Antitrust, Vol. 39, No. 2, Spring 2025.

EDITOR'S NOTE

The States of Antitrust

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RAY CHARLES (THE COMPOSER, NOT the blues singer) may be little remembered today, but if you have children (or were yourself a child sometime after the late 1960s or early 1970s), you have probably either sung or heard one of his works: "Fifty Nifty United States."[1] Our magazine expresses no view as to which (if any) of the fifty states are, in fact, nifty (other than the definitely nifty states of Nebraska, where I was born, and Minnesota, my home for forty years). But as our cover photo of some of the stars in the U.S. flag's blue field of stars suggests, we are keenly aware of the fact of state enforcement in antitrust.

This issue begins with a panel discussion moderated by Antitrust editorial board Kellie Lerner and featuring panelists from three state attorneys general offices: Utah's David Sonnenreich, Minnesota's Elizabeth Odette (who is also an Antitrust editorial board member and chair of the National Association of Attorneys General's Antitrust Taskforce) and Washington D.C.'s Adam Gitlin.[2] They are joined by Lauren Weinstein, a private attorney who has represented states in antitrust litigation. The panel discusses how potential antitrust claims come to a state AG's attention, how a private law firm might pitch a potential case to a state AG, the role of the RFP process, the compensation arrangements for private firms representing states in antitrust or consumer protection cases (and how those arrangements can vary by state, even within a single multi-state case), the differing roles that private firms can play, and much more.

Erik Stock, a former Chief of the New York Attorney General Office's Antitrust Bureau, discusses the role that state AGs play in enforcing antitrust laws. He recognizes that some have questioned the value of state enforcement, but he asks an important question: *if* states are going to enforce antitrust laws, then *how* should states do so? He argues that states seeking to promote antitrust reform on fundamentally national issues should do so by utilizing their antitrust enforcement tools under federal law, not state law.

Next we turn to a discussion of state and federal antitrust enforcement in procurement law. Sandra Talbott (Deputy Director of the Antitrust Division's Procurement Collusion Strike Force) and Derek Whiddon (Assistant Attorney General in the Ohio AG's Antitrust Section) begin with a rather shocking example of blatant bid-rigging by suppliers to the California Department of Transportation. Having grabbed our attention, they take us through the efforts that states and the federal government have made in recent years to prosecute bid rigging cases, under both antitrust law and other criminal statutes. They also discuss how procurement collusion cases come to their education and how procurement officers can spot red flags for collusion.

Our next two articles are not, strictly speaking, part of this issue's theme of state antitrust enforcement—although they do both involve different kinds of *state*ments. Former Assistant Attorney General Makan Delrahim and former Acting Assistant Attorney General (and Antitrust Section Chair-Elect) Renata Hesse discuss "statements of interest" that the Antitrust Division is authorized by statute to file in litigation to which the U.S. Government is not a party. The Antitrust Division has made increasing use of these statements in the last two administrations. Delrahim and Hesse describe the process through which the Division identifies cases and decides whether to file, as well as the reasons to file (or not file).

Brian Clark, Kyle Pozan, and Susan Macpherson then discuss a different kind of statement—interim statements during trial. These are not new: in my first antitrust trial in the 1990s, Judge Paul Magnuson gave each side a total of three hours to use for closing argument or at any other time during the trial. The authors bring to bear their experience as trial attorneys (Clark and Pozan) and jury consultant (Macpherson) on the value of using interim statements during trial—better juror comprehension of the evidence and avoidance of jury fatigue, for example. They also discuss some of the practical issues that courts and trial attorneys need to address if interim statements are permitted.

Our Fall issue featured Katherine White's article on the implications of *Loper Bright*[3] for the FTC's rulemaking and enforcement activity in consumer protection matters. This issue follows up on that topic with former FTC Commissioner and Acting Chair Maureen Ohlhausen's article on *Loper Bright*'s effect on the FTC's rulemaking and enforcement activity in competition matters. She observes that there have been two trends at odd with each other—the FTC's increasingly expansive view of its rulemaking authority for unfair methods of competition based on Section 6(g) of the FTC Act[4] and the U.S. Supreme Court's increasingly deep skepticism towards agency assertion of broad powers not explicitly granted by Congress.

Next come two articles dealing with interesting issues in merger enforcement. Rebecca Kirk Fair, Rebecca Scott, and Kristof Zetenyi discuss the nature and economics of digital platforms, including direct and indirect network effects, economies of scale and scope, and the significance of data collection. They then explore how these and other

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issues played out in real-world examples of digital-platform acquisitions. Jeffrey Oliver, Rachel Rasp, and Sarah Zhang discuss the concept of "captive capacity" (where a vertically integrated firm manufactures an input for its own use in a downstream product). This is a critical issue in determining market share, both in merger cases and in any other antitrust case where market share matters. They suggest that the guidance in the FTC and DOJ's merger guidelines has become increasingly opaque since the 1982/1984 versions of the guidelines, and they describe both how the courts have addressed the issue and the arguably inconsistent positions that the FTC and DOJ have taken in litigation over the years.

In our last two articles, James T. McClave and Antitrust editorial board member Jamie McClave describe a two-step econometric method that they argue can resolve the class-wide question of both damages and common impact in "one stroke"; and Andre Geverola and Javier Ortega Alvarez discuss antitrust risk and enforcement when competitors collaborate on environmental, social, and governance initiatives.

Finally, returning to our state enforcement theme, I would be remiss to close without noting another contribution resulting from state AG antitrust enforcement. In addition to editorial board member Elizabeth Odette of the Minnesota AG's office, our board includes two alumni of the Texas AG's office—board member Eric Lipman and executive editor Maggie Sharp. And no, the Texas AG cannot have them back! ■

[1] *See generally* L.V. Anderson, *"Fifty Nifty United States"—How a 1960s novelty song became one of the greatest mnemonic devices of all time*, Slate (Nov. 30, 2015), https://slate.com/culture/2015/11/the-history-of-the-novelty-song-and-mnemonic-device-fifty-nifty-united-states.html. Our readers outside the U.S. might prefer "Yakko's World" (from the Animaniacs cartoon series), a song that lists all (almost) the countries of the world. For background, see https://animaniacs.fandom.com/wiki/Yakko%27s_World_(song).

[2] Washington D.C., of course, is not a state, but its attorney general's office serves a similar purpose for the District.

[3] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[4] 15 U.S.C§ 46(g).