CHAPTER I

CONTEXT OF STATE ANTITRUST ENFORCEMENT

A. Introduction and Overview of State Antitrust Enforcement

State antitrust enforcement officials continue to be very active in investigating, litigating and resolving civil and criminal antitrust matters. The rising tide of antitrust enforcement by state attorneys general affects all industries and jurisdictions and has had a significant impact on the development of U.S. antitrust law. The states' efforts in this area have also sought to improve consumer welfare by increasing competition, with the result being higher quality products and services, more choice, and greater innovation. State antitrust enforcement is not without its challenges—the interplay of state and federal antitrust laws is complex, sometimes involving a multiplicity of actors, laws, and jurisdictions.[1] The Section of Antitrust Law (Section) has prepared this Third Edition of the State Antitrust Enforcement Handbook (Handbook) to analyze these developments and serve as valuable resource for state and federal antitrust enforcers and private practice attorneys.

In particular, the Handbook focuses on how state attorneys general exercise their authority to investigate antitrust concerns and to secure remedies for antitrust violations. Whether one views antitrust

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1. For a state-by-state analysis of antitrust laws, see ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES (5th ed. 2014) [hereinafter ABA STATE ANTITRUST TREATISE]. In this three-volume work, practitioners, government attorneys, and academics cite and analyze the statutes and case law from each American jurisdiction, provide a historical overview of state enforcement and private antitrust litigation under state statutes, and highlight differences between state and federal law. The treatise also describes the role of state attorneys general in enforcing federal antitrust laws on behalf of the states and their entities and as parens patriae on behalf of natural person consumers pursuant to § 4C of the Clayton Act, 15 U.S.C. § 15c. Unlike the *ABA State Antitrust Treatise*, this *ABA State Antitrust Enforcement Handbook* is organized by substantive topic, rather than by individual state. Moreover, this book focuses primarily on actual practices of state attorneys general, rather than on what they are legally enabled to do.

enforcement by state attorneys general as "an important part of the enforcement network,"[2] "free rid[ing],"[3] achieving "rough justice,"[4] or a force for "imprecision, duplication and costs,"[5] attorneys general are a significant independent force, with independent decision-making authority, and they must be reckoned with in many antitrust investigations.

The chapters that follow focus on specific aspects of attorney general authority that can be divided into four primary areas: (I) legal authority for state antitrust enforcement (Chapters 1 and 2); (II) process related to state antitrust enforcement (Chapters 3, 4, and 5); (III) substantive areas where states commonly enforce antitrust law (Chapters 6 and 7); and (IV) criminal enforcement (Chapter 8).

The Section has made every effort to ensure that the information contained in this Handbook is accurate and current; however, in a project of this size and complexity, it is always possible that errors or omissions have occurred, or that after publication deadlines the law has been superseded by statutory or case law developments. Hence, this Handbook should be used as a reference and starting point for an analysis relating to state antitrust enforcement issues.

While this Handbook would not be possible without the valuable comments and contributions received by various attorneys in the offices of state attorneys general, the views set forth in the following chapters should not be taken to be an endorsement of the contents of the publication nor a reflection of the official or unofficial views of any state attorney general.

States have significant rights under federal and state antitrust law. These rights are exercised by state attorneys general, who fulfill their enforcement responsibilities within a federal system in which each state

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2. Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1041 (2001).
3. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001).
4. Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, *in* ANTITRUST LAW IN NEW YORK STATE 1, 1 (Robert L. Hubbard & Pamela Jones Harbour eds., 2d ed. 2002).
5. Michael L. Denger & D. Jarrett Arp, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, ANTITRUST, Summer 2001, at 41, 45.

is sovereign.[6] Each state has the right to make enforcement decisions that differ from those of other state and federal enforcers.[7] Moreover, state enforcers can rely on state antitrust law, which generally is not preempted by federal antitrust law even when federal antitrust law differs from state antitrust law. State enforcers can also assert state law claims as supplemental claims in federal court.[8]

State attorneys general have broad authority to address competition concerns that affect three constituencies.

First, as chief legal officers of their states, attorneys general often pursue proprietary claims—that is, claims as direct purchasers of goods or services—on behalf of state agencies, divisions, and programs.[9] Proprietary claims constitute a significant part of state enforcement.[10]

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6. State attorneys general continue to recognize the value of collective activity which is facilitated by the National Association of Attorneys General Multistate Task Force (NAAG Multistate Task Force) which has 56 members, including officials from fifty states, one district, two commonwealths, and three territories. The NAAG Multistate Task Force has helped to coordinate multistate joint litigations, merger reviews, and several projects that help direct the states' approach to antitrust law and policy. The antitrust law and practice in each of these fifty-six jurisdictions are detailed in the ABA STATE ANTITRUST TREATISE, *supra* note 1.

7. Different enforcement decisions can be made for reasons other than the merits of an antitrust claim, including when one enforcer decides not to take action in light of an action already being taken by another enforcer. Enforcement decisions may vary between jurisdictions, such as in *California v. American Stores Co.*, 495 U.S. 271 (1990), in which California secured divestitures beyond those secured by the Federal Trade Commission (FTC), and *Bon-Ton Stores v. May Department Stores*, 881 F. Supp. 860 (W.D.N.Y. 1994), in which New York secured a preliminary injunction even though the FTC had not issued a second request. Having multiple antitrust enforcers was not an "afterthought . . . [but rather] an integral part of the congressional plan for protecting competition." *Am. Stores*, 495 U.S. at 284.

8. *See* California v. ARC Am. Corp., 490 U.S. 93, 103 (1989).

9. *See, e.g.*, N.Y. EXEC. LAW § 63.

10. *See, e.g.*, Complaint, Florida v. Hitachi-LG Data Storage, Inc., No. 3:13-cv-01877 (N.D. Cal. April 24, 2013); Complaint, Washington v. AU Optronics Corp., No. 10-2-29164-4 (King Cty. Super. Ct. Aug. 11, 2010); California v. Infineon Techs. AG, 531 F. Supp. 2d 1124 (N.D. Cal. 2007); Texas v. Organon USA Inc., No. Civ. 02-2007 FSH, 2005 WL 2230314 (D.N.J. 2005); Ohio v. Bristol-Myers Squibb Co., No. 1:02-CV-

Second, state attorneys general may represent consumers, pursuing injunctive relief and damages on their behalf under both federal and state laws.[11] Where consumers (including state agencies) are "indirect" purchasers who are unable to recover damages under federal law because of the Supreme Court's holding in *Illinois Brick Co. v. Illinois*,[12] attorneys general in a number of states can pursue claims on these consumers' behalf, primarily under state laws.[13]

Third, states have broad authority to represent the public interest. State law often gives state attorneys general criminal enforcement authority[14] and broad investigatory powers.[15] Moreover, in addition to the typical right to injunctive relief under Section 16 of the Clayton Act,[16] state attorneys general can act as parens patriae to prevent actual or threatened harm to a state's general economy.[17] States can also file amicus curiae briefs in the federal appellate courts without the consent of

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01080(EGS), 2003 WL 21105104 (D.D.C. 2003); Complaint, New York v. Aventis, S.A., No. 2:01-CV-71835 (E.D. Mich. May 15, 2001); Complaint, Alabama v. Bristol-Myers Squibb Co., No. 01-CV-11401 (S.D.N.Y. Dec. 12, 2001). The settlements in these cases are available at www.abanet.org/antitrust/committees/state-antitrust/settlements.html.

11. *See, e.g.*, 15 U.S.C. §§ 15c–15h.
12. 431 U.S. 720 (1977).
13. For example, litigation brought by state attorneys general against the pharmaceutical industry alleging unlawful abuse of the Hatch-Waxman Act provisions was based in large part on state-law claims to recover money for consumers. *See, e.g.*, Order and Final Judgment Approving Settlement, *In re* DDAVP Antitrust Litig., No. 05-cv-2237 (S.D.N.Y. Nov. 28, 2011); Complaint, Florida v. Abbott Labs., No. 1:08-cv-00155 (D. Del. Mar. 18, 2008); Amended Complaint, Colorado v. Warner Chilcott Corp., No. 05-cv-02182 (D.D.C. Dec. 2, 2005); Complaint, Alabama v. Bristol Myers Squibb Co., No. 01-cv-11201 (S.D.N.Y. filed Dec. 6, 2001); Complaint, Ohio v. Bristol Myers Squibb Co., No. 02-cv-1080 (D.D.C. June 4, 2002); HIP Health Plan of Fla. v. Schering-Plough Corp., No. 01-cv-1652 (D.N.J. Apr. 4, 2001).
14. See the ABA STATE ANTITRUST TREATISE, *supra* note 1, for a discussion of criminal authority in each state.
15. See the ABA STATE ANTITRUST TREATISE, *supra* note 1, for the relevant statutes in each state.
16. 15 U.S.C. § 26.
17. *Id.* §§ 15c, 26. *See, e.g.*, Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736 (2014).

the parties or leave of court, and may collaborate with federal enforcers and private counsel in investigating and litigating violations of the antitrust laws.[18]

B. History of State Antitrust Enforcement

The historical forces that led to the passage of the Sherman Act also stimulated the development of state antitrust laws.[19] By 1890, when the Sherman Act was passed, at least 26 states already had some form of antitrust prohibition.[20] Among the purposes Senator Sherman cited for his bill was "supplement[ation of] the enforcement of" these state laws.[21] Many fundamental concepts of federal antitrust law, such as the per se rule against price fixing, were based at least in part on principles developed by state courts that were construing state antitrust laws.[22]

The 1970s were a very active period for state antitrust enforcement. First, the National Conference of Commissioners on Uniform State Laws adopted a model state antitrust statute in 1973.[23] Although the model act

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18. SUP. CT. R. 37.4; FED. R. APP. P. 29(a). A common subject of states' amicus briefs is the state action exemption from antitrust liability. *See, e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992) (noting that Wisconsin, joined by thirty-five other states, had filed an amicus brief that argued against a broad interpretation of the state action doctrine). In recent years, states have submitted amicus briefs regarding their parens patriae authority. *See, e.g.,* Brief of Amici Curiae States, *AU Optronics Corp.*, 134 S. Ct. 736 (No. 12-1036); Brief of Amicus Curiae States, Saint Alphonsus Med. Ctr. – Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015) (No. 14-35173).
19. For a more thorough discussion of the development of state law, see ABA SECTION OF ANTITRUST LAW, MONOGRAPH NO. 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW (1988).
20. *Id.* at 3.
21. 21 CONG. REC. 2457 (1890).
22. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 400 & n.1 (1927) (holding that price fixing among competitors is illegal per se and relying on prior state case law to same effect).
23. UNIFORM STATE ANTITRUST ACT, *reprinted in* 5 LOUIS ALTMAN ET AL., CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 5:20 (4th ed. 2004) (original model act adopted in 1973). Though originally drafted in 1973, sections 6 (attorney general investigation powers), 7 (state civil penalties and injunctions), and 8 (private damages and injunctions) of the uniform act were amended in 1979. The model act provides for civil penalties of $50,000 for each violation of its § 7, but

was not widely adopted, it might have been an impetus for state legislatures to review their individual statutes with an eye toward modernization. Follow-on actions on behalf of states and public entities, brought in the wake of federal criminal and civil actions, became the norm by the early 1970s.[24] Then, in 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act),[25] authorizing state attorneys general, as a matter of federal law, to sue on behalf of their citizens as parens patriae.[26]

Congress expected parens patriae authority to foster claims in consumer industries when private actions, even class actions, might not be practical and efficient. Congress also expected that state attorneys general would use parens patriae authority to seek damages for consumers who were harmed in small amounts by statewide or nationwide conspiracies.[27] *Illinois Brick*, however, virtually eliminated

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does not contain criminal penalties. The model act has been adopted in Arizona (1974), Delaware (1979), Michigan (1985), and North Dakota (1987).

24. *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971); *In re* Chicken Antitrust Litig., 560 F. Supp. 943 (N.D. Ga. 1979). In the following decades, state civil antitrust actions followed federal convictions in the highway construction industry nationwide.
25. Pub. L. No. 94-435, 90 Stat. 1383.
26. 15 U.S.C. § 15c provides, in part:

    > (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, in any district court of the United States having jurisdiction of the defendant, 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 sections 1 to 7 of this title.
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    > (2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

27. The federal parens patriae provision built on the argument that the state attorney general is the natural and best representative of a state's consumers because the attorney general has statewide authority and is closer to the interests of the people than are either federal officials or class counsel. *See, e.g.*, *Chas. Pfizer*, 440 F.2d at 1089; Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in*

federal damages lawsuits by and on behalf of consumers who suffer damages indirectly through a passed-on overcharge.[28] In the years since *Illinois Brick*, state enforcement officials have recovered on behalf of indirect purchasers by invoking parens patriae authority under state law, rather than federal law.[29]

In addition to the HSR Act, as part of the Crime Control Act of 1976,[30] Congress authorized $30 million in grants to state attorneys general as "seed money" to establish antitrust enforcement units within their offices and to enforce the antitrust laws on behalf of their states and citizens.[31]

Parens Patriae Antitrust Actions Brought by State Attorneys General, 68 FORDHAM L. REV. 361, 376–79 (1999).

28. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), prohibited the defendants from arguing that the plaintiffs were not injured because they had passed on any overcharge to purchasers further down the distribution chain. *Id.* at 491–94. The Court in *Illinois Brick* extended that rule to hold that purchasers further down in the distribution chain could not recover damages, with only limited exceptions, such as when there were preexisting cost-plus contracts or assignments of the antitrust claim. 431 U.S. at 730–33.

29. *See infra*, Ch. II, Part A.2.c.

30. Pub. L. No. 94-503, § 116, 90 Stat. 2407, 2416 (formerly codified at 42 U.S.C. § 3739(i) but repealed in 1979).

31. *See* Thomas Greene et al., *State Antitrust Law and Enforcement*, *in* PRACTISING LAW INST., 33RD ANNUAL ANTITRUST LAW INSTITUTE (1992); Thomas A. Papageorge, *The Future of Federal-State Antitrust Enforcement: A View from a State Prosecutor*, *in* WESTERN ANTITRUST LAW CONFERENCE (ALI-ABA Continuing Legal Ed. No. C407, May 11, 1989); Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 251 (1999) (describing "a counter-revolution [that] was well underway at the state enforcement level" when, "in the mid-1970s, antitrust staffs of state attorneys-general organized . . . under the umbrella of the National Association of Attorneys-General—known as 'NAAG'"); David J. Van Susteren, Comment, *The Texas Free Enterprise and Antitrust Act—Analysis and Implications*, 22 HOUS. L. REV. 1181, 1184–87 (1985). Every state's attorney general except Georgia's accepted the 1976 congressional grants and used them to begin or expand enforcement of state and federal laws on behalf of states, political subdivisions, and consumers. *See* ABA STATE ANTITRUST TREATISE, *supra* note 1; ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 188 (2007) (noting that the 1976 congressional

Much state antitrust enforcement is coordinated with other enforcers, usually other states. Building on multistate activities in the 1970s and early 1980s, in 1983 the states created the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG Multistate Task Force) to coordinate the exercise of the powers and authority of state attorneys general in antitrust matters. Through NAAG's Multistate Task Force, the states have issued a series of resolutions, guidelines, protocols, and a compact, all of which address the manner in which states typically analyze competitive concerns. These documents include the *Vertical Restraint Guidelines*, *Protocol for Coordination in Merger Investigations*, *Horizontal Merger Guidelines*, *Voluntary Pre-Merger Disclosure Compact*, *Model Healthcare Conversion Guidelines*, *Protocol for Consideration of Whether to Participate as Amicus Curiae*, and the *State-Federal Protocol for Increased State Prosecution of Criminal Antitrust Offenses.*[32]

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grants "enabled twenty-five states to establish antitrust enforcement units for the first time").

32. Information about the NAAG Multistate Task Force, including copies of the documents issued by NAAG, is available at www.naag.org/issues/issue-antitrust.php.