

ANTITRUST TRADE AND PRACTICE

Expert Analysis

State of the States: Antitrust Enforcement Gets More Aggressive

Much of the antitrust community's attention over the last year has focused on the ongoing shifts at the federal agencies—by way of example, so far this year, our articles have covered the aggressive review of, and in some cases, departure from, the horizontal and vertical Merger Guidelines by the Federal Trade Commission (FTC) and Department of Justice (DOJ); the DOJ's criminal prosecution of no-poach agreements; and federal agencies' withdrawal of Trump-era patent policy, among others. But state antitrust enforcers have been active as well—and, like the federal agencies, they have had mixed results. State attorneys general play a unique role in U.S. antitrust enforcement. They can bring suits under their state's antitrust laws,



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which mostly—though not entirely—track the federal antitrust laws. State attorneys general can also bring suit under federal antitrust laws with *parens patrie* standing, a special type of standing that allows governments to bring suit on behalf of their residents. We review some of the biggest recent case developments from state attorneys general, as well as legislative updates on laws that may introduce new standards in evaluating antitrust cases.

Case Updates

No Disgorgement for Generic Drug Price Fixing. State attorneys general suffered a setback earlier this summer in one of the largest antitrust cases in the country, *In re Generic Pharmaceuticals Pricing*

Antitrust Litigation, 16-MD-2724 (E.D. Pa. June 7, 2022). The case, brought in federal court in 2016 by attorneys general from 47 states, plus D.C. and Puerto Rico, has tracked a DOJ investigation into price-fixing, bid-rigging, and customer-allocation schemes in the generic drug industry, which has so far led to charges against seven generic drug manufacturers and a settlement of nearly \$450 million. The states' antitrust case is even larger, alleging a massive conspiracy among twenty generic drug manufacturers to fix prices for several years. The state attorneys general sought disgorgement of the manufacturers' allegedly ill-gotten gains, as well as injunctive relief.

In a June 7 opinion, U.S. District Judge Cynthia M. Rufe granted the manufacturers' motion to dismiss the states' disgorgement claims while allowing the claims for injunctive relief to proceed. Judge Rufe based her decision on two grounds. First, under Third Cir-

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cuit and Supreme Court precedent, she held that disgorgement is not an available remedy under §16 of the Clayton Act because allowing disgorgement would “undercut, rather than further, the federal antitrust enforcement scheme.” *In re Generic Pharmaceuticals Pricing Antitrust Litigation* at 6, 16-MD-2724 (E.D. Pa. June 7, 2022) (memorandum opinion granting motion to dismiss in part), ECF No. 2128. Second, disgorgement would run afoul of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court’s seminal case on indirect purchaser remedies, by allowing the states as indirect purchasers to obtain duplicative remedies. Judge Rufe, however, allowed the states, in their capacity as *parens patrie*, to seek injunctive relief under the Clayton Act.

Judge Rufe’s decision is one of the first major decisions following the Supreme Court’s unanimous decision last year in *AMG Capital Management v. FTC*, 141 S. Ct. 1341, 1347 (2021), in which the court disallowed the FTC’s longstanding practice of recovering restitution damages and disgorgement under §13(b) of the FTC Act. Relying on *AMG Capital Management*, Judge Rufe held that, like §13(b) of the FTC Act, §16 of the Clayton Act does not authorize disgorgement as an antitrust remedy. Judge Rufe’s decision signals a retraction in pos-

sible government relief available against antitrust defendants.

D.C. Attorney General Pursues Monopolization Claims Against Amazon. The D.C. Attorney General also faced a setback this year in the District’s case against Amazon, *District of Columbia v. Amazon.com*, No. 2021 CA 001775 B (D.C. Super. Ct. Aug. 1, 2022). D.C. Attorney General Karl Racine sued Amazon in 2021, alleging that Amazon’s contracts with online sellers, which prevent them from selling their products for lower prices or better terms

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outside of Amazon, violated D.C.’s local antitrust laws. Racine alleged that Amazon used its dominant position to require these contract provisions, which have resulted in higher fees to Amazon and higher prices for consumers. The suit followed on the heels of the European Commission’s case against Amazon, opened in 2020, regarding similar business practices. *Amazon-Buy Box*, AT.40703 (Eur. Comm’n Nov. 10, 2020). Of note, the federal antitrust agencies have not yet brought any conduct litigation cases against Amazon, so this D.C. case contains

the most far-reaching theory of harm alleged against Amazon in the United States.

In March of this year, D.C. Superior Court Judge Hiram Puig-Lugo dismissed the case in an oral ruling, holding that the complaint contained only conclusory allegations that did not rise to the level of plausibility, and thus did not satisfy the pleading standard established by the Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The D.C. Attorney General moved for reconsideration, a motion which was supported by the DOJ. Judge Puig-Lugo denied the motion on August 2, holding again that the complaint did not meet the *Iqbal* plausibility standard. Judge Puig-Lugo held that the complaint failed to plead facts showing that Amazon was charging a supra-competitive price—a price above the competitive market level—for any of its products, or that suppliers had the market power to force online retailers such as Walmart, Costco, and Target to raise their retail prices.

Attorney General Racine has said that he will appeal the decision to the D.C. Court of Appeals, the highest court in the D.C. court system, but has not yet filed an appeal.

Illinois Attorney General Targets Temporary Staffing No-

Poach Agreements. Meanwhile, following DOJ's lead, the Illinois Attorney General has successfully challenged no-poach agreements against temporary staffing agencies. Illinois Attorney General Kwame Raoul sued three staffing agencies and their client, Colony Display, in Illinois state court in 2020, alleging that the agencies enforced no-poach agreements to prevent hiring from each other at Colony's facilities, and that they fixed wages for Colony at a below-market rate. The agencies moved to dismiss the state's complaint on the grounds that Illinois's antitrust law, which contains an exclusion for employees' labor services, consequently shields staffing agencies from antitrust liability. The trial court denied the motion to dismiss. On June 3, 2022, an Illinois Appellate Court panel, in an interlocutory appeal, held that the exclusion did not allow the staffing agencies to escape liability. Instead, the exclusion applies only to individual workers. The panel also held that the state could use the stronger per se standard for antitrust conspiracy, so long as the conduct alleged included an agreement between competitors. The parties had argued that the per se standard should not apply because the alleged agreement included a vertical customer in Colony.

In May, Attorney General Raoul filed suit against another group of

temporary staffing agencies for no-poach agreements. Illinois is just the latest in a list of federal and state efforts to crack down on no-poach agreements for workers, including the DOJ's recent criminal no-poach prosecutions and the Washington attorney general's no-poach initiative targeting franchises. It seems

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likely that more states will closely scrutinize no-poach agreements as this movement continues.

Legislative Updates

New York Law Passes Senate, But Not Assembly. For the second time in two years, the New York State Senate passed the "Twenty-First Century Anti-Trust Act," which would have enacted sweeping changes to the state's antitrust laws. The bill would have established a new "abuse of dominance" standard for anticompetitive conduct, which would have expanded the definition of monopolization to include "conduct that tends to foreclose or limit the ability or incentive of . . . actual or potential competitors to

compete," "leveraging a dominant position in one market to limit competition in a separate market," some types of refusals to deal, and restraints in labor markets. The standard is modeled after the European Commission's abuse of dominance standard, which no American jurisdictions have yet adopted.

New York's antitrust bill would also have had effects for merger review and private antitrust litigation. On merger review, bill would have required any company "conducting business" that is required to file pre-merger notification under the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) to provide its HSR documents to the New York attorney general. And on private litigation, the bill would have allowed private litigants—as well as the New York attorney general—to recover fees for expert witnesses and consultants. In sum, the bill would have allowed for much more aggressive antitrust suits against companies in dominant market positions and provided greater financial incentives for litigants to bring those suits. However, the bill is unlikely to become law—at least for the time being. Since its passage in the New York Senate in May, it has not been taken up by the New York General Assembly. The 2021 version of this bill met a similar fate, and the Assembly does not seem

to have much appetite to pursue it further. Still, the continued support for expanded antitrust enforcement from one of the most powerful legislative chambers in the country may encourage other states to look to expand their antitrust laws.

Restrictive Covenant Legislation. Two states' legislatures have delved into legislation regarding employers' use of restrictive covenants for employees. First, Colorado passed House Bill 22-1317 on June 8, 2022, a new law that places several limits on how restrictive covenants can be used. Of note, the new law prohibits nearly all restrictive covenants for employees earning less than \$101,250 a year. The law also narrows the scope of protectable interests when considering when a restrictive covenant is enforceable; under the new law, the restrictive covenant must be no broader than necessary to protect trade secrets. Finally, the law introduces criminal penalties for employers who use intimidation to restrict employees from moving to a competitor.

Second, the New Jersey legislature is considering Assembly Bill (AB) 3715, a bill that would place several limits on restrictive covenants and also prohibit no-poach agreements. Of note, the bill would limit restrictive covenants to a one-year time frame and prohibit restrictive covenants for several

categories of employees, including interns, seasonal employees, low-wage workers, and employees terminated without a determination of misconduct. The bill would also require employers to pay employees 100% of the employee's wages and benefits while the restrictive covenant is enforced. Finally, the bill would invalidate no-poach agreements. AB 3715 has passed out of committee in the General Assembly and has been introduced in the Senate, but neither house has passed the bill.

These state efforts to limit restrictive covenants and no-poach agreements show states' willingness to further pursue labor antitrust violations, giving state enforcers new tools to pursue antitrust violations that affect workers. More states can be expected to introduce and pass similar legislation in the coming months and years.

Federal Legislation Affecting State Enforcement. The U.S. Senate passed the State Antitrust Enforcement Venue Act of 2021 in June of this year by unanimous vote. The bill would exempt state attorneys general's antitrust suits from multidistrict litigation (MDL) rules. The proposed exemption, which would mirror federal antitrust agencies' MDL exemption, would allow state attorneys general to have more control over the courts in which they litigate. A companion bill has

been introduced in the House of Representatives, but it is still in committee.

Conclusion

In the last few months, we have seen state antitrust enforcers struggle in their pursuit of more aggressive antitrust policies and practices. State attorneys general have met resistance in both in federal and state courts, while in the legislative arena, the largest push for expanded antitrust liability stalled again in New York. But states' attempts to pursue aggressive antitrust enforcement shows that, in many states, politicians and civil servants are eager to push through major expansions and reforms of their jurisdiction's antitrust laws. They may find more avenues for success in the coming years, and companies should remain aware of potential changes.