State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General

Fourth Edition
National Association of Attorneys General

Courtesy Chapter

Published by
National Association of Attorneys General
1850 M Street, NW, 12th Floor
Washington, DC 20036
(202) 326-6000

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State Attorneys General Powers and Responsibilities
Fourth Edition

Library of Congress Control Number: 2018960580

ISBN 978-1-946357-00-7
ISBN 978-1-946357-01-4 (Softcover)

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This book is dedicated to Attorneys General and the men and women who work for them in the 56 jurisdictions. They continue to make an important contribution to state govenment and the American legal system. Without them, there would be no book to write.

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Acknowledgments

The editor would like to acknowledge the many individuals who contributed to the preparation of this book.

This book builds on previous editions, which were edited by Lynne Ross. We gratefully acknowledge her hard work and dedication to this project in its early years.

This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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Chapter 15

Antitrust

By Emily Myers, Antitrust Chief Counsel, NAAG

During the past several decades, state attorneys general have played an increasingly significant role in ensuring the operation of the free market. Their unique ability to enforce both federal and state antitrust laws has led attorneys general to bring multistate cases that are national in scope, in addition to local bid-rigging and price-fixing cases.

Even before passage of the Sherman Act in 1890, the majority of states had some form of antitrust prohibition. The Sherman Act itself was designed to supplement these state laws. State attorneys general actively enforced these laws, and important aspects of antitrust law, including the *per se* rule against price-fixing and remedying anticompetitive combinations with dissolution, were first developed under state law.[1]

With the enactment of the Sherman Act, attorneys general became less active in antitrust enforcement for several decades. Attorneys general resumed more vigorous antitrust enforcement in the mid-1970s. This revival stemmed in part from new state laws authorizing attorneys general to sue on behalf of their states and political subdivisions in state and federal courts. Two new federal laws enacted in 1976 also encouraged antitrust enforcement activity by attorneys general. The Crime Control Act[2] provided seed money for states to fund antitrust enforcement programs and the Hart-Scott-Rodino Antitrust Improvements

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1 *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 400 (1927) (holding price fixing among competitors illegal per se, relying on prior state case law to the same effect); *California v. American Stores*, 495 U.S. 271 (1990) (holding divestiture is an available remedy and citing state statutes.)

2 Pub. L. 94-503, Title I, § 116, 90 Stat. 2415 (1976).

Act authorized state attorneys general to maintain federal *parens patriae* treble damage antitrust actions for their respective citizens.[3]

Today, attorneys general are using traditional enforcement tools in innovative ways, working together on multistate cases in both federal and state courts. Their goal now, as always, is to preserve competition, which lowers prices, improves quality and fosters development of a greater variety of innovative new products for citizens of their states.

Legal Authority

Federal Law

The Sherman Act of 1890[4] and the Clayton Act of 1914[5] are the primary federal antitrust statutes. Section 1 of the Sherman Act, which was modeled on several pre-existing state statutes, prohibits contracts, combinations and conspiracies in restraint of trade. Some restraints of trade, such as price-fixing, horizontal allocation of customers or territories, and certain boycotts are so inherently destructive of competition that they are deemed to be unlawful *per se*, that is, unlawful without further proof of injury from the conduct. Other trade restraints, primarily vertical nonprice restraints, are judged under the "rule of reason:" a trier of fact must decide whether the procompetitive effects of the restraint outweigh the anticompetitive effects on competition. Section 2 of the Sherman Act prohibits monopolization and attempts or conspiracies to monopolize trade or commerce.

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The Clayton Act and the Federal Trade Commission Act of 1914[6] were designed to supplement the basic provisions of the Sherman Act. These federal laws prohibit actual or potential restraints of trade that may tend to reduce competition in the marketplace. Section 7 of the Clayton Act prohibits mergers that reduce or substantially tend to reduce business competition.

An attorney general may bring an action for damages and/or injunctive relief for injury to the state, as well as to its cities and other political subdivisions, under Section 4 of the Clayton Act.[7] These actions are brought to recover dam-

3 15 U.S.C. § 15c.
4 15 U.S.C. §§ 1-7.
5 15 U.S.C. §§ 12, 13, 14-19, 20, 21, 22-27.
6 15 U.S.C. §§ 41-51.
7 15 U.S.C. § 15.

ages incurred by the state in its capacity as a direct purchaser of goods or services affected by alleged price-fixing conspiracies.[8] If the purchaser is a state subdivision or municipality, state law determines whether the attorney general may bring suit in the name of the state alone.[9] In some states, the attorney general may bring a class action on behalf of governmental entities and consumers affected by antitrust violations.

The attorneys general may not seek monetary damages for injury to the general economy of the state[10] but Section 16 of the Clayton Act does give attorneys general authority to seek equitable relief for injury to the general economy.[11] Unlike actions for damages, injunctive actions may be brought by states in their common law capacity as *parens patriae* to forestall injury to the state's economy.[12]

In bringing actions to challenge anticompetitive mergers under Section 16, states stand on the same footing as private plaintiffs and may obtain both preliminary and permanent injunctive relief, including, as the Supreme Court held in *California v. American Stores,* divestiture of assets.[13] Attorneys general may also recover damages for the residents of their state as *parens patriae* under Title III of the Hart-Scott-Rodino Antitrust Act of 1976.[14] The Act authorizes a state attorney general to bring an action for injuries caused by a violation of the Sherman Act to natural persons residing within the state. Damages established are trebled and may be distributed either in a manner authorized by the court in its discretion or to the state as a civil penalty, provided that each affected person

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8 *See, e.g., New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82 (2d Cir. 2000), in which the state sought to recover overcharges in connection with bid-rigging on the New York City Convention Center.

9 *See, e.g.,* Oh. Rev. Code Ann. § 109.81(A) ("The attorney general shall act as the attorney at law in any antitrust case for the state. He may act as the attorney at law in any antitrust case for any political subdivision of the state, for the governing body of any political subdivision of the state, or, as parens patriae, for any natural person residing in the state."); 740 Ill. Comp. Stat. 10/7(2) ("The attorney general may bring an action on behalf of this State, counties, municipalities, townships and other political subdivisions organized under the authority of this State to recover the damages under this subsection or by any comparable Federal law."); s*ee also, In re Petroleum Prods. Antitrust Litig.,* 1992-2 Trade Cas. (CCH) ¶ 69,915 (C.D. Cal. 1992); *In re Infant Formula Antitrust Litig.*, MDL No. 878, 1992 WL 503465 (N.D. Fla. Jan. 13, 1992).

10 *Hawaii v. Standard Oil Co*., 405 U.S. 251, 263-64 (1972)

11 15 U.S.C. § 26.

12 *See, e.g., Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp.2d 537, 545 (S.D. Miss. 2006) ("The State has a quasi-sovereign interest in the economic well-being of its citizens, which includes securing the integrity of the marketplace"); *Illinois v. SDS West Corp*., 640 F. Supp.2d 1047, 1050-52 (C.D. Ill. 2009) (collecting cases).

13 *California v. American Stores*, 495 U.S. 271 (1990).

14 Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394 (1976) (codified at 15 U.S.C. §§ 15c-h).

has a reasonable opportunity to secure an appropriate portion of the relief. The constitutionality of the *parens patriae* legislation has been uniformly upheld[15] and attorneys general have brought numerous *parens patriae* actions since enactment of the provision.[16] *Parens patriae* actions also have been recognized as "superior to a class action as a means for adjudication of collective claims" because they do not require certification to proceed."[17]

State Law

Kansas adopted the first comprehensive antitrust law in 1889. Although most states adopted their antitrust laws in the late nineteenth or early twentieth centuries, only a few states, including Missouri, New York, Texas and Wisconsin, had active enforcement programs before the mid-1960s. Generally, antitrust enforcement during the first part of the twentieth century was the province of the federal government.

In 1973, the National Conference of Commissioners on Uniform State Laws adopted a model state antitrust statute. Several states adopted the model, including Arizona in 1974. By 1975, more than a dozen states had active antitrust enforcement programs. State enforcement was given a boost by the 1976 Crime Control Act.[18] Under the act, Congress appropriated $25 million in grants to the attorneys general over three years as seed money to help states develop antitrust enforcement programs. Since then, attorneys general have played a major role in antitrust enforcement around the country.

All fifty states, as well as the District of Columbia, Puerto Rico and the Virgin Islands, have some type of state antitrust statutes. Most are patterned on or analogous to Sections 1 and 2 of the Sherman Act. A smaller number of states have counterparts to Section 7 of the Clayton Act, which prohibits anticompetitive mergers,[19] and the Robinson-Patman Act, which forbids price

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15 *See, e.g., Iowa v. Scott & Fetzer Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,873 (S.D. Iowa 1982).

16 *See, e.g., Florida, et al. v. Nine West Group, Inc. and John Doe, 1-500*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000); *In re Western New York Coupon Litigation*, 1998 U.S. Dist. LEXIS 17982, 1998-1 Trade Cas. (CCH) P72,119 (W.D.N.Y. 1998); *Maryland et al. v. Mitsubishi Electronics America*; 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. 1992); *but see Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008) (case brought by state attorney general could be removed to federal court because insurance policy holders were real parties in interest in damages action, claims for injunctive relief could stay in state court because state was real party in interest).

17 *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 204 (D. Me. 2003); *Pennsylvania v. Budget Fuel Co.*, 122 F.R.D. 184, 185 (E.D. Pa. 1988); *see also In re Montgomery County Real Estate Antitrust Litig.*, 1988-2 Trade Cas. (CCH) ¶ 68,230 (D. Md. 1988).

18 42 U.S.C. § 3739.

19 *See, e.g.,* Alaska Stat. § 45.50.566; Colo. Rev. Stat. § 6-4-107; Haw. Rev. Stat. § 480-7;

discrimination.[20] Other state laws contain unique variations. For example, the Pennsylvania law covers only bid rigging and New York's Donnelly Act prohibits anticompetitive "arrangements." Many states also have antitrust statutes that apply to specific industries.[21]

All state statutes designate the attorney general as the primary antitrust enforcement official. The majority of statutes also authorize enforcement by local prosecutors and private rights of action by persons injured by the antitrust violation. Some states limit the authority of local prosecutors by requiring them to obtain authorization of the attorney general to bring an antitrust action.[22] In California, local prosecutors are required to notify the attorney general before filing suit, and before settling.[23]

Almost every state has some form of criminal penalty for anticompetitive conduct.[24] The majority of states with criminal antitrust laws classify them as felonies, although a few classify antitrust crimes as misdemeanors.[25] Punishment prescribed by the felony state statutes varies for individual offenses from $5,000 in Nevada to $500,000 in Maryland and $1 million in Alaska.[26] Fines for corporations range from $20,000 in Maine to $1 million in California, New Jersey, and New York, and $50 million in Alaska.[27] As under federal law, some states,

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Miss Code Ann. § 75-2113.

20 *See, e.g.,* Ark. Code Ann. § 4-75-207; Cal. Bus. & Prof. Code § 17043; Colo. Rev. Stat. § 6-2-105; Fla. Stat. ch. 540.01; Idaho Code § 48-202; Neb. Rev. Stat. Ann. § 59-501; Pa. Stat. Ann. tit. 73, § 213.

21 *E.g.*, N.J. Stat. Ann. § 33:1-89 (price discrimination by sellers of alcoholic beverages); S.D. Codified Laws § 37-2-1 (locality based price discrimination sale of petroleum products); 6 V.S.A. § 2751 (unfair trade practices by buyers of dairy products).

22 *See, e.g.,* Nev. Rev. Stat. § 598A.070; N.M. Stat. Ann. § 57-1-10; N.D. Cen. Code § 51-08.1-07.

23 Cal. Bus. & Prof. Code § 16750(g).

24 The attorneys general of Delaware and Kansas do not have criminal jurisdiction for any antitrust violations. Other states have criminal penalties for specified types of antitrust violations or unfair trade practices. *See, e.g.*, Idaho Code Ann. § 48-405 (below-cost sales); N.D. Cent. Code § 51-09-02 (price discrimination), § 51-10-05 (sales below cost); S.C. Code Ann. §§ 39-3-180, 39-5-145 (price gouging), § 39-5-560 (motion pictures); Va. Code Ann. §§ 59.1-68.7 (bid-rigging on government purchases); Wash. Rev. Code § 9.18.120, .130 (bid-rigging on public purchases); W. Va. Code §§ 47-11A-11(below-cost sales).

25 *See, e.g.,* Ala. Code § 13A-11-122; Ark. Code Ann. § 4-75-204, D.C. Code § 48-2506; Mich. Comp. Laws § 445.779; Or. Rev. Stat. § 646.990, and Wyo. Stat. Ann. § 40-4-104

26 Nev. Rev. Stat. § 598A.280; Md. Code Ann., Com. Law I § 11-212; Alaska Stat. § 45.50.578.

27 Me. Rev. Stat. Ann. tit. 17-A, § 1301; Cal. Bus. & Prof. Code § 16755; N.J. Stat. Ann. § 56:9-11; N.Y. Gen. Bus. L. § 341; Alaska Stat. § 45.50.578.

including California, also authorize fines equaling the greater of twice the pecuniary gain or loss caused by an offense.[28] The statutory maximum prison terms in many states are less than one year,[29] but a few states have authorized substantially longer prison terms, including: New York (four years); New Mexico (five years);Minnesota (seven years)[30] and New Jersey (between five and ten years).[31] Attorneys general also use other provisions of a state's criminal code to address antitrust violations, including provisions on criminal conspiracy, grand theft or larceny by false pretenses.[32] Additional penalties under state law include voiding of contracts that are in violation of state antitrust law,[33] debarment from state contracting opportunities for violation of state or federal antitrust law,[34] and provisions that restrict a violator's right to do business in the state or can force the forfeiture of a company's corporate charter.[35] Almost every state includes in its antitrust legislation an exemption for organized labor and for agriculture cooperatives, but state laws vary widely in their grant of exemptions to other industries.

Despite variations in statutory language, state antitrust laws are usually construed in a manner consistent with federal law, at least with respect to what constitutes a violation. Many state antitrust statutes direct that the legislation be construed in light of analogous federal antitrust laws.[36] In other jurisdictions, state courts frequently refer to and follow interpretations of comparable federal antitrust law.[37] The practice has tended to harmonize federal and state legal developments in the antitrust area during a period of increasing state enforcement.

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28 Cal. Bus. & Prof. Code § 16755; Or. Rev. Stat. § 161.655 (double amount gained from violation).

29 *See*, *e.g.*, Mass. Gen. Laws ch. 93, § 10; Md. Code Ann. Com. Law I § 11-212; Utah Code Ann. § 13-5-15.

30 *See* N.Y. Gen. Bus. Law § 341; N.M. Stat. § 57-1-6; Minn. Stat. § 325D.56.

31 N.J. Stat. Ann. § 56-9-11(c), § 2C:43-6.

32 *See, e.g., People v. Johnson*, Sac. Super. Ct. No. 88-407013 (Cal. 1988) (grand theft by false pretenses and antitrust count); *People v. Durfee Chevrolet-Oldsmobile, Inc.*, Brighton Town Ct., Monroe Co., State of New York (Dec. 10, 1990) (criminal facilitation of conspiracy in restraint of trade).

33 *See, e.g.*, Cal Bus. & Prof. Code § 16722.

34 *See, e.g.*, Ariz. Rev. Stat. § 34.257; Md. State Fin. & Proc. § 16-203.

35 *See, e.g.*, Cal. Bus. & Prof. Code § 16752; Ind. Code Ann. § 24-1-4-2; Kan. Stat. Ann. § 50-105; Mich. Comp. Laws Ann. § 750.154; Ohio Rev. Code Ann. § 1331.07; Wis. Stat. Ann. § 133.12.

36 *See, e.g.*, Del. Code. Ann. tit. 6, § 2113; Fla. Stat. § 542.21; Iowa Code § 553.2; Md. Code Ann., Com. Law § 11-202(a)(2); Mich. Comp. Laws § 445-784(2); Nev. Rev. Stat. § 598A.050.

37 *See, e.g., Alakayak v. B.C. Packers, Ltd.,* 48 P.3d 432 (Alaska 2002).

In some cases, however, state courts have refused to follow U.S. Supreme Court construction of federal antitrust laws when interpreting state antitrust laws.[38]

There are several significant differences between state and federal antitrust law, discussed more fully below. First, a number of states, either by statute or by judicial decision, permit indirect purchasers injured by antitrust violations to seek damages. Second, under federal law, resale price maintenance (RPM), an agreement between entities at different levels of the distribution chain as to the price at which goods are sold to the public, is analyzed using the rule of reason. State attorneys general have used state law to challenge RPM as illegal *per se*. Third, state statutes authorizing *parens patriae* actions for violations of state antitrust laws[39] extend the scope of *parens patriae* authority beyond the "natural persons" covered by the federal statute.[40]

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Enforcement

Multistate Litigation

During the past decade, the trend in state antitrust enforcement has been toward multistate litigation filed by a number of attorneys general on cases with national or regional impact. The Multistate Antitrust Task Force of the National Association of Attorneys General was created in 1983 to coordinate the exercise of the powers of the individual attorneys general in antitrust matters. The Task Force is a staff level group which includes all states. The Task Force organizes the conduct of multistate investigations and the filing of multistate actions. A single attorney general or group of attorneys general will take the lead in an

38 *See, e.g.*, *O'Brien v. Leegin Creative Leather Prods.,* No. 101,000, (Kansas, May 4, 2012) ("[w]hile . . . cases [interpreting federal antitrust statutes] may be persuasive authority for any state court interpreting its antitrust laws, such authority is not binding upon any court in Kansas interpreting Kansas antitrust laws."); *Hyde v. Abbott Labs,* 473 S.E.2d 680 (N.C. App.), *rev. den.*, 478 S.E.2d 5 (N.C. 1996) (North Carolina courts "are not required to construe [the state] antitrust statute in harmony with the federal antitrust laws").

39 Cal. Bus. & Prof. Code § 16750; Colo. Rev. Stat. § 6-4-111(3), Conn. Gen. Stat. § 35-32; Del. Code Ann. tit. 6, § 2107; D.C. Code Ann. § 28-4507; Fla. Stat. Ann. § 542.22; Haw. Rev. Stat. § 480- 14; Idaho Code § 48-108; 740 Ill. Comp. Stat. 10/7(8); Kan. Stat. Ann. § 50-103; Md. Code Ann. Com. Law § 11-209; Minn. Stat. Ann. § 325D.59; Neb. Rev. Stat. § 59-828; Nev. Rev. Stat. § 598A.160; Ohio Rev. Code Ann. § 109.81(A), Okla. Stat. Ann. tit. 49 § 205; R.I. Gen. Laws § 6-36-12(g); S.D. Codified Laws Ann. § 37-1-33; Utah Code Ann. § 76-10-916. Vt. Stat. Ann. tit. 9, § 2458; Va. Code Ann. § 59.1-9.15; W. Va. Code § 47-18-17.

40 *See, e.g.*, Conn. Gen. Stat. Ann. § 35-32(c).

investigation, and one of the lead attorneys general issues subpoenas or civil investigative demands. The parties are told that their responses will be shared with other interested attorneys general. The attorneys general have found that this process can not only reduce the burden on respondents, but can increase coordination among the states and allow the most efficient use of state resources.

Multistate litigation typically includes cost sharing arrangements among the attorneys general and may also include deputization of staff attorneys from one state to act as assistant attorneys general in other states for investigation and litigation purposes.

Some examples of successful multistate coordination in antitrust cases include the following:

- A number of multistate cases have focused on anticompetitive activities designed to delay entry by generic competitors in the pharmaceutical industry and to invoke antitrust immunity under federal antitrust laws. Attorneys general settled multistate actions against Bristol-Myers Squibb for improper listing and anticompetitive agreements that prevented the distribution of generic Buspar[41] and for illegal monopoly maintenance and fraudulent patent procurement for Taxol.[42] Attorneys general also reached a settlement resolving claims that manufacturers had conspired to keep generic Cardizem off of the market.[43]

- The states filed a number of cases against insurance brokers alleging numerous improper agreements to obtain compensation from insurers in exchange for increasing the volume or profitability of insurance policies the brokers placed with these insurers. The states alleged that the brokers unlawfully deceived clients by steering clients' insurance business to favored insurance companies, and soliciting fictitious bids to create the false impression that competitive bidding had produced the best possible price when, in fact, no competitive process had taken place. The states also

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41 *In re Buspirone Antitrust Litigation*, No. 01-Cv. 11401, MDL 1413 (S.D.N.Y. Mar. 7, 2003) (preliminary approval granted) (alleged monopolization of drug markets through patent abuse).

42 *Ohio v. Bristol-Myers, Squibb Co.*, 2003 WL 21105104 (D.D.C. May 13, 2003) (preliminary approval granted) (alleged monopolization of drug markets through patent abuse).

43 *In re Cardizem CD Antitrust Litigation*, 391 F.3d 812 (6th Cir. 2004) (alleged customer allocation among generic and brand name drug manufacturers).

alleged that brokers solicited, and insurers paid, kickbacks for favorable treatment.[44] Total settlements in the multistate cases exceeded $1 billion.

- In 1998, attorneys general from twenty states and the District of Columbia filed suit alleging that software manufacturer Microsoft had abused its monopoly power in the market for desktop operating systems and had destroyed competition.[45] The States' case was consolidated with a case brought by the U.S. Department of Justice. After a lengthy and well publicized trial, nine states[46] and the Department of Justice entered into a Revised Proposed Final Judgment ("RPFJ") with Microsoft.[47] The remaining nine states along with the District of Columbia[48] did not agree with the remedies outlined in the RPFJ and drafted their own remedial proposals for consideration by the district court in the remedies trial. In November 2002, the district court upheld the RPFJ previously entered into by the Department of Justice and Settling States, but issued some revisions based on the Non-Settling States' remedial proposals.[49]

- State attorneys general reached settlements totaling more than $350 million with a number of financial services companies to resolve charges that the companies rigged bids and paid kickbacks in the market for municipal bond derivatives. Municipal bond derivatives are contracts that tax-exempt issuers use to reinvest proceeds of bond sales until the funds are needed, or to hedge interest-rate risk. The attorneys general alleged that as a result of the wrongful conduct, state, city, local, and not-for-profit entities entered into municipal derivatives contracts on less advantageous terms than they would have otherwise. Settlement proceeds have been repaid to the bond issuers. The investigation, in which the states have worked with the U.S.

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44 *See, e.g.,* Agreement Between the Attorney General of the State of New York and American International Group dated January 18, 2006, available at http://app3.naag.org/antitrust/docs/387.civil.NY%20v%20AIG%20settlement.pdf; *Connecticut v. Marsh & McLennan Companies Inc.*, No. FST-CV-05-4004360-S (X05) (Super. Ct. Conn. (Sept. 21, 2005); *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241 (3d. Cir. 2009).

45 *New York v. Microsoft Corp.*, No. 1:98CV1233 (D.D.C. May 15, 1998).

46 The nine original settling states are New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina and Wisconsin.

47 *United States v. Microsoft*, 231 F. Supp. 2d 144 (D.D.C. 1998).

48 California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Michigan, Utah, West Virginia and the District of Columbia.

49 *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002).

Department of Justice, the Securities and Exchange Commission and the Internal Revenue Service, is ongoing.[50]

Individual State Enforcement

The antitrust dockets of individual attorneys general usually comprise cases involving sectors of the marketplace that are vital to the welfare of consumers and the state's economy. Individual state antitrust cases have involved products and services such as milk, bread, gasoline, home heating oil, highway construction and solid waste disposal.

For example, the attorney general of New York sued pharmaceutical manufacturer Actavis plc and its New-York based subsidiary to prevent Actavis from withdrawing the Alzheimer's drug Namenda from the market and forcing patients to switch to a once daily version, Namenda XR. The patent for the original Namenda was to expire in the near future, and the company would then face competition from generic drug makers. The attorney general alleged that Actavis planned to force patients to switch unnecessarily to Namenda XR because it had a longer patent. Once patients switched to Namenda XR, state laws would make it difficult for patients to switch back when generic competitors to the original Namenda became available. The attorney general alleged that, by forcing patients to switch to Namenda XR, Actavis was violating antitrust laws designed to encourage competition and keep prices down for consumers. A district court enjoined Actavis from ceasing production of Namenda, and the injunction was affirmed by the Second Circuit.[51]

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The attorney general of Texas entered into settlements with two dental supply companies to resolve allegations that they worked together to thwart the entry of a lower cost, online source of dental supplies provided by the Texas Dental Association. The State alleged that the companies colluded to discourage distributors and manufacturers from working with the TDA and its business partner

50 *See, e.g.,* Settlement Agreement between Natixis Funding Corp. and the states of Colorado, Connecticut, District of Columbia, Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina Tennessee and Wisconsin (Feb. 18, 2016 *available at* http://app3.naag.org/antitrust/docs/693.civil.Natixis%20settlement%20muni%20bonds.pdf.

51 *State of New York v. Actavis,* 787 F.3d 638 (2d Cir. 2015).

and agreed not to attend the TDA's annual trade show in 2014. The agreements prohibit this behavior in the future and require antitrust compliance training.[52]

The Florida attorney general reached settlements with two large paper manufacturers resolving claims that the companies conspired with other paper manufacturers to fix the price of sanitary paper products. As part of the settlements, Georgia-Pacific Corporation donated 271 acres of environmentally sensitive land to the state land preservation program.[53]

The Michigan attorney general alleged that between 2001 and 2007, two ice producers, Arctic Glacier and Home City Ice, allocated geographic territories and customers between themselves, lessening competition and potentially resulting in higher prices for consumers of bagged ice. The companies agreed to pay $740,000 in the form of penalties.[54]

The attorney general of North Carolina filed ten lawsuits, alleging that 26 individuals and companies had agreed not to bid at auctions of foreclosed properties after being paid by other bidders. This bid-rigging resulted in a lower price being paid to property owners. The parties were enjoined from further conspiracies to rig bids and from communicating with other bidders. Some defendants were barred from future participation in real estate auctions. The defendants agreed to pay $800,000 in restitution to the property owners.[55] The attorney general continued to monitor this market, and an additional settlement was filed in 2010.[56]

The attorney general of New York entered into a settlement with a real estate developer that owned an outlet mall outside of New York City and prevented retailers at that mall from opening outlet stores in New York City locations. The leases for the mall stores included so-called radius restrictions that impose a substantial penalty on retailers who open a second store within 60 air miles of the original mall, creating an 11,000 square mile zone in which the developer faced little effective competition from other outlet centers. The developer agreed to

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52 *Texas v. Benco Dental Supply Company*, No. D-1-GN-15-001386 (Travis Cty. Dist. Ct. April 9, 2015); *Texas v. Henry Schein, Inc.*, No. D-1-GN-17-003749, (Travis.Cty. Dist. Ct., 261st Judicial Dist. Aug. 3, 2017).

53 *State ex rel. Butterworth v. Kimberly-Clark Corp.*, No. 1:97CV086-MP (N.D. Fla. July 28, 1999) (settlement agreement).

54 Settlement Agreement, *Cox v. Home City Ice Co.,* No. 10-1080-CP (30th Jud. Dist. Ingham Cty. 2010).

55 Press Release, Office of the Attorney General of North Carolina, Feb. 15, 2006, "Cooper Stops Firms Accused Of Rigging Real Estate Bids."

56 Consent Decree, *State ex rel. Cooper v. McBarnette,* No. 10CV020647 (N.C. Super. Ct., Wake Cty., Dec. 21, 2010).

revise existing leases to remove radius restrictions that would otherwise prevent outlet center development and made a payment to the state.[57]

The attorney general of Connecticut entered into several settlements as a result of an investigation into hotel room rates. The attorney general's investigation revealed that hotels in close proximity were engaging in the process known as "call-arounds," through which they exchanged non-public information such as current room rates and occupancy rates. They used this information to set their own prices. The settlement required that the hotels end this practice and pay a fine.[58]

Mergers

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Attorneys general have actively pursued merger cases at both the federal and state levels. Attorneys general have challenged a variety of health care acquisitions and mergers, including acquisitions by hospitals of physician practice groups, mergers of health systems and mergers of health insurers. They have frequently worked with the federal agencies on these cases. In two separate cases involving hospital acquisitions, the states of Illinois and Pennsylvania and the FTC sought to enjoin the merger of two hospital systems. In each case, the trial court denied the preliminary injunction and the state and the FTC appealed to the court of appeals. In each case, the court of appeals reversed the trial court and granted the preliminary injunction and the parties subsequently abandoned the merger.[59] The attorney general of Idaho joined with the FTC in challenging the already-consummated acquisition of a large physician practice group by a hospital in Nampa, Idaho. The court held that the transaction was anticompetitive and ordered that the transaction be unwound. The decision was affirmed by the

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57 Assurance of Discontinuance, In the Matter of Investigation by Attorney General of the State of New York of Simon Property Group, Inc., Assurance No. 17-154 (Aug. 21, 2017), *available at* http://app3.naag.org/antitrust/docs/720.civil.NY%20v. %20Simon—Woodbury%20Commons.pdf.

58 Press Release, Office of the Attorney General of Connecticut, April 1, 2010, "Attorney General Announces Agreement To Stop Hotels From Anticompetitive Exchanges Of Price Information; Press Release, Office of the Attorney General of Connecticut, August 11, 2011, "Attorney General Reaches Settlement With Hotels Over Alleged Scheme To Fix Price Of Hotel Rooms".

59 *FTC and Illinois v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *FTC and Pennsylvania v. Penn State Hershey Medical Center*, 838 F.3d 327 (3d Cir. 2016).

Ninth Circuit.[60] Two separate multistate groups also joined the U.S. Department of Justice in challenging two proposed mergers of health insurers: Anthem with Cigna and Aetna with Humana. In each case the mergers were enjoined. [61]

Attorneys general have also challenged several oil company mergers. For example, California challenged the acquisition by Valero of two petroleum storage and distribution terminals owned by Plains all American Pipeline in Martinez and Richmond, California. Although the court denied the state's request for a temporary restraining order, it held that the state had a likelihood of success on the merits and the parties abandoned the transaction.[62] Fourteen attorneys general worked with the FTC to investigate the proposed merger of Exxon Corp. and Mobil Corp. The attorneys general entered into four separate consent agreements with the oil companies addressing different aspects of the merger on a regional basis.[63] California, Oregon and Washington entered into a settlement agreement to resolve concerns about the proposed $26 billion merger of BP Amoco and Atlantic Richfield Co, under which the merging parties agreed to maintain competition by selling assets in Alaska to another competitor.[64] A group of states and the FTC agreed to consent judgments in the proposed merger of Conoco Inc. and Phillips Petroleum requiring both companies to divest assets and agree to certain conduct-based relief in order to complete the merger.[65]

Attorneys general have also focused on anti-competitive mergers in the trash-hauling industry. On a multistate basis, seven states and the U.S. Department of Justice challenged the merger of Allied Waste Industries and Republic Services, two of the nation's largest waste haulers. The suit was resolved by a

Courtesy Chapter

60 *St. Alphonsus Med. Ctr. Nampa v. St. Luke's Health Sys*., 2014 U.S. Dist. LEXIS 9264 (D. Idaho, Jan. 24. 2014), aff'd 778 F.3d 775 (9th Cir. 2015).

61 *United States et al. v. Anthem, Inc*., 236 F. Supp. 3d 171 (D.D.C. 2017), *aff'd* 855 F.3d 345 (D.C. Cir. 2017); *United States et al. v. Aetna Inc*., 240 F. Supp. 3d 1 (D.D.C. 2017).

62 Order Denying TRO, *State of California v. Valero Energy Corp. et al*., No. 3:17-cv-03786 (N.D. Cal. Jul. 7, 2017).

63 *New Jersey v. Exxon Corp.*, No. 1:99CV03183 (D.D.C. Nov. 30, 1999) (consent decree and final judgment); *Alaska v. Exxon Corp.*, No. A-99-618-CV (D. Alaska Nov. 30, 1999) (consent decree and final judgment); *California v. Exxon Corp*., No. CIV-99-12466 RSWL (C.D. Cal. Nov. 30, 1999) (consent decree and final judgment); *Texas v. Exxon Corp*., No. 3- 99CV2709-L (N.D. Tex. Dec. 3, 1999) (final consent judgment).

64 *California v. BP Amoco,* Case No. C000420 (N.D. Cal. Apr. 13, 2000) (consent decree and final judgment).

65 Consent Judgments were filed by Colorado, Idaho, Oregon, Utah and Washington in Utah federal court, Texas and New Mexico in Texas federal court and by Missouri in Missouri federal court. A copy of the consent judgment can be found at http://www.ftc.gov/os/2002/08/conocophillipsdo.pdf.

settlement that required divestiture of 11 landfills, eight waste transfer stations, and numerous hauling routes throughout the plaintiff states.[66] Individual states have also challenged waste-hauling mergers. The attorney general of Utah filed suit and entered into a consent judgment in connection with a waste-hauling acquisition which the attorney general alleged would lessen competition in the market for commercial waste hauling services in Washington County, Utah.[67] The acquirer agreed not to discriminate in the provision of landfill services to competing haulers, not to bundle charges for recycling and waste hauling services, and to limit the terms of customer contracts. The Ohio attorney general settled a state court suit seeking to enjoin a waste-hauling acquisition in the Mansfield, Ohio area.[68] The company agreed to divest a transfer station and four small container commercial routes to a purchaser acceptable to the attorney general. It also agreed not to challenge the environmental, zoning, or other permits or applications for permits or licenses pertaining to the divested assets.

Courtesy Chapter

Criminal Prosecution

In addition to more traditional criminal charges associated with bid-rigging on public contracts, some attorneys general with criminal jurisdiction have used their antitrust statutes to prosecute certain patterns of official corruption that did not fit neatly with more traditional criminal statutes

The attorney general of New York announced criminal convictions against two trash collection firms for conspiring to rig bids for private customers, forcing those customers to pay artificially inflated prices. They also colluded on bidding for municipal contracts. The companies paid more than $1 million in criminal fines, as well as civil penalties.[69]

The Michigan attorney general brought criminal charges against two energy companies, alleging that they collaborated to avoid bidding wars against each other in Michigan public auctions and private negotiations for oil and gas

66 Final Judgment, *U.S. et al. v. Republic Services, Inc.*, No. 1:08-cv-02076 (D.D.C. July 15, 2010).

67 *Utah v. Allied Waste Industries*, No. 2:99-CV-00303J (D. Utah June 29, 1999) (consent judgment).

68 *State v. Allied Waste Industries, Inc.,* No. 00-388H (Ohio Comm. Pleas Ct., Richmond Cty., May 12, 2000).

69 Press Release, Office of the Attorney Gen. of New York, Apr. 9, 2017, "A.G. Schneiderman Announces Bust Of Broome County Waste Management Cartel For Colluding To Rig Bids And Fix Prices"

leases. This collaboration allegedly caused prices to plummet for landowners, including the state. After a trial court ruled that the case could move forward, the parties settled the criminal charges by paying $30 million in civil penalties.[70]

For the first time in several decades, the Ohio attorney general used the state's antitrust law, the Valentine Act, to charge a supplier of traffic control devices with felonies in connection with bids submitted to the Ohio Department of Transportation. The defendant submitted multiple quotes from itself and several related companies to meet ODOT's required number of quotes and give an appearance of competition, and also worked with a co-conspirator to submit prearranged quotes for traffic control devices.[71]

In Michigan, five gas station owner/operators pleaded guilty and no contest to charges that they engaged in a gasoline price-fixing operation in Madison Heights, Michigan. The stations involved in the price-fixing operation were all located within two miles of each other. The attorney general's investigation revealed that the five stations set their gasoline prices at an artificial level, within a penny or two of each other, on at least five days, in an attempt to increase profits from gasoline sales by eliminating competition. The defendants paid significant fines.[72]

In New Jersey, the attorney general investigated and prosecuted state employees and outside contractors in connection with a scheme to rig bids on construction materials for two school districts. In addition to guilty pleas by two contractors, the attorney general also obtained guilty pleas from the engineer for the districts, who admitted to preparing false bids himself and directing the contractors to submit false bids. In addition, the business administrator of the district admitted to recommending the hiring of the contractors, despite knowing that their bids were false, and accepting free goods and services from the contractors.[73]

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70 Press Release, Office of the Attorney Gen. of Michigan, March 5, 2014, "Schuette Files Criminal Charges Against Energy Firms Chesapeake and Encana."

71 *See* Office of the Attorney Gen. of Ohio, Dec. 18, 2012, Press Release, "Attorney General DeWine, Prosecutor Deters Announce Guilty Pleas for Bid Rigging of Traffic Devices."

72 Press Release, Office of the Attorney General of Michigan, Dec. 7, 2011, "Schuette Announces Guilty Pleas in Madison Heights Gas Price-Fixing Operation."

73 Press Release, Office of the Attorney General of New Jersey, Jan. 27, 2012, "Ex-Business Administrator for Westfield Schools Sentenced for Accepting Windows & Doors from Vendor He Recommended; School district engineer and two contractors also pleaded guilty in bid rigging investigation." *See,* Office of the Attorney Gen. of New Jersey Press Release, July 1, 2010, "South Jersey Contractor Sentenced to Jail for Rigging Bids on Contracts with Department of Corrections and Haddon Township."

In another New York case, the attorney general charged a New York City employee with accepting bribes to rig bids on playground contracts. The attorney general alleged that the defendant had provided engineers' estimates, an internal government document, to bidders on those contracts. The defendant received a percentage of the price if the contractor won the contract.[74]

Competition Advocacy

As the enforcers of state and federal antitrust laws and as the chief legal officers of their respective states, the attorneys general have a substantial interest in ensuring that antitrust laws are applied in a manner that is consistent with underlying Congressional policy and federal judicial precedent. The attorneys general communicate their views on antitrust and competition policy through comments on proposed federal regulations and legislative advocacy, but most often through amicus briefs.

The attorneys general have filed *amicus curiae* briefs in a number of antitrust cases in the federal appellate courts and in the Supreme Court. At the Supreme Court, they have supported the per se rule against vertical price-fixing,[75] urged the Court to adopt certain market definition rules in cases involving two-sided platforms,[76] and advocated for broader state action immunity for state licensing boards.[77] In the lower courts, the states have argued that mergers to monopoly cannot be justified by efficiency arguments,[78] proposed a definition for a prevailing party in a government antitrust action,[79] and advocated use of the "hypothetical monopolist" test in determining geographic markets in antitrust cases.[80]

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74 Press Release, Office of the Attorney General of New York, April 13, 2012, "A.G. Schneiderman Announces Indictment of Former NYC Parks Employee for Bid-Rigging and Accepting Bribes."

75 The Court overruled the *per se* prohibition on vertical price-fixing. *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877 (2007).

76 *State of Ohio et al. v. American Express Co.*, No. 16-1454 (U.S. 2017).

77 *North Carolina State Board of Dental Examiners v. FTC*, No. 13-534 (U.S. 2015).

78 *FTC and North Dakota v. Sanford Health*, No. 17-3783 (8th Cir. 2017).

79 *FTC and Pennsylvania v. Penn State Hershey Medical Center*, No. 17-2270 (3d Cir.2017).

80 *FTC et al. v. Advocate Health Care Network*, No. 16-2492 (7th Cir. 2016).

Preventive Antitrust

Education of state and local government officials on the fundamentals of the antitrust laws is an important function performed by many attorneys general. In Alabama, Colorado, Maryland, Nebraska, New York and Oregon, among other states, the attorneys general have written pamphlets on state antitrust enforcement which are distributed to state officials and members of state boards and committees.

Many attorneys general review state contracts, professional licensing board regulations, and proposed business practices for anticompetitive effects. The Maine and Virginia attorneys general review proposed business practices submitted to their offices voluntarily by the parties. Other states review contemplated business practices on an informal basis, without binding either party to the evaluation. In Indiana, the attorney general reviews state contracts to ensure that they do not inhibit competition or encourage bid rigging and other unlawful practices. In Virginia, the attorney general reviews proposed State Bar Legal Ethics Opinions for anticompetitive effects.

Courtesy Chapter

Emerging Issues

State Action Immunity and Defense of State Actions

"State action immunity" is a doctrine created by the Supreme Court to provide states, when acting as sovereigns, with immunity from federal antitrust lawsuits if the state's exercise of its authority has anticompetitive effects.[81] The Supreme Court's decisions in this area are based on the idea that the acts of the sovereign state, even if they are anticompetitive, outweigh the importance of a freely competitive marketplace. If the state itself (for example, through a state agency) is regulating the market, the state action is fairly clear. The interest of the state is less clear in situations where private parties are acting to regulate a market (for example, when state licensing boards are composed of practitioners licensed by the board).

The Supreme Court stated a two-part test to "determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." State action protection covers private

81 *Parker v. Brown*, 317 U.S. 341 (1943).

parties only where (1) the challenged restraint reflects a clearly articulated state policy that permits the anticompetitive conduct (the "clear articulation" test) and (2) the permitted anticompetitive activities are actively supervised by the state (the "active supervision" test).

In its 2015 *North Carolina Dental*[82] decision, the Supreme Court focused on the second prong of the test. The court held, "A state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity." The court further held that active supervision by the state is to be determined on a case-by-case basis but requires that 1) A state supervisor must review the substance of the action (not just the process by which the action was taken); 2) The supervisor must have the power to veto or modify the action; and 3) There must be active supervision, not just the potential for supervision.

The Supreme Court's decision left a number of questions unanswered. Those questions are gradually being addressed through litigation,[83] legislation,[84] and guidance from the federal agencies and state attorneys general.[85] In these cases, the attorney general must balance his or her role as an advocate for free markets and open competition with the obligation to defend state statutes and state licensing boards.

In their role as competition advocates, however, attorneys general have also successfully urged close scrutiny of the state action defense. For example, thirty-six attorneys general filed an *amicus* brief supporting the Federal Trade Commission in a challenge to alleged horizontal price fixing by title insurance companies through the use of state rating bureaus. The attorneys general argued, and the Supreme Court held, that the states did not actively supervise the establishment of title insurance rates.[86]

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82 *North Carolina State Board of Dental Examiners v. FTC*, ___ U.S. ___, 135 S. Ct. 1101 (2015).

83 *See, e.g., Edinboro College Park Apartments v. Edinboro University Foundation,* 850 F.3d 567 (3d Cir. 2017); *Prime Healthcare Services-Monroe LLC v. Indiana University Health Bloomington*, 2016 U.S. Dist. LEXIS 136474 (S.D. Ind. 2016); *Bauer v. Pennsylvania State Board of Auctioneer Examiners*, 154 A.3d 899 (Pa. Comm. Ct. 2017); *Conrad v. Bevin*, No. 3:17-cv-00056 (E.D.Ky. Feb. 16, 2018).

84 *See, e.g.*, Miss. Code Ann. § 73-47-1; Mont. Code Ann. § 37-1-121; Ohio Rev. Code Ann. § 107.56;

85 *See, e.g.,* Cal. Attorney Gen. Op. No. 15-402 (Sept. 10, 2015); Idaho Attorney Gen. Op. No. 16-01; Okla. Attorney Gen. Op. No. 2016-138A (Mar. 7, 2016).

86 *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992).

Indirect Purchasers

In the case of *Illinois Brick v. Illinois*,[87] the U.S. Supreme Court held that only direct purchasers of price-fixed items may sue the price fixers for treble damages. Persons who purchased a product through a middleman are precluded from recovering any damages they may have suffered; they may only seek injunctive relief.

The impact of the *Illinois Brick* decision on state antitrust enforcement was significant, but in 1990, the Supreme Court held, in *California v. ARC America Corp*,[88] that state statutes permitting recovery by indirect purchasers were not preempted. The Supreme Court found that recovery under state law did not pose obstacles to enforcement of federal antitrust policy because liability under state laws would be in addition to, not in lieu of, liability under federal law.

The *ARC America* decision has led to enactment of state statutes and decisions by state courts that now permit recovery of indirect damages by approximately 70% of all consumers in the United States. Twenty-four states, the District of Columbia and Puerto Rico have statutes that specifically permit indirect purchasers to recover damages for state antitrust law violations.[89] In a number of states, courts have interpreted state antitrust and consumer protection statutes to permit indirect purchaser suits. A federal district court has held that states whose antitrust statutes are to be interpreted consistently with Section 5 of the Federal Trade Commission Act[90] can maintain actions for restitution or disgorgement on behalf of indirect purchasers.[91]

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87 431 U.S. 720 (1977).

88 490 U.S. 93, 101 (1989) (finding state antitrust laws to be within "an area traditionally regulated by the states" for which there is a "presumption against pre-emption," and holding indirect purchaser recovery statutes were not preempted).

89 Ala. Code § 6-5-60(a); Ark. Code Ann. § 4-75-212, § 4-75-315; Cal. Bus. & Prof. Code § 16750(a); Colo. Rev. Stat. §§ 6-4-101; D.C. Code Ann. § 28- 4509(a); Haw. Rev. Stat. § 480-3; Idaho Code § 48-108; 740 Ill. Comp. Stat. 10/7(2); Kan. Stat. Ann. § 50-161; Me. Rev. Stat. Ann. tit. 10, § 1104(1); Md. Code Ann., Com. Law II § 11-209(b)(2); Mich. Comp. Laws Ann. § 445.778; Minn. Stat. Ann. § 325D.57; Miss. Code Ann. § 75-21-9; Neb. Rev. Stat. §§ 59-821; Nev. Rev. Stat. §§ 598A.160, 598A.210; N.M. Stat. Ann. § 57-1-3; N.Y. Gen. Bus. Law § 340(6); N.D. Cent. Code §§ 51.08.1.08; Or Rev. Stat. §§ 646.775 and 646.780; P.R. Laws Ann., tit. 32, §§ 3341- 3344; R.I. Gen. Laws § 6-36-12(g); S.D. Codified Laws Ann. § 37-1-33); Vt. Stat. Ann. tit. 9, § 2465; Wis. Stat. Ann. § 133.18(1)(a).

90 15 U.S.C. § 45.

91 *FTC v. Mylan Labs., Inc.*, 99 F. Supp.2d 1, 4-5 (D.D.C. 1999).

Resale Price Maintenance

Another significant difference between federal and state antitrust laws has arisen since the Supreme Court's decision in *Leegin Creative Leather Products Inc. v. PSKS.*[92] In that case, the Court reversed the long-standing doctrine that vertical price restraints are illegal *per se*, and held that such restraints should be examined under the rule of reason. Several states have taken the position that vertical price restraints are illegal under their state law. Maryland has enacted a statute to preserve the *per se* treatment of resale price maintenance. The law adds a new section which provides, "For purposes of subsection (a)(1) of this section, a contract, combination or conspiracy that establishes a minimum price below which a retailer wholesaler or distributor may not sell a commodity or service is an unreasonable restraint of commerce."[93]

California has also enacted a statute that explicitly addresses resale price maintenance, and the laws of a number of other states can be read to prohibit the practice.[94] California has settled several vertical price fixing case, brought under the state's antitrust statute.[95] The supreme court of Kansas held that under Kansas law, vertical price-fixing is not analyzed under the rule of reason, but is illegal *per se*.[96] The attorney general of Kansas had filed an amicus brief urging this result.

Courtesy Chapter

Class Action Fairness Act

In 2005, Congress enacted the Class Action Fairness Act (CAFA).[97] CAFA permits removal to federal court of a case filed in state court if the case is a class action with more than 100 class members, in which the matter in controversy exceeds $5 million and in which any member of a class of plaintiffs is a citizen of a State different from any defendant. A "class action" is defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure (FRCP) or similar State statute or rule of judicial procedure authorizing an action to be brought by one or

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92 551 U.S. 877 (2007).

93 S.B. 239, 426th Gen. Assembly, Reg. Sess. (Md. 2009); H.B. 657, 426th Gen. Assembly (Md. 2009), codified at Md. Code Ann. Com Law § 11-204(a)(1).

94 Cal. Bus. & Prof. Code § 16720(b); *see also, e.g.,* Ala. Code § 8-10-1; Conn. Gen. Stat. § 35-28(A); Minn. Stat. § 325d.53, Subdiv. 1(1)(a); Mo. Rev. Stat. § 416.031; Mont. Code Ann. § 30-14-205; N.H. Rev. Stat. Ann. § 356:2; Ohio Rev. Code Ann. §§ 1331.01(B)(4)-.02; S.C. Code Ann. § 39-3-10.

95 Consent Judgment, *California v. Derma-Quest Inc.*, No. RG10497526 (Cal. Super. Ct., Alameda Cty. (Mar. 3, 2010); *California v. Bioelements, Inc.*, No. 10011659 (Cal. Super. Ct. Riverside Cty, Jan. 11, 2011).

96 *O'Brien v. Leegin Creative Leather Products*, 277 P.3d 1062 (Kan. 2012).

97 28 U.S.C. § 1332(d).

more representative persons as a class action." Removal is also available for "mass actions," defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."

Defendants frequently sought to use CAFA to remove to federal court state court actions brought by state attorneys general under their state antitrust statutes. In 2014, the Supreme Court decided that CAFA does not apply to mass actions where the state is the sole named plaintiff.[98]

Both before and after the Supreme Court's decision in *AU Optronics,* removal of state attorney general actions under CAFA was denied for several reasons. First, several federal courts determined that the state antitrust statutes used by the attorney general are not "similar" to FRCP 23, which applies to federal class actions. In particular, the attorney general actions lack the numerosity, commonality and typicality requirements of a class action.[99] Second, the courts examined the identity of the plaintiffs in these cases, and determined that the state itself, rather than the citizens of the state who might eventually benefit from the restitution sought in these actions, was the real party in interest.[100] The argument that individuals are the real parties in interest was also rejected by a number of courts, one of which held, "simply because some individual citizens may recover restitution does not render those individuals the real parties in interest" and "the State has a strong public policy interest in pursuing restitution because "restitution will benefit the public welfare by penalizing past unlawful conduct and deterring future wrongdoing (citations omitted)."

Courtesy Chapter

98 *Mississippi ex rel. Hood v. AU Optronics*, ___ U.S. ___, 134 S. Ct. 736 (2014).

99 *State of New Hampshire v. Purdue Pharma, et al*, 2018 U.S. Dist. LEXIS 3492 (D.N.H. Jan. 9, 2018); *West Virginia ex rel. McGraw v. Bristol Myers Squibb Co.*, 2014 U.S. Dist. LEXIS 24026 (D. N.J. Feb. 26, 2014); *LG Display Co. Ltd. v. Madigan,* 665 F.3d 768 (7th Cir. 2011); *State ex rel. McGraw v. CVS Pharmacy Inc.*, 646 F.3d 169 (4th Cir. 2011) *cert. den.*, 132 S. Ct. 761; *Washington v. Chimei Innolux Corp.*, 659 F.3d 843 (9th Cir. 2011).

100 *Arizona ex rel. Horne v. Countrywide Financial Corp.*, 2011 U.S. Dist. LEXIS 35203 (D.Ariz. 2011).