TRUSTBUSTERS

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History shows that individuals stop limiting their free will and begin acting for themselves when governments fail to maintain safe and functioning societies that provide public benefits. The people of the United States founded their chosen system of government to provide checks and balances on all types of power. The resulting social contract between them requires state and federal "trustbusters" to provide those checks and balances on both each other and all those who seek to become totalitarians of trade so that society can enjoy the innovation and choices that competition creates. As we look at current conditions in the vaccine, baby formula, and other industry marketplaces, are they efficiently and effectively innovating and providing society with choices? State enforcers' more than a century of experience demonstrates that such public benefits can be achieved by serving as champions of competition, proactive preventers and healers of harm, and deputies of deterrence.

I. INTRODUCTION

A silver lining to the ongoing pandemic is that it showcases how competitive markets can efficiently and effectively drive innovation that benefits society as a whole. According to reporting from CNBC, pharmaceutical and biotechnology companies were aware of a mysterious and dangerous new pathogen spread in Wuhan, China from at least the earliest months of 2020. Yet, they contented themselves with nicely "playing in a sandbox"[2] to minimize competition and maximize profits associated with existing technologies that had "too few pros and too many cons"[3] to stop its spread. It was not until the World Health Organization declared Covid-19 to be a global pandemic in March 2020 — which would impact their own bottom lines regardless of where they tried to shift their operations — that their focus shifted to competing to develop innovative vaccines to stop it. This competition allowed three companies to successfully clear safety, efficacy, and supply chain hurdles in the United States and efficiently provide society with new vaccination choices in record time.

Recent supply shortages in state-based markets for infant formula, however, show how even well-intentioned competitive restraints can result in undesirable inefficiencies — such as decreased quality and access to life-sustaining products. While infant formula may seem like a convenience to some, many infants require it to properly grow and thrive. Quality control failures nevertheless forced a large producer's main facility to shut down this spring after its formula was linked to infant deaths and injuries. Pursuant to competitively bid 4-year "sole-source" contracts, that producer provided 100% of the formula to 34 states' participants in the United States' Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC").[4] Since roughly half of the nation's users receive their formula through WIC,[5] the producer's shutdown significantly reduced the available supply of non-tainted formula in those states.

History shows that individuals stop limiting their free will and begin acting for themselves when governments fail to maintain safe and functioning societies that provide public benefits.[6] As we look to other industry marketplaces, are they efficiently and effectively innovating and providing society with choices? State enforcers' more than a century of experience demonstrates that such public benefits can be achieved by serving as champions of competition, proactive preventers and healers of harm, and deputies of deterrence.

II. CHAMPIONS OF COMPETITION

A. States' Protection of Competition Inspired Supplemental Federal Antitrust Law

Before federal antitrust law existed in the United States, commerce conquerors were straining individual state efforts to protect competition by conducting interstate commerce through a vehicle they cunningly called "trusts." Their selfishness, however, led society to squint through their smokestacks and voice distrust of these trusts.

Within this context, Senator Sherman argued for the adoption of federal "anti-trust" law[7] in 1890 by distinguishing state-chartered corporations from tyrannical trusts. While a corporation was "an artificial person without . . . a soul to save or body to punish," states could keep it from becoming a monopoly so long as they chartered competing corporations "on equal terms[.]"[8] However, "associated enterprise and capital" had formed "trusts . . . to avoid competition by combining controlling corporations, partnerships, and individuals engaged in the same business" throughout the nation.[9] Trusts placed "the power and property of the combination under the government of a few individuals," or a

2 Meg Tirrell, *"A Race Against Covid: How Moderna and Pfizer-BioNTech Developed Vaccines in Record Time,"* CNBC (Aug. 27, 2021) (quoting Moderna Vaccine Access Director), https://www.cnbc.com/covid-19-vaccines-in-record-time.html.

3 *Id.* (quoting Pfizer Vaccine Research and Development Head).

4 Matt Stoller, *"Big Bottle: The Baby Formula Nightmare,"* BIG (May 13, 2022), https://mattstoller.substack.com/p/big-bottle-the-baby-formula-nightmare.

5 *Id.*

6 This concept is sometimes called a "social contract." English philosopher John Locke asserted in 1689 that a social contract worked only if both the sovereign and its governed kept their promises to each other. A perceived breach of this social contract has been attributed to the United States Declaration of Independence from England on July 4, 1776. See Carl Lotus Becker, *The Declaration of Independence: A Study in the History of Political Ideas*, 27 (1922).

7 National Archives, *"Sherman Anti-Trust Act (1890),"* https://www.archives.gov/sherman-anti-trust-act. It is now codified at 15 U.S.C. §§ 1-38, as amended over time by other acts. The substance of Sherman Act §§ 1-2 remains intact at 15 U.S.C. §§ 1-2, although consequences for violations have increased over time.

8 21 Cong. Rec. 2457 (1890), https://www.govinfo.gov/GPO-CRECB-1890-v21.pdf.

9 *Id.*

single person — sometimes called "a president" — outside the nation's election process and unaccountable to society.[10] Trusts thus were, "a substantial monopoly injurious to the public . . . far more dangerous than any heretofore invented" because the "sole object of such a combination is to make competition impossible."[11]

Unlike intrastate corporations, trusts were excelling in extinguishing interstate competition because their multistate scale allowed them to shift assets and operations between the states at their discretion to maximize short- and long-term profits. This shifting started a flywheel which resulted in a vicious cycle where trusts "reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist."[12] Without competitors, a trust also "dictates terms to transportation companies" and "commands the price of labor without fear of strikes," thereby vertically extending its ability to abuse its monopoly power over both its inputs and outputs.[13]

Succinctly stated, trusts were conspiring to coin their own currency. This was a sovereign privilege society socially contracted to reserve solely for its chosen national system of government that was built upon the checks and balances of federalism and separation of powers. Accordingly, national action was required to supplement the states' ability to protect competition. As Senator Sherman proclaimed:

If anything is wrong this is wrong. If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[14]

Senator Sherman quoted from various state court opinions that considered and rejected various asserted competitive benefits of trusts to bolster his plea for supplemental interstate competition protection. He provided a complete Michigan Supreme Court opinion as an exemplar.[15] That opinion evidenced a sophisticated understanding of economics and deemed a match trust's actions to be against public policy — even though it reduced prices for matches. The court detailed a variety of credible evidence indicating that the trust was "organized for the purpose of controlling the manufacture and trade in matches in the United States and Canada."[16] It was "governed by a single motive" of accumulating "money, regardless of the wants and necessities of . . . people."[17] It could make that money by either raising "the price of the article" or decreasing the "quantity to be made" at will.[18] As a result, "all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line" was caught up in the trust.[19] Trusts were thus "destructive to both individual enterprise and individual prosperity" and "odious to our form of government" as reflected in the "scope and spirit of the Federal Constitution" and expressly prohibited by "several of our State constitutions."[20] Public sentiment and policy were accordingly right to oppose "[a]ll combinations among persons or corporations for the purpose of raising or controlling" prices and these intolerable "monopolies" deserved "the condemnation of all courts.[21]

Following the Michigan court's cue, Senator Sherman asserted that adopting the bill would be consistent with society's acceptance of the checks and balances associated with both federalism and separation of powers. It would preserve the states' expertise in using their courts to protect competition. It would also supplement it by providing the ability to pursue in federal courts those trusts that sought to skirt compliance with existing state competition enforcement efforts to suit their selfish profit maximizing motives. He asserted:

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 2458.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*; see also, e.g. Wash. Const. art. XII, § 22, MONOPOLIES AND TRUSTS (1889) (prohibiting monopolies and trusts and requiring the legislature to pass laws to enforce it). Today, RCW Chapter 19.86 serves as a comprehensive Washington statute aimed at fulfilling this constitutional mandate and to "foster fair and honest competition." See Julian C. Dewell & Wayne Gittinger, Washington Legislation — 1961; *Antitrust: The Washington Antitrust Laws*, 36 Wash. L. Rev. & St. B.J. 239-240 (quoting Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216 § 20 (1961)), https://digitalcommons.law.uw.edu/wlr/vol36/iss3/1.

21 Cong. Rec., *supra* note 8, at 2458.

This bill . . . has for its single object . . . to supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of these States. It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States.[22]

With that, the Sherman Anti-Trust Act was passed by a unanimous vote of 242-0.[23]

B. States Today Use Both State and Federal Antitrust Law to Protect Competition

After trusts doubled down on their efforts to preserve monopoly profits by requiring federal enforcers to engage in a larger-than-life version of Whack-a-Mole, Congress acted to authorize and incentivize additional actors to file suit for federal antitrust statute violations. Its adoption of the Clayton Act amendments to the Sherman Act allowed "any person" injured by "anything forbidden" in the federal antitrust statutes to sue in federal court and recover treble damages, costs incurred, reasonable attorney fees, and prejudgment interest.[24] Judicial decisions subsequently included states amongst the persons who could file suit for federal antitrust statute violations. Those decisions also allowed states to combine claims for statutorily recognized injuries that the state itself sustained in its proprietary capacity with common law claims the state's attorney general stated for equitable relief as its chief law enforcer and as *parens patriae* for its residents in a single federal suit.[25]

By 1974, however, some federal courts started stemming states' ability to combine their antitrust claims into one federal suit by refusing to recognize their common law *parens patriae* claims "in the absence of specific statutory authorization."[26] Trusts viewed these decisions as decreasing their risk of liability and their potential exposure to treble damages for extracting monopoly profits from society. They wasted no time expanding efforts to extract monopoly profits from individuals and small businesses across the nation that were least likely to have "a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the . . . costs of protracted and complex litigation."[27]

In response to those federal judicial decisions, the United States Department of Justice ("DOJ") testified in favor of a bill that set the stage for the 1976 Hart-Scott-Rodino[28] amendments to the Clayton Act which, amongst other things, expressly authorized states to bring *parens patriae* actions for federal antitrust statute violations. The DOJ observed that, if the bill failed to pass, the alternatives were "either no actions on behalf of individual consumers or actions brought as class actions under rule 23."[29] If no such actions were brought, it would frustrate the Clayton Act's "goal" of deterring "future antitrust violations."[30] Rule 23 was also insufficient "to enable the States to protect their citizens from antitrust violations," because courts had interpreted it to "hamper the maintenance" of class action lawsuits for "antitrust violations" causing "small individual damages to large numbers" of "ultimate consumers[.]"[31] Accordingly, "a statutory grant of power" expressly allowing states to fill this enforcement gap by bringing actions as *parens patriae*" was "both desirable and useful" to "supplement the enforcement activities of the Federal Government and serve as an additional deterrent against future antitrust violations[.]"[32]

Today, states use state, federal, or a combination of state and federal antitrust laws to protect competition in state and federal courts. Washington, for example, is currently litigating a case in state court for state antitrust law violations against a national chicken trust. It recently

22 *Id.* at 2457.

23 *Sherman Anti-Trust Act*, *supra* note 7.

24 The Clayton Act also bans price discrimination and anticompetitive mergers. In addition, it strengthens workers' ability to receive fair pay and treatment for their labor by declaring strikes, boycotts, and labor unions legal under federal antitrust law. It is now codified starting at 15 U.S.C. § 12. Congress additionally passed the Federal Trade Commission ("FTC") Act at this time, which created a new federal agency to prevent unfair methods of competition. That Act is now codified starting at 15 U.S.C. § 41.

25 Antitrust *Parens Patriae* Amendments Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the United States House of Representatives, 93 Cong. at 18, 81 (1974), https://www.govinfo.gov/CHRG-93hhrg41525.pdf.

26 *Id.* at 18.

27 *Id.* at 19.

28 The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383 at 1394-96, https://www.congress.gov/STATUTE-90-Pg1383.pdf, is now codified starting at 15 U.S.C. § 15c.

29 *Parens Patriae* Hearings, *supra* note 25, at 18.

30 *Id.* at 19.

31 *Id.* at 18-19.

32 *Id.* at 19-20.

obtained its first settlement in that suit[33] after opposing personal jurisdiction pleas for dismissal. In addition, 39 states are currently litigating a case in federal court for state and federal antitrust law violations against Google for its use of anticompetitive practices to insulate its mobile phone app distribution service, Google Play Store, from competition and to force Android mobile phone app developers to raise app prices for consumers in order to pay Google's exorbitant fees in the ongoing case of *State of Utah, et al. v. Google LLC, et al.*, No. 21-5227 (N.D. Cal.).[34]

III. PROACTIVE PREVENTERS AND HEALERS OF HARM

After the United States Supreme Court disappointingly concluded in 1977 that injured persons lacked standing to file suit for federal antitrust violations unless the trust directly overcharged them,[35] states persisted in acting to heal harms trusts caused to all of their residents. Some states did so by bringing common law *parens patriae* antitrust actions in state court.[36] Other states enacted statutes to expressly allow indirectly overcharged residents to recover damages under state antitrust laws. The United States Supreme Court later acknowledged that such state antitrust statutes, which provide remedies above and beyond the federal antitrust statutes, are not pre-empted by federal law.[37]

Although States are limited to recovering damages on behalf of direct purchasers (either as *parens patriae* on behalf of their residents or for their own propriety damages) for violations of federal antitrust laws, state enforcers may also seek a variety of equitable relief from federal courts as chief law enforcers for their states to proactively prevent and heal harm to competition. They may block mergers or secure injunctive and other equitable relief to prevent harm to competition.[38] They may also seek divestiture to heal harm to competition.[39] Additionally, they may prevent wrongdoers from continuing to enjoy their unlawful gains by seeking disgorgement.[40]

State enforcers may also seek both equitable relief and statutory remedies from state or federal courts when state antitrust laws are violated to proactively prevent and heal harm to competition, their states, and their residents. The exact available equitable relief and state statutory remedies vary from state to state. In Washington, for example, state enforcers have the ability to resolve anticompetitive issues through pre-suit assurances of discontinuance in lieu of litigation.[41] The Washington Attorney General's Office recently used this tool to efficiently resolve anticompetitive no-poach practices by corporate franchise chains doing business across the nation. It accepted nationwide assurances of discontinuance for identified anticompetitive worker no-poach practices from 236/237 of these franchise chains. It brought suit in state court against the remaining corporate fast-food chain when it refused to provide such an assurance.[42] While subject to further review and revision, a recent study found that increases in posted job ad earnings at 185 corporate franchises employing workers across the nation resulted from the office's enforcement of Washington antitrust law to eliminate no-poach provisions nationwide.[43]

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33 Washington State Office of the Attorney General, *"AG Ferguson Recovers $725,000 in First Resolution of Broiler Chicken Price-Fixing Lawsuit,"* (May 19, 2022), https://www.atg.wa.gov/broiler-chicken.

34 See also "State Antitrust Litigation and Settlement Database," National Association of Attorneys General, https://www.naag.org/issues/state-antitrust-litigation-and-settlement-database (publicly-available database of information involving state enforcer suits and settlements for state and federal antitrust violations).

35 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). This decision gutted much of the intended deterrent effect of expressly authorizing federal *parens patriae* suits through the 1976 Clayton Act amendments.

36 By 2007, the Washington Attorney General had recovered $48 million on behalf of consumers through its common law *parens patriae* authority. Senate Bill Report, SB 5228, Reg. Sess. 2007-2008 at 2 (2007), https://lawfilesext.leg.wa.gov/biennium/2007-08/Reports/Senate/5228.

37 *California v. Arc Am. Corp.*, 490 U.S. 93, 101-106 (1989). Washington later codified the attorney general's common law *parens patriae* authority. See Senate Bill Report, *supra* note 36; RCW 19.86.080.

38 See, e.g. Letter from Attorney General of Washington Bob Ferguson to the Honorable Victor Marrero, *New York v. Deutsche Telekom AG*, No. 1:19-cv-05434-VM-RWL, Dkt. 369-1 at 1-2 (S.D.N.Y. Jan. 13, 2020) (detailing examples of states seeking and obtaining relief from merger parties).

39 See, e.g. Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *State of New York, et al. v. Facebook, Inc.*, No. 21-7078, Dkt. 1932867 at 29-31 (D.C. Cir. Jan. 28, 2022).

40 *FTC, et al. v. Shkreli*, No. 20CV706 (DLC), 2022 WL 135026, at *48 (S.D.N.Y. Jan. 14, 2022) (awarding over $64 million in unlawful gains to seven states as disgorgement after a bench trial on state and federal antitrust law claims involving an alleged scheme to block and delay lower-cost generic drugs from competing with a branded drug so that its price could be raised by 4000% when patients had nowhere else to turn for this life-saving medication).

41 RCW 19.86.100. The Washington Attorney General also regularly uses consent judgments or decrees to resolve filed suits, and may sometimes file suit and a consent judgment or decree on the same day.

42 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), https://www.atg.wa.gov/no-poach.

43 Brian Callaci, Sergio Pinto, Marshall Steinbaum, and Matthew Walsh, *"The Effect of No-Poaching Restrictions on Worker Earnings in Franchised Industries,"* SSRN (July 6, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155577.

When the Washington Attorney General files suit for state antitrust law violations to prevent or remedy identified anticompetitive issues, it may seek: (1) disgorgement, injunctive relief, divestiture, and other equitable relief in the name of the State as its chief law enforcer;[44] (2) restitution, injunctive relief, and other equitable relief as *parens patriae* of directly or indirectly injured residents,[45] and (3) actual damages and equitable relief for all direct and indirect proprietary injuries of the State as its attorney.[46] It may also seek other equitable relief and remedies at law that the court deems necessary, as well as prejudgment and post-judgment interests, costs and attorney fees. When the office filed a health care suit challenging both a consummated merger and a price fixing agreement for state and federal antitrust law violations, for example, a court-approved consent decree required the defendant health care system to:

- divest at least a majority ownership interest in an ambulatory surgery center;
- firewall commercial payer negotiations for physicians employed by the defendant healthcare system from those employed by an affiliated multispecialty care clinic;
- remove a contract provision that decreased access to quality healthcare;
- avoid certain future contract terms;
- comply with certain notification requirements; and
- pay up to $2.5 million for distribution by the Washington Attorney General's Office as cy pres grants to increase access to healthcare for residents of the affected community.[47]

This resolution ensured that the affected community had increased healthcare resources in place to draw upon when Covid-19 surfaced just months later.

IV. DEPUTIES OF DETERRENCE

State enforcers deter wrongdoers from violating antitrust laws by taking action to enforce them with appropriate consequences. In addition to a range of equitable relief and state law remedies, all state enforcers have the statutory ability to deter future antitrust violations by seeking treble damages for direct injuries to their state and as *parens patriae* for direct injuries to their residents for violations of federal antitrust law. Additionally, some states provide criminal penalties to deter future state antitrust law violations.[48] Other states, like Washington, provide for civil penalties, and if necessary, corporate dissolution to deter such violations.[49]

Regardless of the tools employed, state enforcers seek to deter wrongdoers from violating the antitrust laws by seeking consequences "large enough to be more than just an acceptable cost of doing business."[50] To adequately deter conduct solely through a penalty, it must exceed "the amount the defendants benefitted" and any additional amount necessary to heal the harm caused by violating antitrust law.[51] Washington, for example, recently filed suit and resolved a price fixing action against Amazon as an equitable relief and civil penalties enforcement matter.[52] The complaint alleged hundreds of Washington antitrust law violations that were each subject to a maximum civil penalty up to $900,000, making the ongoing risk associated with violating the court-ordered nationwide injunction obtained substantial.

44 See RCW 19.86.080; RCW 19.86.060.

45 See RCW 19.86.080.

46 RCW 19.86.090.

47 Washington State Office of the Attorney General, *"Attorney General Ferguson: CHI Franciscan will Pay up to $2.5 Million Over Anti-Competitive Kitsap Deals,"* (May 13, 2019), https://www.atg.wa.gov/chi-franciscan.

48 Milton A. Marquis, Ann-Marie Luciano & Gianna Puccinelli, *"Recent Trends and Insights in State Attorney General Antitrust Enforcement,"* CPI Antitrust Chronical at 15 (Aug. 2021) (citing ABA Section of Antitrust Law, State Antitrust Practice Statutes (3d ed. 2004)).

49 RCW 19.86.140; RCW 19.86.060; Wash. Const. art. XII, § 22, MONOPOLIES AND TRUSTS (Oct. 1, 1889) (prohibiting monopolies and trusts and requiring the legislature to pass laws to enforce it with "adequate penalties," including forfeiture of corporate franchises).

50 *United States Dep't of Just. v. Daniel Chapter One*, 89 F. Supp. 3d 132, 152 (D.D.C. 2015), *aff'd*, 650 F. App'x 20 (D.C. Cir. 2016).

51 *Id.*

52 Washington State Office of the Attorney General, *"AG Ferguson Investigation Shuts Down Amazon Price-Fixing Program Nationwide,"* (Jan. 26, 2022), https://www.atg.wa.gov/amazon.

V. CONCLUSION

The people of the United States founded their chosen system of government to provide checks and balances on all types of power. The resulting social contract between them requires state and federal “trustbusters” to provide those checks and balances on both each other and all those who seek to become totalitarians of trade so that society can enjoy the innovation and choices that competition creates.

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