumer welfare standard first espoused by Robert Bork in *The Antitrust Paradox*. Critics argue that this standard doesn't do enough to protect competition itself, while proponents argue that it facilitates the ultimate goal of competition: lower prices, efficient output, innovative business, and consumer choice. Either way, we can all agree that competitors must be fair, allowing others into the market. In athletics, we already know what anticompetitive instincts can produce.

III. UNFAIR COMPETITION: WHAT TONYA HARDING AND JESSE OWENS CAN TEACH US

What would happen if an Olympic competitor tried to rig the competition in his or her favor, long before the torch was even lit? In 1994, ice-skater Tonya Harding's ex-husband hired a hitman to eliminate Harding's U.S. competition, Nancy Kerrigan, before the upcoming 1994 Winter Olympic Games in Norway.[6] On January 6, 1994, hitman Shane Stant clubbed Kerrigan's right leg with a police baton at her final practice before the U.S. Women's Championships.[7] While Kerrigan recuperated, Harding won the U.S. Women's Championships.[8] Although the attack prevented Kerrigan from competing in the U.S. Women's Championships, she luckily recovered in time to compete in the upcoming Olympics.[9]

Like allegations of bid rigging and other antitrust crimes, the attack resulted in criminal indictments and plea bargains. Harding pled guilty to hindering the investigation and was sentenced to probation. She was also forced to resign from the U.S. Figure Skating Association, thereby withdrawing her from the World Championships.[10] Stant and his driver pled guilty to conspiring to assault Nancy Kerrigan while her ex-husband, Jeff Gillooly, and her bodyguard, both, pled guilty to racketeering for crafting the plan.[11]

Harding's involvement in planning the attack has not been proven, but, because at the very least we can say this was done on her behalf (willingly or not,) this story still provides a useful parallel to examine rigged competition and actions taken to harm competitors.

In contrast, the many Olympians who choose to honor the Games, competing fairly, remind us that it is about more than who walks away with the gold medal. While not everyone wins, it is through competition that some of the world's greatest athletes have achieved coveted awards and set new records in their fields, marking their achievements in the history books and rewarding their struggle. While there are many greats to choose from, Jesse Owens and his story stand out not just because of his achievements but what they came to mean. On May 25, 1935, Jesse Owens, an African-American Ohio State freshman from Alabama, tied a world record and set three new world records at a Big-Ten track and field meet in less than an hour.[12] To this day, no one has tied this achievement.[13] Owens followed this impressive feat by winning four gold medals at the 1936 Olympic Games in Berlin, Germany. [14] It was at the 1936 Olympics, also known as the "Nazi Olympics," where the Chancellor of Germany, Adolf Hitler, planned to showcase the superiority of the Aryan race.[15] Owens succeeded on merit alone, disproving Hitler's racist ideology four times, and his record of four athletic gold medals was unmatched for almost fifty years.[16] Owens later received many awards, but it is worth noting that he was awarded the Medal of Freedom, the highest civilian honor in the U.S., by President Ford in 1976.[17]

6 Laura Barcella, *'I, Tonya': What You Need to Know About Tonya Harding and Nancy Kerrigan: How two star skaters turned into rivals – and changed the way the world watched the Olympics*, Rolling Stone, Dec. 6, 2017, 'I, Tonya': Inside Real Tonya Harding, Nancy Kerrigan Story - Rolling Stone.

7 *Id.*

8 *Id.*

9 *Id.*

10 Michael Lloyd, *Tonya Harding-Nancy Kerrigan: Harding found guilty of hindering investigation*, The Oregonian, Jan. 01, 2014 (updated Jan 10, 2019).

11 The Associated Press, *Figure Skating; Kerrigan Attacker and Accomplice Sent to Jail*, The N.Y. Times, May 17, 1994.

12 *Jesse Owens*, Ohio History Central (Aug. 15, 2021, 1:06pm) Jesse Owens - Ohio History Central.

13 *Jesse Owens Biography*, Olympics (Aug. 15, 2021, 1:08pm) Jesse Owens Biography, Olympic Medals and Records (olympics.com).

14 *Resources*, Jesse Owens Memorial Park (Aug. 15, 2021, 1:09pm) Resources : Jesse Owens Museum (jesseowensmemorialpark.com).

15 *Id.*

16 *Biography*, Jesse Owens Biography, Olympic Medals and Records (olympics.com).

17 About Jesse Owens, Jesse Owens: Olympic Legend (Aug. 15, 2021, 1:11pm) About | Jesse Owens.

Throughout U.S. antitrust policy debates, scholars have disagreed on how to best realize the goal, but they all agree with one thing: competition is the goal. On August 27, 1953, the U.S. Attorney General appointed the National Committee to Study the Antitrust Laws, and after nineteen months of work the report was published.[18] The committee was made up of 59 lawyers, law professors, and economists.[19] The report opened with this simple, defining statement, "The general objective of the antitrust laws is promotion of competition in open markets."[20] The U.S. Supreme Court echoed this in a 1963 opinion, writing, "Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy."[21] Even now, in 2021, our antitrust textbooks teach, "The antitrust laws are equally designed to maintain the competitive order and provide the means of keeping competition free."[22] Perhaps it is because the system is organized around competition that we impose game-like rules, similar to those governing other competitive endeavors.[23]

Competition in and through the Olympics has produced the world's greatest athletes, and it is that same competitive force, which is and should remain fundamental to our economy. In order to do that, our laws have to keep that primary objective in focus. Competition in open markets results in innovation, lower prices, and better-quality products from which consumers can choose. For purposes of antitrust law, competition and its purpose are defined, "as a process of rivalry among sellers (the definition applied by most courts), is simply a means to this end. Thus, competition viewed as rivalry among firms is not an end in itself, but rather a process to maximize consumer welfare."[24] The definition of competition alone tells us that the process is the point. There is no means by which we can ensure that a "best" or "perfect" product will be created, but the process of competition ensures that, at the very least, competitors are incentivized to work towards that ideal.

In the market context, anticompetitive conduct occurs where a competitor "contravenes or disavows the fundamental fact of the competitive order, viz., the competitive struggle, and attempts instead to dominate market conditions."[25] The goal is similarly to handicap or eliminate the Kerrigans. When this occurs, it is impossible to tell if "the best" has truly won out, like when Harding won the U.S. Women's Championship in 1994. We cannot know if Kerrigan would have won because she was prevented from even competing. What we do know is that when anticompetitive conduct occurs, competition is stifled, and even the possibility of the positive outcomes of competition are destroyed.

If we are not ensuring that markets operate competitively, then we are disincentivizing and undermining the entire process. As Callman has explained, "It is the primary function of the law of unfair competition to safeguard the competitive community against methods of trade and business that are destructive of equal opportunity in honest competition, and to protect free enterprise from such practices."[26] Imagine if Tonya Harding had been allowed to compete in another Olympics. Not only would there have been a moral outcry against her participation, but neither her competitors nor her spectators would have trusted the integrity of the competition. Protecting the competitive process ensures that competitors achieve based on their merits, not on that of their hitmen.

We know that competition is the goal, but it can be easy to lose sight of this when reviewing pages of proposed legislation, sifting through the "legalese," and trying to determine the ultimate effect. Nevertheless, we can look to our Olympic greats for inspiration to keep up the work. As Jesse Owens said, "We all have dreams. But in order to make dreams come into reality, it takes an awful lot of determination, dedication, self-discipline, and effort."[27]

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18 Report of the U.S. Attorney General's National Committee to Study the Antitrust Laws (Mar. 31, 1955) The Attorney General's National Committee to Study the Antitrust Laws - Google Books.

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IV. GETTING BACK TO OUR ROOTS: THE SHARED PURPOSE OF THE ENFORCEMENT COMMUNITY

It is an exciting and engaging time to be a practitioner of antitrust law. Journalists, academics, politicians, and the business community alike are all concerned with what many see as a rise in monopoly power. Headlines about Big Tech have re-introduced many to an area of law that the general public considered only in history class, if we're lucky, and certainly wasn't considered a sexy area of law (except for the few of us, of course, who live and breathe it.) Yet, debates now rage over the sufficiency of the consumer welfare standard, the adequacy of the statutes as written, and the capability of enforcers. Lost in all the noise, however, is a shared understanding of our common goal: the preservation of fair competition. No matter which particular theory of antitrust you personally espouse, we can all agree that our role is to prevent the Tonya Hardings of corporations from abusing their market power or rigging the system to suppress competition and all of its myriad benefits. Instead, antitrust enforcers should diligently protect competition so that the Jesse Owenses of commerce can flourish.

V. CONCLUSION

Using competition, the core value of our antitrust laws, as a lens, we can evaluate current antitrust laws and new legislative proposals to see if they are fulfilling their purpose. Are our markets currently competitive? How will this legislative proposal increase competition? How will this merger potentially decrease it? Also, next time your friends ask you what it is you do or what's going on with antitrust policy debates, at least you'll have a new Olympic metaphor to explain it.

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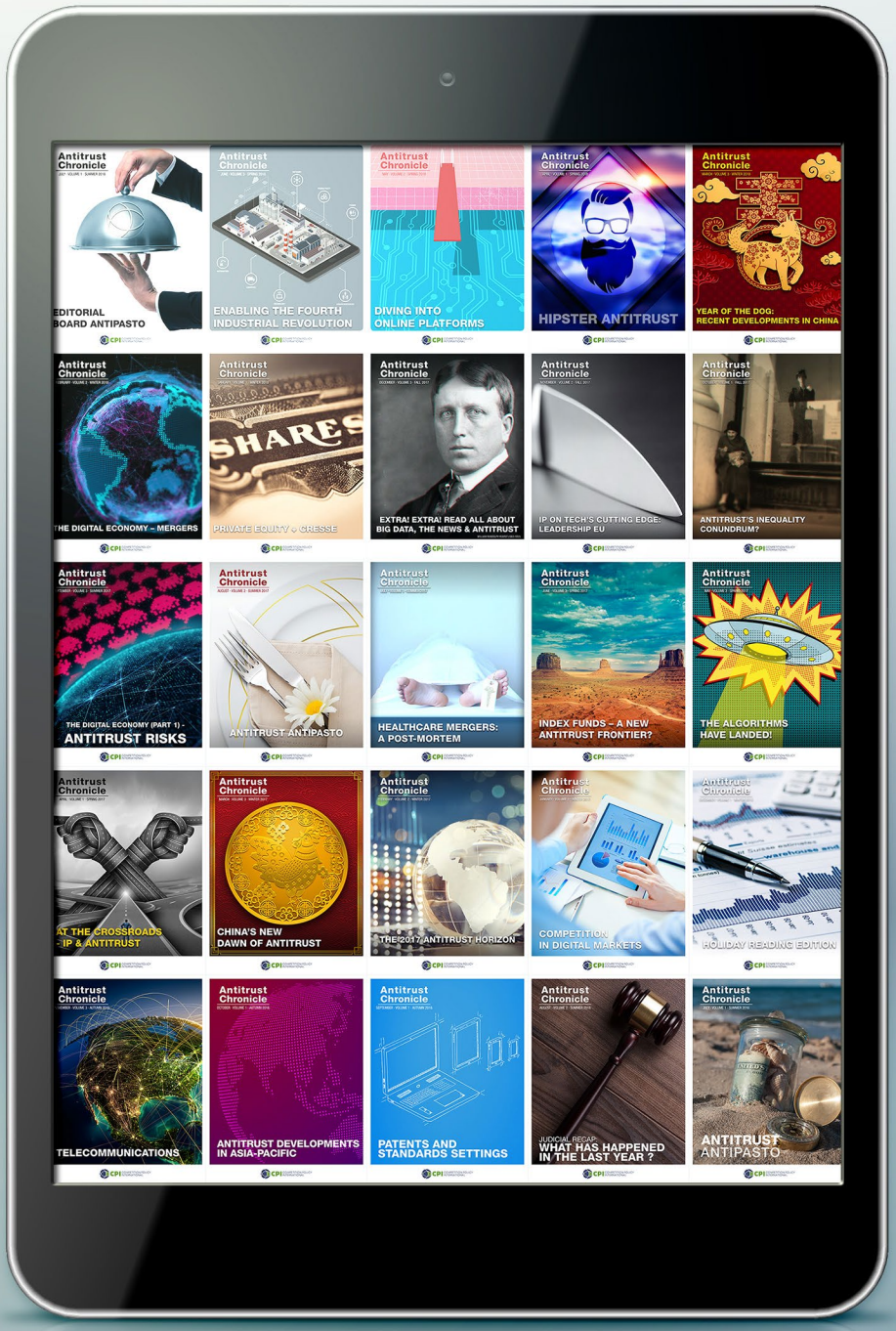


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