

INTRODUCTION TO THE CPI STATES' CHRONICLE EDITION 2020



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...with Colorado Attorney General Phil Weiser



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I want to thank *Competition Policy International* for soliciting and including state voices again this year for a States' Edition of the Antitrust Chronicle. I think it is important to add State opinions, priorities, and recent enforcement actions to those of the federal and international antitrust enforcers, as well as to highlight the great writing talent among state antitrust attorneys. For those two reasons, I sought to incentivize more advocacy writing when I became Chair of the National Association of Attorneys General ("NAAG") Antitrust Taskforce by changing the name and focus of our *Amicus* Committee to the Multistate Writing Committee. I also introduced the Chair's Writing Award, given annually to the primary authors of a well-written and impactful article or *amicus* brief that had been published or filed within that fiscal year. The inaugural Chair's Writing Award for the 2019 fiscal year was awarded to Nicholas Grimmer and David Ashton of Texas and Max Miller of Iowa as principal authors of the bipartisan, 31-state *amicus* brief in *Apple v. Pepper*, which advocated for the Supreme Court to overrule the *Illinois Brick* ban against indirect purchaser damages.² The brief was thoughtful and persuasive in its detailed argument for how economics and the law have now become sophisticated enough to be able to calculate indirect damages, and few state *amicus* briefs generate direct questions from the justices during oral argument as this one did.

NAAG has several AG-level Committees, including the Antitrust Committee. This year's CPI States' Chronicle Edition starts with an interview with Colorado Attorney General Phil Weiser, who is one of the three current co-chairs of the NAAG Antitrust Committee, along with Maryland Attorney General Brian Frosh and Nebraska Attorney General Doug Peterson. General Weiser previously served as a Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice ("DOJ") and has put his antitrust enforcement knowledge and experience to great use, including negotiating innovative settlements in Colorado for the *United-Health/DaVita* merger and with the Mortenson Company for construction bid-rigging charges, and leading a coalition of 26 states who submitted Comments in February 2020 on the Federal Trade Commission ("FTC") and DOJ draft Vertical Merger Guidelines.

In his interview, General Weiser discusses these initiatives, as well as his views on the potential of carefully-drafted behavioral remedies, especially for certain vertical mergers and conduct, to adequately address changes in rapidly shifting business sectors. In addition, he discusses recent antitrust legislative initiatives by the Colorado General Assembly.

Interestingly, General Weiser and Emilio Varanini in the California Attorney General's Office both cite in their pieces Justice Brandeis' comment that the States are laboratories of democracy, wherein a state may "try novel social and economic experiments."³ The California legislature

² Brief for Texas, Iowa, and 29 Other States as Amici Curiae in Support of Respondents, *Apple, Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204), 2018 WL 4808836; Press Release, AG Paxton Congratulates Attorneys David Ashton and Nick Grimmer on Winning Prestigious NAAG Antitrust Award (Sept. 25, 2019), at <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-congratulates-attorneys-david-ashton-and-nick-grimmer-winning-prestigious-naag-antitrust>.

³ *New States Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

has been particularly active with antitrust healthcare “experiments,” passing a statute in 2019 banning pay-for-delay settlements between brand and generic pharmaceutical manufacturers and considering a bill this session on healthcare consolidation. This follows the Washington legislature’s new statute requiring that all healthcare providers in the state give the Attorney General written notice before any “material change” in organization or ownership. New York also recently introduced a landmark bill to amend its antitrust laws, in part to address issues in Big Tech markets, which is fitting for one of the lead states in our multistate Facebook investigation.

The California Attorney General’s Office also recently underwent a reorganization to assist its healthcare legislative efforts, which created the Healthcare Rights and Access Section. Emilio has been a Deputy Attorney General in California’s Antitrust Section for 20 years, but will now be a Supervising Deputy Attorney General in this new Section, where he will be responsible for the office’s healthcare-related antitrust work. Emilio was one of the lead attorneys in California’s recent settlement with Sutter Health, and in his article, he points out that the COVID-19 pandemic does not change the application of the antitrust laws to healthcare markets, as illustrated by the California court’s recent ruling that Sutter Health may not postpone the approval process of its settlement with his office because of COVID-19. This is a sentiment that both federal antitrust agencies and Congressional leaders have expressed, and like them, the States will be alert to further consolidation of healthcare providers that may be caused by both COVID-19 and the disproportionate flow of federal support funds through the CARES Act to bigger providers who already command a disproportionate share of commercial insurer business.

General Weiser, Joseph Conrad (Assistant Attorney General in Nebraska’s Consumer Protection Division), and Elinor Hoffmann (Acting Chief of the New York Antitrust Bureau) all discuss the States’ authority to enforce the federal antitrust laws independently of the federal agencies. As General Weiser points out, the general rule has always been that the federal antitrust agencies and the States cooperate very well together, and the federal agencies do not object to the additional relief that States often negotiate on top of settlements between the parties and the federal and state enforcers working together. It is only the rare instance where the state and federal enforcers differ on the underlying case where these questions arise.

Elinor’s article focuses on the legal issues and congressional intent of our national system of multiple antitrust enforcers, while Joe describes the dynamic between federal and state enforcers in more economic terms. Elinor notes that Congress intended to strengthen antitrust enforcement through a regime of multiple enforcers. This clearly illustrates that States not only have, but *should* have the authority to bring federal antitrust claims in order to ensure that the best interests of our consumers are preserved. Although the district judge in the States’ *T-Mobile/Sprint* merger challenge ruled against blocking the merger, he nonetheless vindicated the States’ ability to promote the public interest in the same manner and to the same degree as the federal enforcement authorities.⁴ Joe notes that our system of concurrent jurisdiction may create inefficiencies and spillover effects in both directions, but these effects also strengthen the incentives of state and federal enforcers to cooperate and work together.

One area where I believe that the States currently lead the federal agencies in enforcement and scholarship is in the application of anti-trust enforcement policies on labor. In particular, Rahul Rao, Assistant Attorney General in Washington’s Antitrust Division, details Washington’s Franchise No-Poach Initiative, which ended in July and during which the state entered into a stunning 235 assurances of discontinuance with national franchise chains, representing almost 200,000 locations and millions of workers nationwide, to remove the no-poach clauses from their franchise agreements. In October 2019, Rahul also testified before Congress about the Initiative and the harmful effects no-poach provisions can have in suppressing wages and worker mobility, particularly for lower-wage employees.⁵ In his article, Rahul discusses the standard of review for assessing the legality of franchise no-poach clauses, where he advocates for *per se* treatment and contrasts DOJ’s position that these provisions should be analyzed under the Rule of Reason, partly because they are ancillary to the main franchise agreement. However, the Initiative’s findings that a significant number of franchisors never included a no-poach clause, and the relative willingness of most of these companies to get rid of them, undercuts the assertion that these provisions are truly ancillary or reasonably necessary to the overall franchise agreement. The States are continuing Washington’s no-poach work, as illustrated by the recent no-poach complaint by Illinois against three temporary staffing agencies and a manufacturer.⁶

4 *New York v. Deutsche Telekom AG*, 2020 U.S. Dist. LEXIS 23716* 113, n.21 (S.D.N.Y. Feb. 10, 2020).

5 Hearing on Antitrust and Economic Opportunity: Competition in Labor Markets Before the Subcomm. on Antitrust, Commercial & Admin. Law of the House Comm. on the Judiciary, 116th Cong. (2019) (Statement of Rahul Rao, Assistant Attorney General, Washington State Office of the Attorney General), at <https://docs.house.gov/meetings/JU/JU05/20191029/110152/HHRG-116-JU05-Wstate-RaoR-20191029.pdf>.

6 Press Release, Attorney General Raoul Files Lawsuit Against Staffing Agencies For Use of No-Poach Agreements and Wage-Fixing (July 29, 2020), at https://www.illinoisattorneygeneral.gov/pressroom/2020_07/20200729c.html.

The NAAG Antitrust Taskforce's Labor Committee, which is co-chaired by Schonette Walker, Deputy Chief of Maryland's Antitrust Division, provides a monthly forum for a diverse array of speakers on labor antitrust issues and has sparked some fascinating non-public initiatives. Every other month, the committee's call is open to the public, and representatives of both federal antitrust agencies, as well as several academics and representatives of consumer advocacy groups, have asked to join our calls. In addition, the committee has helped draft three sets of multistate comments on antitrust labor issues to the FTC, the most recent being the Comments of 20 Attorneys General in March 2020 in response to the FTC's Workshop on Non-Competes.⁷

Here, Schonette and Arthur Durst, Assistant Attorney General in DC's Public Advocacy Division, discuss the ways in which non-compete clauses in employment contracts harm workers, innovation, and entrepreneurship and how the traditional justifications for non-compete clauses can be better achieved through less burdensome means. In addition, they highlight recent enforcement and legislative actions by States against non-competes in the absence of federal law or enforcement actions. These include settlements prohibiting non-competes by Washington,⁸ Illinois,⁹ and New York¹⁰ and state legislation in New Hampshire, Virginia, Indiana, and Maryland barring the enforcement of non-competes for different classes of workers.

Finally, David Sonnenreich, Deputy Attorney General and Director of Utah's Antitrust Section, discusses a crucial tool of state antitrust enforcement: the ability of States to keep information and documents confidential. David addresses confidentiality protections States use when working alone, in multistate actions, or when working with one of the federal enforcement agencies. Although every State has different confidentiality protections and FOIA exemptions in our state statutes, the States in a multistate antitrust investigation take very seriously our confidentiality responsibilities, as shown by our agreements with each other, parties submitting documents, and the federal agencies to keep this material from being disclosed. David ends with some very helpful tips and rules of thumb when negotiating confidentiality terms with state enforcers.

I remain proud of all of the States' antitrust enforcement actions and am incredibly honored to be in a position to brag about them as often as possible. I thank CPI for again giving us this forum to showcase our recent activities and thoughts in this critical area of our country's economic wellbeing.

7 Public Comments of 20 State Attorneys General in Response to the Federal Trade Commission's January 9, 2020 Workshop on Non-Compete Clauses in the Workplace (March 12, 2020), at https://downloads.regulations.gov/FTC-2019-0093-0322/attachment_2.pdf.

8 Press Release, Attorney General Bob Ferguson Stops King County Coffee Shop's Practice Requiring Baristas to Sign Unfair Non-Compete Agreements (Oct. 29, 2019), at <https://www.atg.wa.gov/news/news-releases/attorney-general-bob-ferguson-stops-king-county-coffee-shop-s-practice-requiring>.

9 Press Release, Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements (Jan. 7, 2019), at http://www.illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html.

10 Press Release, A. G. Underwood Announces Settlement with Payment Processing Firm to End Use of Non-Compete Agreements (Oct. 26, 2018), at <https://www.ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-payment-processing-firm-end-use-non-compete>. See also Press Release, A. G. Underwood Announces Settlement with WeWork to End Use of Overly Broad Non-Competes that Restricted Workers' Ability to Take New Jobs (Sept. 18, 2018), at <https://www.ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-wework-end-use-overly-broad-non-competes> (together with Illinois).

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