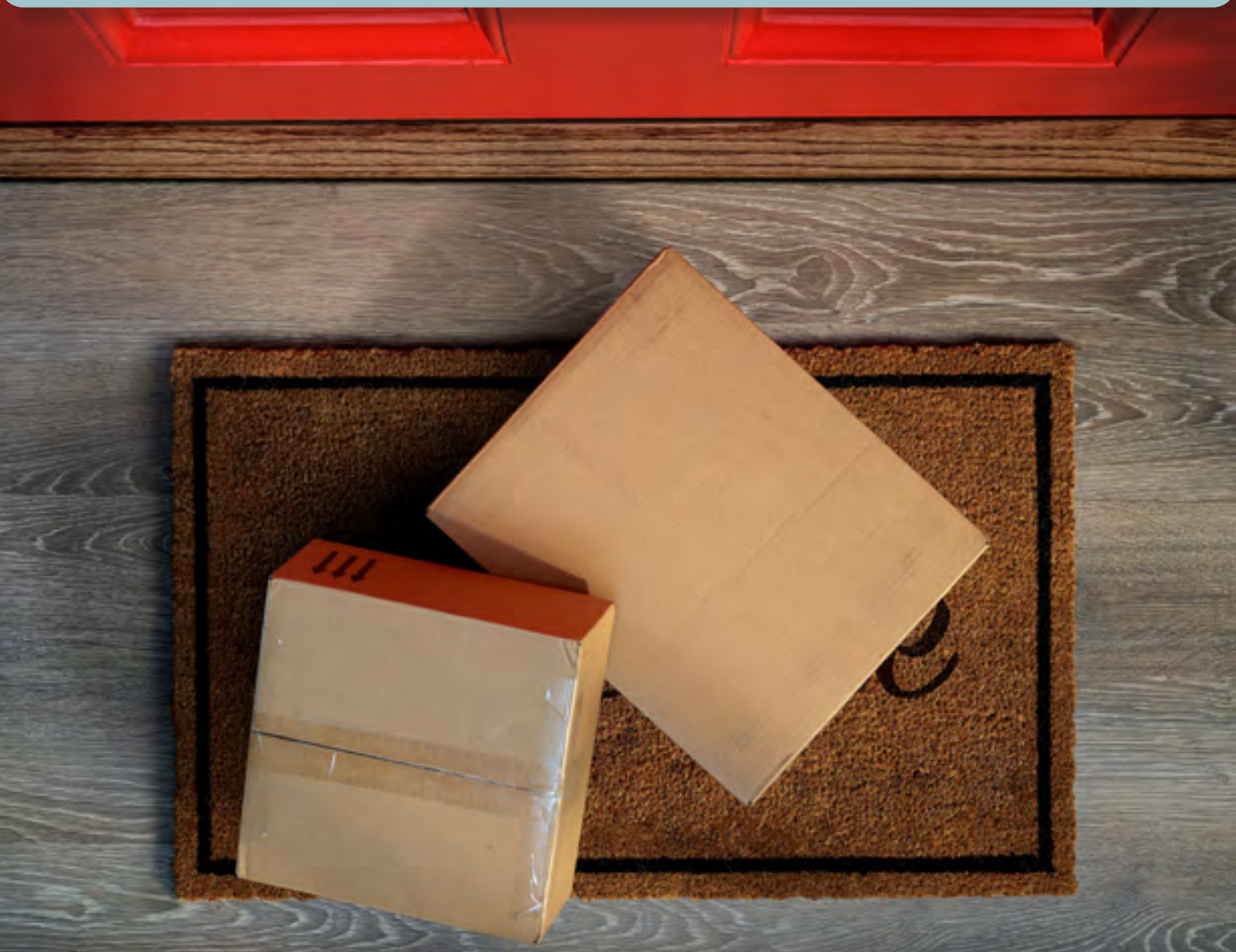
STATE ENFORCEMENT: LESS THEORY, MORE DELIVERING FOR CONSTITUENTS



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By Jeff Dan Herrera & Cholla Khoury

Antitrust practice is in an incredibly dynamic moment with significant debates centered on the direction jurisprudence and enforcement should proceed. These debates pose important questions with significant policy, economic, and political outcomes. However, such debates remain fairly abstract and are largely divorced from the antitrust enforcement work that state attorneys general ("State AGs") perform. State AGs, with the constraint of a direct electoral mechanism, have a greater accountability to voters and constituents than other forms of antitrust enforcement. Because of this direct relationship with constituents, in combination with the limited resources of state budgets, State AGs have a greater imperative to pursue enforcement that delivers for constituents. State AG antitrust enforcement necessarily follows constituent priorities and has less room for abstract, ideological pursuits. State enforcement may therefore prioritize protecting the cultural economy of the state, remedying consumer harm through unfair trade practice laws, and protecting the state's own pecuniary interests as an entity.

I. INTRODUCTION

The debates, discourse, and disagreements within antitrust circles in recent years make this a fascinating time to practice in the field. New questions — largely spurred by giant tech firms, never-before-imagined technologies, and how antitrust enforcers should respond to them — are swirling. Questions around dominant platforms, the consumer welfare standard, vertical integration, monopsony, labor markets, and more, all require serious and deliberate consideration.

While certainly worthy of the energy devoted to them, these questions can, at times, feel divorced from their effect on the lives of constituents of state attorneys general ("State AGs"). State AGs are the only governmental antitrust enforcers with direct electoral accountability.[2] For State AGs with statutory and electoral imperatives as well as limited resources and budgetary constraints, the priority must be to deliver direct and tangible results for the state and its constituents. While the scope of these questions and issues may be significant in shaping the aggregate nature of the national and global economies, State AGs must take a practical approach to merging the interest of contributing to these debates with that of also delivering for constituents.

The consumer welfare standard occupies one of the most lively and significant debates: should antitrust practitioners be concerned solely with the bottom line for end-product consumers, or should a more holistic, structure-based analysis of competition be employed?[3] For State AG resource-allocation decisions, that question is balanced against the needs of the states' residents and considered in the light of the whole statutory structure of a state; indeed, those two may likely come into tension at times.

New Mexico is a state with a profound rural heritage, and agriculture comprises a critical portion of our state economy. As such, our office is particularly concerned with the effect of concentration and collusion within the food production industry. Such concentration may lead to restricted supply and ultimately higher prices for working families; the same families that, in New Mexico at least, may be the ones producing the food in the first place. Given that our state has significant poverty, consumer prices for essential goods such as groceries are always a consideration. But in industries where many New Mexicans also participate in the supply chain, the consequences of monopsony, vertical integration, and collusion to smaller businesses and workers are also of great concern.

Because of that interest, our office is currently engaged in litigation against producers in the broiler chicken[4] and pork industries,[5] brought under the state Antitrust Act,[6] the state Unfair Practices Act ["UPA"],[7] and common law unjust enrichment. In both industries, the producers — which are almost entirely vertically integrated — have allegedly engaged in collusive conduct to restrict the supply of their respective goods, ultimately raising prices for end-product consumers. But the effect of market concentration from these producers has a detrimental impact to New Mexican farmers as well. The producers contract with farmers for the farmers to raise the animals. But during that time, the animals remain under the ownership and control of the producers. Rather than independent farmers raising animals and selling them in an open, competitive market, the producers have effectively turned these would-be independent farmers into contract employees providing a service to the producers. This practice limits the potential profits for farmers, thereby inhibiting entry into the practice of farming and hurting a longstanding heritage industry in our state.

For the New Mexico Office of the Attorney General, these types of concerns and the needs of the people of our state figure prominently in determining our priorities for enforcement. Like every State AG, we have certainly pursued antitrust claims, both independently and in concert with other State AGs and federal agencies, where market participant conduct has run afoul of the antitrust laws in ways that have been harmful for end-product consumers.

Toward that end, there are the additional considerations, and tools, that a state has which private plaintiff enforcement suits do not.

2 Compare with the political appointees on the Federal Trade Commission or the Department of Justice Antitrust Division, neither of whom face direct election by voters.

3 See generally Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

4 See Complaint for Violations of New Mexico's Antitrust Act and Unfair Trade Practices Act and Unjust Enrichment, *New Mexico ex rel. Balderas v. Koch Foods, Inc.*, No. D-101-CV-2020-01891 (1st Jud. Dist. Ct. N.M. Sep. 1, 2020).

5 See Complaint for Violations of New Mexico's Antitrust Act and Unfair Trade Practices Act and Unjust Enrichment, *New Mexico ex rel. Balderas v. Agri Stats, Inc.*, No. D-101-CV-2021-01478 (1st Jud. Dist. Ct. N.M. June 29, 2021).

6 Antitrust Act, NMSA 1978, §§ 57-1-1 to -19 (1891, as amended through 1987).

7 Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019).

Whereas private plaintiff enforcement is constituted by individuals and business entities that have suffered some direct pecuniary harm, State AGs, as elected officials with a duty to enforce the law,[8] have both the interest of protecting their citizens from similar harm through *parens patriae* authority[9], as well as of direct harm to the state itself as an entity. In *New Mexico ex rel. Balderas v. Gilead Sciences, Inc.*, our office brought litigation against the manufacturers of HIV medications.[10] In this suit, the alleged anticompetitive conduct injured the pecuniary interests of New Mexico as an entity. Given the devastating effect the HIV/AIDS epidemic has wrought across the country, State Medicaid programs have sought to fund drugs that prevent its spread, such as those manufactured by the Defendants. Just as violations of the antitrust laws may cause a market participant to be injured through paying supra-competitive prices, so, too, may a state as a market participant incur such injury, as we allege to be the case in this instance.

As most practitioners in the field are aware, antitrust enforcement and consumer protection are not entirely synonymous, yet they share significant overlap, both in protecting consumers from predatory behavior and ensuring confidence in the market economy. State AGs have the flexibility to choose its enforcement tools due to the fact that State AGs are not limited to antitrust claims when protecting consumer interests. As is the case with the New Mexico Office of the Attorney General, many State AGs house their antitrust enforcement within a broader consumer protection bureau. This organizational structure allows assistant AGs to take a more holistic approach to protecting consumers from predatory and unfair trade practices. To the antitrust purist, competition law and policy — grounded in neoclassical economic theory and industrial organization models — may be wholly separate from the work of protecting consumers from fraud and deception. But to those practicing in a State AG office, the bottom line is protecting constituents, regardless of the means. When a New Mexican brings a complaint to the Consumer & Environmental Protection Division of our office, the academic distinction between antitrust and consumer protection is almost entirely immaterial. Our obligation is not to opine on the nuances of the Rule of Reason, to limit our inquiry to finding horizontal collusion, or to ensure that a market meets some theoretical threshold for a competitive environment. Rather, our obligation is to use the correct tool from a diverse tool belt for a given matter in order to ensure that our constituents are protected from actors who would use markets to subordinate others. When we identify a potential harm to our constituents, our assistant AGs have the responsibility of determining the best tool or tools for the job of enforcing the law and protecting consumers.

This is not to say that antitrust practice is without its place in state enforcement. Rather, this is to say the priorities of a given state's residents — by necessity — will shape the contours of what that enforcement looks like. If the harms our office identifies are more ably addressed under New Mexico's Unfair Trade Practices Act statute — largely addressing deceptive and fraudulent conduct — then resources should naturally be shifted toward remedying these concerns. Given that many State AGs operate under scarce budgetary constraints, this necessarily leaves less room for individual large, resource-intensive, macro-oriented antitrust suits or theory-driven impact litigation that seeks to reform antitrust jurisprudence in any given direction.

But, the distinction and division between antitrust and consumer protection need not make claims mutually exclusive. Indeed, in many instances, the actions that a firm takes to suppress competition may also constitute cognizable claims under unfair trade practice laws. In *Gilead*, our office has alleged both violations of the state Antitrust Act and the state UPA.[11] The state UPA is a multi-faceted tool to address conduct by economic actors outside the realm of normal competitive market behavior.[12] We allege in the complaint that the Defendants, through a range of schemes — including anticompetitive settlement agreements in exchange for dropping patent infringement suits, collusive joint venture agreements to shore up vulnerable patents, and misleading marketing tactics toward healthcare providers to prescribe patent-protected medication rather than that subject to competition in the generic market — thus, both anticompetitive conduct and conduct in violation of the UPA. As we allege, the conduct was not merely anticompetitive in the traditional antitrust sense — that is, behavior was not limited to staving off competition

8 See e.g. NMSA 1978, § 8-5-2(B) (providing for the duty of the Attorney General of New Mexico to "prosecute and defend in any . . . court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor").

9 See 15 U.S.C. § 15c(a)(1) ("Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [15 U.S.C. §§ 1-7]."

10 See Complaint for Violations of New Mexico's Anti-Trust Act and Unfair Practices Act, *New Mexico ex rel. Balderas v. Gilead Sciences, Inc.*, D-101-CV-2021-00377 (1st. Jud. Dist. Ct. N.M. Feb. 24, 2021).

11 See *id.*

12 Specifically relevant here, the UPA defines an "unfair or deceptive trade practice" to include, among others, "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that the person does not have;" "representing that goods or services are of a particular standard, quality or grade or that goods are of a particular style or model if they are of another;" "making false or misleading statements of fact concerning the price of goods or services, the prices of competitors or one's own price at a past or future time or the reasons for, existence of or amounts of price reduction;" or "using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive." NMSA 1978, § 57-12-2(D). Further, the UPA defines an "unconscionable trade practice" as "an act or practice in connection with the sale… of any goods or services…that to a person's detriment…results in a gross disparity between the value received by a person and the price paid" NMSA 1978, § 57-12-2(E).

from generic drugs and garnering supra-competitive prices through collusion and monopolization. It was also deceptive and unfair, and thus cognizable under the UPA. Neither a strictly antitrust suit nor a strictly UPA-based suit would have captured the full range of conduct at issue nor the full range of enforcement authority a State AG possesses.

All of this said, while the constraints on a given state AG's office are real, one should not discount the collective power of State AGs working in concert. The capability to conduct large-scale investigations into antitrust violations by large firms may be attained by state AG offices pooling resources. Litigation seeking industry-wide reform is a regular occurrence in multistate litigation brought through the coordinated efforts of multiple State AGs acting in their shared *parens patriae* authority. Such multistate litigation is not without its limits: even with pooled resources, a state AG is still subject to the constraint of ensuring that its work is delivering for constituents. Not all multistate litigation will be a good fit for all State AGs. But where states' interests overlap and litigation is possible, multistate suits can be a powerful tool to enact broad change across a particular industry nationwide. One example of such litigation is the multistate Generic Drug Litigation.[13] In this instance, our office joined AGs for numerous states, territories and the District of Columbia to investigate — and subsequently bring an action against — numerous pharmaceutical companies that had allegedly created a massive network of collusive agreements that resulted in billions of dollars of harm to the national economy and to the states and our constituents.

State AGs serve their respective jurisdictions with broad grants of authority and the officials elected to serve in this role have the difficult policy decision of prioritizing enforcement. Thus, just as state legislatures are considered to be laboratories of democracy,[14] so too should antitrust enforcement through State AGs be a source of experimentation and development of the law. With respect to the differing needs of the several states, and with respect to the statutory differences between those states, the antitrust enforcement bar should welcome the distinct approaches that various state AG offices may bring.

13 See Complaint, *Connecticut v. Teva Pharmaceuticals, Inc.,* 3:19-cv-00710-MPS (D.Conn. May 10, 2019).

14 See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("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.").

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