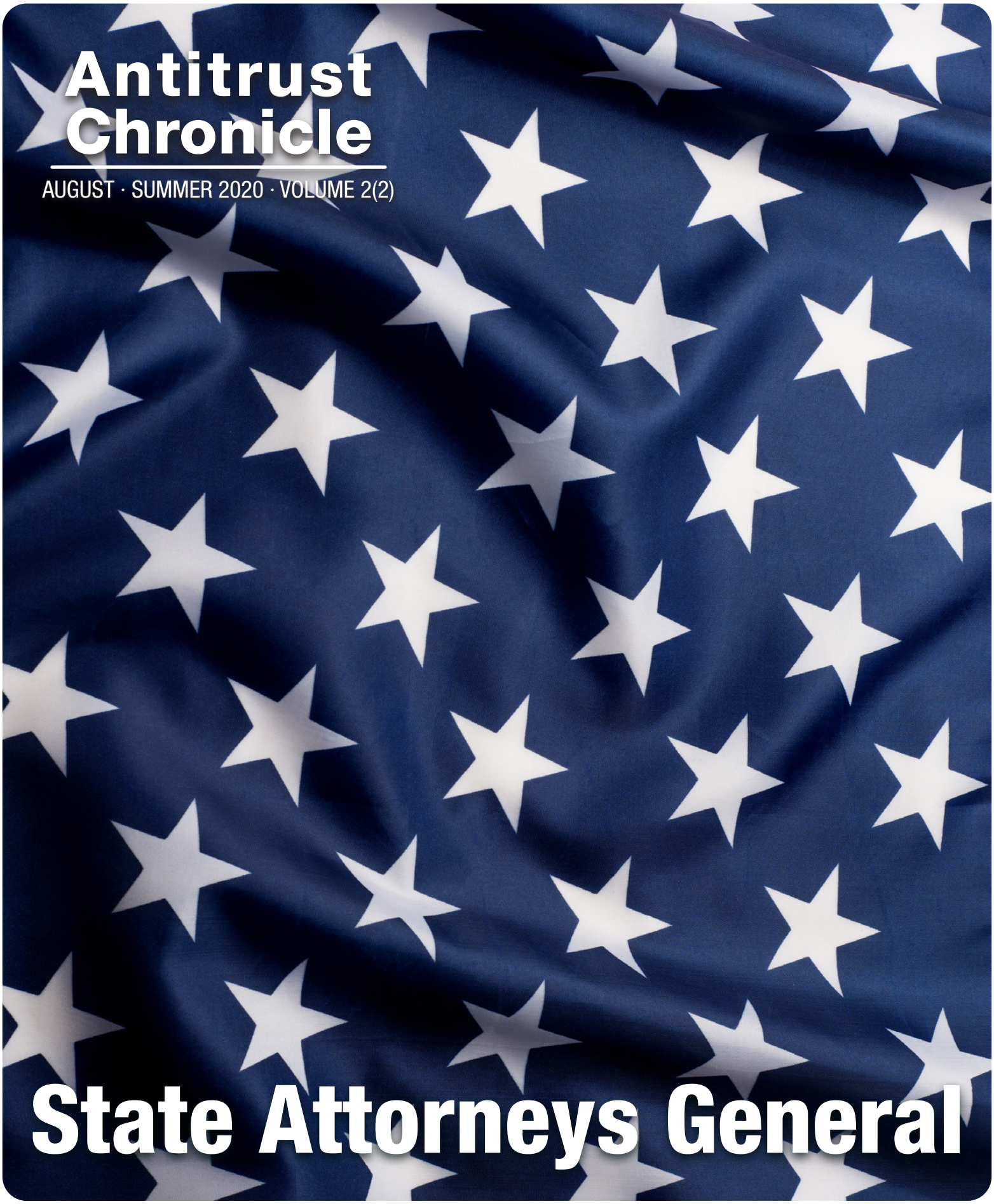

Antitrust Chronicle

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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.

It is sometimes forgotten that the U.S. has 53 agencies that enforce the antitrust laws: the DOJ, the FTC, 50 states, and the District of Columbia. States Attorneys General thus form key pieces of the U.S. enforcement jigsaw.

Within this federalist laboratory, there are times when states decide that their citizens require stronger enforcement than that taken by the federal authorities, and vice versa. This process of experiment produces a vibrant dialogue between the states and the national enforcers, ultimately to the benefit of consumers (but at times also resulting in tension).

The contributions in this Chronicle from part of this debate. The issues discussed include healthcare, labor law, state confidentiality rules, and the enforcement of antitrust rules in the age of big tech.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go.

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

Sincerely,

CPI Team

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Sarah Oxenham Allen is Chair of the National Association of Attorneys General Antitrust Taskforce and Senior Assistant Attorney General and Antitrust Unit Manager at the Office of the Virginia Attorney General.

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We have a national policy that favors competition over other types of economic arrangements. Like other aspects of our federalist system, there are times when states determine that the best interests of their citizens require a stronger enforcement approach than that taken by the federal authorities, or vice versa. The authority of the states to act independently is strongly supported by statutes and Supreme Court precedent. Recent cases illustrate instances when the states have exercised that authority to pursue a result that they believe will best protect their citizens from anticompetitive harm.

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Starting off from the vantage point of Justice Brandeis' famous paean to federalism and state experimentation in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), this article explains the systematic multi-pronged approach of the California Attorney General to addressing challenges in healthcare access, affordability, quality, and equity in California. That approach includes initiating litigation such as the landmark Sutter case, that resulted in a settlement in December of 2019, multiple state legislative initiatives—including last year's pay-for-delay law that just withstood a challenge in the United States Court of Appeal in the Ninth Circuit, and the establishment of the new Healthcare Rights and Access Section. That Section will be responsible for all healthcare-related matters that involve the investigation and filing of lawsuits on behalf of the public interest to protect healthcare equity and access, including all antitrust matters that arise in the healthcare space.

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By David Sonnenreich

When a company is served by a state enforcer with an antitrust investigative subpoena or civil investigative demand, concern invariably arises over the confidentiality of the information that the company is being asked to provide. This is a vexing and perplexing topic for private counsel, who are often unfamiliar with the interplay of diverse state FOIA and investigatory laws. In this article, Deputy Utah Attorney General David Sonnenreich seeks to unravel these issues, and to give practical guidance both as to what can be done to minimize unintentional disclosures (e.g. FOIA request responses) and how to negotiate appropriate protections concerning anticipated intentional disclosures (e.g. sharing between states involved in a multistate investigation). The article provides insight into how a state enforcer handles confidential information during an antitrust investigation, and examines witness confidentiality agreements and other tools that can be used to address confidentiality concerns.

States and Non-Competes: Where Are Things Headed?

By Schonette J. Walker & Arthur Durst

Non-competes have been used in employment contracts for centuries. In the past few decades however, perhaps because their use has increased, they have come under greater scrutiny as their potential for harm has been exposed. Arguments that these provisions are capable of inflicting significant harm on employees, competition and even downstream consumers are persuasive. As states see the potential for negative impacts on their citizens and their economies, many are taking action in the form of legislation as well as litigation. And as more is learned in this space, additional areas of scrutiny will likely emerge.

When Competition Meets Labor: The Washington Attorney General's Initiative to Eliminate Franchise No-Poaching Provisions

By Rahul Rao

In January 2018, the Washington Attorney General launched an initiative to eliminate no-poach clauses in franchise agreements nationwide. These particular no-poach provisions were covenants in franchise agreements that restricted employee mobility among locations within the same system. By restricting franchise entities' ability to hire or recruit new employees, no-poach provisions decreased competition for the labor of franchise employees. This decrease in labor competition had the potential to reduce opportunities, as well as stagnate wages, benefits and working conditions. Viewing these clauses as naked restraints of trade — in the form of price fixing and market allocation — Washington challenged these provisions as being *per se* illegal. Washington's industry-wide investigation resulted in legally binding agreements with about 235 corporations to immediately stop enforcing and eliminate no-poach clauses from franchise agreements nationwide. These corporate chains include nearly 200,000 locations nationwide who collectively employ millions of workers across the United States.

In Defense of State Enforcement: A Positive Perspective on State and Federal Cooperation

By Joseph Conrad

Antitrust enforcers do not always see eye to eye. The recent cases of *Qualcomm* and *Sprint/T-Mobile* provide two recent examples. Despite the rare fractures that separate enforcers, the two-tiered enforcement infrastructure has significant benefits that outweigh any inefficiencies. State and federal enforcers have been able to expel many of the inefficiencies in our overlapping enforcement regime through cooperation. Cooperation, however, does not happen merely by accident. The spillover effects between state and federal enforcement incentivizes cooperative antitrust federalism. Those spillover effects flow in both directions. On one hand, the concurrent jurisdiction held by States Attorneys General and both federal enforcers under federal law exhibits externalities in which an enforcement decision by one agency affects the decisions by other concurrent enforcers. At the same time, enforcement decisions under federal law have serious implications for States Attorneys General, who have their own state antitrust laws that are commonly constructed and construed consistent with federal law.

WHAT'S NEXT?

For September 2020, we will feature Chronicles focused on issues related to (1) **Price-Gouging**; and (2) **Failing Firm Defense**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, 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 2020

For October 2020, we will feature Chronicles focused on issues related to (1) **CRESSE Insights**; and (2) **Collaboration Agreements**.

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.

INTRODUCTION TO THE CPI STATES' CHRONICLE EDITION 2020

BY SARAH OXENHAM ALLEN[1]

1 Sarah Oxenham Allen is the current Chair of the NAAG Antitrust Taskforce and a Senior Assistant Attorney General and Unit Manager of the Antitrust Unit of the Office of the Virginia Attorney General. Any opinions expressed herein are hers alone and do not necessarily reflect the opinions of NAAG or any particular Attorney General, including Virginia Attorney General Mark Herring.

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 *UnitedHealth/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 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.

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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).

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 antitrust 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]

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 York[10] and state legislation in New Hampshire, Virginia, Indiana, and Maryland barring the enforcement of non-competes for different classes of workers.

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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.

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).

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.

CPI TALKS…

…with Colorado Attorney General Phil Weiser

In this month's edition of CPI Talks… we have the pleasure of speaking with Mr. Phil Weiser, Attorney General for the State of Colorado, Hatfield Professor of Law and Telecommunications, former Executive Director and Founder of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship, and Dean Emeritus at the University of Colorado Law School.

Thank you, Mr. Weiser, for sharing your time for this interview with CPI.

1. **Colorado, along with 46 other States and territories has initiated an investigation of Facebook for potential antitrust violations, and has joined 50 States and territories in an investigation into Google. In parallel, the FTC has launched its own investigations into Facebook's and Amazon's practices, while the DOJ is stepping up its investigation into Google. As you recently noted in the merger context, "[t]he states are independent enforcers of the antitrust laws. It's up [to] the courts, not a federal agency to decide the lawfulness of a merger." Is there need for better coordination between individual States and the agencies in this regard?**

A strength of the American model of governance is our Federalism. Under this model, States have independent authority and the responsibility to enforce the antitrust laws. This dynamic is also the situation in the international arena, where there is a need for coordination and harmonization. With respect to state-federal coordination, the general rule is that we work very well together, sharing information, documents, and analyses, enabling us to reach better results. Where we end up pursuing different paths, as happened last year in Colorado in a merger between United Health and DaVita Medical Group, that coordination can still hold. The real exception is where the federal government takes umbrage at the possibility that states would go in a different direction and makes the claim that it has the ability to occupy the field, excluding states from exercising their independent authority. In the *Sprint/T-Mobile* case, where the federal government made such a claim, it was appropriately rejected by the court, as I explained in the address you referenced.

2. **More generally, is litigation the correct means to resolve potentially anticompetitive conduct in high tech sectors, such as social media? Or is a multi-pronged regulatory and litigation-based approach necessary, given that the margin of maneuver of the agencies (and the lower courts) is limited by the relatively restrictive federal case law with respect to certain key antitrust doctrines? Given the high velocity of tech markets, and the relatively slow pace of litigation, is there a risk that industry developments will outpace any evolution in the case law?**

There are a couple of questions in this one, so let me take them in turn. First, with respect to the development of antitrust doctrines, I believe that they are supple and, in the face of compelling facts and well-reasoned economic theories of harm, thoughtful judges can adapt to meet new challenges. The *Microsoft* case stands as a powerful case in point. Second, on the point about antitrust remedies, there is indeed a challenge with respect to dynamic industries. This concern was captured well by Judge Posner after his stint as a special master in the *Microsoft* case: "The real problem [facing antitrust law] lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly." There are, however, powerful responses to this concern and for addressing a pattern of conduct that achieves lasting anti-competitive harm. I have discussed strategies for developing remedies both in my scholarly work (see here and here) and as an antitrust enforcer (see here and here).

3. **On a related note, certain players (notably Facebook) have called for government "regulation" of certain aspects of their businesses (notably the dissemination of harmful content). In theory, a similar initiative could apply to competition principles. In parallel, international reports into the digital sector, notably the UK's 2019 Furman Report, have called for industry codes of conduct to forestall potential antitrust violations. Is there a risk in adopting industry-sponsored initiatives (either in the form of government regulation or "codes of conduct")? Do such initiatives risk creating a mere smokescreen, or, worse, regulatory capture? How can any "knowledge gap" between industry and the private sector be breached?**

This is an important challenge to keep in mind with respect to regulation generally, whether overseen by an administrative agency or through audited self-regulation (or co-regulation, as it called in Europe). I do believe that codes of conduct can play a constructive role where there are checks on the concern of capture and the development of a regulatory capacity to operate effectively. For a longer discussion of this promise, see this article.

4. **The DOJ is currently reviewing its Vertical Merger Guidelines. There appears to be growing recognition among regulators that vertical mergers are not always as benign as had previously been presumed (notably in light of the recent experience of the *Live Nation/Ticketmaster* merger remedies, and the DOJ's attempt to block *AT&T/Time Warner*). In your view, what are the key reforms that ought to be implemented, both in terms of substantive review of vertical mergers and potential remedies? Should agencies and courts adopt a more imaginative approach to the design of behavioral remedies for vertical mergers (despite the DOJ's stated preference for structural remedies wherever possible)?**

This past February, Colorado led a coalition of states that filed comments with the federal agencies on how to approach vertical mergers. (I discussed those comments here.) With respect to key lessons, a starting point is to recognize that, in a range of scenarios, vertical mergers can be anticompetitive and therefore merit close scrutiny. One such scenario is where a vertical merger may remove the most likely potential rival to an incumbent firm. Another scenario is where a dominant firm seeks to undermine an upstart rival by gaining control of a critical input. This was the circumstance in the *United/DaVita* merger I mentioned earlier, where we took action to protect competition in the Medicare Advantage market. As for behavioral remedies, we discussed the appropriate role for them in our comments, explaining that "[i]f employed to eliminate harm, conduct remedies must be adequate to address identified risks, subject to practicable monitoring by the Agencies, and capable of being effectively enforced in a timely manner." In the case of the *United/DaVita* merger, we identified and implemented this very form of relief, ending an exclusive contracting arrangement that facilitated United's dominant market position.

5. **In the absence of legislative reform at the Federal level, to what extent should State legislatures fill the legislative gap? The Colorado legislature, in particular, has been active in enacting bipartisan legislation to combat anticompetitive practices. Please outline the major reforms introduced at the State level in Colorado. What further work needs to be done, and what can other States (and Congress) learn from Colorado's experience?**

One of the advantages of states is that they can be, as Justice Brandeis put it, laboratories of democracy. To that end, the Colorado General Assembly charged our office with investigating the rise of insulin prices. Between 2012-2016, notably, such prices doubled. In normal competitive markets, we don't see such behavior. As such, we are now undertaking a study of what dynamics are taking place in this market, whether there are measures for addressing them, and how we can protect those who depend on insulin. After we publish our report this fall, we look forward to contributing to the national debate on this important issue. The Colorado General Assembly also recently addressed the Attorney General's authority to challenge mergers, adopting the vision that I described earlier: Colorado has independent sovereign authority to review mergers in parallel with, but independent of, federal agencies and we are committed to using that authority appropriately.

6. **The Colorado AG's office recently concluded separate settlement agreements with the Mortenson Company and Trammell Crow for alleged violations of the state's Antitrust Act concerning tainted bidding processes for the expansion of the Colorado Convention Center. Aside from a financial settlement, in a novel development, Mortenson will be required to contribute in-kind construction services to help the COVID-19 pandemic efforts. Do you foresee a broader role for such hybrid settlements (whereby companies contribute to public works) beyond the COVID-19 crisis? Do such settlements bring other benefits (e.g. in enhancing public and corporate awareness of antitrust rules)?**

The ability to craft creative remedies and sanctions is an opportunity we will continue to develop. In the bid rigging case you note, it was important to our office to take actions that would spur reflection and engagement around ethics and compliance on the part of the companies who participated in the wrongful action. We also welcomed Mortenson's interest and commitment in taking on a construction project that would address an element of the COVID-19 crisis. Going forward, we will continue to be open to creative arrangements and use opportunities to develop innovative remedies that supplement more traditional ones, including those that provide for a broader public good.

STATE ANTITRUST ENFORCEMENT: THE SAME AND NOT THE SAME

BY ELINOR R. HOFFMANN[1]

1 Acting Chief, Antitrust Bureau, Office of the New York State Attorney General. The opinions expressed in this article are the author's own, and do not necessarily reflect the opinions of the Attorney General of the State of New York or any member of her office.

I. INTRODUCTION

There has been much discussion in the past two years about the role of the states — that is, State Attorneys General — in antitrust enforcement. Some aspects are not controversial — for example, the right of a state to address a merger between two health care providers within a state.[2] And no one (save the defendant) questioned before the court the New York Attorney General's authority to seek a nationwide injunction under Section 2 of the Sherman Act to stop a monopoly maintenance scheme with national effects.[3] Views on the states' exercise of their independent authority under federal law are most sharply presented in cases where both federal and state authorities investigate the same matter, under federal law, and reach different conclusions.

Challenges to the states' authority to enforce the federal antitrust laws are rare because that authority is deeply rooted in the federal statutory scheme and in common law. But recently, some have asked: (1) whether the states should exercise that authority to make prosecutorial determinations that differ, in whole or in part, from those of the federal enforcement authorities; and (2) what deference should a federal court give to a federal agency's enforcement decision when considering a state claim relating to the same set of facts?

II. STATE ENFORCEMENT AUTHORITY: A BRIEF REVIEW

States have independent enforcement authority, and may seek equitable relief, as well as damages, pursuant to a comprehensive congressional scheme to strengthen antitrust enforcement. As to equitable relief, a State may bring suit under Section 16 of the Clayton Act (26 U.S.C. § 26) as a "person," either in its proprietary capacity or in its quasi sovereign *(parens patriae)* capacity to protect the economic interests of its citizens.[4] In a similar vein, Congress specifically gave states the right to sue as "parens patriae on behalf of natural persons residing in [their] State" for treble damages resulting from antitrust violations. 15 U.S.C. § 15c. To "reiterate congressional encouragement" for state enforcement, Congress included provisions that enable the states to recover attorneys' fees if they prevail. See H.R. Rep. No. 94-499 at 20 (1976); reprinted in 1976 U.S.C.C.A.N. 3572, 2589-90.

In a recent essay, Colorado's Attorney General Phil Weiser characterized the 1976 statute, included in the Hart Scott Rodino Antitrust Improvements Act, as part of Congress's program of "cooperative federalism."[5] According to Attorney General Weiser, Congress's aim was to set a "floor" for enforcement, but permit the states to tailor standards or apply the laws more rigorously as they deemed appropriate. The states have a history of doing exactly that, both in litigated cases and in statutes.

- In *California v. American Stores*, for example, the State of California sued to enjoin a merger after the federal government (the Federal Trade Commission in that case) had reached a settlement permitting the merger to go forward conditioned on certain relief.[6] Acknowledging the independent authority of California, the Court emphasized that state antitrust enforcement "was an integral part of the congressional plan for protecting competition" and it "was in no sense an afterthought."[7]

- In the *Microsoft* litigation, 20 states sued Microsoft in a separate complaint on the same day that the U.S. Department of Justice sued. The cases were consolidated, tried together and appealed together. After the expiration of the Final Judgment settling that case for the DOJ and nine states (9 non-settling states plus the District of Columbia continued litigating), parts of the Final Judgment expired. The states moved for an extension of the Final Judgment; the DOJ and Microsoft opposed. The court granted the states' request for an 18-month extension.

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2 https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-chi-franciscan-will-pay-25-million-over-anti.

3 *New York v. Actavis PLC*, 787 F.3d 638 (2nd Cir. 2015).

4 See *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 447 (1945). Justice Douglas explained: "Georgia, suing for her own injuries, is a "person" within the meaning of § 16 of the Clayton Act; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. . . . But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. Those rights are of course based on federal laws." *Georgia v. Pennsylvania Railroad*, 324 U.S. at 447. (Citation omitted). He also observed that while Congress reserved criminal federal enforcement authority to the federal authority, it did not choose to limit civil enforcement authority in the same way.

5 Prepared remarks: The Enduring Promise of Antitrust, available at https://coag.gov/blog-post/prepared-remarks-the-enduring-promise-of-antitrust/.

6 495 U.S. 271 (1990).

7 *Id.* at 284.

- In 2014, New York brought suit seeking a preliminary injunction against Actavis (now Allergan), alleging that Actavis had violated Section 2 of the Sherman Act by engaging in conduct with the purpose and imminent effect of impeding lower cost competition in the market for an Alzheimer's drug. The district court granted the request for a nationwide preliminary injunction, and the Court of Appeals affirmed.[8]

- In 2017, California pursued a preliminary injunction to halt Valero Energy's acquisition of an independent petroleum distribution terminal after the FTC had dropped its challenge. California's request for preliminary injunction was unsuccessful, but only because in the court's view, California had not been able to show irreparable harm. The parties abandoned the merger.[9]

In a related vein, a number of states in the late 1970s and early 1980s enacted *Illinois Brick* "repealers," enabling indirect purchasers to recover damages under state antitrust laws, despite the inability of plaintiffs to do so under the federal antitrust laws as a result of the Supreme Court's ruling in *Illinois Brick Co. v. Illinois*.[10] At least since *California v. Arc America*,[11] it has been clear that state antitrust laws that permit more stringent enforcement are not pre-empted by federal law. While not raising the same issues as independent state enforcement of federal law, the long history of state antitrust enforcement under state law underscores the critical role that the states play in enforcing our competition policy.[12]

III. STATES HAVE THE RIGHT TO INDEPENDENTLY ENFORCE THE FEDERAL ANTITRUST LAWS: SHOULD THEY?

The answer, most state enforcers will tell you, is "it depends on the facts and circumstances." Consider, for example, two recent cases that starkly illustrate when and under what circumstances states might take action that differs from the action pursued by the federal enforcement authorities based on the same facts.

A. United/DaVita

UnitedHealth Group sought to acquire the clinical network operated by DaVita; the acquisition raised both horizontal concerns (the consolidation of UHG's clinical services with DaVita's clinical services in Nevada) and vertical concerns (the consolidation of UHG's Medicare Advantage insurance product with DaVita's clinical services in Colorado Springs, Colorado). The Federal Trade Commission and the Colorado Attorney General's office investigated. The FTC allowed the merger to go through, conditioned on a divestiture of certain assets in Nevada. Although recognizing the possibility that a vertical merger could have anticompetitive effects, the FTC declined to require a remedy in Colorado, which would have been predicated on a purely vertical theory, in light of litigation risk. As Commissioners Wilson and Phillips explained:

> a lawsuit based upon this evidence posed significant litigation risk. Among other things, the law on vertical mergers is relatively underdeveloped, and an adverse decision can impact enforcement in later cases that present clearer harm. Of course, all litigation presents risks, and sometimes the risks are worth taking. But, faced with a body of evidence of harm that was ambiguous in the first place, we cannot agree with our colleagues that this was a case on which to roll the dice.

The Colorado Attorney General's Office came to a different conclusion. That office decided to take the litigation risk and pursue an independent remedy that would benefit Coloradans, specifically Medicare Advantage patients in the Colorado Springs Area. The office filed suit in state court together with a consent judgment that increased the numbers of provider choices for Medicare Advantage patients, and ensured that Medicare Advantage patients could continue to access DaVita's providers even if insured by Humana, UHG's main competitor in the market. Two FTC Commissioners, Slaughter and Chopra, while expressing support for the Commission's decision on Nevada, wrote separately to outline why they also would have sought a remedy to help Colorado consumers, and to strongly endorse the efforts of the Colorado AG and state enforcement generally:

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8 *New York v. Actavis PLC*, 787 F.3d 638 (2nd Cir. 2015).

9 https://oag.ca.gov/news/press-releases/attorney-general-becerra-valero%E2%80%99s-abandoned-takeover-independent-petroleum.

10 431 U.S. 720 (1977).

11 490 U.S. 93 (1989).

12 See generally, J. Mark, *States and the Development of the Antitrust Laws*, CPI Chronicle, August 2019; H. First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Washington L. Rev. 1004 (2001).

Fortunately, the Attorney General of Colorado has taken action in an effort to address some of the harmful effects of the merger in a separate action. We hope all state attorneys general actively enforce the antitrust laws to protect their residents from harmful mergers and anticompetitive practices.[13]

B. T-Mobile/Sprint

In late April, 2018, the third and fourth largest mobile network operators ("MNOs"), T-Mobile and Sprint, announced a proposed merger that would reduce the number of MNOs in the United States from four to three. A group of states, led by New York and California, as well as the Department of Justice Antitrust Division, thoroughly investigated for over a year to determine whether the merger would be anticompetitive and thereby violate Section 7 of the Clayton Act. By the time the investigation had concluded, both the DOJ and the investigating states had determined that the merger, as originally proposed, would substantially reduce competition in mobile network operations. The DOJ and the states also agreed that neither the parties' predicted procompetitive benefits nor Sprint's alleged status as a "weakened competitor" would offset or justify the harms that were likely to flow from the merger.[14] But at that point, the DOJ's analysis and the states' analyses diverged. Specifically, the DOJ was persuaded that a package of remedies proposed by the parties would enable DISH Networks, a satellite company, to step into Sprint's shoes within a foreseeable period and restore the competition lost as a result of the merger. The states, after reviewing the parties' and Dish's submissions on the issue, disagreed. A group of states prepared to sue to stop the merger. The DOJ reached a compromise with the parties, agreeing to let the merger to proceed subject to a mix of structural and behavioral remedies.

The litigating states (the "States") filed a lawsuit on June 11, 2019, in federal district court in New York, seeking to enjoin the merger. The DOJ proceeded to seek approval of its settlement, filing a Complaint and Final Proposed Judgement to initiate a Tunney Act proceeding in federal district court in Washington. The States' case went to trial in December 2019 before Judge Victor Marrero, who issued a decision in favor of defendants in February 2020.

On the last day of trial, the DOJ filed a Statement of Interest, urging Judge Marrerro to give "due weight and consideration" to the DOJ's decision not to challenge the merger in light of the remedy that DOJ had accepted. The DOJ explained that in its view, the litigating States' "strong interest in this merger [did] not justify their attempt to substitute their judgment" for that of the DOJ and the injunction barring the merger that the States sought therefore was not in the public interest.[15] The States responded, describing the established authority of the States to independently challenge anticompetitive conduct even when federal enforcement authorities and relevant regulatory agencies had declined to do so. They pointed out that a natural consequence of Congress's scheme of multiple antitrust enforcers is that "at times, different enforcers will reach different conclusions about competitive effects."[16]

Importantly, as the States emphasized, and as the earlier discussion of the *United/DaVita* matter illustrates, a prosecutorial decision not to challenge a merger is not the same as a decision that the merger is lawful. (State Response to DOJSOI at 7). Finding the DOJ- approved remedy to be seriously flawed, the States concluded that in the case of *T-Mobile/Sprint*, the likely anticompetitive effects of the merger would outweigh any potential benefits that the merging parties could achieve, and the federal government's conditions for approving the merger were not likely to mitigate those harms. Although the court ultimately denied the litigating States request for an injunction, Judge Marrero declined to simply defer to the DOJ's analysis and resolution. As he explained, "The deference that the Court accords to the DOJ and FCC turns on their familiarity with the telecommunications industry and their extensive conditioning of this particular transaction, rather than on any notion that they represent the national public interest more so than any state. . . . allowing states to bring *Section 7* actions is clearly "an integral part of the congressional plan for protecting competition." *Cal. v. Am.Stores, 495 U.S. 271, 284, 110 S. Ct. 1853, 109 L. Ed. 2d 240(1990)*; . . . What deference the Court accords to the federal regulators should not be taken as a denigration of Plaintiff States' . . . relative ability to vindicate the public interest they represent more generally."[17]

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13 The FTC's press release, linking the Wilson/Phillips and Chopra/Slaughter statements, can be found at https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition. FTC Chair Joseph Simons was recused. The Colorado AG's press release may be found at: https://coag.gov/press-releases/06-19-19/.

14 *New York v. Deutsche Telekom AG*, 1:19-cv-05434-VM-RWL (Amended Complaint) ECF Doc. 65, filed 06/25/19; *United States of America v. Deutsche Telekom AG*, Case 1:19-cv-02232-TJK (Complaint) ECF Doc. 1, filed 7/26/2019.

15 *New York v. Deutsche Telekom AG*, Case 1:19-cv-05434-VM-RWL Document 348 at 29, filed 12/19/2019. DOJSOI at 29.

16 *New York v. Deutsche Telekom AG*, Case 1:19-cv-05434-VM-RWL Document 356 at 21, filed 1/8/2020.

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

IV. CONCLUSION

It makes sense that after firms have evaluated the benefits and disadvantages of a merger or consolidation, and have taken the decision to move forward, they would like to do so as quickly and efficiently as possible. Yet there is acknowledgement in the business community that there are regulatory requirements and inquiries that are part of the process and that may impact the timeline. State enforcement, like federal enforcement (and in many cases, like foreign enforcement), is one factor that has to be taken into account. Concurrent state investigations need not delay a timetable, so long as the parties work cooperatively to get requested information to all agencies promptly. Joint or cooperative investigations among agencies will result in enforcement alignment far more often than they will result in divergence. In cases where there is divergence — when a federal agency decides to prosecute and the state does not (e.g. *United States v. Long Island Jewish Medical Center*,[18] or when a state decides to prosecute and the federal agency does not (as in the *Sprint/T-Mobile* situation), it will take longer than if both agencies had decided to take a pass. But that is the tradeoff inherent in the strong enforcement regime designed by Congress.

We have a national policy that favors competition over other types of economic arrangements. Like other aspects of our federalist system, there are times when states determine that the best interests of their citizens require a stronger enforcement approach than that taken by the federal authorities, or vice versa. As Congress anticipated, many factors — legal precedents, resources, litigation risk, policy — may influence a federal or state enforcement decision. A regime of multiple enforcers reduces the likelihood that problematic mergers or anticompetitive conduct will avoid close scrutiny and increases the likelihood that truly procompetitive mergers or conduct will be viewed positively across the board. The congressional goal was to strengthen antitrust enforcement, not weaken it.

18 983 F.Supp. 121 (E.D.N.Y. 1997).

THE STATES AS LABORATORIES OF FEDERALISM: THE INNOVATIVE VENTURES OF THE CALIFORNIA ATTORNEY GENERAL INTO HEALTHCARE AND COMPETITION-RELATED ISSUES

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I. INTRODUCTION

In his dissent in *New States Ice Co. v. Liebmann*, Justice Brandeis made the following powerful point: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[2] Nowhere should this point hold more true than healthcare. Healthcare has been recognized as involving local concerns such that the exercise of state police power has been blessed, whether it be through cooperative measures with the federal government or it be direct.[3] In turn, insofar as antitrust is concerned, healthcare involves quintessential local markets[4] and as such has historically been the subject of state antitrust enforcement.[5]

Healthcare in California involves multiple challenges in terms of access, affordability, and equity that have deepened over time. Healthcare access to providers has been reduced over time.[6] Market concentration of providers and even insurers has increased in the state, leading to price increases[7] without any corresponding increase in quality.[8] And while the federal government passed the Affordable Care Act ("ACA"),[9] expanding access to insurance and incentivizing innovative collaboration among providers, the implementation of the ACA's various provisions has led to a hard-fought slog on competition-related issues that go beyond its individual mandate.[10] Meanwhile, pharmaceutical prices continue to escalate in ways that remain difficult to address due to, among other issues, institutional opacity at all levels of the manufacturing and supply chain[11] — notwithstanding the path-breaking decision of the United States Supreme Court in *Federal Trade Commission v. Actavis* on reverse payment settlements.[12] The storm caused by these challenges has been amplified by issues raised by California's fight against the COVID-19 pandemic, such as the following: (1) the continued application of antitrust law to healthcare markets as exemplified by the requested — but just rejected — postponement of the approval process of the path-breaking settlement of the *Sutter* antitrust litigation;[13] and (2) the need to address the further entrenchment of providers with market power as exemplified by the disproportionate flow of federal support funds as a result of the CARES Act[14] to those providers who already benefit more from market concentration and from a disproportionate share of commercial insurer business.[15]

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2 *New State Ice Co. v. Liebmann*, 285 U.S.262, 311 (1932) (dis. op. of Brandeis, J.).

3 See, e.g. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); Department of Health and Human Services, *Health Insurance Market Rules*, 78 Fed. Reg. 13406, 13435 (Feb. 27, 2013); Department of Health and Human Services, *Establishment of Exchanges and Qualified Health Care Plans et al.*, 77 Fed. Reg. 18310, 18413, 18417-19, 18443 (Mar. 27, 2012). The respect of the courts for the exercise of state police power in the healthcare space has recently been demonstrated in the U.S. Supreme Court's denial of a First Amendment request for a preliminary injunction against the California Governor's emergency COVID-19 regulations as they applied to religious services. *South Bay United Pentecostal Church et al. v. Newsom et al.*, 140 S.Ct. 1613, 1613-14 (2020) (conc. op. of Roberts, C.J.).

4 See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 679–80 (2003).

5 See, e.g. Steve Tenn, *A Case Study of the Sutter Summit Transaction*, Federal Trade Commission Working Paper No. 293, 1-2 (Nov. 2008).

6 Glenn Melnick, Katya Fonkych & Jack Zwanzinger, *The California Competitive Model: How Has it Fared and What's Next?*, 37 Health Affairs 1417, 1420-21 (2018).

7 See, e.g. Nicolas Petris Center Institute on Health Care Markets and Consumer Welfare, School of Public Health, University of California, Berkeley, Consolidation in California Healthcare Market 2010-16: Impact on Prices and ACA Premiums (Mar. 26, 2018) (hereinafter "Petris Consolidation Report").

8 See, e.g. Nancy D. Beaulieu et al., *Changes in Quality of Care after Healthcare Mergers and Acquisitions*, The New England Journal of Medicine 51 (Jan 2, 2020) (hospital acquisitions by other hospitals or hospital systems lead to modestly worse patient experiences and no significant changes in readmission rates or mortality); Brady Post, Tom Buchmueller & Andrew M. Ryan, *Vertical Integration of Physicians: Economic Theory and Empirical Evidence on Spending and Quality*, 75 Medical Care Research and Review 399, 417-18 (2018) (showing how studies of vertical mergers do not show any systematic improvement in quality as a generalized matter).

9 The Affordable Care Act or ACA refers to the Patient Protection and Affordable Care Act, Pub. L. No. 11-48, 124 Stat. 119 (2010).

10 For example, there has been litigation over the degree of transparency of provider prices required by the ACA. See *Am. Hosp. Ass'n v. Azar*, No. 1:19-cv-03619, 2020 WL 3429774 (D.D.C. June 23, 2020).

11 See, e.g. Robin Feldman, Drugs, Money, and Secret Handshakes, 1-4 (Cambridge Univ. Press 2020).

12 *FTC v. Actavis*, 570 U.S. 136 (2013).

13 Order Denying Mot. for Continuance of Preliminary Approval Hearing, *UFCW v. Sutter Health/State of California v. Sutter Health*, Nos. CGC 14-538451, 18-56538 (July 10, 2020) (document in possession of author).

14 The CARES Act refers to the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (2020). Congress also passed, and the President signed into law, the Paycheck Protection Program and Healthcare Enhancement Act, Pub. L. No. 116-139 (2020), as part of the CARES Act.

15 Richard Scheffler, Daniel Arnold, Surina Khurana & Brent Fulton, The Distribution of Provider Relief Payments Among California Providers, The Nicolas C. Petris Center on Healthcare Markets and Consumer Welfare (July 17, 2020), https://petris.org/wp-content/uploads/2020/07/The-Distribution-of-Provider-Relief-Payments-Among-California-Health-Systems-FINAL.pdf. This study was prepared at the request of the Office of the California Attorney General.

Under the leadership of its current Attorney General, Xavier Becerra, California has responded to these challenges by novel and innovative ventures that include the following: (1) unparalleled litigation across the vast range of healthcare access and equity issues, including in the healthcare antitrust space; (2) multiple state legislative initiatives, including last year's A.B. 824 on anticompetitive pay-for-delay settlements by pharmaceutical companies[16] and this year's S.B. 977 on the acquisition, and abuse, of market power by healthcare systems;[17] and (3) institutional reorganization — culminating in the creation of the Healthcare Rights and Access Section of the California Office of the Attorney General. That section will be responsible for all healthcare-related matters that involve the investigation and filing of lawsuits on behalf of the public interest to protect healthcare equity and access, including all antitrust matters that arise in the healthcare space.

II. HEALTHCARE LITIGATION BY THE CALIFORNIA ATTORNEY GENERAL: WORKING TOWARDS CHANGE IN STATE AND FEDERAL FORUMS

California's novel responses to the swarm of healthcare issues raised as to affordability, access, and equity can be seen first and foremost by the increased litigation activity under the leadership of the current Attorney General. That litigation involves first and foremost the filing of landmark healthcare antitrust cases in state and federal court, as well as other landmark cases that affect healthcare affordability, accessibility, and equity, in order to work towards change in the healthcare system to the benefit of patients.

For example, on July 29, 2019, the Attorney General announced the federal settlement of lawsuits involving four collusive pay-for-delay settlement agreements, that otherwise allowed branded drug manufacturers to continue their monopolies. These settlements involved the payment of $70 million, the largest settlement amount ever achieved by a state, as well as the imposition of injunctive relief, also unprecedented for a state, against future pay-for-delay agreements.[18] More recently, on July 20, 2020, the Attorney General announced the filing of a lawsuit to enforce the ACA's guarantee against discrimination in healthcare *vis-à-vis* proposed rules that weaken those protections for marginalized populations, including the LGBTQ community, women, communities of color, and individuals with disabilities.[19]

Of special note is the Attorney General's landmark *Sutter* litigation, which is the second-ever litigation filed in a state or federal court to address alleged anticompetitive conduct by a dominant healthcare system in local intrastate markets that allegedly raise prices for consumers of healthcare. Brought in March of 2018, that lawsuit in state court was quickly consolidated with an ongoing private plaintiff lawsuit in that same court.[20] Sutter is a large healthcare system of which almost all of its providers and facilities are located in Northern California. The Attorney General, and private plaintiffs, alleged Sutter's anti-competitive restraints — involving "all-or-nothing" conduct, limitations on health plans and employers from incentivizing employees to choose other hospitals, other anti-steering and anti-tiering practices, and prohibitions on health plans from disclosing Sutter's prices to enrollees of those plans — amounted to illegal price tampering, unlawful combinations to monopolize, and/or unreasonable restraints on trade (including *per se* illegal tying).[21] The case survived three motions for summary judgment and ultimately settled minutes from opening statement — after a jury had been already selected.[22] The prospective injunctive relief under consideration for the Court's approval as part of this settlement includes far-ranging measures, lasting for a minimum of 10 years, designed to halt Sutter's alleged anticompetitive conduct and restore competition to healthcare markets in Northern California. Those measures include limits on out-of-network charges, stopping all-or-nothing conduct and preventing conditional participation — most acutely for those providers who have the most market power, halting measures that hinder or eliminate patient access to lower-cost plans or higher quality providers, ceasing anticompetitive bundling

16 A.B. 824, 2019-20 Leg. Reg. Sess. (Cal. 2019).

17 S.B. 977, 2019-20 Leg. Reg. Sess. (Cal. 2020).

18 Press Release, California Office of the Attorney General, Attorney General Becerra Secures Nearly $70 Million against Several Drug Companies for Delaying Competition and Increasing Drug Prices (July 29, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-secures-nearly-70-million-against-several-drug.

19 Press Release, California Office of the Attorney General, Attorney General Becerra Files Lawsuit Challenging Trump Administration's Rule Rolling Back ACA Healthcare Anti-Discrimination Provisions (July 10, 2019).

20 *UFCW & Employers Benefit Tr. v. Sutter Health*, Nos. CGC-14-538451, CGC-18-565398, 2018 Cal. Super. LEXIS 1859 (S.F. Cnty. May 8, 2018).

21 The contours of Sutter's conduct were litigated as early as a demurrer filed against the private plaintiffs. See, e.g. *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, 2016 Cal. Super. LEXIS 5187 at *1-4, 2016 WL 3459451 at *1-2 (S.F. Cnty. Apr. 15, 2016).

22 See, e.g. Order on Mot. for Summary Judgment, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398, 2019 Cal. Super. LEXIS 88 at **1, 5, 13, 14, 22, 2019 WL 2372274 at **1, 2, 4, 5, 8 (S.F. Cnty. Mar. 14, 2019); Order on Mot. for Summary Judgment, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398, 2019 WL 3856011 at **1, 4, 7, 8, 9, 10 (S.F. Cnty. Jun. 13, 2019). The court also ruled on briefing concerning the applicable antitrust standards, Order re: Antitrust Standards at 1, 8-9, 10-12, 13 & n.4, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398 (S.F. Cnty. Aug. 12, 2019) (document in possession of author), and concerning jury instructions, Order re: Jury Instructions at 1, 6-7, 8, 14-15 & n.15, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398 (S.F. Cnty. Sep. 16, 2019) (document in possession of author).

with stand-alone pricing being required, and improving transparency of Sutter pricing for patients — with all of these provisions to be enforced through a compliance monitor to be appointed by the court.[23]

Following the filing of the unopposed motion for preliminary approval in December of 2019,[24] Sutter filed a motion to delay the preliminary approval hearing due to COVID-19 (the hearing was already delayed to June of 2020 due to the COVID-19 pandemic with answers to the wide-ranging questions of the Court on injunctive relief not being filed until May 29, 2020). Raising issues about the intersection of antitrust law with the issues raised by the pandemic, as well as the Attorney General's ability to speak on behalf of the public interest, the Court ultimately denied that motion in a lengthy order on July 10, 2020.[25]

However, litigation is about more than just filing cases in court. The Attorney General's Office has continued its long practice of providing assistance on, and joining, federal appellate amicus briefs in healthcare antitrust cases such as *Federal Trade Commission v. Sanford*, involving a joint challenge by the Federal Trade Commission and the State of North Dakota to a healthcare provider merger.[26] The Office of the Attorney General also recently played a key role in helping craft the multistate comments on what were then the draft Vertical Merger Guidelines of the federal antitrust authorities[27] — comments that were praised by the federal antitrust authorities as influencing the final version of those guidelines[28] and that in part rested on the experience of states like California with healthcare markets.[29] And more recently, the Attorney General himself submitted comments on the Federal Trade Commission's approval, with conditions, of the proposed *AbbVie-Allergan* merger, pointing out that the Federal Trade Commission should study pharmaceutical merger divestitures and that there are current gaps and vulnerabilities in the Federal Trade Commission's analysis of pharmaceutical mergers.[30]

23 See, e.g. Press Release, California Office of the Attorney General, Attorney General Becerra: State, Unions, Employers, and Workers Reach Settlement to Address Alleged Anticompetitive Practices by Sutter Health that Increased Healthcare Costs.

24 Notice of Motion and Motion for Preliminary Approval of Settlement, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398 (Super. Ct. S.F. Cnty. Dec. 19, 2019) (document in possession of author).

25 Order re: Sutter's Motion to Continue Preliminary Approval Hearing, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398 (Super. Ct. S.F. Cnty. July 10, 2020) (document in possession of author).

26 Brief of the States of Minnesota et al. as Amicus Curiae in Support of Appellees, *Federal Trade Commission v. Sanford*, No. 17-3783, 2018 WL 1414322 (Mar. 13, 2018).

27 U.S. Dep't of Justice and Fed. Tr. Comm'n, Public Comments from 28 State Attorneys General on Draft Vertical Merger Guidelines (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/state_ags_final_vmg_comments.pdf.

28 See Fed. Tr. Comm'n, Statement of Chairman Joseph Simmons, Commissioner Noah Philips, and Commissioner Christine S. Wilson Regarding Joint Department of Justice and Federal Trade Commission Vertical Merger Guidelines at 3 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577507/vmgmajoritystatement.pdf (encouraging further study and assessment on the effects of vertical mergers as a possible precursor to further refinements of the vertical merger guidelines).

29 See Public Comments of 28 States Attorney General on Draft Vertical Merger Guidelines, *supra* note 28, at 1, 7, 10, 12-13, 14-15, 16, 19-20.

30 Letter from State of California, Office of the Attorney General, Attorney General Xavier Becerra, to Acting Secretary April Tabor, Federal Trade Commission, AbbVie and Allergan, FTC File No. 191-0169 (June 11. 2020), https://www.regulations.gov/document?D=FTC-2020-0042-0042.

III. HEALTHCARE LEGISLATION SUPPORTED BY THE ATTORNEY GENERAL: APPLYING THE LESSONS LEARNED FROM INVESTIGATIONS AND CASES INVOLVING HEALTHCARE MARKETS

Congress has considered legislative fixes to the federal antitrust laws to reflect the increasingly concentrated nature of American markets and the resulting lessening of competition.[31] However, California has not stood still in this regard. Building on legislative successes in mandating transparency of healthcare costs for enrollees in healthcare plans[32] and mirroring the ACA's former individual mandate as a matter of state law,[33] the Attorney General supported novel healthcare competition legislation both last year and this year in applying lessons learned from investigations and cases involving healthcare markets in our state.

Last year, the Attorney General supported legislation — A.B. 824 — that prohibits collusive pay-for-delay agreements as a matter of state law. This legislation, which was enacted into law, presumes these agreements are anticompetitive if there is delay and the receipt of consideration for that delay and establishes a stronger platform for prosecuting these agreements.[34] A constitutional attack against the newly enacted statute was just rejected this month on standing grounds.[35]

This year, the Attorney General is supporting legislation — S.B. 977 — that would set up a review and approval process for healthcare providers and facilities by healthcare systems, private equity groups, and hedge funds as well as applying updated legal standards to the abuse of market power by healthcare systems.[36] This bill, if enacted, would provide a mechanism to further halt anticompetitive healthcare acquisitions in the state as well as reduce anticompetitive conduct that leads to higher prices.[37] The California Senate voted in favor of this legislation on the floor and it is now in the California Assembly in the Appropriations Committee.[38]

IV. INSTITUTIONAL REORGANIZATION IN THE OFFICE OF THE ATTORNEY GENERAL: BRINGING A SYNERGISTIC APPROACH TO BEAR ON HEALTHCARE MARKETS

Enhancing healthcare access and equity while holding down costs and improving quality requires a synergistic, collaborative approach in applying the law as it does in medicine itself given the panoply of state and federal laws, agencies, forums, and regulations that are involved. As discussed *supra* in this article, achieving these goals requires the use of litigation, legislation, and policy comments, all of which require close coordination.

Accordingly, the California Office of the Attorney General has formed the Healthcare Rights and Access Section as a new section in the Public Rights Division. That section will be responsible for all antitrust, consumer protection, charitable trust, and health equity matters that relate to healthcare going forward.[39] The benefits of such coordination have already been demonstrated in such matters as addressing the constitutional challenge to A.B. 824, supporting S.B. 977, and addressing the scope of the Attorney General's power to speak on behalf of the public interest in healthcare matters in *Sutter* in addressing Sutter's motion to continue the preliminary approval hearing based on COVID-19.

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31 E.g. Consolidation Prevention and Competition Promotion Act, S 307, 116th Cong. (2019-2020), available at https://www.congress.gov/bill/116th-congress/senate-bill/307?q=%7B%22search%22%3A%5B%22klobuchar+mergers%22%5D%7D&s=1&r=3.

32 2011 Cal. Stat. 244 (previously S.B. 751); 2012 Cal. Stat. 869 (previously S.B. 1196); 2014 Cal Stats. 83 (previously S.B. 1340); 2019 Cal. Stat. 247 (previously S.B. 343).

33 On June 27, 2019, Governor Newson signed into law SB 78, which imposes an individual mandate similar to the now-defunct mandate under the federal ACA. See Cal. Gov't. Code, § 100700 *et. seq.*

34 See *Assoc. for Accessible Medicines v. Xavier Becerra*, No. 20-15014, slip. op. at 4 n.1 (9th Cir. July 24, 2020) (document in possession of author); Press Release, California Office of the Attorney General, Attorney General Becerra, Assemblyman Wood: California Enacts First-in-the-Nation Law to Combat Pay-for-Delay Agreements that Inflate Drug Prices (Oct. 7, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-assemblymember-wood-california-enacts-first-nation-law.

35 *Assoc. for Accessible Medicine*, *supra* note 34.

36 Press Release, California Office of the Attorney General, Attorney General Becerra and Senator Monning Announce That Legislation to Reduce Healthcare Costs, Increase Access to Affordable Care Passes Senate Health Committee (May 13, 2020), https://www.oag.ca.gov/news/press-releases/attorney-general-becerra-and-senator-monning-announce-legislation-reduce.

37 *Id.*

38 See http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200SB977.

39 See California Office of the Attorney General, Division of Public Rights (July 28, 2020), https://oag.ca.gov/careers/descriptions/publicrights.

V. CONCLUSION

The novel approaches of the California Attorney General in addressing healthcare and competition, so as to achieve the goals of better access, better equity, more affordability, and better quality of healthcare, are not a zero-sum federalist approach that excludes cooperation with federal and other state antitrust and healthcare agencies where appropriate. Indeed, healthcare antitrust has historically been marked by cooperation between federal and state antitrust authorities, including those in California, on such cases as *Anthem-Cigna*[40] and *CVS-Aetna*.[41] And that course of action will only continue with the new Healthcare Rights and Access Section even as it builds on it in the best tradition of antitrust federalism with these novel and innovative approaches.

However, only relying on the federal government is not conducive to robust healthcare markets that achieve these important goals, rather states must be given room to innovate in our federalist system — especially on local issues like healthcare.[42] In that vein, the ventures of the California Attorney General, taken together, demonstrate the wisdom of Justice Brandeis' additional observation in his dissent in *New Ice Co*. that "[t]here must be power in the states and the nation to remould [*sic*], through experimentation, our economic practices and institutions to meet changing social and economic needs."[43]

40 See, e.g. *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 186 (D.D.C. 2017).

41 See, e.g. Complaint, *United States v. CVS Health Corp.*, No. 18-cv-02340 (D.D.C. Oct. 10, 2018) (document in possession of author).

42 See Kathleen Sebelius, Ned Sebelius, *Bearing the Burden of the Beltway: Practical Realities of State Government and Federal-State Relations in the Twenty-First Century*, 3 Harv. L. & Pol'y Rev. 9, 10-11, 30-32 (2009).

43 *New State Ice Co.*, 285 U.S. at 311 (dis. op. of Brandeis, J.).

HOW CONFIDENT SHOULD YOU BE ABOUT STATE CONFIDENTIALITY?

BY DAVID SONNENREICH[1]

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One topic frequently dominates the first conversation that state enforcers have with counsel for a witness in an antitrust investigation – confidentiality. This is true whether the witness is a potential target of the investigation, a potential victim of alleged anticompetitive behavior, or merely a possible fact witness. Whether we enforcers want nothing more than an informal oral interview, or are demanding compliance under oath with a detailed set of document production requests pursuant to a civil investigative demand ("CID"), the witness's counsel will want to determine the extent to which we can maintain confidentiality and to discuss safeguards that may prevent disclosures of sensitive information. This desire for an assurance of confidentiality often extends beyond the traditional category of trade secrets and can include the very fact that a state enforcer is in communication with the witness, especially where the witness has a justifiable fear of retaliation by the target of an investigation.

The conversation goes something like this: The good news is that state enforcers take witnesses' confidentiality concerns very seriously, work with witnesses (even potential targets) to protect confidentiality, and have a solid overall record of not unintentionally disclosing confidential information. The bad news is that the laws governing the various aspects of confidentiality vary widely from state to state, and the few cases that provide any guidance are state-specific and of little general applicability. Given those realities, the conversation usually turns to what the enforcing state can – and cannot – agree to do in order to provide a level of comfort about confidentiality to the witness.

When discussing confidentiality, it is important to distinguish between unintentional and intentional disclosures. Unintentional disclosures include both accidental disclosures and disclosures that a state is required to make as a result of efforts by third parties using subpoenas or requests made under state freedom of information ("FOIA") laws. Intentional disclosures include disclosures that a state may make to further its investigation, including providing information to other enforcers, experts, and witnesses.

State antitrust investigations frequently do not occur in a vacuum. When a state is acting alone, a witness's counsel may be able to evaluate confidentiality concerns by looking at the specific laws and practices of the investigating state. However, when federal enforcers are investigating the same allegations, there are specific processes by which state enforcers share information with their federal counterparts. Sometimes there are private plaintiff class action lawsuits, and there are unique issues that arise out of the possibility that state enforcers and private plaintiffs' counsel will need to share information. Most importantly, states frequently enforce antitrust laws through formal multistate enforcement efforts ("Multistates"), in which anything from a handful of jurisdictions to over fifty[2] may participate. Information sharing is essential to an efficient Multistate, and it is that relationship which is the starting point for any useful conversation about confidentiality.

For purposes of this article, we will assume the existence of a Multistate and that the witness is a business entity but not a target of the investigation.[3] Multistates are usually structured with a written common interest agreement and frequently a separate Multistate Confidentiality Agreement ("MCA"). The MCA typically specifies how documents will be shared among the participating states, what to do in the event of a FOIA request, the conditions under which experts will be allowed to access documents, and what happens to the documents at the conclusion of the litigation. Depending upon the nature of the investigation and the witness, states' counsel may be willing to share the MCA with a witness's counsel. However, the MCA may need to be redacted to protect the integrity of the investigation or because of state-specific laws that may prevent disclosing the target of an investigation at a preliminary stage.

Informal oral interviews rarely raise significant confidentiality concerns. Most FOIA laws are limited to the production of "records" that already exist and do not cover unrecorded oral communications. In other words, a FOIA request that asks a state to provide a summary of what a witness said in an interview is normally improper. Even if the states' attorneys take notes of the interview, those are typically covered by the work product doctrine.[4] Thus, it is unlikely that the specifics of an oral interview will be subject to unintentional disclosure.

However, this is a good time to emphasize Rule #1 of confidentiality: Do not send states unsolicited documents that you want to keep confidential. Even if your client is anxious to provide documentation showing that it is the victim of anticompetitive conduct, first discuss the issue with states' counsel. If you simply email a PowerPoint or evidentiary materials prior to an interview, those unsolicited documents may become public records. The Multistate will usually want to issue a CID or something functionally similar, such as an investigative subpoena. This may be done before or after an informal "no documents" interview. In some situations, specific jurisdictions may offer a witness a confidentiality agreement in lieu of or in addition to a CID.

2 For simplicity, the District of Columbia, Puerto Rico, Guam, and American Samoa are referred to as "states" in this article.

3 The matters discussed in this article generally do apply to targets of investigations, but additional issues can arise with respect to targets. Those issues, such as problems of parallel civil and criminal proceedings and the right against self-incrimination, are outside the scope of this article.

4 A few states have broad FOIA laws that could be construed to require production of such materials. Enforcers in those states generally attempt to limit their notetaking accordingly.

Oral interviews also illustrate Rule #2 of confidentiality: States are generally willing to try to protect the confidentiality of documents and specific facts (such as clear trade secrets) in them, but often cannot protect mental impressions that might lead a target to infer with whom a Multistate has been communicating. The best way to avoid a problem of that sort is for the witness to discuss it with states' counsel. For example, we often use informal interviews to learn about an industry's structure and terms of art, which allows for more accurate CID drafting. However, if there are certain references that a witness is concerned about us using, we may be willing to use more generic language in a CID directed to a target.

CIDs are the starting point for protecting the confidentiality of witness documents in state antitrust investigations. Most often, they are issued after the formation of a Multistate.[5] The standard for issuing a CID varies but the usual requirement is reasonable cause to believe that a witness has information that may be relevant to a state's civil antitrust investigation. If a CID is challenged in court the issuing state may be required to show that there is a good faith basis for believing that a violation of antitrust law may have occurred. This is lower than a probable cause standard, which makes sense given that a core purpose behind the CID process is to assist a state in determining whether antitrust enforcement is warranted. This is particularly true when an antitrust investigation starts with allegations made by a purported victim that is a competitor of the purported violator. Absent a robust CID process, states would often need to file antitrust suits based more upon information and belief rather than well-developed evidence. CIDs can provide the facts and evidence that are required for an adequately detailed complaint. As such, CIDs not only allow states to do substantial pre-filing discovery, they also help to protect entities from being sued if they are accused of anticompetitive behavior without a factual basis.

State CID statutes (or statutes governing functionally similar processes such as investigative subpoenas) vary widely. Multistates frequently consider the particularities of various statutes before deciding which state or states will issue CIDs, although other considerations also come into play. Those may include the primary locations of witnesses, whether particular states have expertise with regard to particular issues in an investigation, or even questions of resource allocation. One advantage to the responding witness of working with a Multistate is that with the exception of "me too CIDs" the witness will usually avoid the problem of having to respond to separate CIDs from numerous state enforcers.

CIDs are a form of compulsory process, even though they are typically issued by the state attorney general's office without prior court involvement. Most state CID statutes do not contain explicit limitations as to the permissible scope of inquiry. Those that do generally apply the same limitations to a CID as would apply to a subpoena duces tecum issued post-filing by a court.[6] Enforcement mechanisms differ, but may provide that the witness seeking to quash a CID must file an action in court within 20 or 30 days.[7] Conversely, states can typically enforce their CIDs through a court order if the witness does not respond.[8] Failure to provide information requested pursuant to a CID can be a crime, particularly after a court orders compliance.[9]

Absent a CID, information obtained by a state during an investigation is much more likely to be subject to FOIA disclosure. FOIA statutes vary widely in breadth, and even when the language of FOIA statutes seems similar, the interpretation of that language may differ by state.[10] Furthermore, there is little case law guidance in many states. FOIA statutes contain some level of protection for trade secrets in the majority of states, although the mechanism for obtaining such protection varies widely.[11] In general, FOIA laws provide protection for disclosure of documents during the course of a government investigation, but absent some other exemption from FOIA disclosure those documents may become publicly available once the investigation ends.[12]

5 Sometimes a state initiates an antitrust investigation on its own, or issues CIDs to obtain specific information before forming a formal Multistate.

6 See, e.g. 740 Ill. Comp. Stat. Ann. 10/7.2; Neb. Rev. Stat. § 59-1611(3)(b); Wash. Rev. Code Ann. § 19.86.110.

7 See, e.g. Ohio Rev. Code Ann. § 1331.16(I); Utah Code § 76-10-3107(2); Was. Rev. Code Ann. § 19.86.110(9).

8 See, e.g. Conn. Gen. Stat. Ann. § 35-42(f); 740 Ill. Comp. State. Ann. 10/7.6.; N.C. Gen. Stat. Ann. § 75-10; Tenn. Code Ann. § 8-6-404.

9 See, e.g. N.C. Gen. Stat. Ann. § 75-12.

10 These variations are the primary reason that I have avoided trying to give statistical breakdowns of FOIA laws and have instead used general phrases. My impressions are based both on my own experiences dealing with these issues for many years, and conversations with my colleagues in other states about these topics.

11 For example, the party providing the trade secret material may be required to identify the specific documents that contain trade secrets and to explain why they should be kept confidential. A general designation of all documents produced as "confidential trade secrets" may not suffice. *See, e.g.* Utah Code §63G-3-309(1)(a)(i).

12 *Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372 (UT 2008).

Most enforcers would agree that a court issued protective order protects documents from FOIA requests, particularly documents that are appropriately designated as "confidential" because they contain trade secrets or other sensitive information. Thus, it is a common Multistate practice to work with defense counsel to obtain protective orders. However, such orders normally only issue after a complaint is filed,[13] they may not retroactively protect documents provided to the states during an investigation, and there are states where even a court order may not exempt all types of documents from FOIA disclosure.

Given the inherent uncertainties over the scope of FOIA law, the interplay between CID statutes and FOIA statutes is complicated and varies widely by state. In some states there is clear statutory authority that information obtained via a CID is not public,[14] occasionally supported by case law.[15] In other states the situation is less clear. There are states where information obtained directly by the state may be deemed subject to disclosure under that state's FOIA laws, but where information obtained from another state under an MCA may be protected from FOIA disclosure. Statutes allowing sharing of investigatory materials between states frequently allow or require the receiving state to apply the same confidentiality protections as the originating state.[16] Multistates therefore try to issue CIDs from "strong protection" states and share with "broad disclosure" states to the extent that the shared documents are likely to be subject to the original acquiring state's confidentiality provisions.

Collaboration with federal investigators raise additional issues. When allegations of anticompetitive behavior or merger reviews are of interest to both federal and state enforcers, we sometimes end up conducting a joint investigation. In other instances, we conduct parallel investigations that may be coordinated to a greater or lesser degree. We most frequently work with either the United States Department of Justice or the Federal Trade Commission, each of which have their own protocols for sharing information. The details of those procedures are beyond the scope of this article, but what is relevant is that federal agencies typically require state-specific consents from witnesses to share information that they obtained. This means that even though there is a Multistate, if you represent a witness who produced documents to the DOJ you may end up needing to give dozens of consents. Unfortunately, those consents may implicate the vagaries of individual state FOIA statutes previously mentioned. Thus, there may be a need to separately negotiate and customize at least some of the consents to accommodate those differences.

Witnesses sometimes receive "me too" CIDs from states. Those CIDs follow two basic patterns. The first is the "me too" CID seeking information that the witness is providing or has previously provided to a federal enforcer. To an extent, this can mitigate the need for the individual confidentiality waivers discussed above. Indeed, states sometimes issue such "me too" CIDs where negotiations over the waivers between the states and the witness have stalled . The second common reason for a "me too" CID is that some states believe that documents received pursuant to their own CID are better protected from unintentional disclosure than documents received only pursuant to an MCA.

Whatever the reason for issuing it, once a state receives information from a "me too" CID, that information is subject to the state's own CID statute as well as any sharing provisions under state law or under an MCA. Fortunately for the witness's counsel, it is rare for a state that issues a "me too" CID to get involved in negotiations regarding the scope of the original document production, the adequacy of that production, or the mechanics of that production. One exception sometimes arises in the context of "me too" CIDs for documents produced to a federal agency, when the witness tries to remove the control numbers from the prior federal production. The "me too" state will push back strongly when that occurs and will require that the production includes the same control numbers as on the original version. Having the same control numbers allows the state and federal enforcers to communicate efficiently about the same evidence. When the "me too" CID is issued by a state to provide additional FOIA protection for a CID issued by another state in a Multistate this usually isn't an issue because the "me too" state typically either does not require a physical second production or just asks to be copied on the production to the lead state that issued the original CID.

Some states can enter into witness confidentiality agreements ("WCAs") in addition to CIDs. Such agreements may be explicitly provided for by statute.[17] More frequently, authority to enter into a WCA may be implied by a statutory provision (e.g. that a witness may consent to certain disclosures of CID materials),[18] or may be a matter of practice (perhaps under the theory that because such agreements are not prohibited by statute they are permitted).

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13 An exception is where a court proceeding has been initiated to either quash, modify, or enforce a CID. The court may issue a protective order as part of the proceeding, or as part of the relief in appropriate cases.

14 See, e.g. Conn. Gen. Stat. Ann. §35-42(c)(1), (c)(2), (e); Tenn. Code Ann. §8-6-407; Utah Code §63G-2-201(3)(b).

15 See, e.g. *Comm'r of Emergency Servs. & Pub. Prot. V. Freedom of Info. Comm'n*, 330 Conn. 372, 390 (2018).

16 This authority may be found in a state's FOIA statute rather than specifically in an antitrust statute. See, e.g. Utah Code §63G-2-206.

17 See, e.g. Utah Code § 76-10-3107(8)(a).

18 See, e.g. 740 Ill. Comp. Stat. Ann 10/7.2(2); Ohio Rev. Code Ann. § 1331.16(L); Wash. Rev. Code Ann. § 19.86.110(7).

A primary reason for using WCAs is that they are more flexible than CIDs. For example, a WCA can contain provisions providing notice to a witness before any documents are disclosed pursuant to a FOIA request, a right that a witness may not have by statute when it produces documents in response to a CID. Similarly, if a Multistate issues a CID to Witness "A," and in response obtains documents in which Witness "B" has a legitimate privacy interest, a WCA with Witness "B" can give some protections that otherwise would not be available to Witness "B."

Another common reason for using WCAs early in an investigation is to get the information needed to draft cogent CIDs and to quickly obtain key information from non-hostile witnesses. This two-step process can benefit the witness as well as the Multistate because the resulting CID may be better focused and much easier for the witness to comply with.

Another use of WCAs segues us from the question of limiting unintentional state disclosures of confidential information to the question of negotiating intentional disclosures that a state may wish to make of CID responsive materials. A state issuing a CID for a Multistate will naturally need to be able to share it with other participating states. Likewise, the Multistate's experts will need access to the materials. Sometimes there is a need to share information obtained from one witness with another witness, for example when the witnesses fundamentally disagree about what happened at a meeting where both were present. A WCA can help to resolve some concerns that a witness may have about how the Multistate will use information provided by the witness.

There is wide variation among the states as to what uses of materials obtained by CID are explicitly permitted or prohibited. Most statutes permit sharing with other state and federal enforcers regardless of the consent of the witness. Some statutes require notice to the witness prior to such sharing,[19] and may require that the receiving enforcing entity agrees to keep the information confidential.[20] The question of whether a state can share information with experts or fact witnesses is even more variable. Under some statutes the witness must consent to such disclosures, while other statutes seem to give the enforcing state an unlimited right to use the information for purposes of the investigation as the state see fit. Some statutes are arguably unclear or contain language that is subject to multiple interpretations with respect to how CID materials can be used. Rarely are these issues resolved by judicial decisions. Given all of the possible permutations of law and legal, it benefits both the witness and the Multistate to resolve these issues through negotiation.

Thus, the third and final rule of confidentiality: Be reasonable in negotiating WCAs or terms for CIDs. Generally, state enforcers will be sympathetic to the legitimate, specifically articulated concerns of witnesses, and will negotiate appropriately tailored restrictions on the use of highly confidential information. However, states will push back hard against what appears to be overbroad "belt and suspender" prohibitions. That is particularly true where the language proposed by the witness's counsel is seen by the Multistate as materially hampering the investigation.

It is helpful for private counsel to understand how carefully Multistates handle the materials that they receive from witnesses and other sources. Antitrust investigations invariably involve large volumes of documents and other data from numerous sources, including records obtained directly from witnesses, from government agencies, and from public sources. This gathering process can result in millions of pages of materials which need to be reviewed and evaluated for relevance and evidentiary value. Multistate investigations normally use a single cloud-based document review platform to store all of the documents gathered in a given investigation. The review platform is typically "hosted" by a single state, and only specific attorneys and limited support staff who are working on that particular Multistate investigation have access to the database.[21]

Thus, the norm is that "sharing documents" in a Multistate does not mean that the witness's whole document production is going to be dumped into servers under the control of dozens of different state governments around the country. The exact review platform and the hosting state can vary from case to case, but the software normally uses artificial intelligence to help reviewers hone in on documents that have a higher probability of having evidentiary value. Document review platforms have mechanisms for organizing relevant documents topically and for building case outlines, so there isn't a need for each state to download even the subset of the produced documents that are likely to become evidence in a case. Only a small percentage of those potentially probative documents are likely to ever be copied outside the document review system, and then only for specific purposes. The most common reasons why a document produced by a witness may be copied outside the case management system include:

19 See, e.g. Ohio Rev. Code Ann. § 1331.16(L)(requiring "reasonable notice to the person who provided the material"); Utah Code § 76-10-3107(9)(c)(ii)(requiring notice "20 days prior to disclosure").

20 See, e.g. Neb. Rev. Stat. § 59-1611(6); Utah Code § 76-10-3107(9)(c)(ii)(A).

21 This is a typical approach, but there is variation in how Multistates handle documents, particularly in preliminary stages or small-scale investigations that may not warrant the expense of a centralized document review platform.

- Use as actual evidence at trial, in pleadings in filed cases or motions concerning enforcement of CIDs, and other court proceedings (which are frequently filed under seal or in a redacted version, depending upon the matter at issue).

- Disclosure in discovery during filed cases (invariably under the protection of a court approved confidentiality order).

- Providing relevant documents to experts so that they have the facts necessary to form expert opinions. Experts are typically required to sign confidentiality agreements and are not typically given unlimited direct access to the Multistate's cloud-based document review platform.

- Occasionally referring to a specific document with another witness. This may be done where two witnesses have conflicting memories of an event, for example, or where the Multistate is trying to learn about an industry and has questions about terminology or industry norms.

- Sometimes individual documents or excerpts from documents are included in evaluative materials that are used within the Multistate team. For example, when considering the merits of a specific legal argument the Multistate may circulate a memorandum that includes such materials, or may use them in a video or telephone conference on the issue.

- Some individual lawyers in the Multistate may create relatively small research files in their own computer systems to facilitate their own work. For example, this may occur when an assistant attorney general is putting together a status memo for the Attorney General and "front office" staff about the status of a Multistate, and such a memo may include key evidence.

The nuances of document sharing between a Multistate and private class counsel in a parallel case are beyond the scope of this article and can be highly case-dependent, but a few points are in order. Once a Multistate files a lawsuit, this relationship is frequently defined by parallel or joint orders entered in both cases. These orders frequently require document sharing at some level. For example, a defendant may be required to provide all discovery in to both private plaintiffs and the Multistate. Conversely, there may be a single limit requiring joint plaintiffs' depositions across both the private class action and the Multistate enforcement case, which necessitates coordination and sharing of documents relevant to those depositions. Private plaintiffs' counsel and the Multistate may need to share documents when working together on motions or case strategy, or if jointly hiring experts. However, these types of document sharing are typically limited to the specific relevant documents at issue, rather than giving private plaintiffs' counsel access to the Multistate's document review platform database.

A common mistake in these sorts of negotiations about the use of evidence is for the witnesses' counsel to focus too narrowly on what appears to be favorable language in the issuing state's CID statute, and to make demands based upon their interpretation of that language without considering the consequences. For example, even if the statute explicitly requires the witnesses' consent to share information with other witnesses, it can be unwise to try to block such sharing completely. After all, the Multistate can usually arrange for a different state with a more favorable statute to issue an identical CID, or find a witness who has much the same information and is willing to consent to its unrestricted use.

A common problem that arises in negotiations about confidentiality is that counsel for the witness treats the state enforcers as if we were representing a private litigant who may be in competition with the witness. Counsel frequently try to include boilerplate provisions or concepts that are typical of confidentiality orders in private litigation, without considering whether those provisions are appropriate in the context of state enforcement actions. Here are some examples:

- The witness's counsel seeks to include "attorneys eyes only" or "highly confidential" designations which are sometimes used in private litigation to prevent trade secrets from passing to a competitor, but which are rarely justified when dealing with state enforcers. In private litigation, these types of "beyond confidential" designations are generally intended to keep trade secrets from going to the party on the other side of the case, which may be a direct competitor of the producing party. [22] However, that is not an issue in a Multistate investigation because we don't represent a competing business. Conversely, those designations are typically not adequate to provide any particular protection for trade secrets under the designation requirements of state FOIA statues, and counsel who rely upon them may be inadvertently waiving the right to claim trade secret status under a state's FOIA law.[23]

22 These designations may make sense in limited situations where information is being shared between state enforcers and counsel for a private class action. Thus, they are sometimes seen in confidentiality orders filed in Multistate cases where discovery is being conducted jointly with an MDL.

23 For example, to claim the specific trade secret protection under Utah's version of FOIA, the party submitting the document to the government must provide "with the record" (arguably contemporaneously with production) "a concise statement of reasons supporting the claim of business confidentiality" for each "record that the person believes should be protected." Utah Code §63G-2-309(1)(a)(i). Given the burdens that process may entail, most counsel for witnesses in antitrust cases rely upon the specific confidentiality

- The witness's counsel insists upon the ubiquitous "return or destroy upon the completion of litigation" clause. Those clauses frequently conflict with state records retention laws, and also may not be practical in certain states for a variety of reasons. These variables are not always under the control of the attorney general's office.[24] Thus, states will typically seek limiting clauses, stating that materials provided by the witness will be deleted when permitted under state retention laws and government policy, to the extent that it is feasible to do so.

- The witness's counsel tries to keep too much confidential, for example by insisting that all documents be filed under seal, or by designating virtually everything as "confidential."[25] In private litigation it often benefits both sides to restrict disclosure of not only highly confidential material such as trade secrets, but also materials that may be simply embarrassing or awkward. Thus, both sides may support broad orders limiting public disclosure in court filings. State enforcers, however, represent the public interest, including the public's right to know what a case is about and the nature of the evidence in the case. We are usually happy to keep a company's internal financial projections out of the public record, but don't ask us to redact emails about a personal relationship between executives of competing companies that may be relevant to a price fixing scheme.

- The witness's counsel insists on language changes because "we are more comfortable with our language." Even where that proposed language is arguably clearer or otherwise superior, counsel for the Multistate need to consider the impact of non-uniformity in the context of a case involving numerous witnesses and state enforcers in dozens of states. Variation is acceptable in some parts of a WCA or CID, and the request for a change by witness's counsel can be accommodated. For other topics, such as notice of a FOIA request that may implicate the witness's documents, variation would lead to serious problems because of the need for a uniform process across the case. For example, if the WCA has a ten-day notice provision, we won't agree to a five-day notice provision for one witness.

Ultimately, the key to understanding the confidentiality of witness information is good communication between counsel for the witness and the assistant attorneys general who are representing the Multistate. Which is why this is typically the first conversation that we have after we issue a CID.

provisions of the Utah Antitrust Act, Utah Code §76-10-3107(9), rather than claiming trade secret protection *per se*. See also, Utah Code §63G-2-201(3)(b)(a record is not public under Utah's FOIA statue if access is restricted pursuant to another statute).

24 For example, an independent branch of state government may control the process of computer file backups for IT and other purposes. Likewise, an archives or government records office may control the retention and ultimate disposition of records.

25 Overuse of "confidential" designations by a witness when producing documents also creates FOIA problems. When a requestor challenges denial of a FOIA request in court, if the court conducts an in-camera review and determines that such a designation has been significantly overused there is a palpable risk that the court will summarily deny protection to any documents provided by the witness.

STATES AND NON-COMPETES: WHERE ARE THINGS HEADED?

BY SCHONETTE J. WALKER & ARTHUR DURST[1]

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I. INTRODUCTION

Over at least the past ten years, a growing body of economic literature has been detailing the pernicious effects of non-compete agreements between employers and employees. Harm to low-wage workers from non-competes is particularly well established. Broadly, the provisions forbid employees from working for competitors of an employer, for a certain period of time and over a defined geographic area.[2] Non-competes also prevent the employee from anywise competing with the employer in the future, including starting a competing business. In this sense, non-competes can be especially problematic for one of the key drivers of the U.S. economy — new small businesses growth.

Ten years of mounting evidence may seem like a long time, but it is not in the context of affecting change in an area of law that goes back far longer. That is partly what is so surprising about the change going on with non-competes –these agreements have been around for so long and yet we don't have a full understanding of their impact. Non-competes have a very long history in common law and date all the way back to the 1400s.[3] A caveat to this condensed history is that non-compete *use* has not been constant; use has grown rapidly recently, thus non-compete circumstances haven't exactly stayed the same.[4] Now, the only constant we see in this longstanding area seems to be change.

II. NON-COMPETES IN BRIEF

Non-competes by definition have anticompetitive aspects.[5] A key issue however is their reasonableness. Reasonableness analyses are built into the common law and the antitrust evaluations of non-competes. Reasonableness under common law requires passing a three-part test to show that the non-compete (1) is no greater than required to protect a legitimate business interest of the employer; (2) is not unduly harmful to the employee; and (3) does not injure the public.[6] Of course, antitrust standards of analysis, whether *per se*, quick look or full rule of reason, all have reasonableness baked in. While not addressing how these agreements should be analyzed through an antirust lens, we acknowledge a growing chorus that, in the antitrust context, employment non-competes are almost always unreasonable and should be presumptively illegal.

III. NON-COMPETES HARM WORKERS

The economic literature will continue to develop, but already there is a clear signal coming through: non-compete agreements are suppressing wages. Perhaps the best evidence of this comes from Oregon. It banned non-competes for hourly workers, which resulted in increased wages and job mobility.[7] Further evidence comes from Hawaii, which banned non-competes for technology workers, resulting in a 4 percent increase in new-hire wages in the technology sector.[8] This evidence supports the notion that non-competes may be harmful even for higher wage employees.

Aside from reduced wages for workers, there is a greater realization that non-competes have negative externalities (i.e. they are harmful to people not party to the contract). The harmed third-parties are proximately other workers in the same labor market that suffer depressed wages and the potential market entrants that have difficulty attracting necessary workers, as discussed more below.[9] Finally, consumers also suffer because innovation is reduced because there is less information flow and entry within an industry.

2 Eric Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 Antitrust L. J. 165 (2020).

3 Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 Lewis & Clark L. Rev. 497, 504 (2016).

4 Around 20 percent of workers are currently under a non-compete agreement. See e.g., FTC Transcript from "Non-Competes in the Workplace" 118 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf; Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. Times, May 13, 2017, https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html (quoting Russell Beck, '"Companies of all sorts use them for people at all levels,' he said. 'That's a change.'").

5 Bishara & Starr, *supra* note 3, at 506.

6 E.g. *Reliable Fire Equipment Co. v. Arrendondo*, 965 NE. 2d. 393, 396 (2011).

7 Michael Lipsitz & Evan Starr, *Banning Noncompete Agreements Benefits Low-Wage Workers*, Univ. Chicago, ProMarket (Oct. 18, 2019), https://promarket.org/2019/10/18/banning-noncompete-agreements-benefits-low-wage-workers/ ("[T]he noncompete ban increased average hourly workers' wages by 2-3 percent, rising to 6 percent five years after the ban was implemented. Moreover, because only 14 percent of the hourly-paid population signs noncompetes—and we cannot distinguish which ones in our data—our estimates of the earnings effect is an average across those who did and did not sign noncompetes. If we scale our estimates by the proportion of workers who actually signed noncompetes, the effect on noncompete signers may be as large as 14-21 percent, though spillover effects in the labor market likely mean that the true effect was somewhat lower.").

8 Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Works*, (U.S. Census Bureau Center for Econ. Studies Paper No. CES-WP-17-09) (2017).

9 *Id.* at 132 ("What we're learning is that in occupations in labor markets where you have more non-competes and more stringent enforcement, you seem to have less entrepreneurship, less innovation . . . ").

IV. NON-COMPETES HARM INNOVATION

That non-competes can slow innovation takes on a different meaning in light of the fact that industries can cluster in specific areas. For example, the 65 miles around Dalton, Georgia is responsible for the lion's share of the country's carpet production.[10] And the San Francisco Bay Area needs no introduction as the center of the computer technology industry. Likewise, for New York City with finance.[11] The same goes for Detroit with cars. The way industries gather in a geographic area is known as agglomeration economies. One reason for this phenomenon is due to knowledge spillovers within an industry. In other words, employees gain knowledge at a company, and when they leave to go to a competitor or start their own company, their knowledge is shared with new people, yielding new ideas and innovation. If non-competes slow down labor movement, it makes sense that innovation might be stifled because access to a common labor pool has been a main reason firms have naturally tended to co-locate near each other. We are staying out of the debate of whether California's ban on non-competes has caused the phenomenon of Silicon Valley,[12] but point out that one of the reasons that industries cluster is to benefit from a pool of employees, and the benefits to the industry from that labor pool are lessened when non-competes become prevalent.

V. NON-COMPETES HARM ENTREPRENEURSHIP & COMPETITION

Employment non-competes can stymie the creation of smaller "disrupter" entrepreneurs in an industry. This stymieing happens because of (1) the mere existence of non-competes, (2) enforcement of non-competes, (3) difficulty hiring qualified personnel because of non-competes, and (4) higher non-compete enforceability levels in certain jurisdictions which tend to inhibit "spin outs" or startups within an industry.[13] Even without a non-compete ever being enforced or litigated, it can result in harm to entrepreneurship. They may, in themselves, deter individuals from leaving their jobs to start a competing enterprise.[14] This *in terrorem* or chilling effect may be related to just the fact that the former employee is subject to a non-compete; it may also be related to threats or reminders by an employer that a non-compete exists. Likewise, when a former employer actually sues to enforce a non-compete, this can prevent a start-up from entering a market if the lawsuit is successful and may delay entry even if the lawsuit is unsuccessful.[15]

Non-competes also can have an impact on the availability of key labor inputs for start-ups because they may prevent the hiring of prospective employees. Anecdotal complaints from start-ups unable to hire qualified employees because of non-competes are common.[16] And although some larger firms may be willing to take on the risk of hiring an employee subject to a non-compete, even to the point of litigation, many smaller and growing firms are unable to take on that risk and are therefore blocked from hiring needed talent and entering certain markets.

The degree to which a state is welcoming (or not) to non-competes, including how easy (or not) a non-compete is to enforce, likely also affects some entrepreneurship. Studies have shown that start-ups launch at lower rates and have a harder time attracting talent where employment non-competes are strictly enforced.[17] One study found that enforcement of employment non-competes decreases the creation of spinout firms within an industry.[18] And, for those spinouts that are created in the same industry, they start larger, stay larger, and survive longer than

10 Charles Davidson, *Carpeting on a Roll in Georgia*, Fed. Reserve Bank of Atlanta, Econ South (2006), https://www.frbatlanta.org/regional-economy/econsouth/econsouth-vol_8_no_4-carpeting_on_a_roll_in_georgia.

11 See Paul Krugman, *Increasing Returns and Economic Geography*, 99 J. Pol. Econ. 483, 485 (1991) ("[T]he concentration of several firms in single locations offers a pooled market for workers with industry specific skills, ensuring both a lower probability of unemployment and a lower probability of labor shortage. Second, localized industries, can support the production of non-tradable specialized inputs. Third, information spillovers can give clustered firms a better production function than isolated producers."); Ellison, et al. *What Causes Industry Agglomeration? Evidence from Coagglomeration Patterns*, 100 Am. Econ. Rev. 1195 (2010) (confirming Alfred Marshall's proposed reasons why industry concentrate in geographic areas, including knowledge transfer).

12 See Russell Beck, *Misconceptions In the Debate About Noncompetes*, Law360 (July 8, 2019), https://www.law360.com/articles/1174776/misconceptions-in-the-debate-about-noncompetes.

13 For the purposes of this article "spinout" means firms founded by employees who leave their previous employer to start a new firm. Posner, *supra* note 2, at 188; Evan Star, Natarajan Balasubramanian & Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 Mgmt. Sci. 552, 552-53 (2018).

14 Bishara & Starr, *supra* note 3, at 539.

15 Florence Shy-Acquaye, *The Effect of Non-Compete Agreements on Entrepreneurship: Time to Reconsider?*, 10 U. Puerto Bus. L. J. 92, 100 (2019) (describing a former employee sued by former employer soon after starting business who spent six months litigating a settlement).

16 *Id.* (business owner unable to hire qualified employees because non-competes prevented work for competitors).

17 Karla Walter, Center for American Progress, *The Freedom to Leave, Curbing Noncompete Agreements to Protect Workers and Support Entrepreneurship*, 3. (2019).

18 Posner, *supra* note 2, at 188.

other new ventures.[19] Because some of this reduced entrepreneurship is the result of a sort of Darwinian weeding out of weaker start-ups, some consider this a social good. This however is a shortsighted since the proliferation of fewer, larger competitors leads to market concentration, for products and for labor, which is currently of great concern. To give an example, when Florida increased enforceability of employment non-competes in 1996, large firms moved to or were established in the state faster than small firms, resulting in more large-firm employment and higher labor market concentration.[20]

Similar impediments to entrepreneurship related to non-compete enforceability is seen following IPOs or acquisitions. Typically, following events like IPOs or acquisitions in biotech industries, there are spikes in entrepreneurship. This response, however, is muted in states with stronger enforcement of employment non-competes.[21]

As the debate on non-competes continues and new evidence sharpens the picture, governments and employees might not be the only ones seeking a future with fewer non-competes, but employers may as well. After all, non-competes make it harder for firms to hire employees. Also, aside from self-interested motives, it may become apparent at least to the leaders of the largest companies that non-compete agreements may be at odds with their public statements through the Business Roundtable and similar organizations that say they will serve all their "stakeholders," including employees.[22]

Currently, in the Eighth Circuit, two trucking companies' hiring practices have led to litigation. The defendant trucking company hired the drivers of a competitor that bound its drivers with employment agreements tied to training in exchange for reduced pay and a ten-month non-compete. This case provides an example of an employer (Transam Trucking) who likely would prefer a world with fewer non-competes. Judge Stras dissented from the panel decision that reversed the dismissal of the plaintiff's claims by noting that the dispute was "about competition for long-haul truck drivers . . . [and that] [t]ortious interference with contract is not about favoring some business models over others."[23] With cases like this and non-competes becoming more prevalent, companies who do not use non-competes may become more public about the use and impediments of non-competes in their industry.

VI. BROAD JUSTIFICATIONS FOR NON-COMPETES ARE NOT SUPPORTABLE

It's worth recalling justifications that have supported non-competes. There are principally two: 1) to protect and encourage the sharing of trade secrets within the company and 2) to encourage and protect an investment in training employees. However, the general difficulty for an employee to change jobs renders these justifications less relevant.[24]

Moreover, to the extent a goal of a non-compete is to protect certain business assets, the use of the non-compete is a remarkably inefficient tool. If we examine just a limited number of examples, we see that there are other more specific areas of law to address the protection of assets the former employer desires. A major argument for the use of non-competes is that the former employee may have access to trade secrets of the former employer and may use those trade secrets in her employment with a new employer or use them in her own new start-up business. The non-compete however is not the best tool to fight that misappropriation of a business asset. A leading scholar in this field "[r]eview[ed] the variety of mechanisms that may be used to protect intangible assets" and came to the conclusion "that using noncompetes is a part of a 'belt-and-suspenders' approach to IP protection...[and][t]his approach relies on the assumption that more protection is always better, but this assumption is faulty."[25]

Indeed, other instruments like non-disclosure agreements, confidentiality agreements and/or intellectual property laws are arguably more appropriate. NDAs and CAs are contracts that can have clearly spelled out penalties for breach, including liquidated damages. Some argue that

19 Bishara & Starr, *supra* note 3, at 526.

20 Posner, *supra* note 2, at 188.

21 Bishara & Starr, *supra* note 3, at 523.

22 *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans*,' Bus. Roundtable, (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

23 *CRST Expedited, Inc. v. Transam Trucking, Inc.*, No. 18-2633 at 16 (8th Cir. 2020) (J. Stras, dissenting).

24 See Posner, *supra* note 2, at 181-182 ("If real-world labor market frictions often prevent employers from switching jobs, then these frictions should also enable employers to invest in general human capital and intangible assets like good will and trade secrets. A noncompete is necessary only to the extent that those frictions fall short. The benefit of a noncompete should thus be understood in marginal terms.").

25 Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 Wm. & Mary L. Rev. 873, 911 (2010).

resorting to these contract terms amount to seeking redress after the fact and that is inadequate because the trade secrets may have been disclosed already. But a trade secret could be divulged or stolen by a current employee just as easily, and the remedies would be similar if not the same: an action for theft of intellectual property. Indeed, many employers may have found that resort trade secret litigation is the right tool to protect corporate secrets. A 2018 report showed that the Central District of California had more trade secret lawsuits in the last decade than any other district in the country.[26] There could be a number of reasons for this and the fact that California courts do not enforce employment non-competes may very well be a contributing factor.

Proponents of non-competes will also point to the protection of customer lists and goodwill as additional justification for post-employment restrictive covenants. Again, there are less restrictive alternatives to using non-competes that potentially thwart or destroy competition — the non-solicitation agreement. With this provision, the former employee may not solicit customers of her former employer. Breach of this provision will likely involve the payment of damages from the breaching former employee to the former employer. This approach addresses a specific potential problem with a specific tool — not an overbroad restriction with a propensity to harm workers and lessen competition.

VII. STATES ARE TAKING ACTION

With no federal rule or law controlling non-compete agreements, several states, whether through their Attorneys General or their Legislatures, have been acting against non-competes. At the end of last year, the Washington State Attorney General's Office settled a case against a coffee chain that included a non-compete provision in employment agreements with all of its retail employees.[27] On the legislative front, in June, Virginia joined a trend of states that bar enforcement of non-competes against low-wages workers (defined as earning less than the weekly average of a Virginia worker).[28] Indiana also recently created new requirements for non-competes with doctors, including that the doctor have the option to buy out the provision for a "reasonable price."[29] Maryland's legislature also passed a low-wage worker non-compete prohibition in 2019.[30]

VIII. POTENTIAL NON-COMPETE PROBLEMS IN THE FUTURE — NEXT CONSIDERATIONS

As with many things, the COVID-19 pandemic may change how non-competes are viewed. Mass layoffs and furloughs are impacting dozens of industries and millions of workers. A company that furloughs or lays off a worker and then attempts to enforce a non-compete may face a different environment in a courtroom that looks to whether a non-compete provision violates public policy. A few states already prohibit the enforcement of a non-compete if the employee was terminated without cause, but many are undecided.[31] If companies try to enforce non-competes, some courts may have the opportunity to answer the question of whether an employee terminated without cause is still subject to the provision.

As companies eventually hire workers back to replace their ranks, a good indication that a company is not being thoughtful about its non-compete policies is when non-competes are wholesale required for *all* employees. Although many of those companies may never expect to enforce a non-compete even if they have the opportunity, the existence of the non-compete does damage outside of the courtroom, too. They can "gum up" the hiring process by increasing uncertainty for current and former employees and prospective employers. Hopefully such companies will reconsider blanket non-compete policies as they hire employees back. Still, the likely relative scarcity of jobs will give employers more of an ability to have an employment contract that includes an abusive non-compete.[32]

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26 https://www.hklaw.com/en/insights/publications/2018/08/california-district-leads-nation-in-trade-secret-l (last visited July 13, 2020).

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

28 Garen E. Dodge & Nathaniel M. Glasser, Virginia Prohibits Non-Compete Agreements with *"Low-Wage" Workers*, Nat'l L. Rev. (June 23, 2020), https://www.natlawreview.com/article/virginia-prohibits-non-compete-agreements-low-wage-workers.

29 Michael W. Padgett & Robert Frederick Seidler, Indiana's New Restrictions on Physician Non-Compete Agreements, Nat'l L. Rev. (May 6, 2020), https://www.natlawreview.com/article/indiana-s-new-restrictions-physician-non-compete-agreements.

30 https://www.forbes.com/sites/tomspiggle/2019/08/13/how-maryland-is-continuing-the-trend-of-restricting-non-compete-agreements/#1c91d97e7463 (last visited 7-14-2020).

31 See Russell Beck, *Employee Noncompetes: A State by State Survey*, Beck Reed Riden, (April 27, 2019) https://www.beckreedriden.com/wp-content/uploads/2019/04/Non-competes-50-State-Survey-Chart-20190427.pdf. A helpful chart to see both whether a state considers public policy in enforcing a non-compete and whether a non-compete is enforceable against an employee terminated without cause.

32 Josh Eidelson, *How the American Worker Got Fleeced*, Bloomberg, July 2, 2020, https://www.bloomberg.com/graphics/2020-the-fleecing-of-the-american-worker/ ("The pandemic certainly could give employers even more power to set the rules.").

A possible next area of consideration, study and state activity may be the other contract provisions that usually accompany non-competes: confidentiality, non-solicitation provisions, etc. The most likely candidate of these other provisions is the non-solicitation agreement prohibiting recruiting former fellow employees. This type of provision seems less harmful than non-competes, but at the same time also offers much less justification. We struggle to see the procompetitive benefits of employees silenced from sharing job opportunities or extolling the benefits of a new employer; this is in contrast to the former employee actively soliciting customers of her former employer.

Finally, states seem likely to continue defining different regulatory regimes for different types of workers and for different income levels. There may be significant pushes across the country to get more legislation passed to ban abusive non-competes. These legislative changes will provide further evidence and natural experiments for economists and researchers to determine the full effects of non-competes.

IX. CONCLUSION

A lot has changed with non-competes in the last ten years. Our understanding of the impact of non-competes and their prevalence is much improved. So far, it's clear that the prevalence and harms from non-competes have been under-appreciated. Further study and understanding seems likely at least in part because the states, at various levels, are reacting to this new information. Indeed, many states are enacting new and stricter legislation to regulate non-competes, especially as they impact low wage workers. This will create more opportunities for natural experiments related to these employment provisions. Additionally, we expect there will be further scrutiny of the additional contract provisions that usually accompany non-competes.

WHEN COMPETITION MEETS LABOR: THE WASHINGTON ATTORNEY GENERAL'S INITIATIVE TO ELIMINATE FRANCHISE NO-POACHING PROVISIONS

BY RAHUL RAO[1]

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Disclaimer: The views expressed in this article are Mr. Rao's, and do not necessarily represent the views or position of the Washington State Attorney General or the Attorney General's Office.

I. INTRODUCTION

Starting in January 2018 and continuing for a little over two years, Washington State championed an initiative to permanently end the nationwide use of franchise no-poach clauses. This initiative was a success. And through its efforts, Washington eliminated no-poach clauses from about 235 corporate chains, representing nearly 200,000 locations across the country. Eliminating these clauses expanded competition for *millions* of workers' labor throughout the United States.

II. FRANCHISE NO-POACH PROVISIONS DEFINED

To start, a no-poach provision is an agreement — either by itself or as part a broader contract — between two employers, where one or both agree not to hire, solicit, or recruit the other's employees. For franchise systems, the no-poach agreement appears as a single provision within a franchise agreement — a lengthy contract between a franchisor and the independently owned and operated franchisee — that restricts employee mobility within that system.

Franchise no-poach provisions may take different forms. For example, some prohibit hiring another location's employees, while others prohibit recruiting. Some no-poach provisions may prevent poaching only the franchisor's employees. Others protect only company-owned locations. While some only restrict poaching between franchisees. And finally, some no-poach provisions include all the above restrictions.

Despite their variations, all franchise no-poach provisions share a single, unifying quality: restricting franchise entities' ability to hire or recruit new employees. Thus, all no-poach provisions, in some way, inhibit the competition for franchise workers' labor. The consequences for this reduction in competition include diminished opportunities, stagnated wages, and non-competitive benefits and working conditions.

III. WASHINGTON'S INITIATIVE

In September 2017, the New York Times published the article: "Why Aren't Paychecks Growing? A Burger Joint Clause Offers a Clue."[2] That article explores why wages were stagnating across the country, specifically looking at low-wage employees in fast food and quick serve restaurants. Underlying the New York Times's reporting was research by leading labor economists — Alan Krueger & Orley Ashenfelter, both of Princeton University — suggesting that downward pressure from no-poach agreements may be partly responsible for wage stagnation.[3]

That article — and Professors Krueger & Ashenfelter's research — caught the attention of the Washington Attorney General's Office. Finding the presented issue compelling and concerning, the Washington Attorney General's Office, in January 2018, began to investigate franchise systems' use of no-poach provisions.

Within seven months, Washington secured legally binding agreements, through an Assurance of Discontinuance ("AOD"), from seven fast food franchisors to immediately stop enforcing and eliminate no-poach clauses from their franchise agreements nationwide.[4] The AOD also required the franchisor to give nationwide notice of the agreement to its system. While Washington's initiative to end franchise no-poach provisions began with fast food chains — where most workers tend to make minimum wage and are especially vulnerable to wage suppression — the state enforcer believes that all franchise no-poach provisions are *per se* violations of Washington's antitrust laws, as well as its federal analogues.

For that reason, Washington sought to investigate nearly every franchise system with a significant presence in the state. This number is in the many hundreds. As the investigation revealed, most franchise systems had no-poach provisions either at the time of the investigation or

2 Rachel Abrams, *Why Aren't Paychecks Growing? A Burger Joint Clause Offers a Clue*, New York Times, September 27, 2017, https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html.

3 See Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (September 28, 2017), Working Paper #614, Princeton University Industrial Relations Section, https://dataspace.princeton.edu/jspui/handle/88435/dsp014f16c547g.

4 See Press Release, Washington State Office of the Attorney General, AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

See also RCW 19.86.100 ("In the enforcement of [Washington's Consumer Protection Act (CPA)], the attorney general may accept an assurance of discontinuance of any act or practice deemed in violation of [the CPA], from any person engaging in, or who has engaged in, such act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of [a Washington State Superior Court]. Such assurance of discontinuance shall not be considered an admission of a violation for any purpose; however, proof of failure to comply with the assurance of discontinuance shall be prima facie evidence of a violation of [the CPA].")

recently before then. For the few franchisors that never used a no-poach, Washington took no enforcement action. But for those systems who were using or recently used a no-poach provision — about 235 corporate chains — the Washington Attorney General's Office secured their binding commitments to eliminate these clauses nationwide. In total, these settlements impact nearly 200,000 locations nationwide, and frees competition for the labor of millions of workers.

While most chains accepted Washington's offer to resolve the investigation without suit, one franchisor refused. Washington sued that franchisor — Jersey Mike's Franchise System — and its Washington franchisees in state court in Seattle.[5] This was the first lawsuit brought by a state attorney general against a company over no-poach clauses. Washington's complaint asserted a *per se* theory of liability and alleged a quick-look analysis in the alternative. Rejecting Jersey Mike's motion to dismiss, the Court left intact both *per se* and quick-look arguments. The parties eventually settled — two months before trial — on terms substantively identical to all other AODs, plus $150,000. Every other franchise system cooperated with the State's investigation.[6]

Growing beyond fast food, Washington's initiative expanded across several industries, including: automotive services, child care, commercial cleaning, convenience stores, custom window treatment, electronic repair, home healthcare, home repair, hotels, insurance adjustors, parcel services, residential housekeeping, tax preparation, and travel agencies.

In June 2020, the Washington Attorney General's Office announced the successful end of the no-poach initiative — eliminating no-poach practices nationally for every franchise system with a significant presence in Washington.[7]

IV. FRANCHISE NO-POACH PROVISIONS ARE MARKET ALLOCATION AND PRICE FIXING AGREEMENTS — AND THEY ARE *PER SE* UNLAWFUL

Both Section 1 of the Sherman Act and Washington's Consumer Protection Act prohibit "[e]very contract, combination . . . or conspiracy" in restraint of interstate trade or commerce.[8] Naked restraints of trade among horizontal competitors — such as those competing for employees in a labor market — are *per se* unlawful.[9]

Most common in the category of *per se* violations are agreements among horizontal competitors to fix prices or divide markets.[10] It does not matter if a specific price was actually "fixed," rather than simply suppressed.[11] Market allocation among competitors — by customers or geography — is also *per se* unlawful. Under *per se* analysis, once the plaintiff shows that certain agreements exist, courts automatically find the agreement is unreasonable.[12]

While the most common horizontal conspiracies involve an agreement among sellers to raise *prices*, antitrust laws equally apply to horizontal conspiracies among *buyers* to stifle competition.[13] Buyers markets include labor markets, where employers compete to *purchase* labor

5 Complaint, *Washington v. Jersey Mike's Franchise Sys., Inc., et al.*, No. 18-2-25822-7 SEA (King City Sup. Ct. Oct. 15, 2018).

6 See Press Release, Washington State Office of the Attorney General, *Jersey Mike's Will Pay $150k To Resolve AG Ferguson's First No-Poach Lawsuit* (Aug. 23, 2019), https://www.atg.wa.gov/news/news-releases/jersey-mike-s-will-pay-150k-resolve-ag-ferguson-s-first-no-poach-lawsuit.

7 See Press Release, Washington State Office of the Attorney General, *AG Report: Ferguson's Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains* (June 16, 2020) (full report linked in press release), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate.

8 See, e.g. *supra* note 4. See also 15 U.S.C. § 1; RCW 19.68.030 (Washington's Consumer Protection Act). See also, e.g. *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991) (listing elements of a Section 1 claim).

9 *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963).

10 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); see *United States v. Socony-Vacuum Oil*, 310 U.S. 150, 218 (1940) ("[T]his Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se*."); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000).

11 *Socony-Vacuum Oil*, 310 U.S. at 222; see *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422 (1990) (constricting supply is "the essence of 'price-fixing'").

12 *Maricopa Cty. Med. Soc'y*, 457 U.S. at 343–44 (1982); see also *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (stating that because these agreements "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, [ ] they are deemed unlawful *per se*.").

13 *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (finding antitrust liability "even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers.") (footnotes omitted); see also *Knevelbaard Dairies*, 232 F.3d at 988–89 ("[A] buying cartel's low buying prices are illegal and bring antitrust injury.").

from workers who *sell* it.[14] No-poach agreements among competing employers are "a type of customer allocation scheme which courts have often condemned in the past as a *per se*" violation of antitrust laws. And thus, it is *per se* unlawful for competing employers/buyers to agree with each other not to compete for workers/sellers.[15]

In the franchise context, franchisees, among themselves and with the franchisor, are direct competitors for labor. As separately owned and operated entities with discretion to make independent hiring and employment decisions — such as whom to hire and how much to pay — these clauses are agreements among employers not to compete for workers. And because franchise agreements are uniform within a system, each franchisee knows that other franchise units are subject to the same no-poach restriction.[16] Thus, agreements among employers not to compete for workers — even if done through an intermediary — are both horizontal labor market allocations and price fixing conspiracies, and are *per se* unlawful.[17]

V. EVEN IF NOT *PER SE* UNLAWFUL, ONE NEED ONLY TAKE A "QUICK LOOK" AT THE RESTRAINTS TO SEE ANTI-COMPETITIVE EFFECTS

In the spectrum of antitrust analyses — with *per se* occupying one end and full rule of reason on the other — "[a]n abbreviated or 'quick-look' analysis is appropriate when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets."[18]

Among other situations, courts do a "quick look" when a restraint would normally be illegal *per se*, but "a certain degree of cooperation is necessary if the [product at issue] is to be preserved."[19] In other words, quick look review "is usually best reserved for circumstances where the restraint is sufficiently threatening to place it presumptively in the *per se* class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications."[20]

Here, one with even a rudimentary understanding of economics could conclude that a worker trained in a franchise's unique operations would be valuable to another franchise unit. Indeed, logic itself might dictate that no-poach agreements only make sense if there is a risk that a worker might switch employers for better pay, benefits, or working conditions.

That same observer would also see that a no-poach agreement limits workers' bargaining power with their current employer, eliminates the threat of moving to a competing employer, and limits workers' ability to go to a competing employer for better money or working conditions. One need no more than lay observation to see that no-poach provisions eliminate a market that would otherwise allow qualified, trained workers to capitalize on their value.

14 *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (agreements among competitors limiting upstream inputs—such as labor—can be *per se* unlawful).

15 *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (plaintiffs "successfully pled a *per se* [antitrust claim] for purposes of surviving a 12(b)(6) motion" in alleged conspiracy among defendants to fix and suppress employee compensation and to restrict employee mobility through "Do Not Cold Call" agreements).

16 In its complaint against Jersey Mike's, Washington argued that the franchise agreements document "a 'hub and spoke' contract, combination, and/or conspiracy to restrain trade and commerce in which all Defendant Franchisees agreed with the Franchisor not to solicit or hire other Franchisees' workers. Because the agreement is standard and because the terms of the franchise agreement are made public, Franchisees know the basic contents of each other's agreements." See *supra* note 4.

17 *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 213) ("The court thus finds that the United States' allegations concerning agreement between eBay and Intuit [not to hire each other's employees] suffice to state a horizontal market allocation agreement" that is *per se* unlawful); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 157–58 (N.D.N.Y. 2010) (holding that information exchange between defendants to fix nurse wages was illegal *per se* and tantamount to a conspiracy to fix prices); see *Brown*, 936 F.2d at 1045 (holding that agreements among competitors limiting upstream inputs can be *per se* unlawful).

18 *Cal. Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756, 770 (1999).

19 *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984).

20 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1911. (3d. and 4th Editions, 2019 Cum. Supp. 2010–2018).

VI. ARGUMENTS FOR A FULL RULE OF REASON ANALYSIS MISUNDERSTAND THE FRANCHISOR-FRANCHISEE RELATIONSHIP IN THE RELEVANT MARKET

As interest in franchise no-poach provisions ballooned, franchisors and others[21] sought to shield no-poach provisions from *per se* treatment. Specifically, the U.S. Department of Justice ("DOJ") inserted itself into three no-poach class actions in the Eastern District of Washington to file statements of interest.[22] In response to its statements of interest, Washington filed amicus briefs with the district court setting forth its position on the class plaintiffs' claims that the franchise no-poach provisions violated Washington's Consumer Protection Act.[23]

In its statements of interest, DOJ articulated certain fundamentals of antitrust analysis of franchise no-poach provisions consistent with Washington's view. First, both enforcers agree that a franchisor and franchisee can be separate entities able to conspire under Section 1. And second, both agree that naked, horizontal no-poach agreements between rival employers within a franchise system are subject to the *per se* rule.

Washington, however, disagreed with DOJ's assertion that a no-poach clause contained within a franchise agreement, is, absent some other agreement between the franchisees, subject to the rule of reason because it is — in DOJ's view — a vertical restraint. The two enforcers also disagree on DOJ's position that even if there were some alleged agreement among franchisees, the no-poach provision would still fall under the full rule of reason because it is ancillary to the broader franchise agreement. Washington believes both arguments are incorrect.

First, as to the contention that no-poach provisions are vertical, DOJ qualifies this position by noting that certain agreements may be horizontal if they restrain competition between the franchisor and franchisee.[24] This exception to DOJ's argument includes no-poach provisions that restrict a franchisee from poaching an employee of a company-owned store or poaching from the franchisor itself. The only circumstance falling within DOJ's verticality argument is where the no-poach provision restricts only franchisees from poaching each other's employees. Yet even in that single no-poach variation, the franchise agreement's uniformity — that they are all identical, and thus all parties know and intend to be bound by the same restrictions — presents enough circumstances to plead a hub-and-spoke conspiracy, with the franchisor as hub.

More, in an open letter to DOJ's Antitrust Division, the American Antitrust Institute ("AAI") questioned many of DOJ's arguments.[25] As to the argument that a vertical relationship demands a rule of reason analysis, AAI noted that the orientation of the restraint, by itself, does not determine the mode of analysis. Rather, what is critical is the economic *effect*, not formalistic line drawing.[26] Thus, even if parties operate at different levels of distribution, agreeing to a restraint that has a horizontal, anticompetitive effect, would be subject to the *per se* rule. For franchise no-poach clauses, the restraint only impairs horizontally positioned parties who would otherwise compete in labor markets. It thus deserves *per se* treatment.

DOJ's second argument — that even if the restraint is horizontal, the no-poach provisions are ancillary restraints — is also incorrect. Under the ancillary-restraints doctrine, a traditionally *per se* restraint escapes *per se* liability if, among other things, it is reasonably necessary to complete the main transaction.[27] Both Washington and AAI agree that the facts and results of Washington's initiative undercut any argument that these clauses are *necessary* to the franchise agreement. That 100 percent of relevant franchise systems in Washington State — about 235 chains — immediately eliminated their no-poach provisions with no subsequent harm to the franchise systems, shows that the restraints were never necessary. Without showing necessity, one never triggers the ancillary-restraints doctrine, and the restraints remain *per se* unlawful.

The actions in which DOJ and Washington filed competing briefs settled before any argument or decision on the merits.

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21 "Others" includes the United States Department of Justice, who, in March 2019, filed statements of interest in the District Court for the Eastern District of Washington in support of franchisor-defendants in three no-poach class actions. See *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 11, 2019), *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246 (E.D. Wash. Mar. 11, 2019), and *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244 (E.D. Wash. Mar. 11, 2019).

22 See Corrected Statement of Interest of the United States, filed in *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019), *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019), and *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019).

23 See Amicus Curiae Brief by the Attorney General of Washington, filed in *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 11, 2019), *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246 (E.D. Wash. Mar. 11, 2019), and *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244 (E.D. Wash. Mar. 11, 2019).

24 See *supra* note 22 at 12-13.

25 See American Antitrust Institute Letter to AAG Delrahim and DAAG Murray (May 2, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf.

26 *Id.* at 6. (citing *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007)).

27 See, e.g. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

VII. CONCLUSION

It is uncontroversial to state that antitrust law is not limited to sellers; that it applies equally to buyers. It is similarly without dispute that employers who hire workers are buyers of labor. In a labor market, firms that compete to hire or retain employees are direct, horizontal competitors for those workers. This horizontal, competitive relationship in a *labor* market exists without regard to the parties' relationship in *any other* market.

And while the complex — and sometimes confounding — business structures of franchise systems understandably create some analytical confusion because of the necessary coordination of outputs, when evaluating the entities' labor-inputs, the franchise units are independent centers of employment decision-making who compete with each other for workers. At their core, franchise no-poach provisions seek to eliminate that competition much like any other market allocation or price fixing agreement. This is conduct that has always been, and will always be, *per se* unlawful.

IN DEFENSE OF STATE ENFORCEMENT: A POSITIVE PERSPECTIVE ON STATE AND FEDERAL COOPERATION

BY JOSEPH CONRAD[1]

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I. INTRODUCTION

Congress has constructed antitrust enforcement in the United States in a cake-like fashion: with three separate layers. Each layer contains its own set of independent enforcers, adding further complexity to the U.S. enforcement regime.

Federal enforcement sits atop the structure with enforcement duties divided between the U.S. Department of Justice Antitrust Division ("USDOJ") and the Federal Trade Commission ("FTC"), who largely share parallel jurisdiction. The middle layer of this structure is comprised of state enforcement. States Attorneys General Offices ("State AGOs") wield independent authority to bring enforcement actions under federal law, while simultaneously holding separate power to bring state antitrust claims. At the bottom of the enforcement structure rest private plaintiffs, who most commonly invoke antitrust and serve as the enforcement foundation.

This multi-faceted and overlapping enforcement regime is much maligned for increasing the probability of over-deterrence. To be sure, antitrust enforcement can be a significant liability for defendants. Government enforcers have the ability to exercise investigative authority to pursue potential violators, even before filing a lawsuit. Then, if litigation does ensue, the costs can be exponential. Antitrust litigation often brings about follow on suits from other government enforcers, along with private plaintiffs.[2] The high costs associated with enforcement are acceptable when incurred while prosecuting anticompetitive conduct. However, those costs may have a chilling effect on procompetitive conduct when enforcers commit false positives (wrongly concluding there was harm to competition) when making enforcement decisions.

In particular, critics of the two-headed enforcement regime have complained that state enforcers create unnecessary uncertainty for business and contribute to over-deterrence.[3] These concerns largely decry state enforcement efforts for chilling procompetitive conduct, mudding national competition policy, and distorting antitrust analysis with unrelated policy concerns. In short, state enforcement has come under its fair share of scrutiny.

Despite complaints from critics, state enforcement provides substantive contributions to the field of antitrust. For instance, state enforcement delivers additional resources to our nation's capacity, as the States employ over 150 attorneys dedicated to antitrust.[4] Moreover, state enforcement facilitates viewpoint diversity and policy competition between state and federal enforcers to promote robust enforcement. Finally, state enforcement also generates substantially more case law, which helps develop antitrust understanding.[5]

Contrary to what critics suggest, the enforcement system captures substantive benefits with limited costs because of cooperative enforcement. Often overlooked by critics is the symbiotic relationship that has developed between state and federal enforcers. Since the end of the Reagan Administration, state and federal enforcers have developed synergies by coordinating investigations and subsequent litigation. State enforcers offer their federal counterparts familiarity with local markets and industries, close ties with local institutions, and the ability and experience in compensating injured individuals.[6] In exchange, federal enforcers provide experienced and intently focused staff, national and international perspective on competition issues, and in-house staff economists.

Cooperative enforcement mitigates the often-cited costs and burdens associated with state enforcement efforts. For example, coordinated investigations reduce redundant and duplicative requests made upon investigatory targets and allow enforcers to find efficiencies in the process. But, perhaps even more importantly, synchronization between enforcers mitigates potential problems arising from inconsistent state and federal antitrust policy and enforcement decisions.

Generally, state and federal enforcers have incentive to reach consensus on enforcement policy. The incentive lies in two separate mechanisms. First, the spillover effects that result from a single enforcer's enforcement decision; and second, the harmonization between state and federal antitrust law. The aforementioned incentives ensure that state enforcement policy commonly coincides with positions taken by federal enforcers; however, differences do at times ensue – particularly on some high-profile matters. Despite these rare public disagreements between enforcement bodies, the gains derived from our multilayered system overwhelm any efficiencies produced from policy deviations.

2 Richard A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925, 940 (2001) [hereinafter Posner, New Economy].

3 Deborah Platt Majoras, Deputy Assistant Attorney General, Dept. of Justice, Antitrust Division, Antitrust and Federalism, Remarks Before the New York State Bar Association (Jan. 23, 2003) at https://www.justice.gov/atr/speech/antitrust-and-federalism#N_8_. [hereinafter Majoras, Antitrust and Federalism].

4 Thurman Arnold Project at Yale, State Antitrust Employment at https://som.yale.edu/faculty-research-centers/centers-initiatives/thurman-arnold-project-at-yale/state-antitrust-employment.

5 Brief for the American Antitrust Institute as Amicus Curaie, *Wal-Mart Stores, Inc. v. Rodriguez*, 322 F.3d 747, 748 (1st Cir. 2003).

6 Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L.J. 673, 673 (2003) [hereinafter, Calkins, Perspectives].

The next section will provide details on the historical perspective on state antitrust enforcement before we explore the incentives for cooperation. The third section will then provide details on the potential spillover effects resulting from state enforcement in federal law, which in turn offer incentives for both sets of agencies to coordinate. The fourth section will turn the tables and identify ways in which federal enforcement exerts external forces on state antitrust laws. Finally, the paper will end with a brief conclusion.

II. HISTORICAL PERSPECTIVE

Before exploring the incentives for cooperation between state and federal antitrust agencies, it is first important to have a historical perspective on the enforcement mechanisms and the growth of state enforcement. State antitrust enforcement has existed longer than the first federal antitrust law, the Sherman Act, which was passed in 1890. Senator Sherman himself announced during debate over the Sherman Act that our nation's federal antitrust laws are meant to only supplement, not displace, state enforcement.[7]

Modern antitrust law refers principally to federal statutes. Although state antitrust enforcement predates the passage of the Sherman Act, contemporary state antitrust enforcement did not begin until the passage of two pieces of federal legislation in 1976. First, the Crime Control Act of 1976 provided financial resources to state attorneys general for antitrust enforcement.[8] Second, the Hart-Scott-Rodino Act ("HSR")[9] in which states received Congressional authority to bring federal antitrust claims as *parens patriae* for treble damages.[10] Shortly after HSR's passage, the National Association of Attorneys General ("NAAG") established an Antitrust Task Force to develop antitrust policy and coordinate antitrust investigations and litigation.[11]

The authority granted in HSR places States AGOs a privileged position as a private plaintiff. Under that authority, State AGOs may bring federal antitrust cases on behalf of its residents for treble-damages and equitable relief when the welfare of its citizens is threatened.[12]

State enforcement grew from its newfound authority throughout the 1980s, partially in response to a decline in federal enforcement during the Reagan administration.[13] In the first Bush and Clinton administrations, the relationship between state and federal enforcers became more cooperative, which only enhanced state intervention in antitrust.[14] *Microsoft* perhaps best characterizes the growth of state enforcement. The states began investigating Microsoft in 1997 and jointly litigated the case with the USDOJ, marking one of the most significant antitrust cases in history.[15]

The *Microsoft* experience, however, set ablaze a new debate over the proper role of state antitrust enforcement after the states splintered from the USDOJ's negotiated remedy. In the years following, Judge Posner[16] would call for states to be stripped of nearly all antitrust authority and the Antitrust Modernization Commission would review state authority. While the federal statutory basis for state enforcement has not changed in the time since, debates over state antitrust enforcement remain active.

7 21 Cong. Rec. 2457 (1890).

8 Pub. L. No. 94 -503.

9 Pub. L. No. 94-435.

10 Calkins, Perspectives at 676-77, *supra* note 6.

11 *Id.* at 678.

12 Jean Wegman Burns, Symposium: Antitrust at the Millennium (Part 1), 68 Antitrust L.J. 29, 32 (2000).

13 Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 711 (2011).

14 Stephen D. Houck, Transition Report: The State of State Antitrust Enforcement, National State Attorneys General Program, Columbia Law School (Oct. 2009).

15 Kevin J. O'Connor, Federalist Lessons for International Antitrust Convergence, 70 Antitrust L.J. 413, 423 (2002).

16 Posner, New Economy, *supra* note 2, at 940.

III. SPILLOVER EFFECTS IN ENFORCEMENT DECISIONS

The growth of state antitrust enforcement has brought with it concerns that State AGOs may take an overly aggressive posture or espouse policies inconsistent with federal agencies. In doing so, states may undermine the policy choices by their federal counterparts. The spillover implications could come in different, yet related, forms. Some of which are have dynamic implications for antitrust enforcement, while others are purely static.

Perhaps the most widely cited rationale for rejecting state antitrust enforcement is the concern that inconsistent enforcement decisions between state and federal enforcers could chill pro-competitive conduct in the long-run.[17] Antitrust commentators and policymakers have long feared that the extra layer of state enforcement may add uncertainty for businesses who may fear catching the ire of state enforcers.[18] As a result, businesses may decline to pursue pro-competitive mergers or conduct in an effort to avoid any antitrust scrutiny. In turn, consumers miss potential efficiencies or improvements.

In a different sense, state enforcement has another important dynamic impact: it can feed into the development of federal antitrust jurisprudence through case selection.[19] Federal antitrust is more a creature of judicial construction than statutory drafting. The Sherman Act and Clayton Act largely delegate authority to the judiciary, where much of the meaning behind our federal antitrust laws have been crafted. In practice, this raises the possibility that disjointed enforcement could develop unfavorable case law to the detriment of both state and federal agencies.

Concerns over fragmented enforcement efforts also pose a present risk to a given case at hand. The overlapping enforcement structure provides opportunities for disagreement between agencies over whether specific conduct or a proposed merger is anticompetitive. Agencies that decide to pursue enforcement while their fellow enforcers acquiesce to the allegedly anticompetitive conduct or merger seemingly undermine the policy choice made by their peers. In doing so, a single state action may undo conduct or mergers seen as pro-competitive by federal enforcers.

Fortunately, evidence suggests that state and federal enforcers are largely able to avoid the aforementioned spillover effects through coordination. The Antitrust Modernization Commission, while a bit dated, provides helpful insights in their final report about the harmonization of enforcement efforts. Studying 343 antitrust actions accounted for in the National Association of Attorneys General State Antitrust Litigation database from 1990 through 2006, the Commission reported that 59 percent of those cases represented joint enforcement efforts between states and a federal partner. More recently, the USDOJ alone reported bring 25 cases with states that reached a settlement or final disposition after trial from 2010 to 2017.[20]

Of the 142 state-only enforcement actions, 56 percent were related to price-fixing, bid-rigging, or market allocation. All three of these theories are well understood and likely to result in consumer harm.[21] Moreover, the majority of state antitrust effort is focused on areas in which states have a comparative advantage. State antitrust is particularly centered on issues of local or regional importance. One study concluded that over 80 percent of state lawsuits included allegations of local markets, indicating regional consequences involved in the case.[22] These statistics signal a high degree of cooperation and suggest an efficient allocation of resources between state and federal enforcers.

Although the statistics demonstrate how well State AGOs coordinate with federal agencies, divergences do sometimes occur. There have been several high-profile instances in which fractures separate the enforcement posture taken by state and federal enforcers. Two notable examples reflect the spillover effects previously described. The *American Express*[23] litigation and *Sprint/T-Mobile*[24] offer two examples of discrepancies between the approaches taken by state and federal enforcers.

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17 Majoras, Antitrust and Federalism, *supra* note 3.

18 *Id.* ("Antitrust is an area in which over-enforcement and promotion of multiple divergent enforcement views may cause affirmative harm.").

19 Antitrust Federalism, Preemption, and Judge-Made Law, 133 Harv. L. Rev. 2557, 2576 (2020).

20 Renata B. Hesse, Protecting Competition Across 50 United States: Advocacy and Cooperation in Antitrust Enforcement, Remarks at the ABA Fall Forum (Nov. 17, 2016) at https://www.justice.gov/opa/speech/file/911166/download [hereinafter, Hesse, Competition Across 50 United States].

21 Antitrust Modernization Commission, Report and Recommendations (2007), at https://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf.

22 Calkins, Perspectives at 678, *supra* note 6.

23 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) [hereinafter, *Amex*].

24 *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) [hereinafter, *Sprint/T-Mobile*].

As previously mentioned, sometimes differences in litigation strategy can lead to unhelpful precedent that later impacts antitrust jurisprudence. Such was the case in *American Express*.[25] Throughout much of the litigation, State AGOs and USDOJ worked together as co-plaintiffs in an effort to reform vertical restraints imposed on merchants, who American Express forbid from implying a preference for non-American Express cards. American Express successfully defended the practice in the Second Circuit[26], which several State AGOs later appealed to the Supreme Court, despite the USDOJ's brief in opposition to certiorari. Ultimately, the Court granted certiorari and upheld the Second Circuit's decision, finding that courts should evaluate harm to both sides of a two-sided market in certain instances. Federal enforcers felt the spillover effects from the *American Express* decision not long after the decision. The confusion caused by *American Express* later cast a shadow over USDOJ's attempt to block the merger between Sabre and Farelogix, exemplifying the spillover effects.[27]

In addition, state enforcement can sometimes displace enforcement decisions pursued by federal enforcers. The recent effort by thirteen states and the District of Columbia to enjoin the merger between Sprint and T-Mobile provides a recent example. In this instance, both State AGOs and the USDOJ reviewed the potential merger but diverged as states pressed for litigation while USDOJ reached a settlement. Unlike *American Express*, the *Sprint/T-Mobile* case merely presented the threat of spillover effects that never manifested. Ultimately, the merger was consummated after the district court rejected the state's request for an injunction to prevent the merger.[28]

The *American Express* and *Sprint/T-Mobile* examples reveal how disagreements in antitrust federalism often occur in high profile cases, which creates the erroneous assumption that these incongruities are common. However, as demonstrated by the enforcement statistics compiled by NAAG and various law review articles, discrepancies are actually quite rare.

Moreover, it appears that these rare disagreements in antitrust federalism are overwhelmed by more effective enforcement garnered from state enforcement. Past experience shows that state enforcement is responsible for diminishing error cost. Commentators have historically credited State AGOs for *Hartford Fire*[29] in the face of federal inaction.[30] In that instance, State AGOs decided to independently investigate and later file suit against a group of insurance firms for alleged boycotts of certain types of business insurance and municipal bonds. Action undertaken by State AGOs was the direct result of federal inaction. It only took place after states made direct asks to the USDOJ to pursue the matter. The State AGOs would ultimately litigate the case through the Supreme Court, receiving favorable rulings. In this matter, State AGOs actually exhibited positive spillover effects. Today, USDOJ predicates many of its own cartel enforcement efforts upon the precedent established by *Hartford Fire*.

In a more modern example, the Connecticut AGO, along with more than 40 states and jurisdictions independently uncovered alleged conspiracies among generic drug manufacturers.[31] The *Apple e-books* case provides yet another example. There, Texas opened the original investigation into coordinated conduct between e-book publishers and Apple. The state investigation proceeded for a period before USDOJ joined the effort.[32]

These examples only account for a small portion of State AGO's contribution. As mentioned earlier, enforcement activity pursued by State AGOs normally coincide and harmonize with federal enforcers. This tends to suggest that the instances in which antitrust enforcement between state and federal agencies diverges are rare and not representative. Instead, both state and federal officials understand the potential drawbacks from spillover effects caused by disjointed efforts, and these numbers suggest that antitrust federalism can contribute to a more robust enforcement regime.

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25 *Amex*, *supra* note 23.

26 *United States v. Am. Express Co.*, 838 F.3d 179, 205 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

27 *United States v. Sabre Corp.*, No. CV 19-1548-LPS, 2020 WL 1855433, at *1 (D. Del. Apr. 7, 2020).

28 *Sprint/T-Mobile*, *supra* note 24.

29 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

30 Kevin J. O'Connor, Federalist Lessons for International Antitrust Convergence, 70 Antitrust L.J. 413, 423 (2002).

31 Mark Pazniokas, Drug price-fixing lawsuit pushes CT probe into national spotlight, CT Post, May 13, 2019 at https://www.ctpost.com/local/article/Drug-price-fixing-lawsuit-pushes-CT-probe-into-13840601.php.

32 Hesse, Competition Across 50 United States, *supra* note 20 ("A short anecdote from that case illustrates quite concretely the benefits of federal-state cooperation. One of the best documents that provided evidence of the conspiracy to raise e-book prices – a document that wound up being featured in the opening paragraph of the Government's Trial Brief – was found during document review by a staff attorney from the Arkansas Attorney General's Office.").

IV. THE INTERPLAY BETWEEN STATE AND FEDERAL LAW

Commentators on antitrust focus nearly all of their attention on the influence State AGOs have on federal law but often overlook the inverse. The tight connection between state and federal antitrust law makes it possible for federal policies to bleed into state law. Similar to how federal enforcers have incentive to coordinate with state enforcers on federal antitrust cases, state enforcers are equally incentivized to work with their federal counterparts to protect against efforts that might adversely affect how their state antitrust laws are interpreted.

As a general matter, state antitrust laws are similar to their federal counterparts, and are commonly construed consistent with federal law. Approximately half of states use language mirroring Section 1 of the Sherman Act in their own state statutes.[33] In addition, state legislatures have commonly codified provisions to ensure that their state antitrust statutes are construed consistent with federal precedent. As of 2007, at least 27 states had ratified harmonization statutes and state courts have developed rules of construction to embody this statutory feature.[34]

The majority of states bind themselves to federal precedent, to at least some extent, meaning that developments in federal law cause spillover effects into state law. In some instances, states have moved to disentangle themselves from federal law by passing laws denouncing specific federal precedent. The most common examples are state statutes refuting the Supreme Court's holding in *Illinois Brick*; however, other examples are rare.

The decision by state legislatures to bind state antitrust law to federal precedent creates a similar pressure on state enforcers to engage with federal enforcers to protect against significant shifts in antitrust precedent and preserve their ability to pursue certain conduct in state court. Perhaps the most influential example of divergence between state and federal priorities on issues of state law occurred in the *Leegin* litigation.

In the Supreme Court decision in *Leegin*, the Court overruled its nearly century old precedent, making resale price maintenance subject to rule of reason analysis.[35] The USDOJ filed an amicus brief in that case supporting the Court's ultimate decision. Meanwhile, in a separate state-based claim after the *Leegin* decision, the Kansas consumers pursued the very same conduct under Kansas antitrust law as a *per se* violation.[36] In a rare departure from federal law, the Kansas Supreme Court sided with the Kansas consumers, concluding that federal precedent did not bind the court's decision.[37] Shortly after the Kansas Supreme Court's decision, the legislature moved to impose *Leegin* as binding precedent for purposes of state law.[38]

The experience in Kansas is unique, but it does reflect the broader need for cooperative antitrust federalism on behalf of state enforcers to protect their sovereign enforcement tools. Most states have harmonization statutes imposing federal precedent on interpretation of state antitrust laws. However, even for states without harmonization statutes, the reaction post-*Leegin* illustrates potential limits on expanding state enforcement efforts at odds with federal policy.

The practical realities of state-based antitrust enforcement further incentivize states to work with federal enforcers. A harmonized enforcement strategy that relies upon strong relationships and soft power is the best way to mitigate (1) significant changes in federal precedent that will ultimately impact state laws; and (2) the probability that state legislatures will in some way revoke state statutory authority.

33 Michael A. Lindsay, Resale Price Maintenance and the World After Leegin, Antitrust, Fall 2007, at 32.

34 *Id.* at 34.

35 *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

36 *O'Brien v. Leegin Creative Leather Prod., Inc.*, 277 P.3d 1062 (2012).

37 *Id.* at 1068.

38 Joseph G. Krauss, et al., Kansas legislature overrides state Supreme Court's attempt to depart from U.S. Supreme Court precedent, Lexology, May 1, 2013, at https://www.lexology.com/library/detail.aspx?g=57c02ba0-42c5-4543-b25d-95d8724d6900.

V. CONCLUSION

Enforcers should work to accomplish a cooperative antitrust federalism. When enforcers harmonize their efforts, it has the practical effect of driving down compliance costs, reduces enforcement errors, and creates a more unified enforcement policy across both levels of government.

The spillover effects discussed in this paper provide the incentive for improved coordination. The externalities imposed by state enforcement decisions on federal policy is well documented, andsome commentators use these spillover effects in their arugments for federal preemption. Instead the spillover effects actually provide the proper incentives for alignment between enforcement entities. While it is impossible for enforcers to always agree, it is important that each agency has an open dialogue to form common ground and joint initiatives to bring about a more effective and robust system.

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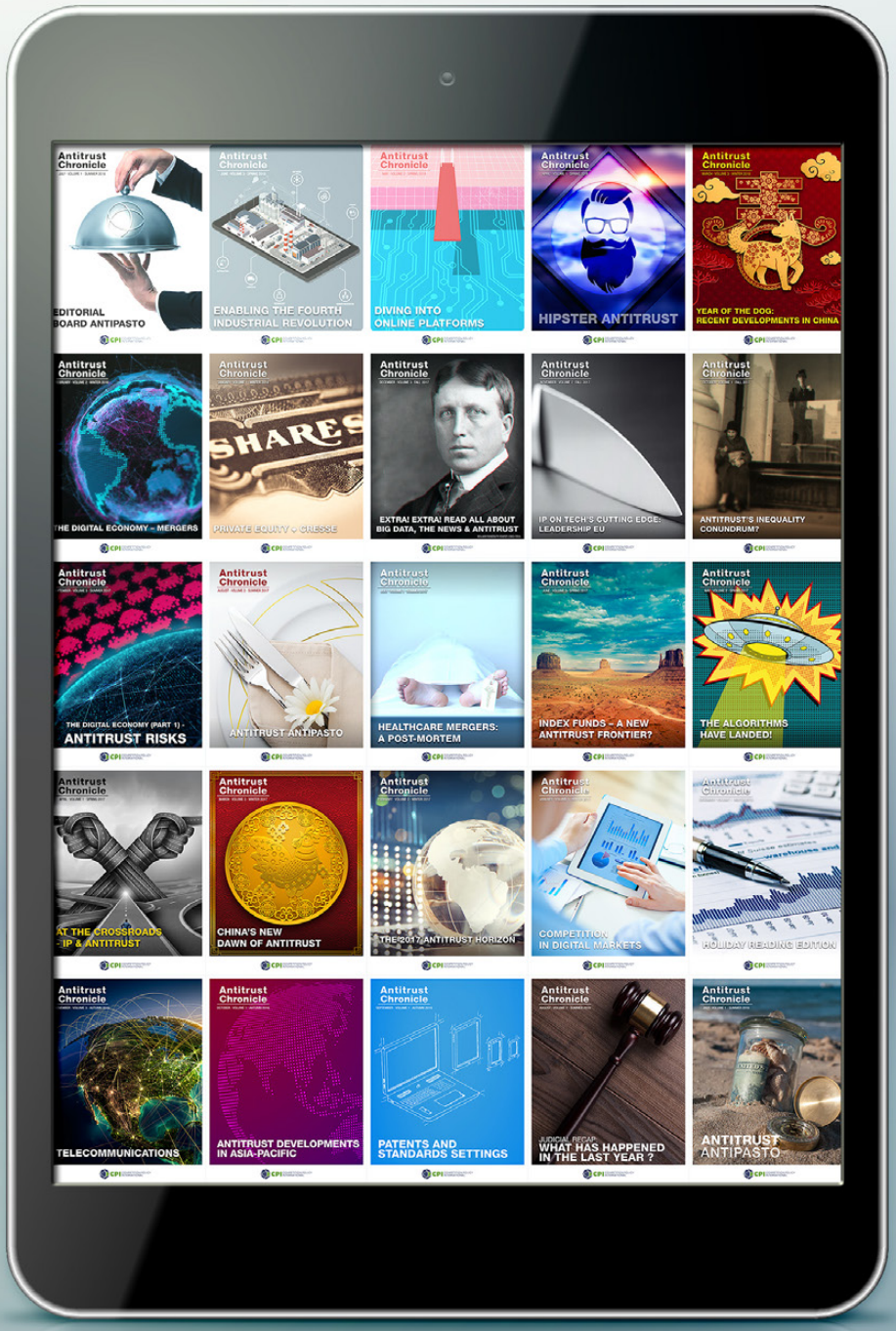


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