GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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The Role of US State Antitrust Enforcement

Juan A Arteaga and Jordan Ludwig[1]

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States' antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so.

Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role

1 Juan A Arteaga is a partner and Jordan Ludwig is counsel at Crowell & Moring LLP.

2 American Bar Association, Section of Antitrust Law, State Antitrust Enforcement Handbook at 18 (3d Ed. 2018) (ABA State Antitrust Enforcement Handbook).

3 Barry E Hawk & Laraine L Laudati, Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison, 20 Fordham Int'l L.J. 18, 20 (1996) (Antitrust Federalism).

for the first 30 years after the Sherman Act's passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because 'the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws', made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC's perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as 'seed money' for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforce-

4 Harry First, Charles L Denison Professor of Law, New York University School of Law, Statement Before the Antitrust Modernization Commission at 4–8 (26 October 2005), Hearings on the Allocation of Antitrust Enforcement Between the States and the Federal Government (Modernization Commission Testimony), available at https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf; James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 135 U. Pa. L. Rev. 495, 497–508 (1987) (May Article).

5 Modernization Commission Testimony, *supra* note 4, at 7; May Article, *supra* note 4, at 501–02; Stephen D Houck, Transition Report: The State of State Antitrust Enforcement at 2 & n.4 (2009) (Houck Report), available at https://static1.squarespace.com/static/577e9d93b3db2b9290cd7005/t/5a04a3b853450afe16fb4291/1510253498807/Houck-AntitrustEnforcement-2009.pdf.

6 Antitrust Federalism, *supra* note 3, at 20.

7 May Article, *supra* note 4, at 592-93; Houck Report, *supra* note 4, at 2.

8 Michael DeBow, State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal, in Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 267, 269 (2004).

9 15 U.S.C. Section 15c.

10 Pub. L. No. 94-503, 90 State. 2407. Today, '[m]ost state antitrust units are financed through direct appropriations from their state legislatures. Several states, however, finance their antitrust units, at least in part, through revolving funds that are funded by attorneys' fees and costs paid to the state in connection with settlements and judgments.' US Dep't of Justice, Antitrust Div. Manual at VII–11 (5th Ed. 2012) (last updated July 2019) (Antitrust Div. Manual), available at www.justice.gov/atr/file/761166/download.

11 Houck Report, *supra* note 5, at 2-3; Alan M. Barr, Assistant Attorney General, Deputy Chief, Antitrust Div., Office of the Attorney General of Maryland, State Challenges to Vertical Price Fixing in the Post-Leegin World at 1 (21 May 2009), available at www.ftc.gov/sites/default/files/documents/

ment during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to 'prohibiting cartels and large horizontal mergers'.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely 'local matters, such as bid-rigging on state contracts', to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[15] During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[16]

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been 'under-enforcement' by the DOJ and FTC.[17] State

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publicevents/resale_price_maintenance_under_sherman_act_and_federal_trade_commission_act/abarr.pdf.

12 Antitrust Federalism, *supra* note 3, at 20; see also Houck Report, *supra* note 5, at 2-3.

13 Antitrust Federalism, *supra* note 3, at 20.

14 Michael Brockmeyer, Report on the NAAG Multi-State Task Force, 58 Antitrust L.J. 215, 216 (1989) (Brockmeyer Report); Antitrust Federalism, *supra* note 3, at 20; Houck Report, *supra* note 5, at 3.

15 Houck Report, *supra* note 5, at 2-3; Antitrust Federalism, *supra* note 3, at 20; Brockmeyer Report, *supra* note 14, at 216.

16 Antitrust Div. Manual, *supra* note 10, at VII-9, VII-12; Press Release, US Dep't of Justice, Antitrust Div., US District Court Blocks Anthem's Acquisition of Cigna (8 February 2017), available at www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna; Press Release, US Dep't of Justice, Antitrust Div., US District Court Blocks Aetna's Acquisition of Humana (23 January 2017), available at www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana; Press Release, US Dep't of Justice, Antitrust Div., Supreme Court Rejects Apple's Request to Review E-Books Antitrust Conspiracy Findings (7 March 2016), available at www.justice.gov/opa/pr/supreme-court-rejects-apples-request-review-e-books-antitrust-conspiracy-findings; Press Release, US Dep't of Justice, Antitrust Div., Justice Department and New York Attorney General Secure Settlement with New York City Tour Bus Joint Venture (16 March 2015), available at www.justice.gov/opa/pr/justice-department-and-new-york-attorney
-general-secure-settlement-new-york-city-tour-bus.

17 FTC Hearings on Competition and Consumer Protection in the 21st Century, National Association of Attorneys General Submission of Public Comment of 43 State Attorneys General at 16 (11 June 2019),

antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[18]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

- In their joint investigation into the *T-Mobile/Sprint* merger, nearly 20 state attorneys general have sued to block the transaction even though the DOJ, along with seven state attorneys general, have approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who has been leading the states' challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: 'The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger's harm to consumers, workers, and innovation.'[20]
- The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting 'no-poach' agreements (i.e., where competitors for employees agree not to recruit or hire each other's employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of 'no-poach' clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[21]

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available at www.texasattorneygeneral.gov/sites/default/files/images/admin/2019/Press/Comment_Submitted_by_National_Association_of_Attorneys_General.pdf.

18 See, e.g., Aldrin Brown, FTC v. Qualcomm: DOJ Intervention Proves Pivotal in Stay of Ruling by Appeals Court, PaRR (27 August 2019), available at https://app.parr-global.com; John D McKinnon & James V Grimaldi, Justice Department, FTC Skirmish Over Antitrust Turf, Wall St. Journal (5 August 2019), available at www.wsj.com/articles/justice-department-ftc-skirmish-over-antitrust-turf-11564997402; Brian Fung & Jessica Schneider, US Justice Department Asks Judge to Pause Antitrust Case Against Qualcomm, CNN Business (16 July 2019), available at www.wsj.com/articles/justice-department-ftc-skirmish-over-antitrust-turf-11564997402.

19 Press Release, New York Office of the Attorney General, AG James: Illinois Adds to States' Momentum by Joining Lawsuit Blocking T-Mobile/Sprint Megamerger (3 September 2019), available at https://ag.ny.gov/press-release/ag-james-illinois-adds-states-momentum-joining-lawsuit-blocking-t-mobilesprint; Press Release, US Dep't of Justice, Antitrust Div., Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (26 July 2019), available at www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package.

20 Press Release, New York State Office of the Attorney General, AG James: T-Mobile/Sprint Megamerger Remains a Bad Deal for Consumers, Innovation, and Workers (26 July 2019), available at www.ag.ny.gov/press-release/ag-james-t-mobilesprint-megamerger-remains-bad-deal-consumers-innovation-and-workers.

21 Letter from Diana Moss *et al.*, President, American Antitrust Institute to Makan Delrahim *et al.*, Assistant Attorney General, US Dep't of Justice, Antitrust Div., at 3–13 (2 May 2019), available at

- None of the more than 20 state attorney general offices that actively investigated the *AT&T/Time Warner* merger joined the DOJ's unsuccessful challenge to the transaction despite the DOJ's concerted effort to secure their support.[22] In fact, nine state attorneys general filed an *amicus* brief opposing the DOJ's appeal of the trial court's decision.[23]
- After the FTC declined to seek any Colorado-related remedies in connection with Optum's acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: 'I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.'[24]
- After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into 'Big Tech' companies even though the DOJ and FTC have ongoing investigations into these companies.[25]

Given that companies will increasingly have to engage with state attorneys general in a meaningful manner with respect to antitrust matters, this chapter discusses key issues related to state antitrust enforcement in the United States. Specifically, this chapter discusses:

- the federal and state antitrust laws under which state enforcers operate;
- the processes through which state enforcers coordinate with each other and their federal counterparts;
- the opportunity for coordination and conflict between state enforcers and private counsel during litigation;
- strategic and practical considerations when engaging with state attorneys general; and
- certain noteworthy enforcement actions that state enforcers have recently prosecuted.

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www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf.

22 Joe Concha, DOJ Asking States to Help Block AT&T-Time Warner Merger: Report, The Hill (15 November 2017), available at www.thehill.com/homenews/media/360523-doj-asking-states-to-help-block-att-time-warner-merger-report.

23 Bryan Koening, 9 AGs, Experts, Biz Groups Back AT&T-Time Warner Merger, Law360 (27 September 2018), available at www.law360.com/articles/1086840/9-ags-experts-biz-groups-back-at-t-time-warner-merger.

24 Press Release, Office of the Colorado State Attorney General, Antitrust Challenge and Settlement to the United Health Group and DaVita Merger Will Safeguard Competition, Cost, and Quality Healthcare for Seniors in the Colorado Springs Area (19 June 2019), available at https://coag.gov/press-releases/06-19-19/.

25 Press Release, New York State Office of the Attorney General, AG James Investigating Facebook for Possible Antitrust Violations (6 September 2019), available at https://ag.ny.gov/press-release/ag-james-investigating-facebook-possible-antitrust-violations; Ylan Muia, States Ramp Up Pressure on Federal Regulators to Rein in Big Tech, CNBC (12 June 2019), available at www.cnbc.com/2019/06/12/states-ramp-up-pressure-on-federal-regulators-to-rein-in-facebook-apple-google.html; John D McKinnon & Brent Kendall, States to Move Forward with Antitrust Probe of Big Tech Firms, Wall St. Journal (19 August 2019), available at www.wsj.com/articles/attorneys-general-to-move-forward-with-antitrust-probe-of-big-tech-11566247753.

Statutory regime governing US state antitrust enforcement

Civil enforcement of federal antitrust laws

Enforcement actions on behalf of state governmental entities

Under the federal antitrust laws, state attorneys general have the express authority to bring civil actions on behalf of their state, municipalities, and governmental entities for harm suffered when directly purchasing goods or services.[26] In bringing such actions, state attorneys general can seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney's fees.[27]

In actions seeking monetary relief, state attorneys general typically allege that the state plaintiffs were forced to pay higher prices by an unlawful horizontal conspiracy, such as a price-fixing or bid-rigging scheme, and seek to recover the overcharges.[28] In some cases, state attorneys general have sought to recover damages arising out of anticompetitive unilateral conduct, such as overcharges paid by state governmental entities due to a defendant's actual or attempted monopolisation of a specific market.[29]

In seeking injunctive relief, state attorneys general often argue that such relief is proper because the business practice or transaction in question – in addition to harming the state plaintiffs – has or will cause injury to the state's general economy.[30] While general harm to a state's economy can serve as a basis for injunctive relief, state attorneys cannot base their request for damages on such harm.[31]

Parens patriae enforcement actions

A well-settled principle in the United States' legal system is that 'the States have a quasi sovereign interest in protecting their citizens from ongoing economic harm'.[32] Consequently, the federal antitrust laws expressly authorise state attorneys general to file *parens patriae* actions in federal court that seek to redress the harm suffered by their citizens due to federal antitrust violations.[33] In providing state attorneys general with *parens patriae* authority, the federal antitrust laws permit state antitrust enforcers to seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney's fees.[34] State attorneys general have been empowered to seek such broad and substantial relief on behalf of their citizens to allow them 'to deter further economic harm and to obtain relief for the injury inflicted on their economies and their citizens'.[35]

26 15 U.S.C. Sections 15, 26.

27 15 U.S.C. Sections 15(a), 26.

28 See ABA State Enforcement Handbook, *supra* note 2, at 21.

29 id.

30 See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-61 (1972); *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 450 (1945).

31 See *Standard Oil Co.*, 405 U.S. at 261-64.

32 *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982) ('[A] State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general . . . .').

33 15 U.S.C. Section 15c.

34 id., Section 15c(a)(2).

35 See, e.g., *In re Electronic Books Antitrust Litig.*, 14 F. Supp.3d 525, 531 (S.D.N.Y. 2014) ('*e-Books Litigation*').

In exercising their *parens patriae* authority, state attorneys general have often sought to protect their citizens and state economies from the harm caused by anticompetitive business practices. For example, in the *e-Books Litigation*, 33 state attorneys general alleged that Apple, Inc and various book publishers unlawfully conspired to fix the prices of electronic books, which resulted in their citizens paying higher prices and harm to their states' general economies.[36] Ultimately, these state attorneys general, working alongside private class counsel, secured settlements from the defendants that provided nearly US$600 million in direct refunds to their citizens.[37] In a pending lawsuit brought against various manufacturers of generic pharmaceuticals, 44 state attorneys general have alleged that the defendants unlawfully conspired to fix the prices for numerous generic drugs, which forced their states and citizens to pay billions of dollars in overcharges, as well as significantly harmed their states' general economies.[38]

State attorneys general have also invoked their *parens patriae* authority to protect their citizens and state economies from the harm caused by anticompetitive transactions. For instance, in their pending challenge to T-Mobile's proposed acquisition of Sprint, nearly 20 state attorneys general have alleged that the transaction will result in their residents paying higher prices for lower quality mobile phone services as well as harm to their states' general economies.[39] Likewise, the state attorneys general that joined the DOJ's successful challenges to the proposed *Anthem/Cigna* and *Aetna/Humana* mergers alleged that these mergers would have harmed their citizens and the general economies of their states by reducing the number of large health insurance providers from five to three.[40]

There are, however, important limitations on the *parens patriae* authority conferred to state attorneys general under the federal antitrust laws. For instance, the monetary relief sought by state attorneys general must: (1) arise out of a Sherman Act violation;[41] (2) have been incurred by natural persons residing in their states (i.e., the losses suffered by business organisations cannot be included in the alleged damages);[42] (3) exclude harm suffered by indirect purchasers of the goods and/or services in question;[43] (4) avoid the risk of multiple recoveries by excluding amounts previously awarded for the same injuries;[44] and (5) arise out of actual financial losses

36 id., at 531-32.

37 Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces the Distribution of $400 Million to Consumers from the Ebooks Settlement with Apple (20 June, 2016), available at https://ag.ny.gov/press-release/ag-schneiderman-announces-distribution-400-million-consumers-ebooks-settlement-apple.

38 See, e.g., Compl. at Paragraphs 1138, 1400-1661, *State of Connecticut et al. v. Teva Pharmaceuticals USA, Inc.* et al., No. 3:19-cv-00710 (D. Ct.) (*Generic Drugs Litigation Complaint*).

39 See, e.g., Redacted Second Am. Compl. at Paragraphs 1-14, *State of New York et al. v. Deutsche Telekom AG*, No.1:19-cv-5434-VM-RWL (S.D.N.Y.) (*T-Mobile Complaint*).

40 See, e.g., Complaint at Paragraphs 1-15, 80, *United States et al. v. Anthem, Inc. et al.*, No. 1:16-cv-01493 (D.D.C.); Complaint at Paragraphs 1-14, 63, *United States et al. v. Aetna, Inc. et al.,* No. 1:16-cv-01494 (D.D.C.).

41 15 U.S.C. Section 15c(a)(1).

42 id.

43 See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733 (1977); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 218-19 (1990); *In re Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1295-96 (D. Md. 1981).

44 15 U.S.C. Section 15c(b)(3).

rather than general harm to their state's economy.[45] Moreover, state attorneys general must provide their residents with adequate notice of the lawsuit and a meaningful opportunity to opt out of the litigation.[46]

In seeking to prove the monetary harm suffered by their citizens, state attorneys general can employ many of the same methods utilised by private plaintiffs. In price-fixing cases, for example, state attorneys general can prove the claimed aggregate damages by utilising 'statistical or sampling methods', 'comput[ing[[the] illegal overcharges', or relying on any other methodology deemed 'reasonable' by the court.[47] In addition, a number of state antitrust laws authorise their state attorney general to hire private lawyers to handle *parens patriae* actions, which the state attorneys general challenging the *T-Mobile/Sprint* merger have done.[48]

Civil enforcement of state antitrust laws

Most states have enacted state antitrust laws that are comparable to Sections 1 and 2 of the Sherman Act.[49] In addition, some states have passed antitrust laws that are similar to Sections 3 and 7 of the Clayton Act and the Robinson-Patman Act.[50] These state antitrust laws typically contain provisions expressly requiring that 'they be construed in conformity with comparable [f]ederal antitrust statutes'.[51]

State antitrust statutes typically provide state attorneys general with broad authority to investigate possible violations, including the power to 'issue civil investigative demands compelling oral testimony, the production of documents, and responses to written interrogatories to individuals and corporations'.[52] Like the federal antitrust laws, most state antitrust laws authorise state attorneys general to file civil lawsuits on behalf of their states and state governmental entities whenever a violation has caused them to suffer harm in their capacity as direct purchasers of goods or services, as well as *parens patriae* actions on behalf of their citizens.[53]

In bringing enforcement actions under state antitrust laws, state antitrust enforcers typically have the authority to seek a broad range of relief, including treble damages, disgorgement of unlawful profits, injunctions, and attorney's fees and costs.[54] In some states, antitrust enforcers

45 See, e.g., *Standard Oil Co.*, 405 U.S. at 260-61.

46 15 U.S.C. Section 15c(a)(2).

47 id., at Section 15d.

48 *T-Mobile Complaint*, *supra* note 39, at 35.

49 ABA State Enforcement Handbook, *supra* note 2, at 23.

50 id. In states that have not passed antitrust laws, the state attorneys general often seek to regulate potentially anticompetitive transactions and business practices through the federal antitrust laws and/or state consumer protection laws.

51 Antitrust Div. Manual, *supra* note 10, at VII-10.

52 id.

53 ABA State Enforcement Handbook, *supra* note 2, at 22–23. For a discussion on constitutional and non-constitutional challenges related to the enforcement of state antitrust laws, see id. at 23–30.

54 id., at 22; see also Antitrust Div. Manual, *supra* note 10, at VII-10. In addition to state attorneys general, some states have authorised other states agencies – such as district attorneys, county prosecutors, departmental attorneys, and special attorneys – to bring civil antitrust enforcement actions. See, e.g., Ariz. Rev. Stat. Section 44-1407; Cal. Bus. & Prof. Code Section 16754.

can also seek to have a contract declared void; suspend a violator's ability to be awarded state contracts for a certain period; rescind an out-of-state company's ability to do business within the state; and terminate an in-state company's corporate charter.[55]

Moreover, state attorneys general can often seek relief on behalf of indirect purchasers when exercising their state law *parens patriae* authority. This is an important distinction between the *parens patriae* authority that state attorneys general enjoy under federal and state antitrust laws. The United States Supreme Court's decision in *Illinois Brick Co. v. Illinois* precludes state attorneys general from seeking damages on behalf of indirect purchasers in *parens patriae* actions brought under the federal antitrust laws.[56] In direct response to this decision, nearly 25 states and the District of Columbia have passed '*Illinois Brick* repealer' laws that expressly authorise state attorneys general to recover damages on behalf of indirect purchasers that were harmed by state law antitrust violations.[57] Notably, the United States Supreme Court has rejected constitutional challenges to these laws on the bases that states are free to permit indirect purchasers to recover damages given that (1) Congress has not passed legislation that preempts such state laws and (2) allowing indirect purchaser recovery under state law does not frustrate the legislative purpose of the federal antitrust laws.[58] The states that have passed *Illinois Brick* repealer laws include California, New York and Illinois.[59]

Criminal enforcement of state and federal antitrust laws

While many states have criminal penalties for state law antitrust violations, '[f]ew state attorneys general's offices have significant experience prosecuting criminal antitrust violations.'[60] Indeed, most state criminal prosecutions for antitrust violations have involved local bid-rigging schemes.[61]

Coordination in multistate investigations and litigation

Coordination among state antitrust enforcers

State attorneys general often coordinate their investigation and prosecution of antitrust matters with their counterparts in other states.[62] To help ensure that these coordinated efforts are conducted in an efficient and effective manner, the NAAG has created an Antitrust Committee,

55 ABA State Enforcement Handbook, *supra* note 2, at 22-23.

56 431 U.S. at 733.

57 ABA State Enforcement Handbook, *supra* note 2, at 24.

58 *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989).

59 See Cal Bus. & Prof. Code Section 16750(a); N.Y. Gen. Bus. Laws Section 340(6); Ill. Comp. Stat. Ann. 10/7(2).

60 Antitrust Div. Manual, *supra* note 10, at VII-11.

61 See, e.g., Press Release, District Attorney Office for New York County, DA Vance Announces Charges Against Former Bloomberg LP and Turner Construction Executives in $15M Bid-rigging and Commercial Bribery Conspiracy (11 December 2018), available at www.manhattanda.org/da-vance-announces-chargers-against-former-bloomberg-lp-and-turner-construction-executives-in-15m-bid-rigging-and-commercial-bribery-conspiracy/; *Michigan v. Chesapeake Energy Corp.*, No. 14-0140-FY (Mich. Cir. Ct.); *Ohio v. Quattro, Inc.* (Ohio Ct. C.P. 2012); Consent Judgment, *New York v. Candle Bus. Sys.,* No. 402805-02 (N.Y. Sup. Ct.).

62 For additional information regarding coordination among state attorney general offices in multistate antitrust investigations and litigation, see ABA State Enforcement Handbook, *supra* note 2, at 42-44.

which 'is responsible for all matters relating to antitrust policy'.[63] This committee is comprised of five state attorneys general[64] and is responsible for promoting effective state antitrust enforcement by developing the NAAG's antitrust policy positions and by facilitating communications among state enforcers regarding investigations, litigation, legislative matters and competition advocacy initiatives, among other things.[65]

In 1983, the NAAG established a Multistate Antitrust Task Force that is 'comprised of state staff attorneys responsible for antitrust enforcement in their states'.[66] This task force 'recommends policy and other matters for consideration by the Antitrust Committee, organizes training seminars and conferences, and coordinates multistate investigations and litigation'.[67] The task force is chaired by a person appointed by the head of the NAAG's Antitrust Committee[68] and has a representative from each NAAG member state.[69] The chair of the task force serves as 'the principal spokesperson for the states on antitrust enforcement'.[70]

The NAAG's Multistate Antitrust Task Force does not handle actual investigations or litigation. Instead, such coordination usually occurs through working groups established by the states involved in an investigation or litigation. In most multistate investigations, the working group will designate a state responsible for leading the investigation. The lead state is often a state that has the most relevant experience and can dedicate the appropriate level of resources to the investigation, and has a sufficient interest in ensuring that the investigation is handled in an effective and efficient manner (i.e., the transaction or business practice in question could potentially impact a significant number of consumers or commerce within its state). (If an investigation is sufficiently large or complex, such as a mega-merger involving numerous markets, the states may create an executive committee that oversees the working group as well as designate multiple lead states.)

In conducting the investigation, the working group will often have a participating state issue information requests under its authorising state laws and thereafter obtain waivers from the respondent that permit the state to share the information with the other participating states.[71] As the investigation progresses, the lead state will typically provide the working group with oral and written status reports detailing the work that has been completed, summarising the factual record that has been developed, identifying any key factual and legal issues, and setting forth proposed next steps. Once the working group has completed its fact-gathering, the lead state will prepare a recommendation indicating whether an enforcement action should be brought and, if so, whether it would be appropriate to enter a settlement. This recommendation is typically shared with the working group first and then with any other interested states.

63 Antitrust Div. Manual, *supra* note 10, at VII-11.

64 The current members of the NAAG's Antitrust Committee are: (1) Attorney General Phil Weiser (Colorado), Co-Chair; (2) Attorney General Herbert H Slatery III (Tennessee), Co-Chair; 3) Attorney General Tom Miller (Iowa); (4) Attorney General Letitia A. James (New York); and (5) Attorney General Mark Herring (Virginia). See NAAG Antitrust Committee webpage, available at www.naag.org/naag/committees/naag_standing_committees/antitrust-committee.php.

65 id.

66 Antitrust Div. Manual, *supra* note 10, at VII-12.

67 id.

68 The current chair of the taskforce is Assistant Attorney General Sarah Allen of the Virginia Attorney General's Office. See NAAG Antitrust Committee webpage, *supra* note 64.

69 id.

70 Antitrust Div. Manual, *supra* note 10, at VII-12.

71 id.

If the lead state recommends that a contested enforcement action be filed, such a recommendation will often be accompanied with briefing material setting forth the legal and factual basis for the recommendation and a draft complaint. After reviewing this material, each state makes an independent determination on whether to join the enforcement action. If more than one state decides to join the enforcement action, the participating states will often file a single complaint in federal court that alleges both federal antitrust causes of action and pendent state law claims. In most cases, the complaint will invoke the participating states' federal and state law *parens patriae* authority.

Once the decision to file a contested enforcement action has been made, the participating states will often create a litigation working group that coordinates and handles their day-to-day litigation tasks, such as pre-trial motion practice, fact and expert discovery, and witness preparation. In addition, the participating states typically create committees that help oversee the litigation and provide input on important strategic decisions and policy-related issues. The most common committees established in multistate enforcement actions include an executive committee, a discovery committee, an expert committee and a settlement committee.

To help cover the cost of prosecuting contested enforcement actions, the participating states typically enter into cost-sharing agreements. These cost-sharing agreements usually provide that common litigation expenses, such as expert and vendor fees, shall be apportioned based on the participating states' population, thereby requiring larger states to cover a larger portion of the costs. As a result, larger states, such as New York and California, have recently begun advocating for the adoption of a hybrid cost-sharing model that determines each state's contribution based on a pro rata formula and population figures. In certain instances, the cost-sharing agreements will also specify how any settlement or judgment shall be allocated among the participating states once any common litigation expenses have been paid.

In addition to cost-sharing arrangements, state antitrust enforcers sometimes seek to fund enforcement actions through grants from the NAAG's 'milk fund', which was established in 1989, and helps cover expert fees in antitrust investigations and litigation. This fund was set up using portions of the settlements that were secured in a series of bid-rigging cases involving school milk contracts in New York.[72] Over the years, the NAAG has maintained the 'milk fund' by requiring the repayment of grants provided to enforcement actions that result in a settlement or judgment and by obtaining contributions from recoveries obtained in other antitrust enforcement actions.[73] More recently, state attorneys general have also sought to help finance multistate antitrust investigations and enforcement actions through the NAAG's 'Volkswagen fund', which was established in 2017 following settlements that state attorneys general reached with Volkswagen for emissions standards violations.[74]

72 See *New York v. Dairylea Coop., Inc.*, 81 Civ. 1891 (S.D.N.Y.).

73 The 'milk fund' is administered by a three-person committee comprised of the NAAG's president, the chair of the NAAG's Antitrust Committee and the New York Attorney General. See ABA State Enforcement Handbook, *supra* note 2, at 48.

74 NAAG, Volkswagen Settlement Fund Committee website, available at www.naag.org/naag/committees/naag-special-committees/volkswagen-settlement-fund-committee.php.

Coordination among state and federal enforcers

Cooperation in civil matters

The level and nature of coordination between state and federal antitrust enforcers can vary based on whether their enforcement philosophies and objectives are aligned. For instance, the current level of coordination between the DOJ and state attorneys general appears to be significantly lower than in recent history as reflected by the conflicting enforcement decisions reached in multiple high-profile investigations and certain new restrictions that the DOJ has implemented with respect to the sharing of investigative material with state attorneys general.

Likewise, the collaboration between state and federal antitrust enforcers can vary based on the particular circumstances of an investigation, such as the subject matter of the investigation and the resources and past investigative experience of the state attorneys general involved in the investigation. For instance, the FTC and state attorneys general have a long history of working hand-in-hand on investigations and litigation related to hospital mergers given that such transactions have particularly local impacts.[75]

As a general matter, however, state and federal antitrust enforcers (especially their career staffs) seek to maximise their coordination when conducting parallel investigations because they have long recognised that '[e]ffective cooperation between [them] benefits the public through the efficient use of antitrust enforcement resources' while 'promot[ing] consistent enforcement [decisions]' and 'minimiz[inig] the burden of duplicative investigations'.[76] While state and federal enforcers have most often coordinated on merger investigations, they have a strong track record of working closely on civil non-merger investigations.[77]

During state-federal investigations, the DOJ or FTC typically take the lead because they have greater resources (including large teams of lawyers and economists), significant expertise in the relevant industries and oftentimes the business operations of the companies being investigated, and extensive experience conducting large and complex investigations. If an investigation involves numerous states, the state attorneys general typically establish an executive committee to coordinate their work and serve as the point of contact for the DOJ or FTC's investigative team. During the investigation, the DOJ or FTC's investigative team will provide the participating state attorney general offices with regular updates on the status of the investigation and any key issues.

75 Joseph J Simons, Chairman, Federal Trade Commission, Remarks at NAAG Winter Meeting at 3–4 (5 March 2019), available at www.ftc.gov/system/files/documents/public_statements/1466558/naag_remarks_chmn_simons_0.pdf.

76 Antitrust Div. Manual, *supra* note 10, at VII-9.

77 Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L.J. 673, 680-84 (2003). For instance, the DOJ and 21 state attorneys general partnered in the investigation that led to the successful monopolisation case brought against Microsoft in 1998. See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Indeed, the *Microsoft* case marked the first time that the DOJ and state attorneys general tried a case together. Jay L Himes, Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case, 11 Geo Mason L. Rev. 37, 51 (2002). The *e-Books Litigation* is another example of effective coordination between state and federal antitrust enforcers on an important and complex civil conduct investigation and trial. Renata B Hesse, Acting Assistant Attorney General, US Dep't of Justice, Antitrust Div., Protecting Competition Across 50 United States: Advocacy and Cooperation in Antitrust Enforcement at 3–4 (17 November 2016) (Hesse Speech), available at www.justice.gov/opa/speech/file/911166/download.

At the conclusion of the investigation, the DOJ or FTC's investigative team will advise the state attorneys general whether it believes the facts and law support the filing of an enforcement action and, if so, whether a settlement should be entered with the companies being investigated. Each state participating in the investigation makes an independent determination on whether to agree with the DOJ or FTC's conclusions. In most instances, the state attorneys general reach the same enforcement decision as the DOJ or FTC. However, there have been instances where the state attorneys general reached a very different enforcement decision as shown by the recent *AT&T/Time Warner* and *T-Mobile/Sprint* merger investigations.

If state and federal antitrust enforcers file a contested enforcement action, the DOJ or FTC will typically take the lead in litigating and trying the case. However, the state attorneys general will continue to play an important and substantive role, including assisting with pre-trial submissions, offensive and defensive depositions, expert reports, and trial witness preparation.[78]

Coordination between state enforcers and private counsel

In general, there often is an overlap between the victims of antitrust violations that state attorneys general seek to represent when suing for damages in their *parens patriae* capacity and those that private class action counsel seek to represent. This overlap creates the opportunity for close coordination as well as direct conflict. On the one hand, this overlap in 'clients' can lead to significant conflict because state antitrust enforcers and class counsel 'can differ sharply in their respective goals, approaches, and incentives'.[79]

On the other hand, this overlap in 'clients' can result in significant coordination because state antitrust enforcers and private counsel can realise meaningful efficiencies by working together during fact and expert discovery, and can ultimately obtain a better result by 'presenting a united front in settlement discussions'.[80] In addition, state antitrust enforcers can benefit from having access to class counsel's 'more experienced trial attorneys and readier access to economic experts'.[81] In turn, class counsel can utilise the state antitrust enforcers' 'pre-complaint discovery' to defeat any motions to dismiss and implement an effective fact and expert discovery plan.[82] Moreover, class counsel can avoid various class certification issues when state attorneys general invoke their *parens patriae* authority.[83]

Oftentimes, the degree of coordination between state antitrust enforcers and class counsel will depend on various factors, such as the stage of the case, the state attorneys general and private lawyers involved in the case, and each group's perceptions of possible outcomes.[84] For instance, state antitrust enforcers are generally less inclined to coordinate with class counsel where class counsel is perceived as simply filing a follow-on action that seeks to piggyback off the work conducted by government enforcers during their investigation and litigation.[85] In con-

78 As noted above, state and federal antitrust enforcers typically do not coordinate on criminal matters because '[f]ew state attorneys general's offices have significant experience prosecuting criminal antitrust violations.' Antitrust Div. Manual, *supra* note 10, at VII-10.

79 ABA State Enforcement Handbook, *supra* note 2, at 44.

80 Kevin J O'Connor, Is the Illinois Brick Wall Crumbling?, 15 Antitrust 34, 36 (Summer 2001).

81 Houck Report, *supra* note 5, at 14.

82 id.

83 O'Connor, *supra* note 80, at 37.

84 id., at 36.

85 id.

trast, state attorneys general are more inclined to coordinate with class counsel that has made significant investments in developing the case and demonstrated a genuine desire to secure the best outcome for consumers rather than simply maximising their fee award.[86]

The *e-Books Litigation* is a recent example of effective coordination between state attorneys general and class counsel that resulted in consumers receiving nearly US$600 million in direct repayments from the defendants. Another example of effective coordination between state attorneys general and class counsel are the lawsuits brought by 23 state attorneys general and private class counsel related to a vitamin price-fixing conspiracy that resulted in US$305 million in settlements for indirect purchasers.[87]

Strategic and practical considerations when engaging with state attorneys general

Below are several factors that parties should consider when assessing the most effective manner in which to engage with state antitrust enforcers prior to or during an investigation.

Unlike the leaders of the DOJ Antitrust Division and FTC, most state attorneys general are elected officials who have to answer to their constituents. As a result, state attorneys general might be more inclined to take into consideration possible public reaction when making an antitrust enforcement decision. In addition, they might be more willing to listen to the views of key players in their state's electoral process – such as influential lawmakers, important employers and labour unions, and powerful interest groups – prior to making an enforcement decision. Thus, the efforts of parties seeking to persuade an attorney general office to reach a specific enforcement decision could be helped by having these types of groups advocate – either through public statements or direct communications with state attorneys general – for their desired outcome. Such third-party advocacy is likely to be more persuasive and effective when presented within an antitrust analytical framework.

Given that state antitrust enforcers have recently become more active and shown a willingness to act separately from their federal counterparts, parties should assess early on whether any state attorneys general are likely to be particularly interested in an investigation and, if so, determine whether their objectives would be served by proactively engaging with these state attorneys general. Such proactive engagement at the outset of an investigation could take the form of early meetings with senior leaders and investigative staff, written submissions that frame the key issues, or expressing a willingness to respond to targeted information requests. Factors that may influence a state attorney general office's interest in an antitrust matter could include whether a large number of residents would be or have been harmed by a transaction or business practice; whether an investigation relates to an important industry in the state; whether a merger may result in significant job losses in the state; or whether the issues involved in an investigation have received considerable local or national media attention.

While state attorneys general have recently shown a greater willingness to bring enforcement actions when federal enforcers fail to do so, the inability to rely on the DOJ or FTC's expertise and resources poses challenges that could make state enforcers more reluctant to bring cases that present higher litigation risks, such as vertical merger challenges or conduct that would require a full blown rule of reason analysis. Accordingly, parties should take into account

86 id., at 36–37; Houck Report, *supra* note 5, at 14.

87 O'Connor, *supra* note 80, at 37.

the theories of harm that are likely to arise in an investigation and whether federal enforcers are likely to act on such theories when formulating and adjusting their engagement strategy with respect to state enforcers.

There are significant differences among state attorneys general. Some offices have a more pro-enforcement culture and philosophy when it comes to antitrust matters. Certain offices have more experienced staff and greater resources that enable them to take an aggressive enforcement approach. Consequently, parties should take these differences into account when determining their strategy for engaging with state antitrust enforcers. For instance, these differences may cause parties to seek to set the tone for an investigation early on by lining up the support of potentially 'friendlier' state attorneys general through immediate and proactive engagement with them. These differences could also cause parties to focus their efforts on state attorneys general that are viewed as leaders within the state antitrust enforcement community.

If faced with parallel state and federal investigations, parties should generally welcome and encourage coordination between the investigative teams. Such coordination helps limit the time, burden and cost associated with overlapping investigations. In addition, such coordination can help parties minimise the risk of conflicting enforcement decisions that can disrupt their business operations, hurt employee morale, and create challenges with important customer and supplier relationships.

Similarly, parties faced with parallel state and federal investigations should ensure that the positions they take before both investigative teams are consistent because state and federal enforcers often share information with each other. If they believe that parties are misleading them in any way, this can prolong both investigations, increase the time and money that parties have to spend on the investigations, and make it much harder to obtain the desired outcome.

Certain state laws provide less confidentiality protection than federal laws. Thus, parties should familiarise themselves with each state's confidentiality protections for material produced during antitrust investigations when negotiating the scope of information requests and any related confidentiality agreements.

Given that state antitrust enforcers tend to have small staffs and limited resources, they may consider closing or limiting the scope of an investigation if they believe that consumer harm is not sufficiently widespread to justify the expenditure of those resources. Similarly, state antitrust enforcers may take a 'wait and see approach' in an investigation if there is pending private litigation that could adequately protect consumers and the competitive process. Thus, while not conceding any wrongdoing, parties seeking to persuade state attorneys to close or curtail an investigation could highlight the limited alleged harm or the fact that such harm (if any) would likely be adequately addressed through other proceedings.

Recent examples of state enforcement litigation

Cartel cases

In recent years, the states have been at the forefront of several cartel-related civil litigations. Their role in such cases has varied from taking the lead entirely and breaking from their federal counterparts, to working with the federal government and private plaintiffs.

The most prominent example of the state attorneys general taking the lead in civil cartel litigation is their role in the massive (and continuously expanding) *In re Generic Pharmaceuticals Pricing Antitrust Litigation*.[88] In this case, the attorney generals for 47 states and the District of Columbia and Puerto Rico, led by the Connecticut Attorney General, joined a complaint after an extensive investigation that alleges an industry-wide conspiracy to inflate the price of certain generic drugs.[89] Two years later, the state attorneys general for 43 states and Puerto Rico, again led by the Connecticut Attorney General, filed a new, second complaint against several manufacturers and, notably, many individuals. The newer complaint, nearly 500 pages long and concerning over 100 different drugs, alleges 'an overarching conspiracy, the effect of which was to minimize if not thwart competition across the generic drug industry'.[90]

The DOJ, by contrast, obtained two guilty pleas from executives in late 2016. The allegations in the executives' charging documents concerned only two drugs, as opposed to the sprawling conspiracy alleged by the states.[91] Since these guilty pleas, as of the time of this writing, the only other public action the DOJ has taken in its generic drugs investigation has been to obtain a deferred prosecution agreement from the executives' corporate employer that soley covers a single drug.[92] This, of course, does not mean that the allegations the states are pursuing have merit or that the DOJ will not ultimately cover more ground, but to date, the states have undeniably taken the more aggressive approach in this sweeping investigation.

The *Generic Drugs MDL* also illustrates the advantages and challenges of coordination with a large contingent of state attorneys general in multi-district litigation. The state attorneys general can be extremely valuable allies for plaintiffs in multi-district litigation. Unlike private plaintiffs, they have the benefit of pre-litigation compulsory process and any complaint they file will benefit from their ability to conduct pre-litigation discovery. To illustrate, the states' later-filed complaint in the *Generic Drugs MDL* was based on:

> *(1) the review of many thousands of documents produced by dozens of companies and individuals throughout the generic pharmaceutical industry, (2) an industry-wide phone call database consisting of more than 11 million phone call records from hundreds of individuals at various levels of the Defendant companies and other generic manufacturers, and (3) information provided by several as-of-yet unidentified cooperating witnesses who were directly involved in the conduct alleged herein.*[93]

88 No. 2:16-md-02724 (E.D. Pa.) (*Generic Drugs MDL*).

89 See, e.g., Plaintiff States' Consolidated Am. Compl., *State of Connecticut et al. v. Actavis Holdco U.S., Inc. et al.,* No. 17-cv-3768 (E.D. Pa.).

90 *Generic Drugs Litigation* Complaint, *supra* note 38, at Paragraph 6.

91 Information, *United States v. Glazer*, No. 16-cr-506 (E.D. Pa.); Information, *United States v. Malek*, No. 16-cr-508 (E.D. Pa.).

92 Information, *United States v. Heritage Pharmaceuticals Inc*., No. 19-cr-316 (E.D. Pa.).

93 Complaint at 3, *State of Connecticut et al. v. Teva Pharmaceuticals USA, Inc. et al,* No. 19-cv-00710 (D. Conn.).

In only the rarest of circumstances could a private antitrust plaintiff hope to gain access to so much information prior to filing an action. Therefore, by simply being a part of a multi-district litigation, the states can be tremendous sources of information and, to the extent permitted, can significantly assist private plaintiffs.

On the other hand, states can (and do) have unique interests from private litigants and may try to distance themselves, as has occurred in the *Generic Drugs MDL*. There, the states filed a motion to establish a separate government track for case management purposes, apart from the private plaintiffs. Specifically, the states sought a ruling that would exempt them from the court's requirement to file complaints on a drug-by-drug basis.[94] Among other things, the states highlighted the 'fundamental differences' between state plaintiffs and class plaintiffs,[95] and that the states' theory was based on an 'extensive multi-year investigation, including information . . . that was unavailable to the private plaintiffs when pleading their separate complaints'.[96] Finally, the states noted that they were not part of the multidistrict litigation when the court issued its original order requiring drug-by-drug complaints.[97] The court granted the states' request with 'no hesitation'.[98]

While the *Generic Drugs MDL* may not be wholly unique, it has previously been less common for states to take the leading role in cartel-related civil litigation, even where states may have started the investigation. The *e-Books Litigation* discussed above is illustrative of what has been the more traditional dynamic, although that may well be changing. As senior DOJ officials have noted, the *e-Books Litigation* serves as a 'remarkable example of effective federal-state cooperation', where the investigation was opened by the Texas Attorney General's Office; early investigative work done by the state attorney general offices in Texas and Connecticut enabled the DOJ to get up to speed quickly; one of the best documents in the case was found during a document review by an Arkansas attorney; depositions taken by Texas and Connecticut lawyers were important during trial; and the states' economist testified at trial, which complemented testimony from the DOJ's economist.[99] Despite the undeniably important role the states played throughout this litigation, the case remained captioned *United States v. Apple Inc.*, and the DOJ took the lead role in establishing liability at trial and prevailing on appeal.

One important feature often seen in cartel-related civil litigation (as was seen in the *e-Books Litigation* and may be seen in the *Generic Drugs MDL*) is the states' *parens patriae* authority. *Parens patriae* suits are powerful tools in several respects. Unlike private class actions, certain attorneys general are granted 'statutory authority to sue in *parens patriae* and need not demonstrate standing through a representative injury nor obtain certification of a class in order to recover on behalf of individuals'.[100] Likewise, a state suit in *parens patriae* can even have a *res*

94 Memorandum of Law in Support of Motion by the Plaintiff States for a Separate Government Track at 2, *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, No. 16-md-02724 (E.D. Pa.).

95 id., at 6 n.7.

96 id,. at 7.

97 id., at 14.

98 6/5/18 Memorandum Opinion, *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, No. 16-md-02724 (E.D. Pa.).

99 Hesse Speech, *supra* note 77, at 3-4.

100 *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 217 (2d Cir. 2013) (citation omitted).

judicata effect in private litigation.[101] For that reason, it is critical for private litigants to be mindful of any *parens patriae* lawsuits and to engage state enforcers early in the process in order to ensure their cooperation as much as possible.

Non-cartel civil conduct cases

State attorneys general have also played pivotal roles in recent non-cartel civil conduct cases. Perhaps most notably is certain states' roles in the *American Express* anti-steering litigation—an unusual rule of reason case that raised novel issues of relevant market definition. In *American Express*, the DOJ and 17 states sued Visa, MasterCard, and American Express over each network's anti-steering rules. Visa and MasterCard settled, but American Express took the case to trial. American Express' anti-steering rules prohibited merchants who accept American Express cards from 'steering customers to alternative credit card brands'.[102] Led by a DOJ trial team, the DOJ and states prevailed after a month-long trial.[103] The district court concluded that '[b]y preventing merchants from steering additional charge volume to their least expensive network, for example, the [anti-steering rules] short-circuit the ordinary price-setting mechanism in the network services market by removing the competitive "reward" for networks offering merchants a lower price for acceptance services'.[104]

American Express, however, appealed the decision and secured a complete reversal of the district court's judgment; the Second Circuit remanded the case with instructions to enter judgment for American Express.[105]

At this point, after a change in presidential administrations and after obtaining several extensions of time to file a petition for writ of *certiorari*, the DOJ dropped out. Led by Ohio, 11 of the original 17 states filed a petition for a writ of *certiorari* seeking review of the Second Circuit's decision.[106] In an interesting twist, the DOJ then filed a brief opposing review of the Second Circuit's decision, while nonetheless arguing the decision was incorrect.[107] Despite the fact that the DOJ, as the lead plaintiff at trial, affirmatively opposed the grant of *certiorari*, the United States Supreme Court agreed to review the case. Ohio took the lead at oral argument (although it split oral argument with the DOJ, which rejoined the states' efforts after *certiorari* was granted).

In a five-to-four decision, the United States Supreme Court affirmed the Second Circuit's decision, concluding that American Express' anti-steering rules did not violate the Sherman Act.[108] While the scope of the decision is beyond the focus of this chapter, the United States Supreme Court addressed novel issues involving relevant markets for two- or multi-sided platforms and appeared to endorse, for the first time, a structured rule of reason analysis.[109]

101 *Alaska Sports Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 774 (9th Cir. 1994).
102 *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 149-50 (E.D.N.Y. 2015).
103 id., at 149–52.
104 id., at 151.
105 *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).
106 Petition for Writ of *Certiorari*, *Ohio v. Am. Express Co.*, No. 16-1454 (S. Ct.).
107 Brief for the United States in Opposition, *Ohio v. Am. Express Co.*, No. 16-1454 (S. Ct.).
108 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).
109 See generally Andrew I Gavil & Jordan L Ludwig, The Many Sides of Ohio v. American Express Co., Antitrust (Fall 2018).

Another high profile non-cartel conduct case brought by a state attorney general is California's case against Sutter Health (*Sutter Health Litigation*). Interestingly, this case followed two private class actions: one brought in the California state court and one brought in the federal court.[110] In the *Sutter Health Litigation*, the California Attorney General alleged that Sutter Health 'unreasonably restrained trade through a variety of anticompetitive [contractual] terms' that fall into three buckets: all-or-nothing terms, which require health plans that offer services at a Sutter Health hospital or related health care provider to also offer the services at every other Sutter Health hospital or related health care provider;[111] anti-incentive terms, which forbid or penalise health plans that use tiered networks or other incentives to incentivise enrollees for choosing a cheaper competing hospital or provider over a more expensive one;[112] and price-secrecy terms, which prohibit health plans from disclosing the prices that Sutter Health negotiated for services offered through the health plan.[113]

Based on these contractual terms, the California State Attorney alleged three violations of California's antitrust statute, the Cartwright Act. The first cause of action was for price tampering, the second for tying and the third for conspiracy to monopolise. The court denied Sutter Health's motion for summary judgment,[114] and subsequently held that, with one potential exception, the state's claims would be adjudicated under the rule of reason.[115] While the details have yet to be made public, Sutter Health recently settled, on the eve of trial, the actions brought by the California State Attorney General and private plaintiffs.[116]

The terms of the settlement will in many ways determine the importance and impact of the *Sutter Health Litigation* but commentators have already noted that this litigation represents a 'landmark case', as it 'is really important for other big health systems and is a clear signal that the state enforcers are looking out for [the challenged business practices] and recognising this as anticompetitive behavior'.[117] If nothing else, 'it reflects a potential expansion of antitrust enforcement from state attorneys general where federal enforcers may be reluctant to intervene.'[118] Commentators have also noted that the private plaintiffs received a significant

110 *UFCW & Employers Benefit Trust v. Sutter Health*, No. CGC14538451 (Cal. Super.) and *Sidibe v. Sutter Health*, No. 12-cv-4854 (N.D. Cal.).

111 Complaint at Paragraphs 113–20. *People of the State of California ex rel. Xavier Becerra v. Sutter Health*, No. CGC-18-565398 (Cal. Super.).

112 id., Paragraphs 121–28.

113 id., Paragraphs 129–32.

114 6/13/19 Order re Sutter's Motion for Summary Judgment or, in the Alternative, Summary Adjudication, *People of the State of California ex rel. Xavier Becerra v. Sutter Health*, No. CGC-18-565398 (Cal. Super.).

115 8/12/19 Order re Antitrust Standards, *People of the State of California ex rel. Xavier Becerra v. Sutter Health*, No. CGC-18-565398 (Cal. Super.).

116 Reed Abelson, Sutter Health to Settle Antitrust Lawsuit, N.Y. Times (16 October 2019), available at https://www.nytimes.com/2019/10/16/health/sutter-hospital-antitrust-california.html.

117 Catherine Ho, Major antitrust case against Sutter over health prices nears trial, San Francisco Chronicle (24 August 2019), available at www.sfchronicle.com/business/article/Landmark-antitrust-case-against-Sutter-over-14374893.php.

118 Michael S McFalls et al., California v. Sutter Health: The State AG Takes Its Gloves Off at 4 (June 2018), available at www.competitionpolicyinternational.com/california-v-sutter-health-the-state-ag-takes-its-gloves-off/.

lift when the California Attorney General decided to join the litigation and adopt their theories of harm becausee it gave 'them more weight than they might otherwise have if brought solely by private plaintiffs'.[119]

Merger litigation

Traditionally, it has been the federal government that has taken the lead on challenging mergers through litigation. But recently, the states have shown that they are willing to independently challenge high-profile mergers even where federal enforcers have opted not to so.

The most notable example by far has been the lawsuit filed by nearly 20 state attorneys generals seeking to block the proposed merger of T-Mobile and Sprint. Led by New York – and before the DOJ had made a final decision one way or the other – nine states and the District of Columbia sued to block the transaction. As has been noted, there does not appear to have ever been another 'situation where state antitrust enforcers went to court to challenge a merger without waiting for a decision by their federal counterparts', or where 'states try to stop a telecommunications merger approved by both the [DOJ] and [Federal Communications Commission]'.[120] Despite its unprecedented nature, the number of states challenging the deal has grown to almost 20, including states that joined after the DOJ announced the remedies that served as the basis for its approval of the transaction. The participating states allege that the four-to-three merger of mobile network operators would increase market concentration to a level that 'significantly exceeds the thresholds at which mergers are presumed to violate the antitrust laws'.[121]

There have been other lower profile, but still significant, instances of states independently flexing their enforcement muscle as well. Notably, states have shown a willingness to seek more aggressive remedies to protect their citizens where the federal government fails to do so. As mentioned above, when Optum sought to acquire DaVita Medical Group, the FTC declined to seek any Colorado-related remedies. The Colorado Attorney General, however, took independent action by filing a complaint under the Colorado Antitrust Act with a consent judgment that sought additional protections in Colorado, namely, precluding UnitedHealth Group (Optum's parent) from enforcing certain exclusivity provisions and from entering into new agreements with certain exclusivity provisions, and keeping in place agreements between DaVita Medical Group and other health plans.[122] In seeking this additional remedy, the Colorado Attorney General stated: 'Traditionally, state attorney general offices have taken a back seat to the federal government in protecting consumers. . . . Today's action is a path-marking step that demonstrates Colorado's commitment to protecting consumers from anti-competitive mergers or other harmful actions.'[123]

119 id.

120 See Brett Kendall & Drew FitzGerald, States' Lawsuit Muddles T-Mobile and Sprint Deal Plans, Wall St. Journal (30 July 2019), available at www.wsj.com/articles/states-lawsuit-muddles-t-mobile-and-sprint-deal-plans-11564495202.

121 T-Mobile Complaint, *supra* note 39, at Paragraph 6.

122 Optum Press Release, *supra* note 24.

123 John Aguilar, FTC signs off on $4.3 billion acquisition of Denver-based DaVita's medical group, The Denver Post (19 June 2019), available at www.denverpost.com/2019/06/19/colorado-davita-unitedhealth-group-merger-approval/.

Overall, merging parties should not neglect state enforcers in attempting to gain approval for a transaction, even if it appears that federal approval is likely. As the above examples show, states are willing to depart from their federal enforcement partners if they believe their citizens' interests and state economies will be harmed by a merger.

Appendix 1

About the Authors

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Juan A Arteaga is a partner in Crowell & Moring's antitrust and white-collar groups. His practice focuses primarily on advising companies, boards of directors, special committees and executives on a broad range of civil and criminal antitrust matters, including litigation, merger reviews, governmental and internal investigations, and counselling regarding various business practices.

Between 2013 and 2017, Mr Arteaga was a senior official in the Antitrust Division of the US Department of Justice. During this period, he served as the Deputy Assistant Attorney General for Civil Enforcement, where he worked on and oversaw numerous civil merger and non-merger investigations and litigations involving various industries. Mr Arteaga also served as the chief of staff and senior counsel to the Assistant Attorney General for the Antitrust Division. While at the Antitrust Division, Mr Arteaga worked on various high-profile merger litigations, including the DOJ's challenges to the *Aetna/Humana*, *US Airways/American Airlines*, *Halliburton/Baker Hughes*, *Electrolux/General Electric*, *Energy Solutions/Waster Control Specialists* and *National Cinemedia/Screenvision* transactions.

Mr Arteaga regularly represents Fortune 500 companies and financial institutions in connection with complex transactions and high-stakes litigation and government investigations. Mr Arteaga has been recognised as a leading practitioner by numerous professional publications and bar associations, including the American Bar Association, New York City Bar Association, Hispanic National Bar Association, *New York Law Journal*, Law360 and the Ethisphere Institute. He has also received numerous awards for his pro bono work and civic service.

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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