# Antitrust Chronicle

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# State Attorneys General

CPI COMPETITION POLICY™ INTERNATIONAL

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# LETTER FROM THE EDITOR

Dear Readers,

This edition of the Antirust Chronicle features contributions from States Attorneys General and their staff throughout the U.S.

It is widely underappreciated that States Attorneys General form an essential part of the "nuts and bolts" of antitrust enforcement. The contributions to this Chronicle shed a much-needed spotlight on their vital role, both on an intellectual and practical enforcement capacity.

We lead off this Chronicle with an edition of our CPI Talks interviews with Colorado Attorney General **Phil Weiser**.

**Paula Blizzard**, **Brian Wang**, **Peter Adelson**, **Matthew Maeder** & **Tom Zick** discuss how competition and monopoly power in technology platforms have become global issues in the past decade. Challenges brought by various authorities to those platforms have struggled to adapt the antitrust laws to new technological and economic realities. This article elucidates on these challenges and proposes some practical solutions. Delving into the nuts and bolts, **Christina Grey** elucidates how both federal and state enforcers begin treating non-compete and no-poach agreements to be anti-competitive in violation of the Sherman Act. **Matthew Michaloski** discusses the uniquely common law concept of "parens patriae" and how it interacts with broader law enforcement concepts, from the point of view of a state-level enforcer.

On a broader level, **Amy N. L. Hanson** reflects on how 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.

On a similar note, **Jay Himes**, **Jeremy Kasha** & **Daniel P. Weick** assess Section 16 of the U.S. Clayton Act, which authorizes "injunctive relief . . . against threatened loss or damage" due to an antitrust violation "under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by courts of equity [.]" While State enforcers and other plaintiffs have long turned to this provision for non-monetary relief to redress anticompetitive conduct, the Supreme Court's initially expansive construction of Section 16 and other federal laws has narrowed in recent decisions. Facing this potential retrenchment in federal remedies, antitrust enforcers could consider the laws of individual States, which offer alternative, additional remedies beyond traditional injunctions and damages.

In turn, **Jeff Dan Herrera** & **Cholla Khoury** discuss how antitrust practice faces a dynamic moment in its history. Today, it faces significant debates centered on the direction jurisprudence and enforcement should proceed. These debates pose important questions with significant policy, economic, and political outcomes. While such debates remain fairly abstract and are largely divorced from the antitrust enforcement work that state attorneys general perform, state AGs are nonetheless at the coalface.

Finally, **Gwendolyn Cooley**, **Caleb Pracht** & **Hart Martin** examine the impact of 2021's Supreme Court decision in NCAA v. Alston. Not only did the Court confirm that the NCAA's cap on education-related compensation was anticompetitive, but they also questioned the ability of the rest of the compensation scheme to pass antitrust muster. This decision sparked further changes to the NCAA's name, image, and likeness rules for college athletes, provoked new legislative proposals, and inspired more legal challenges.

Drawing on this theme, in sum, examining the practices of States Attorneys General is far from "insider baseball." It is a necessary part of any proper understanding of how antitrust enforcement works in practice.
As always, many thanks to our great panel of authors.

Sincerely,

**CPI Team**

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## CALIFORNIA'S UNFAIR COMPETITION LAW: AN EXISTING AND FLEXIBLE RESPONSE TO EMERGING TECH DOMINANCE ISSUES

*By Paula Blizzard, Brian Wang, Peter Adelson, Matthew Maeder & Tom Zick*

Competition and monopoly power in technology platforms have become global issues in the past decade. In many cases, challenges to those platforms have struggled to adapt the antitrust laws to new technological and economic realities. Two main solutions have arisen: writing new laws and re-invigorating existing ones. First, new legislation provides laws that specifically address issues arising in technology platforms. Second, existing law, such as California's Unfair Competition Law ("UCL"), provide effective ways to curb anticompetitive and unfair practices. This article gives an overview of proposed and enacted new legislation, and then discusses the UCL, its application in the *Epic v. Apple* decision, and its broad power to promote competition.

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## TRUSTBUSTERS

*By Amy N. L. Hanson*

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.

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## "IF YOU NEVER DID, YOU SHOULD": STATE EQUITABLE REMEDIES FOR ANTITRUST VIOLATIONS

*By Jay Himes, Jeremy Kasha & Daniel P. Weick*

Section 16 of the Clayton Act authorizes "injunctive relief . . . against threatened loss or damage" due to an antitrust violation "under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by courts of equity [.]" While State enforcers and other plaintiffs have long turned to this provision for non-monetary relief to redress anticompetitive conduct, the Supreme Court's initially expansive construction of Section 16 and other federal laws has narrowed in recent decisions. Facing this potential retrenchment in federal remedies, antitrust enforcers should consider the laws of many individual States, which offer alternative, additional remedies beyond traditional injunctions and damages. This paper summarizes Supreme Court developments and explores State-law remedies, some grounded in equity practice and others expressly included in State antitrust and consumer protection laws. The paper also presents a sampling of decisions from jurisdictions throughout the country recognizing the authority of State Attorneys General or other government officials to secure equitable relief extending to both residents and non-residents of the State.

# SUMMARIES

# WHAT'S NEXT?

For October 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Private Equity**; and (2) **Merger Guidelines**.

# ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2022, 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.

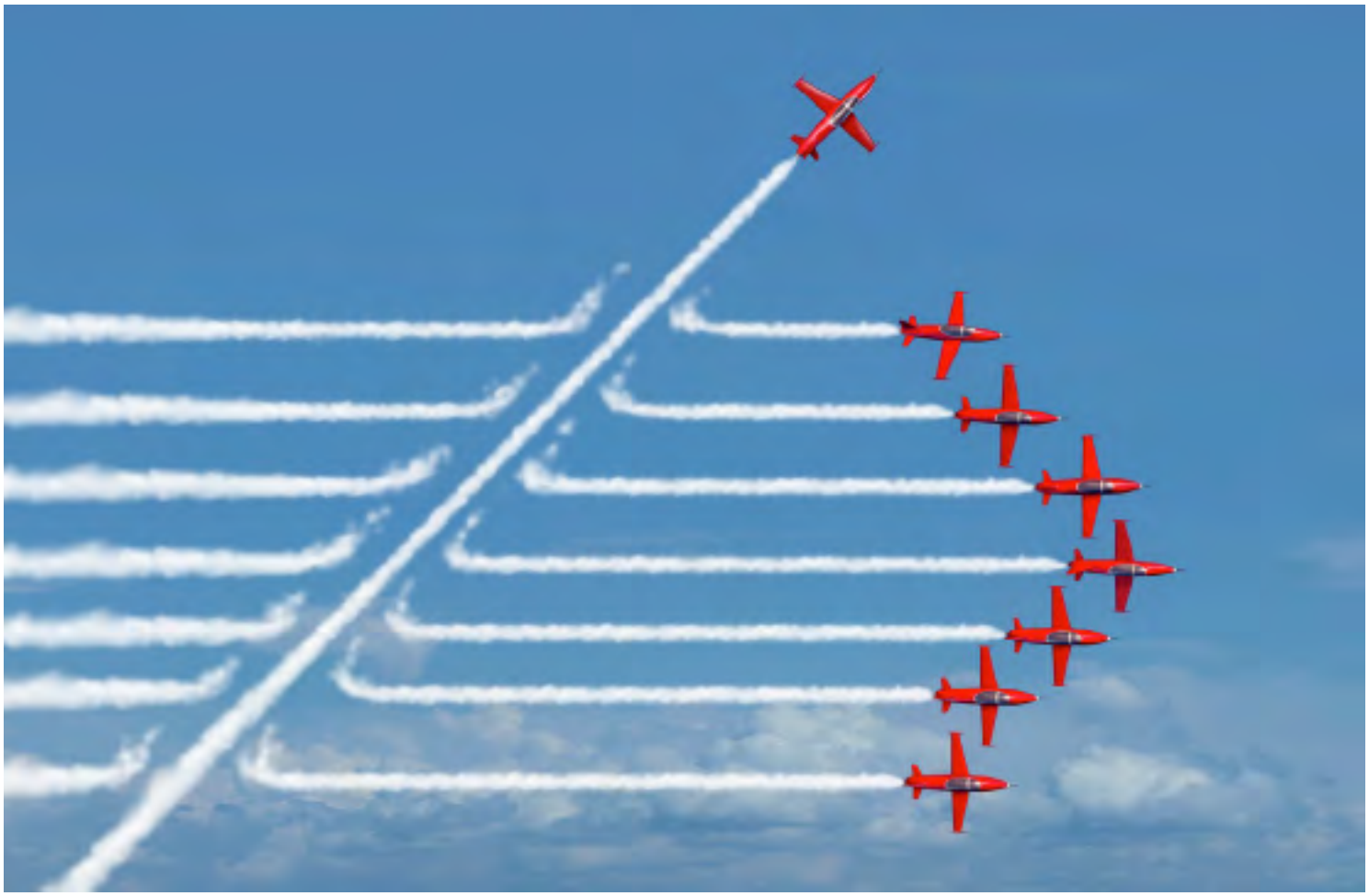
**CPI ANTITRUST CHRONICLES November 2022**

For November 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **CRESSE Insights**; and (2) **Digital Markets Act**.

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.



# CPI TALKS...

*… with Phil Weiser*

In this edition of CPI Talks we have the pleasure of presenting an interview with Colorado Attorney General Phil Weiser. Thank you, Mr. Weiser for agreeing to this interview with CPI.

**1. Is there a new drive to redefine antitrust rules for the contemporary digital economy? What in your view should the thrust of these rules be? Do you foresee further legislative reform in the U.S., along the lines of developments in Europe and elsewhere?**

A central problem, as I have explained previously (including in this congressional testimony),[1] is that the courts have put too much emphasis on the risks of over-enforcement, while neglecting the risks of under-enforcement. Because the courts have undermined effective antitrust enforcement, with cases like *Amex* and *Qualcomm* elevating theoretical justifications for business conduct over rigorous empirical analysis, both legislators and enforcers need to respond. With respect to the digital economy, there are unique challenges when dominant Internet platforms acquire substantial market power and maintain it through anticompetitive means. In addition to enforcement actions, I also believe that legislative action is justified to oversee the conduct of such platforms and to require non-discriminatory access arrangements, as I explain in this letter to Congress.[2]

**2. Technological innovation appears to be accelerating, particularly in certain spaces such as mobile, search, and social media. How can enforcers keep pace? Last year you launched (another) high-profile antitrust suit against Google in the mobile space. What have been your learnings from this experience so far?**

I am proud that 38 Attorney Generals filed the lawsuit in December 2020 to challenge Google's anticompetitive conduct that impacts desktop and mobile search users alike. In considering how to proceed, I kept in mind what I learned in watching Assistant Attorney General Joel Klein lead the antitrust case against Microsoft in the late 1990s. That case involved a dynamic technological environment and the need to move quickly to bring a case to trial. In our case against Google, I am in the position of working to do my best to follow Joel's example — building a high-quality team, thinking rigorously and carefully about the relevant competitive harms, and preparing for a trial on a relatively quick timetable. It is too early to look back on our Google case for any lessons learned except, perhaps, this one: The protection of consumers requires strong action to stop monopolistic conduct. I would also add that taking on this challenge has underscored the enormity of what Joel and the team of those who worked on that original case against Microsoft were able to accomplish.

**3. What do you see as some necessary steps to modernize merger enforcement? You recently issued a joint set of comments with the AG of Nebraska on steps necessary to modernize the horizontal merger guidelines. Can you provide an overview of what you see as the most important aspects of those comments, and what concrete changes in approach you would like to see emerge?**

Attorney General Peterson and I co-chair the National Association of Attorneys General Antitrust Committee and decided that it was important to provide a bipartisan comment to offer guidance and our perspective on the updating of the Merger Guidelines. For me, this was also a bit of *déjà vu*, as I was closely involved in the last update of those guidelines in 2010. The team who worked on our comments did a tremendous job, highlighting a number of key issues, including that the elimination of nascent (or new) competition that threatens to oust long-standing companies needed to be addressed more specifically in the Guidelines.[3]

1 https://coag.gov/blog-post/attorney-general-weiser-testimony-before-the-u-s-house-of-representatives-subcommittee-on-antitrust-commercial-and-administrative-law-march-18-2021/.

2 http://coag.gov/app/uploads/2022/06/AG-Weiser-letter-re-American-Innovation-and-Choice-Online-Act.pdf.

3 https://coag.gov/app/uploads/2022/04/CO-and-NE-Comments-on-Merger-Enforcement.pdf.

We also emphasized, as I noted in my testimony to Congress referenced earlier, that the Chicago School's influence on antitrust policy has led to a "miscalculate[ion] of the error cost equation and given undue weight to the costs of false negatives in merger enforcement." Notably, when looking at many markets, the level of competition has declined and the likelihood of anticompetitive harms has increased. We therefore encouraged our federal colleagues to update the Guidelines to better address the challenges of today's modern economy, including providing for a closer and more effective evaluation of the non-monetary price harms that occur in the digital economy.

**4. The U.S. Senate recently passed the State Antitrust Enforcement Venue Act of 2021 (albeit slightly amended from the original House proposal). This proposal reflects a series of bipartisan efforts to reform antitrust enforcement, in this case with a particular focus on the important role to be played by State AGs. Assuming it is passed by the House, what would be the key implications of this law?**

One point I have made repeatedly, including in our recent comments on the proposed update of the Merger Guidelines, is that it is critical to view state enforcers on a par with federal antitrust enforcers. When Congress authorized State Attorneys General to bring actions on behalf of their citizens, it set up a system of cooperative federalism, as I explained in this article.[4] That model envisions that states should be given latitude to bring cases even when the federal government declines to do so. It follows naturally that states should be given the same prerogative that the federal government has to select the appropriate forum and not to be transferred into a multi-district litigation. I am proud that Colorado members of Congress — Representatives Joe Neguse and Ken Buck, from opposing parties — came together to champion this legislation. And 52 State Attorneys General supported this reform.[5]

**5. Do you foresee a strengthened role for State AGs in light of this and other proposals?**

The strengthened role of State AGs is on account of the increased commitment that AGs have made to engaging in antitrust enforcement. This is, in a way, back to the future. In the early 1900s, the National Association of Attorneys General was founded — and had an early meeting here in Denver — because of concerns with the trusts and the need for states to work together to address this rising threat. We are also living in a time of increased corporate concentration, declining levels of competition, and greater opportunities for anticompetitive harm. There is thus ample opportunity for State AG action to protect consumers and enforce the antitrust laws. And the venue bill is an acknowledgement of that important role.

**6. What are the implications for antitrust rules of the rise of cryptocurrencies? How can antitrust law enforce a rules-based system in a decentralized environment such as the crypto space?**

Antitrust law has long adapted to new technologies. Cryptocurrencies will indeed create new issues for enforcers, but my belief is that the principles of sound antitrust enforcement will continue to be relevant. To be sure, we have much to learn about these emerging markets that are evolving and implicate both competition and consumer protection issues. Nonetheless, whether it was the railroads, the telephone, or the Internet, the antitrust laws have risen to the challenge of adapting to new technologies and protecting competition and consumers.

**7. With the caveat that no crystal ball is available, what do you think is next for antitrust? Competition rules began with the railroads; then there was telecoms and subsequently iterations of the tech industry. How do you see it evolving going forward?**

What I will add here, and have discussed previously, is that we need to do more work on the remedial side. This was a core part of my letter to Congress related to the American Online and Innovation Act, echoing my earlier writing on this topic.[6]

**8. If there is anything else you would like to discuss, please do so here.**

Many have suggested that antitrust law is having an important moment. I agree that we have important work to do to protect consumers. When you look at cases like *Steves & Sons, Inc.*, which involved a successful private challenge to a consummated merger, what haunts me is the following question: how many markets that we don't know about have become unduly concentrated and given rise to price hikes to consumers and the exclusion of rivals? Particularly in this environment, we need to be vigilant as enforcers, doing our homework, learning the critical facts of industry life, and not be afraid to take cases to court.

4 https://www.luc.edu/media/lucedu/law/students/publications/llj/pdfs/vol-52/issue-1/7_Weiser.pdf.

5 https://www.naag.org/policy-letter/naag-endorses-state-antitrust-enforcement-venue-act-of-2021/.

6 https://scholar.law.colorado.edu/articles/454/.

# CALIFORNIA'S UNFAIR COMPETITION LAW: AN EXISTING AND FLEXIBLE RESPONSE TO EMERGING TECH DOMINANCE ISSUES

BY PAULA BLIZZARD, BRIAN WANG, PETER ADELSON, MATTHEW MAEDER & TOM ZICK[1]





1 Paula Blizzard is a Supervising Deputy Attorney General, Brian Wang is a Deputy Attorney General, and Peter Adelson, Matthew Maeder, and Tom Zick are interns in the California Attorney General's Antitrust Section. This article represents only the views of the authors in their personal capacity, and not the views of the California Attorney General.

Monopolization of technology platforms by their owners has become a globally-recognized issue over the last decade. In many cases, enforcement actions have proven difficult, as most existing antitrust laws were written long before digital marketplaces arrived.

Two solutions have arisen: passing new legislation on the one hand, and re-invigorating existing laws on the other. On the legislative front, regulators and legislators in the U.S. and abroad have been trying to pass new laws that can further ensure competition on modern technology platforms. Foreign regulators in Europe and Asia have also enacted new legislation intended to better prevent anticompetitive conduct from platform owners.

In contrast, California's existing Unfair Competition Law ("UCL") may present an alternative route for successfully challenging anticompetitive conduct on technology platforms. As shown in the recent *Epic v. Apple* decision, more vigorous use of existing laws is another option for promoting competition, particularly where California's UCL is already broader than existing antitrust laws.

This article first summarizes legislative efforts, reviewing new laws proposed by foreign authorities, the U.S. Congress and state legislatures to address competition concerns on technology platforms. Second, it turns to California's UCL, an existing law that goes beyond the antitrust laws. It discusses the historical background of California's UCL, explains the "unfair" prong's legal framework and inherent flexibility, and considers the UCL's nationwide applicability. The article concludes by reviewing the opinion of the federal district court for the Northern District of California in *Epic v. Apple*, where the court found that Apple's conduct did not violate antitrust laws, but did violate the "unfair" prong of California's UCL.

# I. NEW LEGISLATIVE EFFORTS

### *A. Foreign Efforts*

Foreign governments have been the most successful in terms of passing new laws related to competition concerns in digital markets. In August 2021, South Korea passed a law that prohibits large app-stores from requiring that apps use their in-app purchases ("IAP") system.[2] Dutch antitrust regulators found unreasonable Apple's requirement that dating-apps use Apple's IAP system and demanded that Apple cease the practice.[3] Though Apple ceased requiring dating apps to use its IAP system, it continues to require a 27 percent commission to be paid.[4]

In addition to these narrower efforts, the EU and UK are attempting to comprehensively address digital competition through the EU's Digital Markets Act and the UK's Digital Markets Unit.

1. EU Digital Markets Act

The EU's Digital Markets Act (DMA) seeks to address the role of "gatekeeper" platforms in the digital ecosystem.[5] "Gatekeepers" are large digital platforms that meet certain financial and userbase requirements. The DMA targets gatekeepers in "core platforms," such as app stores, search engines, digital advertising, and web browsers. It would prohibit a variety of the gatekeepers' actions, such as tying app store access to the owner's IAP system, self-preferencing, or reusing private data collected in one context for another purpose. The DMA also imposes affirmative obligations: gatekeepers must ensure interoperability for certain applications and hardware, share advertising performance data, and ensure that users' access to core platforms is similar regardless of subscription level. The DMA proposes fines of up to 10-20 percent of worldwide revenue for violations of these provisions. The European Commission will have the exclusive power to enforce the DMA.

2 Jiyoung Sohn, *Google, Apple Hit by First Law Threatening Dominance Over App-Store Payments*, Wall St. J., (Aug. 31, 2021), https://www.wsj.com/articles/google-apple-hit-in-south-korea-by-worlds-first-law-ending-their-dominance-over-app-store-payments-11630403335.

3 Auth. for Consumers and Mkts., Summary of Decision on Abuse of Dominant Position by Apple, (2021), available at https://www.acm.nl/en/publications/summary-decision-abuse-dominant-position-apple.

4 Jon Porter, *Apple Proposes 27 Percent Commission in Dutch App Store Dispute*, The Verge, (Feb. 4, 2022), https://www.theverge.com/2022/2/4/22917582/apple-netherlands-antitrust-27-percent-commission-alternative-in-app-payment-systems.

5 Press Release, Eur. Council, Digital Markets Act (DMA): agreement between the Council and the European Parliament, (Mar. 25, 2022, updated May 11, 2022), available at https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/.

Originally proposed in December 2020, the DMA continues to make progress through the EU legislative process. In March 2022, the EU Parliament and Council came to a political agreement, and they released a draft version of the text in May 2022.[6]

2. UK Digital Markets Unit

In 2021, the UK government announced the creation of the Digital Markets Unit ("DMU").[7] The DMU, housed with the UK's Competition and Markets Authority ("CMA"), is tasked with overseeing regulations for the "most powerful digital firms," "promoting greater competition," and "protecting consumers and business from unfair practices." The UK government intends to empower the DMU with new legislation that address digital markets, introducing the legislation in the 2022-2023 Parliamentary session.[8]

Like the DMA, the DMU seeks to identify gatekeepers, which the DMU refers to as companies with "strategic market status" ("SMS").[9] Designated SMS companies — generally those in the digital economy with U.K. revenue over £1 billion and global revenue over £25 billion — will be required to comply with a code of conduct that ensures users are treated fairly on reasonable commercial terms, can choose freely between services provided by SMS firms and others, have access to clear, transparent information from SMS firms, and are able to make informed choices regarding services from SMS firms.[10] The DMU may impose far-reaching remedies to maintain competition in markets where SMS firms operate, and mergers involving SMS firms will be carefully reviewed by the DMU.[11]

Though the DMU is not yet fully empowered, it has already proven active using its pre-existing CMA powers. The DMU has shown great interest in the competitive implications of the mobile market in particular, as the DMU is currently investigating Apple's App Store and its IAP system, and the DMU recently published a report on the mobile ecosystem in June 2022.[12,13]

### *B. Federal Legislative Efforts*

Congress has also turned its attention towards the competitive implications of digital marketplaces. Two bills were voted out of committee in the Senate and are given the best chance of passing: the Open App Markets Act and the America Choice and Innovation Act.

In 2021, a bipartisan group of ten senators introduced the Open App Markets Act. This federal bill (1) prohibits tying IAP to access to the app store, (2) prohibits retaliation against developers offering better prices for other payment methods, (3) mandates that developers be able to freely communicate with customers, (4) prohibits using data derived from a third party app to compete with app, (5) requires that app stores permit third-party app stores, (6) prohibits unreasonable self-preferencing in app-store search, and (7) requires equal access to platform features and capabilities. This bill also exempts special-purpose hardware, such as video game consoles. While app stores could continue to charge a commission on their IAP systems, these provisions might largely eliminate Apple's and Google's ability to force their IAP system on third party developers. Beyond IAP issues, the bill might force mobile platforms to open doors into their "walled gardens," eliminating much of the platform owner's advantage.

6 *Id.*

7 Competition and Mkts. Auth., Digital Mkts. Unit, (Apr. 7, 2021) (updated July 20, 2021), available at https://www.gov.uk/government/collections/digital-markets-unit.

8 Competition and Mkts. Auth., *Digital Mkts. and the New Pro-Competition Regime*, (May 10, 2022), available at https://competitionandmarkets.blog.gov.uk/2022/05/10/digital-markets-and-the-new-pro-competition-regime/.

9 Competition and Mkts. Auth., Advice of the digital Mkts Taskforce, Appendix B: The SMS Regime: designating SMS Firms, at 22-23.

10 Competition and Mkts. Auth., Advice of the digital Mkts Taskforce, Appendix C: The SMS Regime: The Code of Conduct, (2020), at 15.

11 Competition and Mkts. Auth., Advice of the digital Mkts Taskforce, Appendix D: The SMS Regime: The Pro-Competition Interventions, (2020), at 1-2.

12 Competition and Mkts. Auth., *Investigation into Apple App Store*, (2021), available at https://www.gov.uk/cma-cases/investigation-into-apple-appstore.

13 Competition and Mkts. Auth., Mobile Ecosystems Mkt. Study, (2022).

The bill saw success in the Judiciary Committee, who voted in February to advance it on a 20-2 vote.[14] As the bill progresses, it has prompted strong reactions, both positive[15] and negative.[16] Even non-tech groups are weighing in, such as the National Taxpayers Union[17] and the American Enterprise Institute.[18] As Google and Apple defend antitrust suits filed under existing law, the Open App Markets Act may subject their platforms to a more specific set of regulations.

Another bill, the American Innovation and Choice Online Act, targets large online platform operators that engage in "self-preferencing" conduct, such as giving preference to their own products on their platform, excluding or disadvantaging competing products from other businesses on their platform, or discriminating among similarly situated users on their platform.[19] The bill also prohibits platform owners from interfering with a competing business' ability to access or interoperate with the platform, restricts the platform owner's ability to use nonpublic data generated from the platform, and prevents the platform owner from restricting a competing business' access to data the competing business generates from the platform.[20]

In June 2021, the House Committee on the Judiciary advanced the bill out of committee on a 24–20 vote. In January 2022, the Senate Committee on the Judiciary advanced the legislation on a 16–6 bipartisan vote. The bill has not yet received a floor vote in the House or Senate.

### *C. State Legislative Efforts*

Several states have considered or are considering legislation that would limit the ability of digital platform owners to act anti-competitively. These include Arizona's 2021 HB2005, Minnesota's 2022 HF1184/SF1327, and Illinois's 2022 SB3417.

These bills follow similar blueprints. First, they target large mobile app marketplaces. Arizona's HB2005 and Illinois's SB3416 apply to app stores with over 1 million in annual in-state app downloads, and Minnesota's HF1184/SF1327 applies to app stores with over $10 million in annual in-state revenue. Second, these bills create blanket prohibitions on tying access to the app store with use of the app store owner's IAP system, which usually extracts a commission of up to 30 percent for the owner. All bills prohibit tying as applied to developers, and Arizona's HB2005 and Illinois's SB3416 further prohibit it for users. The app store may not retaliate against users or developers not using its program. Finally, these bills all exempt "special purpose" app stores, or app stores for hardware built with a specific purpose, such as video game consoles and music players. Put together, these requirements might force Apple, Google, and sufficiently large desktop app stores to untie their distribution platforms from their IAP system, eliminating the app store owner's 30 percent commission for consumers.

None of these efforts have yet succeeded. The Illinois[21] and Minnesota[22] bills have lain dormant since February 2022. Though the Arizona state House passed HB2005, it never became law; the Arizona state Senate never voted on it, reportedly due to strong lobbying efforts from Apple and Google.[23] Illinois's and Minnesota's proposals have also attracted the opposition's ire, with organizations such as NetChoice[24] and the Chamber for Progress[25] advocating against passage.

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14 Lauren Feiner, *Senate committee advances bill targeting Google and Apple's app store profitability*, CNBC, (Feb. 3, 2022), https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html.

15 *Senate Must Pass the Open App Markets Act to Protect American Entrepreneurs and Consumers from Monopoly Power*, Am. Econ. Liberties Project, (Feb. 3, 2022), https://www.economicliberties.us/press-release/senate-must-pass-the-open-app-markets-act-to-protect-american-entrepreneurs-and-consumers-from-monopoly-power/.

16 *Open App Markets Act Full Explainer*, NetChoice, (Jan. 2022), https://netchoice.org/wp-content/uploads/2022/01/AT__-Open-App-Markets-Act-Full-Explainer.pdf.

17 Will Yepez, *App Store Bill Would Deprive Consumers of Choice*, National Taxpayers Union, (May 27, 2022), https://www.ntu.org/publications/detail/app-store-bill-would-deprive-consumers-of-choice.

18 Mark Jamison, *The Open App Markets Act Does the Opposite of What It Says*, Am. Enter. Inst., (Jan 20, 2022), https://www.aei.org/technology-and-innovation/the-open-app-markets-act-does-the-opposite-of-what-it-says/.

19 Am. Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021).

20 *Id.*

21 *Illinois Senate Bill 3417*, LegiScan, https://legiscan.com/IL/bill/SB3417/2021 (last visited July 1, 2022).

22 *SF 1327*, FastDemocracy, https://fastdemocracy.com/bill-search/mn/2021-2022/bills/MNB00036903/ (last visited July 1, 2022).

23 Nick Statt, *It's Game Over for Arizona's Controversial App Store Bill*, The Verge, (Mar. 31, 2021), https://www.theverge.com/2021/3/31/22357121/arizona-hb2005-app-store-bill-dead-apple-google-big-tech-lobbying.

24 Carl Szabo, *NetChoice Opposition to SB3417*, NetChoice, (Mar. 8, 2022), https://netchoice.org/testimony/netchoice-opposition-to-illinois-sb-3417/.

25 Montana Williams, *Testimony of Montana Williams*, Chamber of Progress, (Mar. 8, 2022), http://progresschamber.org/wp-content/uploads/2022/03/IL-SB-3417-Oral-Testimony.pdf.

## II. CALIFORNIA'S UCL AS AN EXISTING SOLUTION TO ANTICOMPETITIVE CONDUCT

Although regulators around the world have signaled a strong desire to more stringently control anticompetitive conduct in the technology industry, existing state and federal antitrust statutes were written long before digital marketplaces arrived, and new legislation can be difficult to pass.

California's Unfair Competition Law offers a flexible alternative that augments traditional antitrust statutes. It relies significantly on judicial discretion in a case-by-case analysis. As demonstrated in *Epic v Apple*, California's UCL provides a framework that can handle complex digital markets and constrain anticompetitive conduct even if a court finds that traditional antitrust claims have not been proven.

### *A. The Intentional Breadth and Flexibility of the UCL[26]*

The UCL prohibits any unlawful, unfair, or fraudulent business act or practice.[27] The UCL "imposes 'broad' and 'sweeping' prohibitions" against those types of conduct, and the history of the UCL shows that the California legislature deliberately imbued the UCL with this broad reach and flexible scope from the beginning.[28] The California legislature first passed the UCL in 1887 "to enforce basic rules of common honesty and accepted business ethics."[29] The legislature broadened the statute further in 1933 to allow both consumers and direct competitors to bring suits under the UCL to enjoin any "unfair" competition.[30] As California courts have recognized, the intent of the statute was explicitly to combat the innumerable "new schemes which the fertility of man's invention would contrive."[31]

From its inception, the UCL has allowed courts the breadth of authority to rein in forms of unfair competition that were unforeseeable to the drafters of the original statute.

Importantly, the UCL does not impose rigid rules on courts seeking to define unfair conduct. California courts have recognized that "no inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself."[32] The UCL grants trial judges the authority to analyze claims on a case-by-case basis, determining the unfairness of a defendant's conduct based principally on the context and specific factual background of that case.

### *B. The UCL's "Unfair" Prong in Practice*

California courts have interpreted the "unfair prong" to be "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud."[33] The California Supreme Court has identified three flexible tests that courts may apply under the "unfair" prong of the UCL.[34]

First, under the balancing test, which applies to actions brought by consumers,[35] a court determines "whether a business practice is unfair by 'examination of the impact of the practice or act on its victim balanced against the reasons, justifications and motives of the alleged wrongdoer.'"[36]

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26 The California Attorney General recently filed an amicus brief with the Ninth Circuit in the *Epic v. Apple* appeal, further discussed *infra*, to provide the court with the historical background of California's UCL and an explanation of its current framework. Brief of the State of California as Amicus Curiae in Support of Neither Party, *Epic Games, Inc. v. Apple Inc.*, No. 21-16506 (9th Cir. Mar. 31, 2022) [hereinafter California AG Brief].

27 Cal. Bus. & Prof. Code § 17200.

28 California AG Brief, *supra* note 26, at 5 (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)).

29 *Id.* at 5 (internal quotations omitted) (citing *Hesse v. Grossman*, 152 Cal. App. 2d 536, 540 (1957)).

30 *Id.* at 5-6.

31 *Am. Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698 (1935).

32 *Pohl v. Anderson*, 13 Cal. App. 2d 241, 242 (1936).

33 *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103 (1996).

34 California AG Brief, *supra* note 26, at 3.

35 See *Progressive W. Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 286 (2005).

36 California AG Brief, *supra* note 26, at 9–10 (citing *Progressive W. Ins. Co.*, 135 Cal. App. 4th at 285).

Second, under the "tethering" test, which applies to actions brought by competitors,[37] courts are required to show that "any finding of unfairness to competitors under [the UCL] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition."[38] Under this test, "unfair" means "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."[39]

Finally, some California courts have also borrowed a test used in cases under Section 5 of the Federal Trade Commission ("FTC") Act, which requires "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have been avoided."[40]

Significantly, each of these three tests leaves open the opportunity for plaintiffs and enforcers to pursue a claim under the UCL's unfair prong without proving that that conduct violated any other law, and courts — including federal district courts in California — have continuously reaffirmed that unfairness claims under the UCL can proceed without a violation of an antitrust statute.[41] Since there has been no "rush of trial courts finding anticompetitive unfairness without concurrent unlawfulness," courts are clearly able to use meaningful discretion to rein in only truly unfair behavior.[42]

In addition to not requiring a simultaneous antitrust violation, analysis under the UCL's unfairness prong allows for a more "nuanced and qualitative" analysis than the traditionally quantitative-focused analysis under antitrust statutes.[43] Requiring a regimented analysis akin to those performed under antitrust claims would make little sense for a statute expressly created to be broader and more flexible than antitrust laws.[44] This flexibility allows judges to perform contextual and case-specific scrutiny of allegedly unfair behavior, which is vital in rapidly developing marketplaces.

### *C. Nationwide Injunctions under California's UCL*

California's UCL also allows courts to issue nationwide injunctions against companies based in California. By limiting anticompetitive behavior taking place within the State, injunctions against California companies may result in incidental benefits to out-of-state consumers by denying companies the opportunity to injure *any* consumer with "conduct emanat[ing] from California."[45]

Such injunctions do not implicate the Commerce Clause. Indeed, the Commerce Clause does "preclude[] the application of a state statute to commerce that takes place *wholly outside of the State's borders*, whether or not the commerce has effects within the State."[46] Injunctions rooted in California law against companies headquartered in California, however, do not pose any of those concerns. A company choosing to locate themselves in California cannot simultaneously "avail itself of the benefits of California law while using California as a launching pad for anticompetitive acts with effects in other States."[47] Thus, the UCL allows courts to authorize nationwide injunctions against California companies.

37 *Nationwide Biweekly Admin., Inc. v. Superior Court*, 9 Cal. 5th 279, 303 (2020).

38 *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186–87 (1999).

39 *Id.* at 187.

40 *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 257 (2010) (internal quotation marks and citation omitted).

41 See *Cel-Tech Commc'ns, Inc.*, 20 Cal. 4th at 187 (designing the "tethering" test for UCL claims which does not require illegality); Sun Microsystems, Inc. v. Microsoft Corp., 87 F. Supp. 2d 992, (N.D. Cal. 2000) (issuing an injunction against Microsoft under the "unfair" prong of the UCL despite no showing of unlawfulness or fraud); Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1117–19 (C.D. Cal. 2001) (holding that a UCL unfairness claim could proceed beyond pleading despite the plaintiff not claiming that any of the defendants' actions were "unlawful" or "fraudulent").

42 California AG Brief, *supra* note 26, at 14.

43 *Id.* at 20 (citing *Nationwide Biweekly Admin., Inc.* — Superior Court, 9 Cal. 5th 279, 304 (2020)).

44 *Id.* at 20.

45 *Id.* at 23 (citing *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 243 (2001)).

46 *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (emphasis added).

47 California AG Brief, *supra* note 26, at 24.

### *D. Applying the UCL Against Anticompetitive Conduct*

1. Genesis of *Epic v. Apple*

In 2010, Epic, creator of the popular game Fortnite, entered into a developer agreement with Apple.[48] Like other third party developers, in exchange for access to Apple's App Store on iPhones and iPads, Epic had to agree to (1) pay Apple a 30 percent commission on all in-app purchases, (2) refrain from setting up its own app store, (3) refrain from bypassing the Apple App Store, (4) use Apple's in-app payment technology for all purchases, and (5) comply with Apple's anti-steering provisions.[49]

These anti-steering provisions prohibited Epic from telling consumers about other, potentially cheaper payment methods for in-app purchases, methods that would bypass Apple's payment system and Apple's 30 percent commission.[50] Specifically, Epic was barred from including "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase."[51] The developer agreement also prevented developers like Epic from advertising alternative pricing via other forms of payment to customers via email or text through contact information obtained from registrations within the app.[52]

In August 2020, Epic activated "Project Liberty," its attempt to push against Apple's (and Google's) app distribution and payment restrictions.[53] Bypassing Apple's usual app review process, Epic used "hotfix" updates to covertly introduce capacity into Fortnite to allow consumers to bypass Apple's IAP system and pay Epic directly for in-game items at a discount.[54] Epic conceded that this "hotfix" violated its contract with Apple.[55] When Apple found out, Apple immediately removed Fortnite from the Apple App Store and terminated Epic's developer account, and Epic responded by filing suit in federal court, alleging that Apple's restrictive App Store polices violated federal and state antitrust laws as well as California's UCL. [56]

2. Court Found No Violation of Antitrust Laws

After a bench trial in spring 2021, the federal district court rejected Epic's claims that Apple violated federal or state antitrust laws. Unconvinced by Epic's assertion that the relevant market — a threshold issue for antitrust cases — consisted of the "aftermarket" for apps and in-app transactions on just iPhones and iPads, the court adopted its own market definition of "digital mobile gaming transactions."[57] Because the Court's market definition also includes transactions on Android devices, the Court concluded that Epic did not make a prima facie showing that Apple had monopoly power in the relevant market.[58]

Furthermore, while the Court did find that Apple had market power in the relevant market, and that Epic had shown anticompetitive effects from Apple's policies, it concluded that Apple's policies had pro-competitive justifications such as improved security,[59] that Epic's proposed less-restrictive alternatives would not address those security concerns,[60] that Apple was entitled to "some" compensation even if there is no basis for the 30 percent rate,[61] and that Apple's conduct did not qualify as a conspiracy because Apple's developer

48 *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 934 (N.D. Cal. 2021).

49 *Id.* at 943-44.

50 *Id.* at 944.

51 *Id.*

52 *Id.*

53 *Id.* at 936.

54 *Id.* at 938.

55 *Id.* at 923.

56 *Id.* at 940.

57 *Id.* at 1025.

58 *Id.* at 1032.

59 *Id.* at 1039.

60 *Id.* at 1041.

61 *Id.*

agreement was a unilateral contract.[62] The court also found that the App Store and Apple's IAP system are two components of a single product.[63]

Based on the above, the Court found for Apple on all of the federal and state antitrust claims, rejecting Epic's claims for monopolization, attempted monopolization, and tying.[64]

3. Court Found Violation of California's UCL

However, while the Court did not find Apple liable under federal or state antitrust law, it nonetheless found that Apple's anti-steering provisions in its developer agreement were barred by California's UCL. In deciding which of the tests to apply, the Court categorized Epic as both a competitor as well as a "quasi consumer," reasoning that Epic "jointly consume[s] Apple's game transactions and distribution services together with iOS users."[65] It therefore used both the tethering test and the balancing test.[66] Despite Apple's "mostly valid and non-pretextual procompetitive justifications" for its overall conduct,[67] the Court noted that Epic had proved anticompetitive effects as well as excessive operating margins, and Apple had failed to provide specific justifications for its 30 percent commission rate or anti-steering policies.[68]

The Court found that Apple's anti-steering conduct violates the unfairness prong of the UCL under both the tethering and balancing tests. Finding that commercial speech, including price advertising, has always been protected, and that Apple's restrictions on the flow of information could "lock-in" users, the court concluded that Apple's anti-steering policies threatened an incipient violation of antitrust laws and also violated the spirit of the laws.[69] Under the balancing test, the Court concluded that the harm caused by Apple's anti-steering was "considerable" and the utility to be mere "entitlement."[70] The Court distinguished anti-steering in this case from conduct the court upheld in Amex.[71] Whereas Amex dealt with steering consumers towards cards with lower merchant fees in brick and mortar stores,[72] the present case concerns an information ecosystem that "actively impede[s] users from obtaining knowledge."[73]

Accordingly, the Court issued a nationwide injunction enjoining Apple from enforcing its anti-steering provisions on developers across all apps.[74] While the Court identified the relevant market for antitrust purposes to be mobile gaming transactions, it supports its injunction across all apps by noting that the UCL "does not require that the Court import that market limitation."[75] It further rejects the notion that the injunction must be limited to California to avoid a commerce clause violation. Since (1) Apple is headquartered in California, (2) the anti-steering provisions would be enforced under California law, and (3) consumers in California are harmed, the commerce clause does not preclude an application of state law.[76]

62 *Id.* at 1036.

63 *Id.* at 1047.

64 *Id.* at 922.

65 *Id.* at 1052.

66 The Ninth Circuit has declined to apply the FTC test when analyzing consumer claims under the UCL's unfairness prong. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007)

67 *Id.* at 1054.

68 *Id.* at 1056.

69 *Id.*

70 *Id.* at 1057.

71 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

72 *Id.* at 2289.

73 *Epic*, 559 F. Supp. 3d, at 1056.

74 *Id.* 1058.

75 *Id.* 1057.

76 *Id.*

### *E. The UCL in the Epic v. Apple Appeal*

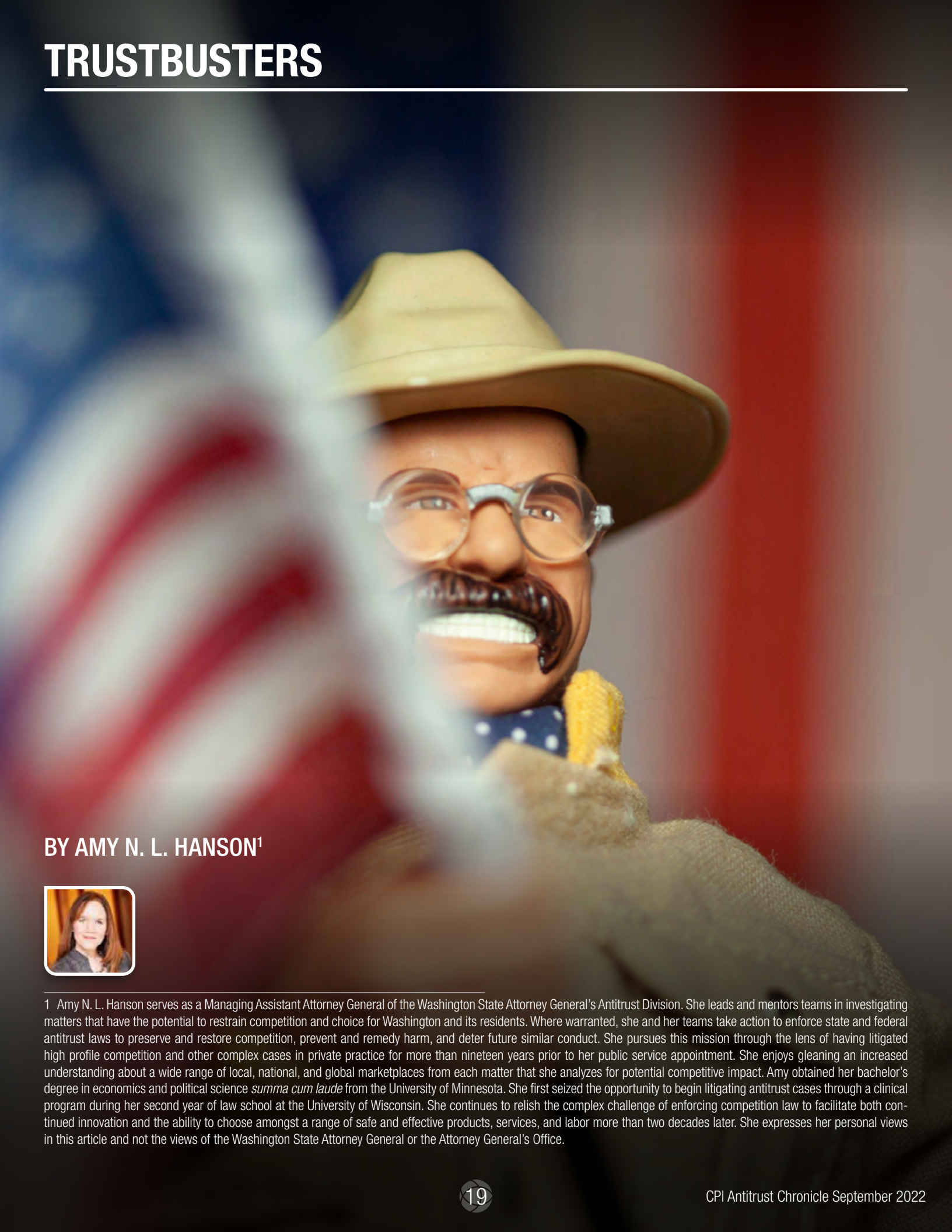
Both Epic and Apple appealed the decision of the district court to the Ninth Circuit. On cross-appeal, Apple argued that a defendant cannot be found to have violated the UCL without also having been found guilty of a Sherman Act or Cartwright Act violation. Thus, Apple argued that since the district court found that Epic failed to prove a violation of either of these antitrust statutes, the judge erred in finding for Epic under the UCL.

The California Attorney General filed an amicus brief with the Ninth Circuit to provide the court with the historical background of California's UCL and an explanation of its current framework. While the brief supported neither party, Epic referred to it to argue that the district court's injunction against Apple under the UCL should be upheld. The Attorney General explained that both the history of the UCL as well as its interpretation by California courts show that the UCL is intentionally broader and more flexible than federal or state antitrust laws, allowing courts to grant relief based on the UCL even where they may not recognize an antitrust violation.

## III. CONCLUSION

As policymakers around the world contemplate novel approaches to restricting anticompetitive conduct by technology companies, California's century-old Unfair Competition Law presents a well-established alternative. Allowing extensive judicial discretion, flexibility, and case-by-case analysis, the UCL provides a framework that is well-equipped to regulate conduct in increasingly complex digital markets.

# TRUSTBUSTERS



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# 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.

# “IF YOU NEVER DID, YOU SHOULD”: STATE EQUITABLE REMEDIES FOR ANTITRUST VIOLATIONS

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# I. INTRODUCTION

Section 16 of the Clayton Act, in pertinent part, authorizes persons "to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by courts of equity, under the rules governing such proceedings[.]"[2] Available to State enforcers and other antitrust plaintiffs besides the United States or the Federal Trade Commission, Section 16 has served as a Swiss-army knife of equitable relief, offering successful plaintiffs equitable remedies, despite the absence of their explicit mention in the statute itself. Recent Supreme Court rulings, however, call into question whether Section 16 will continue to afford a basis for expansive forms of equitable relief. Facing potential contraction of relief under this federal law, State enforcers and other plaintiffs should recognize that the laws of many individual States offer alternative, additional forms of relief.

We first discuss below leading Supreme Court decisions that inform the breadth of equitable remedies lower federal courts may recognize under general statutory grants of injunctive authority, such as that found in Section 16. We then discuss many different remedies found in state antitrust and unfair trade practices laws, which may be available to federal courts exercising jurisdiction over state law claims. In this discussion, we put aside injunctive relief, expressly available under Section 16, and non-equitable remedies, such as actual or treble damages and civil penalties. Our focus instead is on other forms of relief, some grounded in equity practice and others expressly included in State provisions.[3] Finally, we present a sampling of decisions from jurisdictions throughout the country recognizing the authority of the State Attorney General or other government official to secure relief extending to both residents and non-residents of the State.

# II. THE EVOLUTION OF EQUITABLE REMEDIES IN FEDERAL ANTITRUST CASES

### *A. Broad Equitable Authority Under Porter v. Warner Holding Co.*

*Porter v. Warner Holding Co.*[4] is a useful starting point to discuss judicial construction of federal laws granting the court authority to issue injunctive relief. The federal Price Control Administrator challenged rent set in violation of the Emergency Price Control Act. Section 205(a) of the Act authorized suit "enjoining such acts or practices, or for an order enforcing compliance with such provision," and upon a showing that the defendant "has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."[5] The Supreme Court upheld an order of disgorgement as within the law's grant of equitable authority:

> "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."[6]

*Porter* effectively established that an unrestricted congressional grant of equitable jurisdiction could be presumed to confer broad equitable authority. *Mitchell v. Robert DeMario Jewelry, Inc.*[7] hammered home the point. The Secretary of Labor brought suit under the Fair Labor Standards Act for a discriminatory discharge in violation of FSLA §15(a)(3).[8] As relief, the Secretary sought an award of lost wages, based on FLSA §17, which authorized the district court, "for cause shown, to restrain violations of section 15."[9] The district court found a violation, but declined to direct reimbursement for lost wages, and the court of appeals held there was no jurisdiction to order such relief. Reversing, the Supreme Court quoted Porter and further wrote:

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2 15 U.S.C. § 26.

3 Our discussion covers many States, large and small, from all parts of the country. We have not, however, researched the laws of all the States.

4 328 U.S. 395 (1946).

5 *Id.* at 397.

6 *Id.* at 398. See also *Id.* at 398-99 ("[O]nce [a District Court's] equity jurisdiction has been invoked[,] . . . a decree compelling one to disgorge profits ... may properly be entered.").

7 361 U.S. 288 (1960).

8 29 U.S.C. § 215(a)(3).

9 *Id.* at 289; 29 U. S. C. § 217.

> "[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."
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> * * *
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> "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."[10]

### *B. Porter Applied in Antitrust*

Neither Porter nor Mitchell was an antitrust case, and neither involved a State-plaintiff. *California v. American Stores Co.*,[11] however, checked both boxes. After the FTC negotiated a merger settlement that included limited divestitures, California sued for additional divestiture relief under Clayton Act §16.[12] Although the Ninth Circuit declined to recognize a divestiture remedy as within the district court's injunctive power, the Supreme Court reversed.

While the *American Stores* Court cited Porter's effective presumption favoring broad equitable authority, its decision was more nuanced.[13] Besides Section 16's grant of equitable authority, Clayton Act §15 authorizes the United States to sue "to prevent and restrain violations of this Act" and to "institute proceedings in equity to prevent and restrain such violations" through petitions "praying that such violation shall be enjoined or otherwise prohibited."[14] Precedent established that relief in a U.S. action under Section 15 included divestiture.[15]

Comparing the two provisions, the Supreme Court wrote: "On its face, the simple grant of authority in § 16 to 'have injunctive relief' would seem to encompass divestiture just as plainly as the comparable language in § 15[.]"[16] Moreover, construing §16 to include divestiture relief, the Court said, helped "harmonize the section with its statutory context. The Act's other provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers."[17] As further support for its holding, the Supreme Court undertook a lengthy review of the Clayton Act's legislative history.[18]

### *C. Lower Court Applications of Porter*

Lower federal courts applied these decisions broadly. *Federal Trade Commission v. Mylan Labs., Inc.*[19] arose after defendants entered exclusive supply contracts for the active pharmaceutical ingredients in two pharmaceutical products and then raised prices on those products. For the first time in a competition case, the FTC invoked the equitable authority conferred under Section 13(b) of the FTC Act to seek disgorgement of the defendants' profits. Section 13(b) authorizes the district court, "in proper cases," to issue a "permanent injunction" against "any person, partnership, or corporation" that the FTC believes "is violating, or is about to violate, any provision of law."[20] Denying the defendants' motion to dismiss, the district court wrote:

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10 *Id.* at 291, 292.

11 495 U.S. 271 (1990).

12 15 U.S.C. § 26.

13 See *Id.* at 295 (quoting Weinberger v. Romero-Barcelo, 456 U. S. 305, 313 (1982) (quoting Porter, 328 U. S. at 398).)).

14 15 U.S.C. § 25.

15 See, e.g. *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316 (1961). See also *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911) (directing divestiture under Sherman Act § 4, which preceded Clayton Act § 15).

16 *Id.* at 281. Although the courts of appeals were split on this very issue, the Supreme Court concluded: "the plain text of § 16 authorizes divestiture decrees to remedy § 7 violations." *Id.* at 281.

17 *Id.* at 284.

18 *Id.* at 285-93.

19 62 F. Supp. 2d 25 (D.D.C.1999).

20 15 U.S.C. § 53(b).

> "Although courts are generally disinclined to find remedies beyond those that Congress has expressly granted, the equitable jurisdiction of a federal agency such as the FTC must be read in light of the principles articulated in *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946)."[21]

Thus, the court upheld disgorgement under § 13(b) "[b]ased on the principle of statutory construction set forth in Porter and reaffirmed in De-Mario [Mitchell]" and decisions of "five courts of appeals and numerous district courts" permitting the FTC to pursue monetary relief under § 13(b) in consumer protection cases.[22]

States and private plaintiffs brought parallel cases against the same defendants. Because *Illinois Brick*[23] barred treble damage claims by indirect purchasers, they sought monetary remedies under the injunctive relief language of Section 16 of the Clayton Act.[24] The district court held, however, that implying a disgorgement or restitution remedy under §16 would impermissibly circumvent *Illinois Brick*, as would comparable relief under state law "absent express authority for such relief . . . ."[25] On the other hand, where state law allowed indirect purchasers to sue or seek monetary equitable relief, the court declined to dismiss.[26]

Even the Antitrust Division, which almost never sues for monetary relief in civil antitrust cases other than those where the government itself is an injured victim, invoked the *Porter-Mitchell* line of cases. In *United States v. Keyspan Corp.*,[27] the DOJ settled a claim alleging that Keyspan rigged bids on electrical capacity. The settlement included a $12 million disgorgement payment to the United States, the first such request by DOJ in an antitrust case. Relying on both Porter's presumption and Second Circuit authority in SEC disgorgement cases, the district court upheld disgorgement as within its equitable authority under the antitrust laws. "Section 4 [of the Sherman Act] . . . [is] broad and contain[s] no language divesting a court of its 'inherent equitable powers.'"[28]

### *D. The Supreme Court Limits Porter*

Both *Porter* and *Mitchell* arose from law enforcement cases brought by public officials. Private plaintiffs in subsequent cases did not fare so well in the Supreme Court, however. In *Mertens v. Hewitt Associates*,[29] beneficiaries of an ERISA retirement plan sought monetary relief from a nonfiduciary-actuary who allegedly participated in the statutory violation. The relevant ERISA provision authorized a civil action: "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan . . . ."[30] The district court dismissed the claim, and the court of appeals affirmed in relevant part.

The Supreme Court upheld dismissal, noting that the beneficiaries did not seek "a remedy traditionally viewed as 'equitable,' such as injunction or restitution . . . . , but rather compensatory damages —monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties . . .—the classic form of legal relief."[31] The Court recognized that "equitable relief" could embrace "whatever relief a court of equity is empowered to provide in the particular case at issue," but also could "refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[32] However, under ERISA's statutory scheme, "appropriate equitable relief" against a nonfiduciary was limited; only professional service providers who "cross[ed] the

21 62 F. Supp. 2d at 36.

22 *Id.* at 37.

23 *Illinois v. Illinois Brick Co.*, 431 U.S. 720 (1977).

24 See 62 F. Supp. 2d at 42; 15 U.S.C. § 26.

25 62 F. Supp. 2d at 43. See *generally FTC v. Mylan Labs., Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999) (discussing equitable relief under state law). For more recent similar authority, see *In re Pre-Filled Propane Tank Antitrust Litigation*, 893 F.3d 1047, 1059 (8th Cir. 2018) (Section 16 does not enable indirect purchasers to seek disgorgement).

26 62 F. Supp. 2d at 43.

27 763 F. Supp. 2d 633 (S.D.N.Y. 2011).

28 *Id.* at 639-40 (quoting Porter, 328 U.S. at 398). Sherman Act § 4 is identical, in pertinent part, to Clayton Act § 15, discussed above. See also *Keyspan*, 763 F. Supp. at 638 (discussing authority in SEC cases).

29 508 U.S. 248 (1993).

30 *Id.* at 253 (quoting 29 U.S.C. § 1132(a)(3)).

31 *Id.* at 255 (emphasis in original).

32 *Id.* at 257.

line from adviser to fiduciary," and thus had "power to control what the plan did," could be "compelled to make restitution, and subjected to other equitable decrees."[33]

*Meghrig v. KFC Western, Inc.*[34] is similar: Private plaintiffs sued under an environmental statute that authorized a citizen's action "to restrain any person who has contributed or who is contributing to the [the statutory violation] . . . [and] to order such person to take such other action as may be necessary, or both." [35] The issue before the Supreme Court was whether this grant of equitable relief included an award of "equitable restitution." The Court emphasized that where, as in the environmental laws there invoked, "Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute . . . , it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute."[36]

The Supreme Court applied this statute-focused approach, rather than the Porter-Mitchell presumption against limits on equitable authority, most recently in *AMG Capital Management, LLC v. Federal Trade Commission*.[37] There, Federal Trade Commission Act §13(b) came before the Supreme Court in a consumer protection case. The district court had ordered restitution of $1.3 billion against a payday lender, and the court of appeals had affirmed. Although by this time, eight courts of appeals had uniformly upheld issuance of monetary relief under §13(b), the Supreme Court unanimously disagreed.

The Court recognized that *Porter* and *Mitchell* had construed "similar language as authorizing judges to order equitable monetary relief."[38] Nonetheless, "the text and structure of the statutory scheme at issue can, 'in so many words, or by a necessary and inescapable inference, restric[t] the court's jurisdiction in equity.'"[39] Reviewing specifically the language of § 13(b), the Court wrote: "taken as a whole, indicate[s] that the words 'permanent injunction' have a limited purpose—a purpose that does not extend to the grant of monetary relief."[40] The Court further emphasized that, in more recent decisions, it had held, "based on our reading of a statutory scheme as a whole, that a provision's grant of an 'injunction' or other equitable powers does not automatically authorize a court to provide monetary relief."[41]

Unmentioned in *AMG* was the Supreme Court's decision, just a year earlier, in *Liu v. Securities and Exchange Commission*,[42] where the Court by an 8-1 vote upheld a disgorgement award in favor the Securities and Exchange Commission. There, the relevant statute, applicable to SEC enforcement actions, authorized the court to grant "any equitable relief that may be appropriate or necessary for the benefit of investors."[43] Although other parts of the Securities Act and the Securities Exchange Act expressly authorized monetary relief — including disgorgement in SEC administrative proceedings — the Supreme Court relegated this statutory context to analytical background.[44] Instead, the Court focused on "whether a particular remedy falls into 'those categories of relief that were typically available in equity.'"[45]

And "[e]quity courts," the Court noted, "have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names."[46] Notably, the Court quoted *Porter* for the proposition that where a statute confers equitable au-

33 *Id.* at 262.

34 516 U.S. 479 (1996).

35 *Id.* at 484.

36 *Id.* at 488-89 (cleaned up).

37 141 S.Ct. 1341 (2021).

38 *Id.* at 1347. See also *Id.* at 1349 (under *Porter* and *Mitchell,* text and statutory structure can "in so many words, or by necessary and inescapable inference, restrict the court's jurisdiction in equity." (cleaned-up).)

39 *Id.* at 1350 (quoting *Porter***,** 328 U. S., at 398 & *Mitchell,* 361 U. S., at 291).

40 *Id.* at 1348-49.

41 *Id.* at 1350.

42 140 S.Ct. 1936 (2020).

43 15 U.S.C. § 78u(d)(5).

44 See 140 S.Ct. at 1940 (identifying other statutes) & 1946.

45 *Id.* at 1942 (quoting *Mertens*, 508 U.S. at 256).

46 140 S.Ct. at 1942. See also *Id.* ("a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts.").

thority, the court has "all inherent equitable powers" unless the statute "otherwise provide[s] . . . ."[47] The limiting equity principle was only that the award not exceed "net" profits, after deducting expenses.[48] The *Liu* and *AMG* decisions thus recognize an apparent dichotomy: a statute allowing for pursuit of "equitable relief" may permit any equitable remedy (in line with *Porter*), while a statute allowing merely for a "permanent injunction" may not, depending on the overall statutory context.

## III. APPLYING RECENT PRECEDENT TO CLAYTON ACT SECTION 16

The Supreme Court's recent trilogy of decisions leaves the scope of federal antitrust remedies in doubt. Although the language of the statutes involved in *Meghrig* and *AMG* differs to some extent from that in Clayton Act §16, nevertheless, the court could focus on the framework of the Sherman and Clayton Acts, and particularly on their express enforcement provisions, which already include the relatively unusual treble damage monetary remedy.[49] Or, picking up on *Liu*'s re-affirmation of *Porter*, the court might emphasize that monetary relief to prevent a wrongdoer from benefitting from its misconduct is a time-honored part of equity jurisdiction. And far from expressly limiting the court's jurisdiction, Section 16 expressly imports, as guidance, the "conditions and principles" of equity practice generally.

Perhaps *American Stores*, the Supreme Court's only foray into the scope of Section 16 remedies, further supports *Liu*'s signal favoring broad equitable relief. The *American Stores* Court recognized divestiture as available, even those Section 16 refers only to injunctive relief. On the other hand, divestiture directs future conduct, and in that sense is, like most injunctions, forward-looking. By contrast, equitable remedies such as disgorgement of profits, restitution of ill-gotten gains, and an accounting are not only backward-looking, but also are, arguably, unduly duplicative of the Clayton Act's already generous treble damage remedy. This issue has already led one district court to take the *AMG* approach and deny equitable monetary relief under Section 16, though that litigation remains ongoing.[50]

Accordingly, State antitrust enforcers, and private antitrust plaintiffs, would be well-advised to refrain from relying solely on federal law as the source of relief in antitrust cases. Remedies available under state antitrust or unfair trade practices laws are, therefore, an attractive alternative to urging a federal court to adopt an expansive construction of Section 16's grant of injunctive authority.

State "harmonization" provisions — favoring construing state law to accord with federal antitrust law — should not be an insurmountable obstacle. Harmonization would apply with strongest force, of course, where the language of the state remedies law is identical to that of Section 16. By contrast, harmonization should not come into play at all where the state law either: (1) expressly authorizes relief beyond that identified in Section 16; or (2) includes language not found in Section 16 that fairly suggests more expansive remedies are contemplated. Moreover, state harmonization itself comes in different flavors, which afford varying deference to federal antitrust precedent. In New York, for example, state divergence is recognized "where State policy, differences in the statutory language or legislative history justify such a result. . . ."[51] In the section that follows, we detail various state remedy provisions that go beyond the injunctive relief available if the federal court were more inclined to read the limiting signals from *Meghrig-AMG* than the less constrained ones from Liu.

## IV. STATE-LAW REMEDIAL PROVISIONS

Many state remedies provisions, like the provision in *Liu*, speak in terms of "equitable" relief or other open-ended terminology, which itself suggests broader authority than that available under Section 16's injunction language. Missouri law is illustrative:

> "[I]n addition to granting such prohibitory injunctions and other restraints as it deems expedient to deter the defendant from, and secure against, his committing a future violation of [the antitrust laws], the court may grant such mandatory relief as is reasonably necessary to restore or preserve fair competition in the trade or commerce affected by the violation."[52]

47 *Id.* at 1947 (quoting *Porter*, 328 U.S. at 398). See also *Id.* at 1943 (citing *Porter* for the proposition that equitable relief could include disgorgement of profits).

48 Id. at 1943. See also *Id.* at 1945-46, 1950.

49 15 U.S.C. §§ 15, 15c(a)(2).

50 *See In re Generic Pharmaceuticals Pricing Antitrust Litigation*, 2022 WL 2047964 (E.D. Pa. June 7, 2022) (declining to construe Section 16 to cover disgorgement).

51 *People v. Rattenni*, 81 N.Y.2d 166, 171, 597 N.Y.S.2d 280 (1993) (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335, 525 N.Y.S.2d 816 (1988)). See generally *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1151-53 (N.D. Cal. 2009) (quoting and discussing various approaches).

52 Mo. Rev. Stat. § 416.071.2.

Texas antitrust law similarly empowers the court "to enter any order or orders required to implement the provisions of this Act."[53] In addition to enumerated relief available to the Attorney General, Kansas law authorizes the court to issue orders "to prevent violations, . . . to enforce any [available] remedy, . . . [and to] grant other appropriate relief."[54] Comparable provisions are common in the States.[55]

Provisions in other states authorize not only forms of equitable relief, but also other more far-reaching remedies. Express grants of authority to direct relief restitution or disgorgement are common.[56] For example, Pennsylvania's Unfair Trade Practices and Consumer Protection Law provides that where the court issues a permanent injunction, the court may also order the defendant, to "restore to any person in interest

53 Tex. Bus. & Com. Code Ann. § 15.26. See also *Id.* § 15.20(b) (expressly authorizing injunctive relief in an action by the Attorney General).

54 Kan. Stat. Ann. § 50-103(b).

55 See A.R.S. § 44-1408(B) (Arizona) (authorizing "appropriate injunctive or other equitable relief"); Cal. Bus. & Prof. Code § 16754.5 (in an action by the Attorney General, the court may "grant[] such prohibitory injunctions and other restraints as it may deem expedient" and "mandatory injunctions as may be reasonably necessary to restore and preserve fair competition"), § 17070 (any person may sue "to enjoin and restrain" violations), § 17079 (the court may "include in any injunction . . . such other restraint as it may deem expedient . . . to deter . . . and insure against" violations); Colo. Rev. Stat. §§ 6-4-111(1) & 113(1) (the Attorney General and persons injured may sue "to prevent or restrain" violations); Fla. Stat. Ann. § 542.23 (injured persons may sue for "injunctive or other equitable relief") & § 501.207(3) (under the State's Deceptive and Unfair Trade Practices Act, in an action by the Attorney General, the court may "grant legal, equitable, or other appropriate relief."); 740 Ill. Comp. Stat. § 10/7(1) (the Attorney General may sue "to prevent and restrain" violations," and the court may "enter such judgment as it considers necessary to remove the effects of any violation," and prevent its continuation or renewal); IC § 24-1-2-5 (Indiana) (the Attorney General may "institute appropriate proceedings to prevent and restrain violations"); Kan. Stat. Ann. § 50-103(b) (the Attorney General may seek "such orders or judgments as may be necessary to prevent violations" or "to enforce any remedy available to the Attorney General," and "other appropriate relief"); R.S. § 51:128 (Louisiana) (the Attorney General may sue "to prevent and restrain violations") & § 51:130 (the court may issue interlocutory sequestration or receivership orders regarding "any property utilized in violating [the antitrust] law," and "if the public interest would suffer from the suspension of defendant's business, . . . order the judicial sequestrator or receiver appointed to carry on the [defendant's] business . . . until the termination of the suit"); Md. Code Ann. Com. Law §§ 11-209(a)(1) & (3) (the Attorney General may "institute proceedings in equity to prevent or restrain violations," and providing that the court "may exercise all equitable powers necessary for this purpose"); Mass. Gen. Laws, tit. XV, ch. 93, § 9 (the Attorney General may sue "to prevent or restrain violations"); Mich. Comp. Laws §§ 445.777 & 445.778(1) & (2) (the Attorney General, State agencies, and injured persons may sue "for appropriate injunctive or other equitable relief"); Minn. Stat. § 325D.59 (the Attorney General may sue "seeking appropriate relief") & §§ 325D.072, 325D.15, 325D.58 (the court may issue injunctions "to prevent and restrain violations"); Miss. Code Ann. § 11-45-11 (the State may seek "all remedies to which individuals are entitled"), § 75-21-37 (authorizing enforcement "by appropriate legal proceedings and suits at law or in equity") & § 75-24-9 (under the State's Consumer Protection Act, the court may issue injunctions "to restrain and prevent" violations); Nev. Rev. Stat. § 598A.070(1) & (4) (the Attorney General may sue for [i]njunctive relief to prevent or restrain violations . . . [and for] [o]ther equitable relief"); N.Y. Gen. Bus. L. § 342 (the Attorney General may sue "to restrain or prevent" violations); N.C. Gen. Stat. § 75-14 (the Attorney General may "obtain a mandatory order, including (but not limited to) [injunctive relief] . . . to carry out the provisions of this Chapter"); N.D. Cent. Code § 51-08.1-07 (the Attorney General may seek "appropriate injunctive relief, [and] equitable relief") & § 51-08.1-08 (the state and its agencies, and other persons threatened with injury may seek "appropriate injunctive or other equitable relief"); Ohio Rev. Code § 109.81(A)("The attorney general shall do all things necessary . . . to properly conduct any antitrust . . . , including the bringing of an action for equitable relief") & § 1311 (the Attorney General may sue "to restrain and enjoin" antitrust violations); 79 Okla. Stat. § 205A.1 (the Attorney General and injured persons may seek "appropriate injunctive or other equitable relief"); Or. Rev. Stat. § 646.770(1) (authorizing suits "for equitable relief") & § 646.775(1)(a) (authorizing the Attorney General to sue for "equitable" relief); Vt. Stat. Ann. § 2458(b) (under the State's unfair competition statute, the Attorney General may seek, in addition to injunctions, "any other temporary or permanent relief, or both, as may be in the public interest"); Va. Code Ann. § 59.1-9.8 (the court may grant "injunctions to prevent and restrain violations," and "mandatory injunctions reasonably necessary to eliminate violations"); Wash. Rev. Code Ann. § 19.86.080(1) (the Attorney General may seek "to restrain and prevent" violations); Wis. Stat. Ann. § 133.16 (the court may issue relief to "prevent or restrain, by injunction or otherwise," violations).

56 See, e.g. Alaska Stat. §§ 45.50.5809(a) & (b) ("the attorney general may bring an action to enjoin" violations, and "[t]he court may make additional orders or judgments as may be necessary to restore to a person in interest any money or property . . . that may have been acquired by [an antitrust violation] . . . , and as may be necessary to prevent continuing or future violations"); Ark. Code Ann., §§ 4-75-315 (a)(3) & (b)(1) (the Attorney General may seek "restitution" for the State and state agencies, and as *parens patriae*); Fl. Stat. Ann. § 501.207(c)(3)(under the State's Deceptive and Unfair Trade Practices Act, in an action by the Attorney General, "the court may make appropriate orders . . . to reimburse consumers or governmental entities found to have been damaged," and may grant legal, equitable, or other appropriate relief"); KSA § 367.220(1) (Kentucky) (under the Commonwealth's Consumer Protection Act, the court may "provide such equitable relief as it deems necessary and proper"); Md. Code Ann. Com. Law § 11-209(a)(3) (authorizing "restitution to any person of any money or . . . property acquired from that person by means of any violation"); Miss. Code Ann. § 75-24-11 (under the State's Consumer Protection Act, the court may issue "orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property, . . . which may have been acquired by means of any" violations)); N.D. Cent. Code § 51-08.1-07 (the Attorney General may seek "disgorgement"); 9 Vt. Stat. Ann. § 2458 (b)(2) (the Attorney General may seek "restitution of cash or goods") & § 2465(a) (-injured persons may seek "the consideration or value of the consideration given"); Wyo. Stat. §§ 40-114.2(a)(v) & (b) (the Attorney General may sue on behalf of the state and its agencies and as parens patriae to secure "restitution"). See also *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758, 764, 111 Cal. Rptr.3d 666, 671 233 P.3d 1066, 1070 (2010) ("ensuring disgorgement of any ill-gotten proceeds" is one of the "overarching goals" of California's Cartwright Act).

any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court."[57]

Kansas authorizes the Attorney General to sue "to void any contract or agreement" that violations its antitrust law.[58] South Carolina's Unfair Trade Practice statute authorizes recovery of any "ascertainable loss" arising from an antitrust violation.[59] Indiana has a remedy unique to victims of bid-rigging: recovery of "the full amount" of all payments "with interest to the date of judgment," not just the overcharge or actual damages.[60]

New York's Executive Law, which authorizes the Attorney General to sue where a businessperson "engage[s] in repeated . . . illegal acts," covers antitrust violations.[61] While the statute itself provides for "an order enjoining the continuance . . . of any . . . illegal acts," and directing "restitution," case law construes the available relief broadly to include ordering disgorgement,[62] as well as corporate dissolution and barring an individual from industry employment.[63]

57 73 P.S. § 201-4.1. See Opinion and Order on Preliminary Objections, *Pennsylvania v. Chesapeake Energy Corp.*, No. 2015IR0069, slip op. at 59-60 (Ct. C.P. Dec. 15, 2017) (recognizing the Attorney General's right to seek restitution for injured persons), aff'd in part, rev'd in part on other grounds sub. nom. *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51, (Pa. Cmwlth. Ct. 2019) (en banc), aff'd in part, rev'd in part on other grounds *Pennsylvania v. Chesapeake Energy Corp.,* 247 A.3d 934 (Pa. Sup. Ct. 2021). See also Alaska Stat. § 45.50.574 (contracts in violation of the antitrust law are "voidable as to future performance"); Cal. Bus. & Prof. Code § 17203 (the court may "make such orders . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired" by the violation); Colo. Rev. Stat. § 6-4-121 (where an agreement is void under the antitrust law, "[a]ny payments made . . . may be recovered in an action by the party making the payment"); IC § 24-2-2-5 (Indiana) (injured persons may recover "the full consideration or sum paid" for products "controlled by" an unlawful "combination or trust") & § 24-5-0.5-4(c)(2) (under the State's Deceptive Consumer Sales Act, the Attorney General may seek an order that "the supplier to make payment of the money unlawfully received from the aggrieved consumers to be held in escrow" for distribution "aggrieved consumers"); KSA § 367.200 (Kentucky) (under the Commonwealth's Consumer Protection Act, the court may make orders "necessary to restore to any person in interest any moneys or property, . . . which may have been paid out as a result" or an antitrust violation"); Md. Code Ann. Com. Law § 11-209(a)(2) (in an action by the Attorney General, the court may enter orders to "[r]emove the effects of any [antitrust] violation," and "[p]revent [its] continuation or renewal"]; Mich. Comp. Laws § 445.108 (under the State's Unfair Trade Practices Act, any injured person 'may rescind the sale and recover back from the seller the price or any portion thereof theretofore paid"); Miss. Code Ann. § 75-24-11 (under the State's Consumer Protection Act, "[t]he court may make such additional orders or judgments, including restitution, as may be necessary to restore to any person in interest any monies or property . . . which may have been acquired by means of any practice prohibited by this chapter"); Nev. Rev. Stat. §§ 598A.070(4) & 598A.210(1) (the Attorney General and other injured persons may seek "[o]ther equitable relief . . . including, without limitation, disgorgement or restitution"); N.C. Gen. Stat. § 75-15.1 (the Attorney General may seek an order directing "the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of [an antitrust] violation"); N.D. Cent. Code § 51-08.1-07 (the Attorney General may seek "disgorgement"); S.C. Code Ann. § 39-5-50(b) ("The court may make such additional orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use of [an unfair trade practice violation] any moneys or property, . . . which may have been acquired by means of any practice declared to be unlawful in this article"); Tenn. Code Ann. § 47-25-106 (injured persons may recover "the full consideration or sum paid" for products sold by a violator); Wash. Rev. Code Ann. §§ 19.86.080(2) & (3) ("the court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, . . . which may have been acquired by means of any [antitrust violation]."); Wis. Stat. Ann. § 133.14 (contracts prohibited by the antitrust law "shall be void," and "[a]ny payment made upon . . . such contract . . .may be recovered from any person who received or benefited from such payment").

58 Kan. Stat. Ann. § 50-103(a)(9). See also, e.g, Ohio Rev. Code Ann. Ch. 1331, § 1331.06 ("A contract or agreement in violation of [the antitrust law] is void").

59 S.C. Code Ann § 39-5-50(b).

60 IC 24-1-2-4.

61 N.Y. Exec. L. § 63(12). See, e.g. *New York v. Actavis, PLC*, 2014 WL 7015198, at *43 (S.D.N.Y. Dec. 11, 2014), aff'd on other grounds, 787 F.3d 638 (2d Cir. 2015), cert. dis'd, 577 U.S. 1002 (2015); In re TFT-LCD (Flat Panel) Antitrust Litig., 2011 WL 3475408, at *6 (N.D. Cal. Aug. 9, 2011); *New York v. Feldman*, 210 F.Supp.2d 294, 299-300 (S.D.N.Y. 2002).

62 *People ex rel. Schneiderman v. Greenberg*, 27 N.Y.3d 490, 497 (N.Y. 2016).

63 See, e.g. *In the Matter of People of State of New York v. Imported Quality Guard Dogs, Inc.*, 88 A.D.3d 800, 801-02, 930 N.Y.S.2d 906, 907-08 (2nd Dep't 2011); *People v. Northern Leasing Systems, Inc.,* 70 Misc. 3d 256, 279-80, 133 N.Y.S.3d 389 (Sup.Ct. N.Y. Co. 2020); *State v. Midland Equities*, 117 Misc.2d 203, 208 (Sup. Ct. N.Y. Co. 1982).

Other state statutes expressly provide for corporate dissolution, for revocation or suspension of the corporate charter or the power to do business within the state, or for appointment of a receiver.[64] Indeed, the Tennessee Attorney General has "the duty . . . to enforce §47-25-104," which provides simply that: (1) any domestic corporation that "violates [the antitrust statutes] shall thereby forfeit its charter and its franchise, and its corporate existence shall thereupon cease," and (2) any foreign corporation that does so "is prohibited from doing business in the state."[65] Indiana law, on the other hand, sets forth extensive, specific authority that the court may order in an antitrust action by the Attorney General:

**Against any domestic corporation:** The court may "restrain the corporation , , , and appoint a receiver for its property and effects, and take an accounting and make distribution of its assets among its creditors, and exercise any other power or authority necessary and proper for carrying out the provisions of this chapter."[66]

64 Cal. Bus. & Prof. Code § 16752 (the Attorney General may seek "forfeiture of charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the corporation or association"), § 16753 ("Every foreign corporation or association, . . . which violates this chapter, is subject to revocation of [its] powers, franchises or functions and upon such revocation is prohibited from doing any business in this state"), § 17203 (the court may appoint a receiver); Conn. Gen. Stat. Ann. § 35-36a (the Attorney General may sue for "forfeiture of charter rights, franchises, or privileges and powers exercised by such corporation or association [transacting business in the State], and for the dissolution of the corporation or association."); Fl. Stat. Ann. § 501.207(3)(under the State's Deceptive and Unfair Trade Practices Act, in an action by the Attorney General, "the court may make appropriate orders, including . . . appointment of a . . . receiver or sequestration or freezing of assets, . . . to order any defendant to divest herself or himself of any interest in any enterprise . . . ; to impose reasonable restrictions upon the future activities of any defendant to impede her or him from engaging in or establishing the same type of endeavor; [and] to order the dissolution or reorganization of any enterprise"); Idaho Code § 48-108(1)(e) (in an action by the Attorney General, the court may order "divestiture of any assets (i) Acquired in violation of [the antitrust law] to the extent determined necessary by the district court to avoid the creation of a monopoly or any likely substantial lessening of competition . . . ; or (ii) To restore competition in any line of Idaho commerce which has been eliminated by a [monopolization] violation]"); 740 Ill. Comp. Stat. § 10/7(1) (in action by the Attorney General, the court may order "divestiture of property, divorcement of business units, dissolution of domestic corporations or associations, and suspension or termination of the right of foreign corporations or associations to do business in the State"); IC §§ 24-1-1-2 & 24-1-4-2(a) (Indiana) (a domestic corporation that violates the State's antitrust law "shall thereby forfeit its charter and its franchise," while a foreign corporation "is hereby denied the right to do and is prohibited from doing business in the state") & § 24-5-0.5-4(c)(5) (under the State's Deceptive Consumer Sales Act, the Attorney General may seek an order appointing a receiver) & § 24-1.2-5 (in action by the Attorney General, where a domestic corporation violates the antitrust law, the court may "appoint a receiver . . . and take an accounting . . . and make distribution of [the corporation's] assets among its creditors, and exercise any other power or authority necessary and proper for carrying out the provisions of this chapter", and for non-domestic corporations order "ouster perpetually excluding such corporation" from transacting business in the State, and "forfeiting . . . any or all property . . . within the state," and "exercise such power and authority with regard to the property of such corporation as may be exercised with regard to that of domestic corporations"); Kan. Stat. Ann. § 50-103 (a) (6) ("to forfeit the charter and for the dissolution of the corporate existence of any [domestic] corporation"); KSA § 367.200 (Kentucky) (under the State's Consumer Protection Act, the court may order "appointment of a receiver or the revocation of a license or certificate authorizing any person to engage in business in the Commonwealth"); R.S. § 51:139 (Louisiana) (in an action by the Attorney General, the court may "order the forfeiture of the charter of a domestic corporation and its liquidation," and "may order the ouster from the state of a foreign corporation, and the liquidation of its affairs within the state," including "sale . . of any property utilized in any business declared to have been carried on unlawfully"); Md. Code Ann. Com. Law § 11-209(a)(3) (the Attorney General may seek "divestiture of property or business units, and suspension or termination of the right of a foreign corporation or association to do business in the State"); Minn. Stat. § 325D.60 (upon violation of a judgment, the Attorney General may sue "(a) for the forfeiture of any charter rights, franchise privileges or powers of such corporation held by such person under the laws of this state; (b) for dissolution, if the person is a corporation or limited partnership organized under the laws of this state; or (c) for the suspension of the privilege to conduct business within this state"); Miss. Code Ann. § 75-21-19 (authorizing proceedings "for forfeiture of charter, [and] for forfeiture of right to do business in this state") & § 75-24-11 (under the State's Consumer Protection Act, the court may order "the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state"); Mont. Code Ann. § 30-14-223 (the Attorney General may seek "the forfeiture of the business's charter, rights, franchises or privileges, and powers exercised by the business and to permanently enjoin it from transacting business in this state," and the court may "enjoin the business from doing business in this state permanently or for a period of time, . . . or . . . annul the charter or revoke the franchise of the business."); Nev. Rev. Stat. §§ 598A.180(1)(a) & (b) & 598A.190(1) (the Attorney General may seek relief against domestic corporations, including "[t]he forfeiture of charter rights, franchises, privileges and powers, and . . . the dissolution" or "[t]he suspension of the privilege to conduct business within the State;" and against foreign corporations, "the revocation or suspension of franchises, privileges and powers connected with doing business within the State"), and §§ 598A.180(2) & 598A.190(2) (the court may order "other appropriate relief"); Ohio Rev. Code Ann. Ch. 1331, § 1331.11 (in a quo warranto action by the Attorney General, "the court may declare a forfeiture of all its [corporate] rights, privileges, and franchises to the state and may order the corporation dissolved and appoint a trustee to wind up its affairs"); Or. Rev. Stat. § 646.760(2) (the Attorney General may seek "the forfeiture of any corporate franchise, professional or business license, [or] right to do business . . . , where the court finds the use by any defendant of such franchise, license or right has been material to [an antitrust] violation"); 73 P.S. § 201-9 & 9.1 (Pennsylvania) (under the State's Unfair Trade Practices and Consumer Protection Law, the Attorney General may petition the court to "order the dissolution or suspension or forfeiture of any franchise or charter of any corporation which violates the terms of any injunction," and to "appoint a receiver"); S.C. Code Ann. § 39-5-50(b) (the court may order "revocation of a license or certificate authorizing [the defendant] to engage in business in this State") & 39-5-120 (under the State's Unfair Trade Practices Act, in a proceeding by the Attorney General, the court may "order the dissolution or suspension or forfeiture of any franchise or charter of any corporation which violates the terms of any injunction"); Vt. Stat. Ann. § 2458(a) (under the State's Consumer Protection Act, the Attorney General may seek "to dissolve a domestic corporation or revoke the certificate of authority granted a foreign corporation"); Wash. Rev. Code Ann. § 19.86.150 (the Attorney General may seek an order directing "the dissolution, or suspension or forfeiture of franchise, of any corporation which shall violate [specified antitrust laws]"); Wis. Stat. Ann. § 133.12 (a corporation may "have its charter or authority to transact business in this state suspended, canceled or annulled" for antitrust violations).

65 Tenn. Code Ann. § 47-25-104. The substantive provisions, §§ 47-25-101 & 102, are themselves broad, prohibiting, in summary: (a) "[a]ll arrangements, contracts, agreements, trusts or combinations . . . made with a view to lessen or which tend to lessen, full and free competition . . . , or which tend, to advance, reduce, or control the price" of products, and (b) "[a]ny arrangements, contracts, or agreements that may be made [by a person] . . . to sell and market its products . . . at prices reduced below the cost of production . . . which tend to lessen full and free competition . . . ."

66 Ind. Code Ann. § 24-1-2-5. See also R.S. § 51:139A (Louisiana) (in an action by the Attorney General, the court may "order the forfeiture of the charter of a domestic corporation and its liquidation in accordance with existing laws"); Nev. Rev. Stat. § 598A.180(2) (in an action by the Attorney General, the court "may order the dissolution [of a domestic corporation violating the act], suspend the privilege to conduct business for a specific period, . . . or provide other appropriate relief").

**Against any non-domestic corporation**. The court may enter a "decree of ouster perpetually excluding such corporation from the privilege of transacting business in the state of Indiana and forfeiting to the school corporation's education fund or operations fund any or all property of such corporation within the state, and shall exercise such power and authority with regard to the property of such corporation as may be exercised with regard to that of domestic corporations."[67]

Although these corporate-related remedies may be thought severe, depending on the seriousness of the underlying antitrust violation, they could well be warranted.

Florida and Montana authorize administrative enforcement proceeding, which permit the Attorney General to investigate anticompetitive conduct, issue a complaint, hold a hearing, and direct relief, which is then subject to judicial review.[68] In Florida, the reviewing court's "decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition [for review]" and may, among other things, "[o]rder such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld." [69] Montana law similarly provides that the court "may issue writs that are ancillary to the court's jurisdiction or that are necessary to prevent injury to the public or to competitors pending the outcome of the suit."[70]

In sum, state law confers extensive remedial authority in antitrust cases. Equally important, judicial decisions throughout the country recognize that in law enforcement civil actions prosecuted by State officials, the relief ordered can extend not only to state residents, but also to non-residents.

## V. CASE LAW RECOGNITION OF THE NATIONAL REACH OF STATE-BASED EQUITABLE REMEDIES

Many courts have recognized that where the defendant has significant contacts with the forum State, State Attorneys General and other government officials have authority to prosecute law enforcement cases that seek equitable relief whose beneficiaries include residents and non-residents of the State alike. Indeed, in a bid-rigging case brought by the New York Attorney General 20 years ago, the Court wrote that authority for relief that included non-residents was "overwhelming."[71] That New York authority has only since increased.[72]

States throughout the country recognize law enforcement actions confer authority to include non-residents as beneficiaries of equitable relief.[73] For example, the Iowa Supreme Court upheld a restitution order that included non-residents, noting: "Authorities in other jurisdictions have applied similar statutes to provide recovery for nonresidents as well as residents."[74] Likewise, the Utah Supreme Court upheld applying its laws to business "operations that are conducted within this state, even if those laws affect, or are aimed at non-residents."[75]

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67 Ind. Code Ann. § 24-1-2-5. See also R.S. § 51:139B (Louisiana) (in an action by the Attorney General, the court "may order the ouster from the state of a foreign corporation, and the liquidation of its affairs within the state through a liquidating receiver, . . . and the sale . . . of any property utilized in any business declared to have been carried on unlawfully."); Nev. Rev. Stat. § 598A.190(2) (in an action by the Attorney General, the court "may order the revocation or suspension of the privilege to conduct business for a specified period, . . . or provide other appropriate relief.").

68 Fl. Stat. Ann. § 501.208; Mont. Code Ann. § 30-14-220.

69 Fl. Stat. Ann. §§ 120.68(6)(a) & (a)(2).

70 Mont. Code Ann. § 30-14-220(4). See also Nev. Rev. Stat. § 598.0971 (authorizing the Attorney General to initiate and conduct proceedings under the States Deceptive Trade Practices Act).

71 *New York v. Feldma*n, 210 F. Supp. 2d 294, 303 (S.D.N.Y. 2002) (citing authorities).

72 See, e.g. *People v. H & R Block, Inc.*, 58 A.D.3d 415, 417, 870 N.Y.S.2d 315, 316 (1st Dep't 2009); *People v. Telehublink Corp.*, 301 A.D. 2d 1006, 1009-10, 756 N.Y.S.2d 285, 285 (3d Dep't 2003): *People v. Amerimod, Inc.*, 2011 NY Slip Op. 31268 (Sup. Ct. NY Cty May 2, 2011). See also *People v. Lipsitz*, 174 Misc.2d 571, 580, 663 N.Y.S.2d 468, 474 (N.Y. Sup. Ct. 1997) (relief in an early internet fraud case directed to non-US victims as well as US residents).

73 *Brown v. Market Development, Inc.*, 41 Ohio Misc. 57, 64-66, 322 N.E.2d 367, 372 (C.P. 1974); *Enntex Oil & Gas Company (of Nevada) v. State,* 560 S.W.2d 494, 497 (Tex. Civ. App. 1977); Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General, 761 So.2d 1256, 1260-62 (Fla. Ct. App. 2000); In re Breast Cancer Prevention Fund, 574 BR 193, 214 (Bankr. Ct. W.D. Wash. 2017) (applying Washington law): Federal Trade Comm'n v. Information Management Forum, Inc., 12-cv-986-Orl-28KRS (M.D. Fla. June 4, 2013) (applying Florida law in an action by the Attorney General). In addition, many decisions uphold nationwide class certification enabling the forum's law to govern monetary relief. See, e.g. *Diamond Multimedia Systems, Inc. v. Superior Court,* 19 Cal.4th 1036, 80 Cal.Rptr.2d 828, 837 (1999); *Martin v. Heinold Commodities*, 117 Ill.2d 67, 83, 510 N.E.2d 840 (1987). But see *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059 (9th Cir. 2021) (vacating nationwide certification under federal and California state antitrust and unfair competition laws).

74 *State v. New Womyn, Inc.,* 679 N.W.2d 593, 597 (2004).

75 *Johnson-Bowles v. Division of Securities*, 829 P.2d 101, 110 (Utah Ct. App. 1992).

These rulings often arise in securities fraud or consumer protection cases. They are grounded in the State's interest in assuring that business operating in the State is conducted lawfully and that, where it is not, injury to victims can be redressed, whether or not they are State residents. As the Texas Court of Civil Appeals noted in affirming equitable relief, "[a] state is damaged if its citizens are permitted to engage in fraudulent practices even though those injured are outside its borders."[76]

These same considerations apply equally in antitrust cases, where the State's interest in preserving free and open competition is well recognized.[77] And they apply regardless of whether the remedy ordered compensates victims directly or prevents an antitrust violator from retaining the benefits of its ill-gotten gains.[78] Thus, in a recent monopolization case, the district court ruled that, upon proof of violation of New York's antitrust law, the Attorney General "may obtain disgorgement of [the defendant's] net profits attributable to the entirety of its U.S. sales."[79] In the respect, the remedial authority of a State Attorney General enforcing state law extends even further than that available in an Attorney General seeking damages under the Clayton Act's *parens patriae* provision. There, the Attorney General may secure relief for only "natural persons residing in such State."[80]

## VI. CONCLUSION

Regardless of whether equitable remedies under federal antitrust law shrink, there is significant potential to invoke state law, both to supplement relief under federal law and to fill any federal vacuum that may result. While there may be variations from State to State, a significant statutory and case law base exists. State Attorneys General, as well as private plaintiffs seeking equitable remedies, should seize the opportunity.

76 *Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 921 (Tex. Ct. Civ. App. 1st Dis. 1976, writ ref'd n.r.e). See also *State v. Pickrell*, 136 Ariz.589, 597, 667 P.2d 1304, 1312 (1983) (en banc) (the State's "legitimate interest in redressing the wrongs committed from within Arizona" and its "moral imperative to provide redress for those injured" authorizes relief on behalf of non-residents).

77 See, e.g. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 447 (1945) (upholding Pennsylvania's parens patriae authority to seek injunctive relief under the Clayton Act); New York v. Feldman, 210 F. Supp. 2d 294, 305 (S.D.N.Y. 2002) ("Permitting the Attorney General to sue for injuries suffered by both residents and nonresidents is also in keeping with the purpose of Maryland's antitrust statute.").

78 See, e.g. *United States v. Grinnell*, 384 U.S. 563, 577 (1966) ("adequate relief in a monopolization case should . . . deprive the defendants of any of the benefits of the illegal conduct"); United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc) ("a remedies decree in an antitrust case must seek to . . . deny to the defendant the fruits of its statutory violation.").

79 *Federal Trade Comm'n v. Vyera Pharmaceuticals*, LLC, 2021 WL 4392481 (S.D.N.Y. Sept. 24, 2021). See also *Federal Trade Comm'n v. Shkreli*, 2022 WL 135026 (S.D.N.Y. Jan. 14, 2022) (ordering disgorgement based on nationwide sales and an industry bar, both directed to an individual defendant), appeal pending sub nom. *Federal Trade Commission v. Vyera Pharmaceuticals*, LLC, No. 22-728 (2d Cir. Apr. 7, 2022); *Kugler v. Haitian Tours, Inc.*, 120 N.J.Super. 260, 269, 293 A.2d 706 (1972) (New Jersey law "prohibits unlawful practices in New Jersey without limitation as to the place of residence of the persons imposed upon."); *Solomon v. Cedar Acres East, Inc.,* 455 Pa. 496, 501, 317 A.2d 283 (1974) ("Once equity has assumed jurisdiction of an action, money damages may be awarded to insure a just result."). Cf. Statement of Decision, *People v. Ashford University, LLC*, No. 37-2018-00046134-CU-MC-CTL, slip op. at 44 (Super. Ct. S.D. Cty Calif. Mar. 3, 2022) (directing civil penalties based on nationwide violations).

80 15 U.S.C. § 15c(a)(1).

# STATE ENFORCEMENT: LESS THEORY, MORE DELIVERING FOR CONSTITUENTS

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# 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.").

# ANTITRUST REFORM EFFORTS AND STATUTORY *PARENS PATRIAE* AUTHORITY

BY MATTHEW MICHALOSKI[1]

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Ambrose Bierce quite cleverly defined "reform" as a "thing that mostly satisfies reformers opposed to reformation."[2] Like all cynics, he was always somewhat but never entirely correct in his observations, and, in this case, a superior definition is to be found in Dr. Johnson's succinct and felicitous take that to reform is simply "[t]o change from worse to better."[3]

And that word is on the minds of many lately who think they see a lot of worse in antitrust law that they would like to change for better. Take, for instance, the much-discussed House report on digital markets, concluding that the 18-month investigation of dominant online platforms had "demonstrate[d] the pressing need for legislative action and reform."[4]

The word also appears in sweeping legislative proposals like the Competition and Antitrust Law Enforcement Reform Act (S.225) whose caption declares its purpose "[t]o reform the antitrust laws to better protect competition in the American economy." Consider too the Tougher Enforcement of Monopolies Act (S.2039) whose sponsors expressly aim "to reform our nation's antitrust laws"[5] or Rep. Ken Buck's recent declaration that passage of the State Antitrust Enforcement Venue Act (S.1787) in the Senate heralds "the beginning of a new era of antitrust reform and proof-of-concept for a bipartisan reform coalition."[6]

The public square is now filled with speeches, articles, open letters, panegyrics, diatribes, and even TV ad buys opining on the wisdom of the various pieces of antitrust legislation currently pending in the 117th Congress, and the author will not add to the commentary on the substantive merits of these potential reforms. But he does wish to draw attention to one feature common to several bills: the inclusion of an express grant of authority to state attorneys general to bring enforcement actions as *"parens patriae"* on behalf of their residents. Lawmakers employing this language are drawing on a well-established practice of invoking that doctrine in federal statutes.

The *parens patriae* concept has long roots in our law though its history and contours are, in the words of one commentator, somewhat "ill-defined."[7] But, as cultivated in its modern form by the Court over the course of the 20th century, the concept today stands for the reasonably clear — if broad — proposition that state governments have standing to bring actions to vindicate their "quasi-sovereign" interests in protecting their residents' health and prosperity.[8]

That power has been called an inherent incident of sovereignty, and potentially embraces any number of areas of law and specific causes of action.[9] But, there are also over a dozen federal statutes on the books that expressly permit suits as *"parens patriae"* and as many more that permit functionally the same thing with different phrasing.

A review of these statutes reveals several trends: express congressional grants of *parens patriae* authority have overwhelmingly been reserved for matters of trade regulation and have very frequently concerned the unique challenges raised by new technologies (areas typically ripe for "reform" and calling out for effective means of enforcement). It is, then, no surprise that reformers in the legislature have frequently invoked the public-spirited concept of the sovereign's power to act as *parens patriae* for its residents when granting enforcement authority to state governments to aid in the execution of their reforms.

Mindful that another gem from Bierce defined "history" as "[a]n account mostly false, of events mostly unimportant,"[10] the author will now attempt both an interesting and a true recounting of Congress' initial invocation of *parens patriae* standing in statutory text, the conditions preceding that initial enactment, and Congress' subsequent use of that language in other statutes.

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2 Ambrose Bierce, *The Devil's Dictionary* (1911).

3 "reform, v.a." A Dictionary of the English Language, by Samuel Johnson. 1755.

4 U.S. HOUSE OF REPRESENTATIVES, 116TH CONG., REPORT ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (2020) at p. 7. https://perma.cc/L63X-LWKF.

5 https://www.grassley.senate.gov/news/news-releases/lee-grassley-introduce-team-act-to-reform-antitrust-law.

6 https://buck.house.gov/media-center/press-releases/buck-statement-senate-passage-state-ag-venue-bill.

7 Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. Rev. 759 (2016).

8 *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601–02 (1982)

9 *U.S. v. Thompson*, 98 U.S. 486, 489–90 (1878). See 42 A.L.R. Fed. 23 (Originally published in 1979) for a catalog of the various kinds of actions states have attempted to bring under such authority.

10 Bierce, *supra* note 2.

# I. *PARENS PATRIAE* ENFORCEMENT IN THE HART-SCOTT-RODINO ACT

Section 4C of the Clayton Act, 15 U.S.C. § 15c, authorizes state attorneys general to pursue damages "as parens patriae" on behalf of citizens injured by violations of the Sherman Act. The provision was added by Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 shortly after two decisions denying the states' ability to seek damages under Section 4 of the Clayton Act for injury to the general economy[11] and for injuries suffered by individual citizens.[12]

The HSR Act's inclusion of an express grant of parens patriae enforcement authority seems to have been the first such instance in any federal statute and was practically invited by the Ninth Circuit's encouragement in the latter opinion which stated that in bringing suit as *parens patriae* for residents who had not themselves sued to pursue damages for a price-fixing scheme, "the state is on the track of a suitable answer . . . to problems bearing on antitrust deterrence and the class action as a means of consumer protection," and further that "if the state is to be empowered to act in [such] fashion . . . that authority must come not through judicial improvisation but by legislation."[13]

The Supreme Court had earlier made clear that a state may sue as *parens patriae* for injunctive relief under Section 16 of the Clayton Act, the text of which lacks any reference to *parens patriae* authority.[14] And the Ninth Circuit in *Frito-Lay* credited the state's assertions both that its damages action would "serve a valid public purpose by providing the injured citizens with the closest equivalent of the recovery which, individually, is beyond their reach" and also that it was "essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred,[15]" but the court also doubted that recovery for individual citizens could be squared with the "scope of *parens patriae* authority" as it had been thus far developed in American law as a means "to *halt* injury to a quasi-sovereign state interest," i.e. an interest separate and apart from the private interests of the state's individual residents but related to the conditions necessary for securing its residents' wellbeing generally.[16] To "halt injury" — it seems — did not entail remediating an injury already past or deterring potential future injuries from other sources as might be accomplished by awarding damages. [17]

With this backdrop, standalone bills expressly empowering state attorneys general to pursue actions for damages as *parens patriae* for antitrust violations were introduced in the 93rd and 94th Congress, eventually being combined with amendments to the Antitrust Civil Process Act of 1962 and premerger notification requirements as part of the three-title Hart-Scott-Rodino Antitrust Improvements Act of 1976 that would become law after President Ford signed it, publicly doubting that the *parens patriae* provision was really a change from worse to better but expressing hope in his signing statement that, "if responsibly enforced," it could "contribute to deterring price-fixing violations, thereby protecting consumers."[18]

The House Judiciary Committee majority that advanced the measure certainly thought they were changing from worse to better, claiming that they would "employ an ancient concept of our basic English common law — the power of the sovereign to sue as *parens patriae* on behalf of the weak and helpless of the realm — to solve a very modern problem in antitrust enforcement"[19] — that problem being judicial rejection of the states' ability to use the *parens* power to seek damages for antitrust violations. Sponsor Peter Rodino of New Jersey (also the then-chair of the Committee) asserted in a hearing that "States' attorneys general had similar powers and duties at common law, but judicial interpretation of existing statutory language presently bars such suits in the antitrust field."[20]

11 *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

12 *California v. Frito-Lay Inc.*, 474 F.2d 774 (9th Cir. 1973), *cert. denied*, 412 U.S. 908 (1973).

13 *Id.* at 777.

14 *Georgia v. Penn. R.R. Co.*, 324 U.S. 439 (1945)

15 *Frito-Lay* at 776–77.

16 It did not engage with one very recent district court opinion endorsing a state's suit as *parens patriae* to recover damages for pollution to her coastal waters. *State of Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973). *Id.* at 775 (citing *Hawaii v. Stand. Oil Co.* at 257–59) (emphasis added).

17 *Cf. Exxon Ship. Co. v. Baker*, 554 U.S. 471, 492–93 (2008).

18 Gerald Rudolph Ford, Statement by the President on Signing H.R. 8532 Into Law. (Sept. 30, 1976).

19 H.R. REP. 94-499(VI) at 8–9.

20 Antitrust Parens Patriae Amendments, Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary (Feb. 20 and March 6, 1975).

Thus, express grants of authority for the states to exercise their long-established and very broad (albeit somewhat nebulous)[21] power to pursue actions as *parens patriae* entered federal statutory law as a response to judicial reluctance to extend recognition of that power to one particular, desired application of it, viz., damages actions for antitrust violations.

## II. *PARENS PATRIAE* ENFORCEMENT IN SUBSEQUENT FEDERAL STATUTES

But the concept has the potential for broader application, and lawmakers have continued the practice of expressly authorizing *parens patriae* enforcement, choosing to include a dozen such enforcement provisions in statutes from the mid-1990's to as recently as 2018. In order of passage of the relevant laws or amendments, and with the relevant enforcement provisions' current codifications, express *parens* authority is given for enforcement of the following federal statutes: violations of the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248(c)(2); deceptive or abusive telemarketing acts or practices proscribed under FTC rulemaking, 15 U.S.C. § 6103; HIPAA compliance, 42 U.S.C. § 1320d-5(d); the Children's Online Privacy Protection Act, 15 U.S.C. § 6504(a)(1); professional boxing safety standards under the Professional Boxing Safety Act as amended, 15 U.S.C. § 6309(c); prohibited practices under the CANSPAM Act, 15 U.S.C. § 7706(f); consumer protection provisions related to the interstate transportation of household goods, 49 U.S.C. § 14711(a); unfair or deceptive acts or practices in mortgage lending proscribed under CFPB rulemaking, 12 U.S.C. § 5538(b)(1); prohibited practices under the Telephone Consumer Protection Act, 47 U.S.C. § 227(e)(6); unlawful limitations on consumer reviews in violation of the Consumer Review Fairness Act of 2016, 15 U.S.C. § 45b(e)(1); circumvention of online ticket purchasing controls, 15 U.S.C. § 45c(c)(1); and civil actions in connection with human trafficking crimes under the Trafficking Victims Protection Act as amended, 18 U.S.C. § 1595(d).

Several trends are discernible in this list. First, in keeping with the motivation of the HSR Act's prior use, nearly every one of these provisions expressly authorizes state attorneys general to seek damages or expressly authorizes some other form of monetary relief (whether "fines" or "civil penalties"). Second, most (but not all) of these statutes are concerned principally with the regulation of trade in some fashion, and especially with consumer protection,[22] also consistent with the antitrust laws' purpose and with the general nature of *parens patriae* authority.[23] Third, at least half of these statutes appear to concern challenges of trade regulation connected to new digital and telecom technologies and technological innovation of the *bad* kind, i.e. people or businesses engaging in mischief through previously unavailable technological means — new forms of mischief that lawmakers apparently feared might be insufficiently deterred through federal enforcement or private damages actions alone.

Additionally, there are at least a dozen federal statutes similarly authorizing actions by state attorneys general without express reference to the states' acting as *"parens patriae"* but with reference to their acting "on behalf" of their "residents" (or very similar wording) which is precisely what it means for states to act as *parens patriae*.

This group includes violations of the Commodity Exchange Act or implementing rules, 7 U.S.C. § 13a-2; restrictions on debt relief agencies, 11 U.S.C. § 526; violations of requirements for credit repair organizations, 15 U.S.C. § 1679h; violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681s(c); unfair and deceptive acts and practices in connection with agents representing college athletes, 15 U.S.C. § 7804; failing Consumer Product Safety Commission standards for special packaging for household substances harmful to children, 15 U.S.C. § 1477; online dispensing of controlled substances without valid prescriptions, 21 U.S.C. § 882(c); enforcement of consumer product safety rules, 15 U.S.C. § 2073(b); violations of the Federal Hazardous Substances Act, 15 U.S.C. § 1264(d); violations of the Federal Odometer Act, 49 U.S.C. § 32709(d); violations of the Flammable Fabrics Act, 15 U.S.C. 1194(a); and certain unfair and deceptive internet sales practices, 15 U.S.C. § 8405.

Clearly these too are concerned with the regulation of trade, and primarily with consumer protection, and many — though not all — also authorize the states to seek damages.

It is not readily apparent why lawmakers would invoke the power of *"parens patriae"* by name in the HSR Act and nearly a dozen other statutes while also choosing in just as many other cases to authorize a similar power without direct reference to the doctrine. There are no ap-

21 See *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (the "quasi-sovereign" interest necessary to support *parens* standing "does not lend itself to a simple or exact definition.").

22 As used several times throughout this article, I mean by "consumer protection" those measures that protect the interests of the end consumer (or user) as is the case with many federal and state statutes focused on addressing the unique vulnerabilities of the consumer as compared with other buyers upstream in the supply chain.

23 And even those statutes not clearly related to the regulation of trade appear to bear at least some putative connection to protecting residents' health, thus covering the other half of the Court's formulation that the state holds a quasi-sovereign interest "in the health and well-being — *both physical and economic* — of its residents in general." *Snapp, supra* at 607 (emphasis added).

parently different trends in terms of the specific topics addressed by each group. Nor does it seem to be the case that a more formal method of statutory wording faded in favor of a less formal one over time, the on-behalf-of-residents method appearing as early as 1978 with the amendments to the Commodities Exchange Act referenced above[24] and the express *"parens"* method having continued to the present.[25] These methods thus appear functionally identical (and identically functional).

There are yet more federal statutes that authorize enforcement by state attorneys general but without any reference at all either to *parens* authority, by name, or otherwise to the states' acting on behalf of their citizens or residents.[26] These do, again, tend all to be concerned with the regulation of trade, though not uniformly with consumer protection, and they tend not to authorize damages.

Thus, it might be said that the more explicitly a federal statute granting enforcement authority to states draws on the existing concept of *"parens patriae"* power and, further, the more consumer-oriented it is, then the more *likely* it will be to provide for the recovery of damages expressly as an available remedy, thus returning to the point of lawmakers' first use of that phrase in statutory text, but this is no firm rule (for instance, the Restore Online Shoppers' Confidence Act is unquestionably a consumer protection statute and authorizes only injunctive relief, 15 U.S.C. § 8405(a)).

From all this a few more firm generalizations about Congress' grants of explicit enforcement authority to the states can be distilled: building on the existing judicial development of *parens patriae* standing in American law, Congress has seen fit (especially since the beginning of the internet age) to grant statutory enforcement authority to the states as representatives of their citizens for various actions, usually (but not always) doing so under the name of that doctrine, or something equivalent, and usually (but not always) identifying damages as a remedy, and overwhelmingly (but not quite always) for the purpose of regulating trade and quite often for purposes of consumer protection. And if this seems like a rather wordy summarization, it is at least a very accurate one and illustrates that lawmaking is a practical and not a theoretical science.

## III. *PARENS PATRIAE* ENFORCEMENT PROVISIONS IN CURRENT ANTITRUST LEGISLATION

Having now led the patient reader on a circuitous course through nearly a dozen different titles of the United States Code and half a century of lawmaking, this article will bring that knowledge to bear on present-day attempts at reform in antitrust law.

Four unique competition-related bills in the current Congress contain express *parens patriae* enforcement provisions for state attorneys general.[27] In order of their introduction, the list begins with the coyly-titled Bust Up Big Tech Act (S.1204) introduced by Sen. Hawley in April of 2021. Broadly, the bill would ban the vertical integration of platform owner/participants in the provision of several specific digital services. The bill provides for a private right of action and expressly provides for actions by state attorneys general as *parens patriae* on behalf of injured residents for recovery of damages and other relief.[28] Per a press release, the bill would "[e]nsure the antitrust laws are actually enforced, by authorizing state attorneys general and private citizens to bring civil actions to ensure compliance."[29]

The American Choice and Innovation Online Act (H.R.3816), introduced in June of 2021 as one member of a prominent group of "tech" bills in the House,[30] prohibits large digital platforms from engaging in any of a dozen "discriminatory" forms of conduct and includes an express authorization for actions by state attorneys general as *parens patriae* on behalf of injured "natural person" residents to pursue existing remedies available under the Clayton Act (including damages) as well as for civil penalties authorized by the Act itself.[31] Notwithstanding differences in the

24 PL 95–405 (S 2391), PL 95–405, SEPTEMBER 30, 1978, 92 Stat 865.

25 In fact there are many current bills covering a broad range of topics that invoke it: https://www.congress.gov/search?q=%7B%22congress%22%3A%5B%22117%22%5D%2C%22source%22%3A%22all%22%2C%22search%22%3A%22%5C%22parens%20patriae%5C%22%22%7D.

26 *See, e.g.*, 12 U.S.C. § 2614; 15 U.S.C. § 1640(e); 21 U.S.C. § 337; 27 U.S.C. § 122a(b); 31 U.S.C. § 5365(b)(2).

27 Interestingly, one additional statue (S.3410) would amend the Clayton Act to grant the federal government a power to act as *parens patriae* in a way analogous to that of the states by authorizing the U.S. Dept. of Justice to act as "*parens patriae*" to seek damages for unfair methods of competition found to violate the FTCA upon referral from the FTC (following *AMG Capital Management, LLC v. FTC*'s preclusion of equitable monetary relief under Section 13(b) of the FTCA. 141 S.Ct. 1341 (2021)). *See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890) (applying the power to act as *parens patriae* to the federal government); see also Thomas, *supra* note 7 at 783–86.

28 Sec. 2(d), S.1204 - 117th Congress (2021-2022): Bust Up Big Tech Act, S.1204, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/1204.

29 https://www.hawley.senate.gov/senator-hawley-introduces-bust-big-tech-act.

30 https://www.cnbc.com/2021/06/24/house-committee-passes-broad-tech-antitrust-reforms.html.

31 Sec. 2(h)(4), Text - H.R.3816 - 117th Congress (2021-2022): American Choice and Innovation Online Act, H.R.3816, 117th Cong. (2021), http://www.congress.gov/.

substantive prohibitions, a Senate version rumored to be nearing a floor vote and diabolically titled the American *Innovation and Choice* Online Act (S.2992) contains an identical grant of *parens* enforcement power for the same remedies.[32] In a July 29, 2021, letter to the Director of the Administrative Office of the United States Courts co-authored by the sponsors of the bills in both chambers, they note "the statute permitting states to bring *parens patriae* actions for damages was passed as a response to under-enforcement of the antitrust laws."[33]

Another of the original "tech" bills introduced together in the summer of 2021, the Platform Competition and Opportunity Act, contains the same *parens patraie* enforcement provision. Nearly identical versions in both chambers (H.R.3826 and S.3197) would render most acquisitions by large digital platforms presumptively unlawful.[34]

And the same enforcement provision appears once more in the Open App Markets Act, introduced late in the summer of 2021 (as S.2710[35] and subsequently in the House as H.R.5017).[36] The bill would, among other things, prohibit requiring mobile app developers to use default in-app payment systems as a condition of distribution through an app store.

Another bill, the State Antitrust Enforcement Venue Act (H.R.3460 and S.1787) affects state enforcement as *parens patriae* under Sec. 4C of the Clayton Act very directly but presents no occasion for providing a new grant of such authority, intended instead to bolster existing state enforcement authority by removing eligibility for state actions for damages as parens patriae under the Clayton Act to be transferred to multidistrict litigation — a feature imposed from the beginning by the HSR Act,[37] but now thought to be an obstacle to optimal enforcement.[38]

Each of these bill's use of (or relation to) express *parens patriae* authority for damages actions is consistent with the generalizations described above and continues the now half-century practice of supplementing the enforcement efforts of federal and private actions with those of the states and thereby augmenting the deterrent potential of the intended reforms, choosing — here — to do so by express invocation of that doctrine and its long connection to the states' protection of residents' economic wellbeing (see *Snapp, supra* at 607).

Testifying on a predecessor bill to the HSR Act in 1974, the then-Attorney General of Virginia remarked that the inclusion of a *parens* enforcement action for damages offered "tools, both procedural and remedial" for the "effective enforcement and deterrence of antitrust violations" to be enhanced.[39]

Clearly many lawmakers from then to now have been similarly convinced of the utility of this enforcement mechanism, and — to quote once more the ever pithy and uncynical Dr. Johnson — enforcement is "that which gives force to a law,"[40] law itself being those "rule[s] of action"[41] that order human action toward our collective wellbeing and prosperity, the very ends the states are meant to pursue when acting as *parens patriae* . . . and to preserve that hopeful note, the author will leave the reader to discover on his or her own what foul things Bierce had to say about "law."

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32 Sec. 3(c)(3), Text - S.2992 - 117th Congress (2021-2022): American Innovation and Choice Online Act, S.2992, 117th Cong. (2022), http://www.congress.gov/.

33 https://www.klobuchar.senate.gov/public/_cache/files/d/9/d9fa03da-0d55-4b30-8f40-aa633df1aceb/EDDAE8FE2D9B89B0CD29E5BDA668A44A.07.28.2021-letter-to-hon.-roslynn-mauskopf-re-state-antitrust-enforcement-venue-act.pdf.

34 Sec. 5(d), Text - H.R.3826 - 117th Congress (2021-2022): Platform Competition and Opportunity Act of 2021, H.R.3826, 117th Cong. (2021), http://www.congress.gov/; Sec. 5(d), S.3197 - 117th Congress (2021-2022): Platform Competition and Opportunity Act of 2021, S.3197, 117th Cong. (2021), http://www.congress.gov/.

35 Sec. 5(a)(3), Text - S.2710 - 117th Congress (2021-2022): Open App Markets Act, S.2710, 117th Cong. (2022), http://www.congress.gov/.

36 Sec. 5(a)(4), Text - H.R.5017 - 117th Congress (2021-2022): Open App Markets Act, H.R.5017, 117th Cong. (2021), http://www.congress.gov/. Each version also authorizes private treble damages actions for injured developers.

37 Sec. 303, PL 94–435 (HR 8532), PL 94–435, September 30, 1976, 90 Stat 1383.

38 https://buck.house.gov/media-center/press-releases/rep-buck-introduces-state-antitrust-enforcement-venue-act; see also https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2021/06/Final-State-Antitrust-Enforcement-Venue-Act-Endorsement.pdf (letter from 52 state (and territorial) attorneys general asserting that eliminating the possibility of transfer will promote "more efficient, effective, and timely adjudication" of enforcement actions).

39 Antitrust Parens Patriae Amendments, Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary (Mar. 18 and Mar. 25, 1974).

40 "enforcement, n.s." *A Dictionary of the English Language*, by Samuel Johnson. 1755.

41 "law, n.s." A Dictionary of the English Language, by Samuel Johnson. 1755.

# STATE ANTITRUST ENFORCEMENT OF NO-POACH AGREEMENTS AND NON-COMPETE AGREEMENTS

BY CHRISTINA GREY[1]

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# I. INTRODUCTION

Since 2017, multiple State Attorneys General have pursued companies and franchises for having non-compete and no-poach agreements in either their employee contracts or their franchise agreements. Through investigation, the State Attorneys General have determined that these provisions potentially violate antitrust laws specifically for low-wage workers. These agreements block low-wage workers from exploring other opportunities that could lead them to receive higher pay.

This article first discusses what no-poach and non-compete agreements are and the effects on low-wage workers such as their wages and benefits. Second, it will discuss how the State Attorneys General have pursued no-poach and non-compete agreements through litigation as well as letters and comments to federal antitrust enforcement agencies. Lastly, it will discuss how the enforcement by State Attorneys General seems to have affected how the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") have begun looking at labor markets.

# II. NO-POACH AND NON-COMPETE AGREEMENTS

No-poach agreements often appear in franchise agreements between the owner of the franchise and its corporate headquarters.[2] These agreements prevent one franchise store from hiring an employee from another franchise store within the same company.[3] Essentially, no-poach agreements prohibit employees from moving to a store within the same corporate chain.[4] According to economists, the practice of including no-poach agreements in franchise agreements contributes to stagnating wages and possibly limits an employee's growth opportunities.[5] These clauses likely lead to a lack of worker mobility which has "long been viewed as contributing to wage stagnation because switching jobs is one of the most reliable ways to get a raise."[6] For example, an employee at McDonald's, assuming it has a no-poach agreement, would not be able to move to another McDonald's that would offer them higher pay. However, these agreements are seen in industries other than fast food as well but are most common in the fast-food industry.[7] These no-poach clauses in franchise agreements are known to the franchisee and franchisor but not to the employees they affect.[8]

One of the defenses for no-poach agreements is that restaurants have spent time and money training their workers and thus want to protect that investment.[9] However, many people, including State Attorneys General, contend that no-poach clauses violate antitrust laws. No-poach affects employees at thousands of restaurants.[10] On the other hand, non-compete clauses are placed in employee contracts to keep an employee from moving from one company to another, bringing trade secrets to their new employer.[11] A non-compete agreement is included in an employee's employment contract, limiting them from taking a new job or starting their own business in the same industry within a certain geographic area for a certain period of time after leaving their job.[12] According to a 2020 press release by the Attorney General for the District of Columbia, nearly 25 percent of American workers are bound by non-compete agreements with 53 percent of those binding hourly, often low-wage, workers.[13]

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2 Press Release, Office of the Washington 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/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate.

3 *Id.*

4 *Id.*

5 Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue,* NY Times (Sept. 27, 2017).

6 *Id.*

7 *Id.*

8 *Supra* note 2.

9 *Supra* note 5

10 *Id.*

11 *Id.*

12 Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Leads 19 Attorneys General Urging Federal Trade Commission to Crack Down on Abusive Non-Competes in the Workplace* (March 12, 2020).

13 *Id.*

Non-competes, at least as applied to low-wage workers, restrict competition in violation of antitrust laws and employees are unlikely to have trade secrets, and thus all it does is significantly influence pay.[14] Similar to no-poach clauses, non-compete clauses prevent where low-wage workers can find new jobs and often force them to stay at one job rather than take another for better pay.[15] However, non-compete agreements are not limited to one franchise but instead might be a McDonald's employee not able to work at any other fast food chain in a certain number of miles of their current job.[16] If the geographical restriction is large enough, this could lead to the worker not being able to work at any fast food restaurant in their town.

## III. HOW STATE ATTORNEYS GENERAL ARE PURSUING NO-POACH AND NON-COMPETE AGREEMENTS

### *A. No-Poach Agreements*

Several State Attorneys General are pursuing corporate franchise chains for their no-poach clauses, but the Washington Attorney General has spearheaded the enforcement against no-poach clauses in franchise agreements. Between 2018 and 2020, the Washington Attorney General's Office "eliminated no-poach clauses in franchise agreements nationwide for every company that has three or more locations in Washington."[17] These investigations ended with 237 corporate franchisors signing agreements to end no-poach clauses nationwide.[18] The Washington Attorney General filed its first and only no-poach lawsuit in October 2018 against Jersey Mikes who refused to sign an agreement to end no-poach agreements.[19] In 2019 the Washington Attorney General resolved the lawsuit with Jersey Mike's where Jersey Mike's agreed to end no-poach clauses as well as pay $150,000.[20]

In 2018 a group of States began an investigation into no-poach agreements because of concerns that these agreements harm low-wage workers by preventing them from switching employers for better opportunities.[21] The multistate investigation included the Attorneys General of Pennsylvania, Massachusetts, California, District of Columbia, Iowa, Illinois, Maryland, Minnesota, North Carolina, New Jersey, New York, Oregon, Rhode Island, and Vermont.[22] In 2019, these States settled with Dunkin', Arby's, Five Guys, and Little Caesars where these franchises agreed to stop including no-poach agreements in their franchise agreements as well as stopping the enforcement of the no-poach clauses in current franchise agreements.[23]

More recently, the Illinois Attorney General's Office filed suit against three staffing agencies and their mutual client Colony Display, LLC.[24] The State Attorney General alleged that the three staffing agency defendants violated the Illinois Antitrust Act by agreeing "with each other not to recruit, solicit, hire, or 'poach' temporary employees from one another at Colony's facilities" and then Colony also violated the Act by facilitating "the Agency Defendants' agreement by acting as a go-between to communicate about the agreement among the Agency Defendants and by assisting in enforcing the Agency Defendants' no-poach conspiracy."[25] The Court of Appeals found that these no-poach agreements could be found to be in violation of the Illinois Antitrust Act and do not fall under the labor services exemption.[26]

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14 *Id.*

15 *Id.*

16 Press Release, *supra* note 12.

17 *Supra* note 2.

18 *Id.*

19 *Id.*; Press Release, Office of the Washington Attorney General, *Jersey Mike's Will Pay $150K to Resolve AG Ferguson's First No-Poach Lawsuit* (Aug. 23, 2019).

20 Press Release, Office of the Washington Attorney General, *Jersey Mike's Will Pay $150K to Resolve AG Ferguson's First No-Poach Lawsuit* (Aug. 23, 2019).

21 Press Release, Office of the Attorney General for the Commonwealth of Pennsylvania, *AG Shapiro Secures Win for Workers as Four Fast Food Chains Agree to End Use of No-Poach Agreements* (March 12, 2019).

22 *Id.*

23 *Id.*

24 State of Illinois ex rel. Raoul, No. 1-21-0840, at *1 (IL App.--1st 2022).

25 *Id.*

26 *Id.* at *4.

Another recent example is the New York Attorney General's investigation of AmTrust Title Insurance Company and First Nationwide Title Agency.[27] Both companies are title insurers where AmTrust issues title insurance policies either through First Nationwide or through another independent title agency.[28] The New York Attorney General's investigation concluded that AmTrust "entered into no-poach agreements with other title insurance companies and that these agreements effectively stifled competition for employees between AmTrust and their competitors, potentially impacting New York workers."[29] Attorney General Letitia James believed that these no-poach agreements thwarted labor competition, hurt workers, and limited their earning potential.[30] The New York Attorney General came to an agreement with the two title companies that they will terminate any existing no-poach agreements, pay the state $1.25 million as well as cooperate with the Attorney General's ongoing investigation into this agency.[31] This investigation is notable as it appears to be one of the few state antitrust enforcement against no-poach agreements in a non-franchise context—at least what research appears to show.

### *B. Non-Compete Agreements*

In January 2019, the FTC held a public workshop to examine whether it should consider restricting non-competes in employment contracts and to aid this analysis, posed several questions to the public.[32] A coalition of 18 Attorneys General submitted comments to the FTC urging collaboration between federal and state regulators to protect workers from non-competes which they alleged stagnate wages, limit job mobility, and limit opportunities for advancement.[33] The comment urged the FTC to look at the impact of company mergers on the labor market as well as the effects of non-compete, non-solicitation, and no-poach agreements on worker mobility.[34]

One year later, on March 12, 2020, a group of State Attorneys General sent another comment letter to the FTC calling on federal antitrust regulators to issue a rule banning non-compete provisions in contracts.[35] California Attorney General Becerra emphasized that non-compete agreements are already unenforceable in California and that the federal government needed to catch up to the state by putting an end to anti-competitive practices that lead to lower wages and harm consumers.[36] This letter supported a petition submitted to the FTC in 2019 by labor unions, public interest groups, and legal advocates advocating for the FTC to initiate a rulemaking effort to classify worker non-compete provisions as an unfair method of competition and thus illegal under the Federal Trade Commission Act.[37] It also further built on earlier calls by a group of State Attorneys General in July and November for the FTC to use its authority to protect against anticompetitive practices such as non-compete provisions.[38]

In October 2019, early into the no-poach and non-compete investigations, Washington State Attorney General settled with Washington coffee chain Mercurys Coffee where the company agreed to void all of its existing non-compete agreements.[39] Prior to this agreement, Mercurys Coffee required all employees to sign non-compete agreements that prevent employees from working at any coffee shop within 10 miles of a

27 Press Release, New York Attorney General, *Attorney General James Ends Harmful Labor Practices at Top Title Insurance Companies* (July 25, 2022).

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Leads Coalition of 18 AGs Urging Regulators to Protect Workers from Harmful Anticompetitive Labor Practices* (July 16, 2019).

33 *Id.* This coalition included the State Attorneys General of the District of Columbia, California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, and Washington. *Id.*

34 *Id.*

35 Press Release, State of California Department of Justice, *Attorney General Becerra Renews Call for Nationwide Ban on Non-Compete Agreements, Reminds Businesses of Existing Prohibition in California* (March 12, 2020). California Attorney General Becerra joined the state attorneys general of the District of Columbia, Maryland, Minnesota, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Puerto Rico, Rhode Island, Virginia, and Washington. *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 Press Release, Washington State Office of the Attorney General, *Attorney General Bob Ferguson Stops King County Coffee Shop's Practice Requiring Baristas to Sign Unfair Non-Compete Agreements* (Oct. 29, 2019).

Mercurys Coffee location for eighteen months after leaving the company.[40] Practically, this meant that any Mercurys Coffee employee could not work at most coffee shops in an entire Washington county including parts of another.[41] The coffee chain also enforced these agreements by filing lawsuits against workers who started working at other coffee shops after leaving Mercurys Coffee.[42] As part of its agreement with the Washington Attorney General, Mercurys Coffee must void all of its existing non-compete agreements, pay $50,000 to reimburse the Attorney General's Office for attorney's fees and costs, and the coffee chain cannot require hourly baristas to sign non-compete agreements.[43]

Recently, Washington Attorney General Bob Ferguson settled with Tradesmen International LLC regarding its existing non-compete agreements.[44] Tradesmen provides staffing services throughout the United States including seven offices in Washington state.[45] The company entered into non-compete agreements with the employers it placed workers at which prevented workers from finding permanent positions with those employers in violation of Washington law.[46] Tradesmen never disclosed these agreements with the workers themselves.[47] As part of the consent decree, Tradesmen must inform workers that it has employed since Washington's law against certain non-competes came into effect, that the non-competes are no longer enforceable and that it cannot require them in the future.[48] Tradesmen will also pay $287,100 in restitution that the Washington Attorney General's Office will use for Tradesmen's current and former Washington employees.[49]

## IV. IMPLICATIONS

Just this past July, four economists published a study, *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries*, which investigated the effects of the Washington State Attorney General's Office investigation of employee no-poach clauses in franchising contracts.[50] The researchers looked at over a million job postings by 576 companies across the country between 2015 and 2021 and compared wage offerings between those companies targeted by the Washington Attorney General and those that were not.[51] The economists' research estimated that there was a 3.3 percent increase in chain-specific annual earnings based on the salary on the job postings following the removal of no-poach provisions.[52] If a worker fell within the median annual earnings, this corresponded to an increase of $862.39.[53] This paper does not directly analyze the impacts on existing workers but these wage increases in job postings give workers the opportunity to apply for those new, higher-paying jobs and potentially use the higher-wage job offers to bargain with current employers.[54] While this study may not prove definitively that initiatives against anti-competitive no-poach provisions encourage more competition in the labor market and thus provides for better wages and possibly working conditions for low-wage workers, it does imply that the State antitrust enforcement against those provisions is helping workers. Since the push against anti-competitive no-poach and non-compete clauses is still relatively new there are not many studies, but this study provides evidence that what the State Attorneys General are doing in this space is having a positive impact on low-wage workers.

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40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 Press Release, Washington State Office of the Attorney General, *AG Ferguson Shuts Down Tradesmen International's Illegal Use of Non-Compete Agreements, Wins Restitution for Impacted Workers* (July 14, 2022).

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 Brian Callaci, et al., *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155577 (last visited August 1, 2022). It is important to note that the authors are not connected to the Washington Attorney General's Office.

51 *Id.*; Press Release, *Lasting Impact: Study Finds AG Ferguson's No-Poach Initiative Boosted Income for Low-Wage Workers Nationwide*, Washington State Office of the Attorney General (July 26, 2022), https://www.atg.wa.gov/news/news-releases/lasting-impact-study-finds-ag-ferguson-s-no-poach-initiative-boosted-income-low.

52 Callaci *supra* note 50 at 1.

53 *Id.* at 11.

54 Press Release *supra* note 31.

State antitrust enforcement against no-poach and non-compete clauses also appears to have influenced the DOJ's and the FTC's positions on these provisions as well.[55] For example, the DOJ has said that no-poach agreements are prosecutable under criminal antitrust enforcement since 2016 but it did not pursue enforcement until later, after the State Attorneys General had already begun state enforcement. First, the DOJ began filing statement of interests in private no-poach cases.[56] In a private no-poach case alleging that Duke University and the University of North Carolina entered into an agreement to not poach each other's medical school faculty, the DOJ urged the Court to apply the *per se* rule because it was a 'naked no-poach agreement.'[57] Similar to the State Attorneys General, the DOJ showed interest in no-poach agreements in fast food franchise agreements.[58] In 2019, it filed Statement of Interest in three private no-poach cases and argued that "naked, horizontal no-poach agreements between rival employers within a franchise system are subject to the per se rule."[59] Then, in 2021, the DOJ began to bring a number of indictments based on no-poach agreements including (1) *United States v. Patel* which indicted six executives and managers for conspiring to suppress competition by "agreeing to restrict the hiring and recruiting of engineers and other skilled-labor employees;" and (2) *United States v. Surgical Care Affiliates, LLC* which indicted two entities for suppressing competition by agreeing not to solicit each other's senior-level employees.[60] While DOJ did lose its first no-poach case in front of a jury as the defendant was acquitted, the DOJ is unlikely to back down on these cases.[61]

Also in 2021, as mentioned above, the FTC and DOJ held a "Workshop on Competition" that focused on competition in labor markets such as non-compete, no-poach, and non-disclosure agreements.[62] Opening remarks by representatives of both the FTC and the DOJ Antitrust Division stated a goal of pursuing any conduct that harms competition in the labor market through both criminal and civil litigation.[63] Whether this focus by the FTC and DOJ is solely because a change in administration or because both agencies were influenced by the State Attorneys General or both is unclear. It seems likely that the investigations by Washington and other State Attorneys General plus the State Attorneys General's letter and comments to the two agencies influenced both the DOJ and FTC to some degree. Hopefully, these actions by both federal and state antitrust enforcers will lead to further encourage competition in labor markets and lead to better wages and better job opportunities.

## V. CONCLUSION

Overall, it appears that state enforcement in the labor market space involving non-compete and no-poach agreements seems to benefit workers, particularly low-wage workers. Hopefully, state enforcement and federal enforcement both continue allowing more competition in the labor market, preventing wage stagnation, and providing workers more bargaining power with their employer. The State Attorneys General have been pushing this for years and time will tell the full impact of this including whether other Attorneys General will begin to take interest in antitrust enforcement in the labor space as well. Already, several states have passed laws preventing some of these agreements from being used against low-wage workers.[64] In 2021, a bipartisan group of legislators introduced the Workforce Mobility Act of 2021 in both the House and Senate which would prohibit the use of non-compete agreements except in the context of a sale of a business or dissolution of a partnership.[65] Also in the year, the District of Columbia banned non-compete agreements and Illinois amended its current legislation regulating non-compete agreements that

55 Division Update Spring 2019, U.S. Department of Justice, https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach (last visited August 2, 2022).

56 Division Update Spring 2019 *supra* note 39.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Expect Continued Law Enforcement Focus on No-Poach Agreements in 2022*, Sullivan & Cromwell LLP (Jan. 26, 2022), https://www.sullcrom.com/expect-continued-law-enforcement-focus-on-no-poach-agreements-in-2022.

61 Cooley Alert, *DOJ Loses First Wage-Fixing and No-Poach Cases as Juries Acquit*, Cooley (April 26, 2022), https://www.cooley.com/news/insight/2022/2022-04-26-doj-loses-first-wage-fixing-and-no-poach-cases-as-juries-acquit.

62 *Id.*

63 *Id.*

64 Press Release *supra* note 44.

65 *Top 10 Non-Compete Law Developments of 2021*, Faegre Drinker (January 7, 2022), https://www.faegredrinker.com/en/insights/publications/2022/1/top-10-noncompete-law-developments-of-2021.

further restricts the use of non-compete and non-solicitation agreements.[66] Nevada and Oregon also amended their laws regulating restrictive covenants.[67]

What happens in this space will be interesting to watch especially given that, pressed by labor shortages, a growing number of employers are now trying to enforce non-compete clauses through litigation.[68] Even in states such as California, where non-compete clauses cannot be enforced, employers still put them in employment contracts likely hoping the employee believes it to be enforceable.[69]

66 *Id.*

67 *Id.*

68 Jessica Mach, *Labor Shortages Sparks Rise in Non-Compete Lawsuits by Employers*, Benefits Pro (May 10, 2022) (originally published on Law.com), https://www.benefitspro.com/2022/05/10/labor-of-law-amid-labor-shortages-more-employers-suing-to-enforce-non-competes-412-129910/?slreturn=20220702180837.

69 *Id.*

# FOR THE LOVE OF THE GAME: WHAT NEXT FOR COLLEGE ATHLETICS?

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1 The views contained in this article are those of the authors and should not necessarily be ascribed to their respective Attorneys General, nor any other Attorney General, nor the National Association of Attorneys General.

In the wake of the Supreme Court's landmark decision in *Alston*, a re-examination of how we organize amateur and professional sports is underway. This case exposed anticompetitive restraints in the then-current system and has opened the door to rewrite the rules. Post-Alston, there have been challenges to the correct classification of student-athletes, new laws regarding student-athletes' right to compensation for their name, image, and likeness, and questions regarding the appropriateness of professional baseball's antitrust exemption. These examples provide a snapshot of some of the fundamental questions being asked; questions that will likely take many more years to resolve. It has been more than a year since the *Alston* decision, and it will continue to be a guidepost as the NCAA and other sports organizations draft a new playbook.

## I. *ALSTON*

In a unanimous decision last year, the Supreme Court held that competition is not limited to the football field or basketball court – colleges and universities must now compete with each other for student-athletes in the education-related compensation they offer.[2] At first glance, the ruling may seem very narrow and not likely to impact the fragile ecosystem of the NCAA's compensation rules. However, parts of the decision and Justice Kavanaugh's emphatic concurrence went beyond the limited question at issue, calling into question all of the NCAA's compensation rules. The rippling effect of this decision can already be seen in new cases, rules, and legislation, and it has inspired and reinvigorated challenges to the established rules that have so long governed organized collegiate sports.

*Alston* arose from a Section 1 challenge to the NCAA's compensation rules brought by current and former student-athletes in men's Division I Football Bowl Subdivision ("FBS") football and men's and women's Division I basketball.[3] Before this case, the NCAA rules limited compensation to the cost of attendance; student-athletes could also receive limited payments for athletic and educational performance.[4] This was an unusual antitrust case because the defendants, the NCAA and 11 Division 1 Conferences, admittedly engaged in a horizontal price fixing scheme in a market where they hold monopsony power.[5] It was also undisputed that their compensation rules depressed wages and participation of student-athletes.[6] The plaintiffs were able to show that the NCAA's compensation rules produced significant anticompetitive effects in the relevant market, and the burden shifted to the NCAA to justify their compensation restrictions by demonstrating their procompetitive benefits.[7]

The NCAA's case hinged on their definition of "amateurism," which they claimed was a key product feature that affected consumer demand. This proved particularly problematic for the NCAA as their own conception of amateurism changed over the years and was nowhere defined in their rules.[8] The district court struggled to find evidence that the NCAA's entire compensation scheme was necessary to preserve consumer demand, however the court found that unlimited payments unrelated to education may negatively affect consumer demand and blur the lines between amateur and professional sports.[9] As for education-related payments, the district court found 1) the NCAA's restraints were "'patently and inexplicably stricter than is necessary'"[10] 2) removing these restraints would not detrimentally impact consumer demand,[11] and 3) enjoining the NCAA's restraints on education-related payments was a significantly less restrictive way of achieving the same procompetitive benefits that the NCAA argued the current rules achieved.[12]

Both the players and NCAA appealed this case to the Ninth Circuit.[13] The NCAA argued that the district court went too far, and the players argued that the court did not go far enough.[14] The Ninth Circuit disagreed with both sides and upheld the district court's decision in its

2 *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

3 *Id.* at 2151.

4 *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1244-45 (9th Cir. 2020).

5 *Id.* at 2154.

6 *Id.*

7 *Id.* at 2152.

8 *Id.* at 2152.

9 *Id.* at 2152-53.

10 *Id.* at 2162

11 *Id.* at 2152-53.

12 *Id.* at 2164.

13 *In re Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239.

14 *Id.* at 1263.

entirety.[15] While the players did not renew their challenge, the NCAA appealed the decision to the Supreme Court.[16] After careful review, the Supreme Court agreed with the Ninth Circuit and refused to disturb any of the district court's findings.[17]

In Justice Kavanaugh's concurrence, he lauded the decision as an "overdue course correction," and invited further reform for the rest of the NCAA's compensation rules.[18] Whether changes come by legislation, collective bargaining arrangements, or future antitrust suits, Justice Kavanaugh could not have been clearer when he wrote, "I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."[19] Perhaps worried that this could somehow be misconstrued as subtle, Justice Kavanaugh went on to say that he doubted the NCAA could produce a valid procompetitive justification for the rest of their compensation rules.[20]

At the heart of Justice Kavanaugh's concurrence is the policy question – should student-athletes be paid? While the NCAA may struggle with their own definition of amateurism, common sense defines amateur collegiate sports as those organized with unpaid players. The only meaningful distinction from professional sports is compensation; at this level of competition, differences in skill are marginal. He notes that in any other market, this circular reasoning – an amateur athlete is one who is unpaid, therefore we cannot pay amateur athletes - would not be allowed.

This case presents another puzzling problem – as amateur sports are currently organized, under the NCAA's compensation rules, they may violate the antitrust laws. However, our antitrust laws were not enacted so that judges could scrap an entire market structure and build their own. At least as they are currently written, our antitrust laws are meant to stop anticompetitive conduct in an otherwise competitive market, like pulling weeds to maintain a healthy garden. Does this mean that the NCAA has no choice but to allow some form of compensation? If so, will this ultimately destroy amateurism? Surely, there must be a way forward, even if it requires us to reconsider our ideas of amateurism and the value of student-athletes' work.

*Alston* opened with a detailed historical examination of the relationship between college sports and compensation. Writing for the Court, Justice Gorsuch noted that as early as 1852, student-athletes were offered compensation in one form or another.[21] Even after the NCAA enacted restrictions against "pay for play," under-the-table payments were still common.[22] While the NCAA's compensation restrictions have depressed the more open and obvious payments, that has not stopped them from occurring.[23] Perhaps, the lofty goals of a system of uncompensated students playing purely for the love of the game is naïve. If the NCAA reforms its systems and compensates the athletes as it does the students who work in university cafeterias, it might escape antitrust oversight.

Practically, it seems like many colleges and universities would have jumped at the chance to use the *Alston* decision to strengthen their recruiting efforts. Less than three months after the Court's decision, the first university began disbursing academic achievement payments.[24] But almost a year later, only 22 of 130 FBS schools have provided or said they plan to provide such academic achievement payments.[25] Undoubtedly, there will be some push and pull as amateur sports change in the wake of *Alston*, but the NCAA's speculation about a parade of student-athletes in Lamborghinis has not been the result.[26] And if compensation for student-athletes is treated as part of the solution, instead of part of the problem, maybe players can get out of the courtroom and back to the game.

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15 *Id.* at 1265-66.

16 *Alston*, 141 S. Ct. at 2154.

17 *Id.* at 2166.

18 *Id.* at 2166 (Kavanaugh, J., concurring).

19 *Id.* at 2166-67 (Kavanaugh, J., concurring).

20 *Id.* at 2167 (Kavanaugh, J., concurring).

21 *Id.* at 2148 (majority opinion).

22 *Id.* at 2149.

23 Top 5 'pay to play' scandals rocking college football, The Week (Jan. 8, 2015), Top 5 'pay to play' scandals rocking college football | The Week.

24 Ross Delenger, Ole Miss Breaks Ground on Post-Alston Ruling 'Extra Benefits,' Sports Illustrated (Nov. 20, 2021), Ole Miss becomes first school to officially give athletes 'academic benefits' - Sports Illustrated.

25 Dan Murphy, Only 22 of 130 NCAA FBS-level schools say they have plans to provide allowed academic bonus payments to athletes this year, ESPN (Apr. 6, 2022), Only 22 of 130 NCAA FBS-level schools say they have plans to provide allowed academic bonus payments to athletes this year (espn.com).

26 *Alston*, 141 S. Ct. at 2165.

## II. *JOHNSON*

Working more than 40 hours per week in a manner dictated by the universities, with strict rules on when they eat, shower, what they can post on social media, and when they can take classes, the student athlete plaintiffs in *Johnson v. NCAA*[27] alleged that they are employees of the universities they play for, and as such are entitled to compensation.[28] So far, the Eastern District of Pennsylvania agrees.[29]

Deciding a motion to dismiss, the court held that applying the Glatt factors, the complaint plausibly alleged that Plaintiffs are employees of the universities for purposes of the Fair Labor Standards Act.[30]

Picking up on Justice Kavanaugh's concurrence in Alston, Judge Padova noted the circular logic of the defendants' argument that "colleges may decline to pay student athletes because the defining feature of college sports is that the student athletes are not paid."[31]

In light of this admonishment from Justice Kavanaugh, the court focused on traditional labor analysis when it determined that student athletes were employees of their universities. Under the Department of Labor's Wage and Hour Division Field Operations Handbook, participation in programs conducted primarily for the benefit of the participants as a part of the educational opportunities are not work of the kind contemplated by the [Fair Labor Standards Act] and do not result in an employer-employee relationship…"[32]

The complaint alleged that the NCAA reported total revenues of over $1 billion from television and marketing rights, fees, championships. Tournaments, and sales" in 2018.[33] This enormous benefit to the schools persuaded the court that "D1 interscholastic athletics are not conducted primarily for the benefit of student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend."[34]

Under *Glatt v. Fox Searchlight Pictures*,[35] there are seven factors which would best assess the economic reality of the broader question under what circumstances an unpaid intern must be deemed an employee under the FLSA and therefore compensated.

The seven part test includes 1) an expectation of compensation, 2) similarity of training to education, 3) whether there are academic credits for the "internship" or whether it is part of the integrated coursework, 4) whether it corresponds to the academic calendar, 5) whether the internship is time limited, 6) whether the participant complements rather than displaces paid employees, 7) whether the parties understand that the worker is not entitled to a paid job at the conclusion of the internship.[36]

Balancing these factors the court held that the complaint plausibly alleged Plaintiffs are employees for purposes of the FLSA.[37]

The district court has not yet examined the monopsony buying power of the NCAA, and why it would be able to extract free labor from student athletes, nor did the decision discuss the agreement between the individual schools that make up the NCAA to explicitly not pay wages to the students. As the Johnson case is headed to the Third Circuit, it is unlikely that any of these antitrust issues will be examined in this case, but as this article will discuss, there are other venues for these issues.

27 *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491 (2021).

28 *Id.* at 495.

29 *Id.* at 512.

30 *Id.* at 501.

31 *Id.* at 501, citing *Alston, --US--* , 104 S. Ct. at 2167.

32 *Johnson*, 556 F. Supp. at 502. (emphasis removed).

33 *Id.* at 505.

34 *Id.* at 506.

35 *Glatt v. Fox Searchlight Fixtures*, 811 F.3d 528 (2d. Cir. 2016).

36 *Id.* at 509.

37 *Id.* at 512.

## III. *NIL*

The debate about student-athletes' right to benefit from their name, image, and likeness ("NIL") began long before the decision in Alston and the NCAA's subsequent repeal of their rules prohibiting NIL compensation. In the most well-known example, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, former and then-current NCAA athletes filed a class action lawsuit against Electronic Arts ("EA") and the NCAA for using their NIL in EA's successful NCAA Football video game, without compensating the athletes.[38] However, under the NCAA's rules, EA could not compensate the plaintiffs. The case ultimately resolved with a $60 million settlement in 2014.[39]

Perhaps the settlement was detrimental to athletes' overall cause, because it would take seven more years before the NCAA repealed their NIL restrictions in full. However, criticism of NIL restrictions remained strong. For instance, one critic noted that the NCAA had to issue a blanket eligibility waiver for any current athletes who received money from the settlement.[40] One might think that the NCAA having to suspend their own rules in order to pay college athletes what they were legally owed might lead to quick change. Stranger still, the NCAA's chief legal officer said of the settlement, "In no event do we consider this settlement pay for athletics performance."[41] If a videogame appearance doesn't constitute pay for athletics performance, then why impose such a restriction?

California increased the pressure in 2019 when they passed the Fair Pay to Play Act.[42] The law, which will go into effect in 2023, outlaws the NCAA's NIL compensation prohibition in California. Similar to their defense in *Alston*, the NCAA expressed concerns that this law would blur the line between professional and amateur sports.[43] Many voices, athletes included, came down on different sides of this issue.[44] Tim Tebow, an ESPN analyst and former college and professional football player, said that allowing NIL compensation would add to a selfish culture and take away from what is special about college ball, while the bill signing was attended and celebrated by NBA legend, LeBron James.[45]

Whether or not *Alston* was the final straw, just nine days after the Supreme Court's decision, the NCAA adopted an interim policy suspending their NIL compensation prohibition.[46] Some state NIL laws, like California's, preceded the *Alston* decision, but many more came in its wake. The National Conference of State Legislatures' tracker shows 27 states currently have NIL laws in place. An additional 10 have pending legislation. 13 states have either taken no action or their proposed legislation failed. Finally, one state repealed their law, and two other states are considering repeals.[47] Some of the earlier state NIL laws, like Florida's, were more restrictive – prohibiting colleges from aiding their student-athletes in securing NIL deals.[48] Since then, states are experimenting with less restrictive laws that specifically allow colleges to help their student-athletes. Kentucky's law, passed this year, allows colleges to establish programs to facilitate NIL deals and provide support to student-athletes, and Alabama repealed their law to prevent their colleges from having to operate at a disadvantage.[49]

These new and differing state laws will undoubtedly factor into an athlete's choice of school. There is also the possibility that a federal law will be enacted and change the rules of the game once again. But in this moment, where different laws are operative, the NCAA might take

38 724 F.3d 1268 (9th Cir. 2013).

39 Darren Rovell, Athletes whose likenesses appeared in Electronic Arts games will share a $60 million settlement, ESPN (Mar. 15, 2016), College football and basketball players to receive an average of $1,600 in settlement with Electronic Arts (espn.com).

40 Jon Solomon, College athletes react on Twitter after receiving EA Sports lawsuit checks, CBS (April 12, 2016), College Football 2.0: Leadership void must be filled to address sport's uncertain, unregulated future (cbssports.com).

41 Solomon, *supra.*

42 Dan Murphy, California defies NCAA as Gov. Gavin Newsom signs into law Fair Pay to Play Act, ESPN (Sept. 30, 2019), California defies NCAA as Gov. Gavin Newsom signs into law Fair Pay to Play Act (espn.com).

43 Murphy, *supra.*

44 Murphy, *supra.*

45 Murphy, *supra.*

46 Michelle Brutlag Hosick, NCAA adopts interim name, image and likeness policy, NCAA (June 30, 2021), NCAA adopts interim name, image and likeness policy - NCAA.org.

47 Student Athlete Compensation Legislation, National Conference of State Legislatures, Microsoft Power BI (last visited May 17, 2022).

48 Bradley Arant Boult Cummings, LLP, Alabama and Florida Call an Audible on NIL Laws, National Law Review, Volume XII, Number 67 (Mar. 8, 2022), https://www.natlawreview.com/article/alabama-and-florida-call-audible-nil-laws.

49 *Supra.*

advantage of the laboratory of democracy to more closely look at the pros and cons of each. They might also evaluate the impact of these NIL deals on consumer demand to reveal if that "something special" wanes in light of compensation.

## IV. MLB

Interestingly, *Alston* not only dealt with amateur sports, but called into question 100-year-old precedent regarding professional baseball's antitrust exemption. In Alston, the Court quibbled with the idea that the holding in *Federal Baseball* is truly an "exemption," referring to it as a "dalli[ance]."[50] Justice Gorsuch reiterated that in *Federal Baseball* the Court found that baseball games were not under the purview of the Sherman Act because teams were not engaged in interstate trade or commerce, but then he pointed out the obvious hypocrisy, "even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success."[51] While not going so far as to overturn professional baseball's antitrust exemption, the Court did make clear that this exemption had not and would not be extended to other sports leagues, even repeating their prior acknowledgment of the criticisms of that exemption as "unrealistic," "inconsistent," and "aberration[al]."[52] Baseball's strange, to put it diplomatically, judicially-created exemption is further underscored in the opinion when the Court wrote, "The NCAA is free to argue that, "because of the special characteristics of [its] particular industry," it should be exempt from the usual operation of the antitrust laws—but that appeal is 'properly addressed to Congress.'"[53] Future courts are likely to determine that all professional sports are subject to the antitrust laws, unless they receive a pass from Congress.

Baseball's antitrust exemption has long been the subject of controversy, and a lawsuit filed in December of last year has been filed explicitly to overturn this exemption.[54] In 2019, the MLB decided to shrink the minor league teams' number from 160 to 120, and the plaintiffs in *Nostalgic Partners* allege that this action is a horizontal agreement among the MLB and its 30 franchises to limit competition and cut costs, violating the Sherman Act.[55] The Department of Justice filed a statement of interest in this case, noting that even though the court was bound by *Federal Baseball*'s precedent, it should construe the exemption narrowly.[56] Asking the court to narrowly construe the exemption should not be taken as affirmation of that exemption. The DOJ repeated the Supreme Court's dicta in *Alston*, and even referenced a colorful concurrence from the Second Circuit to highlight longstanding disagreement with the decision, "No one can treat as frivolous the argument that the Supreme Court's recent decisions have completely destroyed the vitality of [*Federal Baseball*] decided twenty-seven years ago, and have left that case but an impotent zombi [sic]."[57] If Nostalgic Partners does make its way on appeal to the Supreme Court, critics wonder if they will take up the issue.[58] The Court has recently rejected three cert petitions regarding baseball's exemption, but in light of Alston, some believe that the Court may be ready to re-examine the issue.[59]

But if the Supreme Court is not ready to confront baseball's "inconsistency," legislators might be. Last year, the "Competition in Professional Baseball Act" was introduced, which would eliminate professional baseball's antitrust exemption.[60] On June 28 of this year, the Senate Judiciary Committee sent a bipartisan letter to the Advocates for Minor Leaguers, asking them to answer questions about baseball's antitrust exemption.[61] Even before sending their official response, the Advocates' Executive Director Harry Marino said he was confident this inquiry would

50 *Alston*, 141 S. Ct. at 2159.

51 *Id.*

52 *Id.* (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957)).

53 *Id.* at 2160 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 689 (1978)).

54 *Nostalgic Partners, LLC, d/b/a The Staten Island Yankees et al. v. The Office of the Comm'r of Baseball*, Civ. A. No. 1:21-cv-10876 (S.D.N.Y. filed Dec. 20, 2021).

55 Rachel Scharf, Minor League Teams Sue MLB to End Antitrust Carveout, Law360 (December 20, 2021), Minor League Teams Sue MLB To End Antitrust Carveout - Law360.

56 Statement of Interest of the United States, *Nostalgic Partners,* Case No. 1:21-cv-10876, ECF No. 35.

57 *Id.*

58 *Id.*

59 *Id.*

60 Competition in Professional Baseball Act, S. 1111, 117th Cong. (2021).

61 Press Release, Senate Comm. on the Judiciary, Durbin, Grassley, Blumenthal, Lee Seek Information About Antitrust and Minor League Baseball (June 28, 2022) Durbin, Grassley, Blumenthal, Lee Seek Information About Antitrust and Minor League Baseball | United States Senate Committee on the Judiciary.

ultimately lead to the overturn of professional baseball's exemption.[62] This scrutiny from the courts, the Department of Justice, and the Senate should signal to the MLB that it is time to throw out their old playbook.

## V. CONCLUSION

The Supreme Court's decision in *Alston* undoubtedly has changed the game for both professional and amateur sports. This article only addresses some of those changes, which include lifting the NCAA's prohibition on NIL compensation, further questions and legal action about student-athletes' proper designation and compensation, and the potential overhaul of professional baseball's antitrust exemption.

As antitrust practitioners, we see *Alston* as an important example of what our antitrust laws were designed to do. This case exposed problems in the amateur sports caused by anticompetitive restraints. With the principles of competition firmly in mind, the NCAA (and perhaps the MLB) can now reform their rules. As the Court said in *Alston*, "markets are often more effective than the heavy hand of judicial power."[63] It is now up to the NCAA to issue new rules that promote and preserve student athletics.

62 R.J. Anderson, U.S. Senate Judiciary Committee looking into Major League Baseball's antitrust exemption, CBS (June 28, 2022), U.S. Senate Judiciary Committee looking into Major League Baseball's antitrust exemption - CBSSports.com.

63 *Alston,* 141 S. Ct. at 2166.

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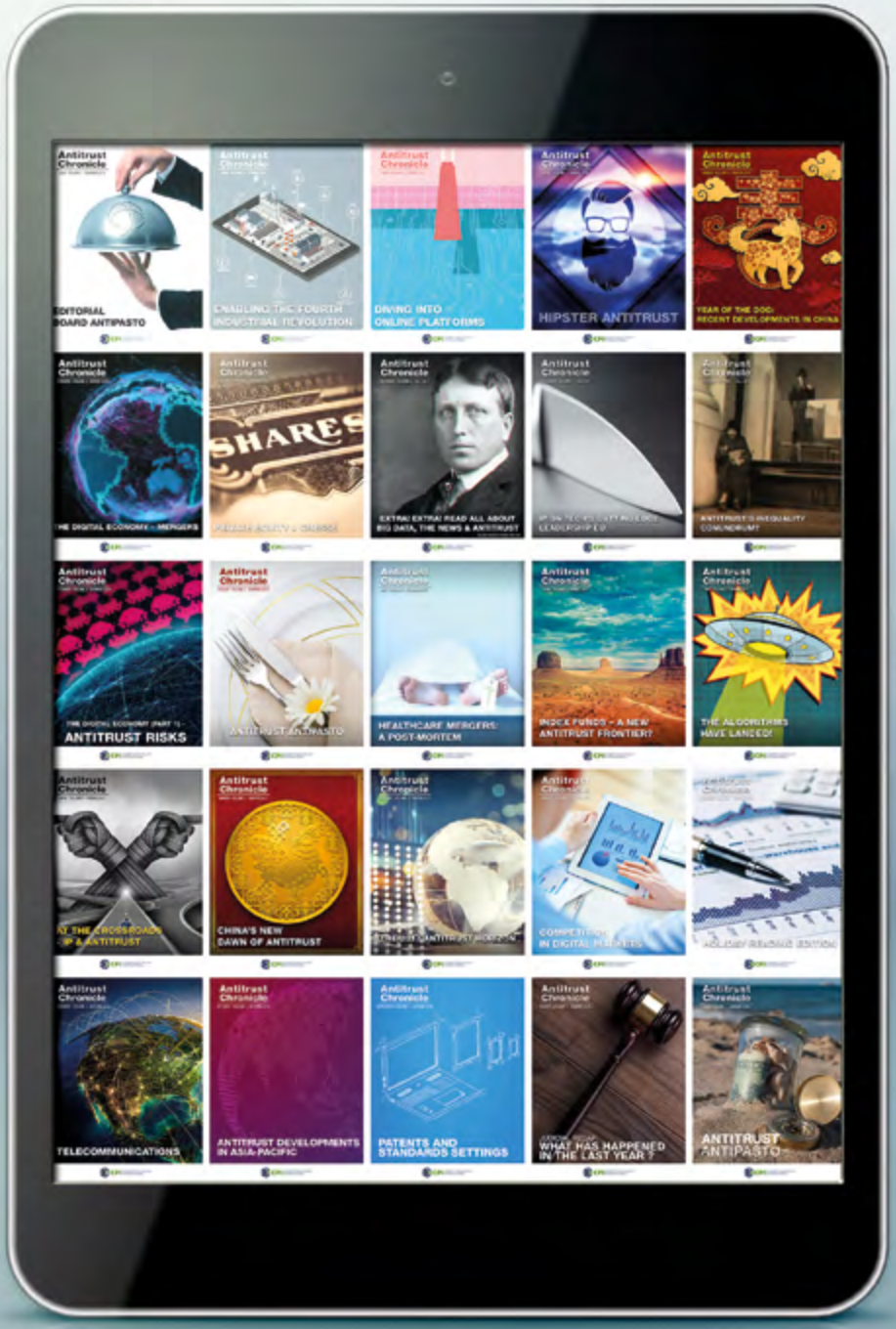


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