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State Attorneys General Jolt Antitrust Enforcement Cadwalader Expands AG Practice

July 23, 2019

Over the past year, State Attorneys General have stepped into what they describe as a void of antitrust enforcement at the federal level. AGs have commenced investigations and brought antitrust actions across industry segments, including financial services, healthcare, telecommunications, technology and others. The substance of the actions cover the waterfront of antitrust including price-fixing, merger enforcement and unfair trade practices.

In this Clients & Friends Memo, we survey some of these high profile recent AG actions.

Cadwalader's recently launched State Attorneys General practice augments its existing antitrust and white collar investigations and litigation capabilities and allows us to better serve and advocate for our clients who do business within the United States. Led by Douglas Gansler, the former AG of Maryland and past president of the National Association of Attorneys General, this team draws on decades of experience and relationships to assist clients across a range of industries in navigating AG inquiries, including defending them in litigation, regulatory investigations, and enforcement actions.

Telecommunications



New York Attorney General James Moves to Block T-Mobile and Sprint Megamerger (June 11, 2019)

New York Attorney General Letitia James and California Attorney General Xavier Becerra are leading a coalition of 14 state attorneys general in challenging a merger between T-Mobile and Sprint, respectively the third and fourth largest mobile network operators in the United States.¹ Significantly, neither the Department of Justice (DOJ) nor the Federal Communications Commission (FCC) had completed its review of the proposed merger before the states filed their action. In their complaint, the state attorneys general argued that the merger would result in higher prices for low and moderate income consumers, and that promised improvements in infrastructure and service

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might not be delivered for many years in the future and might provide little benefit to consumers in rural areas. The lawsuit has already proved to be a roadblock to the merger. T-Mobile and Sprint have agreed not to consummate the merger until after the trial, currently scheduled for October 7th 2019.

Healthcare



Attorney General Tong Leads 44-State Coalition in Antitrust Lawsuit Against Teva Pharmaceuticals, 19 Other Generic Drug Manufacturers, 15 Individuals in Conspiracy to Fix Prices and Allocate Markets for More Than 100 Different Generic Drugs (May 12, 2019)

Connecticut Attorney General William Tong led a coalition of 44 states in filing a complaint against Teva, Sandoz, Mylan, Pfizer and 16 other generic drug manufacturers alleging that these corporate defendants engaged in a campaign to conspire with each other to fix prices for more than 100 different generic drugs.² The lawsuit named 15 individual defendants in addition to the 20 corporate defendants. This is the second suit to be filed in the investigation, the first being filed in 2016 the Eastern District of Pennsylvania.3

Antitrust Challenge and Settlement to the UnitedHealth Group and DaVita Merger Affecting Healthcare for Seniors in the Colorado Springs Area (June 18, 2019)

On June 19, 2019, the State of Colorado filed a complaint, challenging the acquisition of DaVita Medical Group, by Optum, a subsidiary of United Health Group. 4 United Health Group is the largest provider of Medicare Advantage plans in the Colorado Springs region, and DaVita Medical Group owns two large physician groups in the area. The suit was filed just hours before the merger was approved by the Federal Trade Commission. The Colorado Attorney General's Office proceeded on its own without concurrent action from federal actors or other states. According to Attorney General Weiser's office, the FTC had investigated the merger, but declined to seek any remedies. Along with its suit, Attorney General Phil Weiser filed a consent judgment that was agreed to by the merging parties.⁵ Among the remedies provided in the consent judgment, United Health Group agreed to lift an exclusive contract with an area health care provider network, Centura Health and DaVita agreed to extend its agreement with Humana, a main competitor of United Health Group.

Attorney General Becerra Secures Early Victory in Lawsuit Against Sutter Health (March 15, 2019)

On March 29th, 2018, the State of California filed an antitrust action against Sutter Health, one of the largest health systems in Northern California, alleging that Sutter Health included anticompetitive terms in its agreements with vendors.⁶ The allegedly anticompetitive terms included

terms that require vendors to accept all of Sutter's sites-regardless of cost or attractiveness-to have access to any of them, terms that prohibit vendors from incentivizing patients to select providers on the basis of cost, and terms that prohibit vendors from informing patients about the cost of services at Sutter's facilities before the provision of those services. The action follows a six year investigation into the Northern California health system.

Attorney General Josh Stein Announces Settlement with Atrium over Healthcare Pricing, (November 15, 2018)

In 2016, the Department of Justice and the State of North Carolina jointly sued Atrium Health, North Carolina's largest health care system, challenging provisions of Atrium's contracts with insurers that allegedly restricted health insurers from encouraging consumers to choose health care providers that offered them the best value. In November of 2018, the Department of Justice and Attorney General Josh Stein announced a settlement agreement in the action.8 Among its terms, the settlement prohibits Atrium from entering into contracts that would prevent insurers from disclosing healthcare prices to consumers, that would punish insurers for providing price transparency to consumers or that would restrict insurers from offering consumers financial incentives to using lower cost providers.

Japanese Pharmaceutical Company Agrees to 20 Year Settlement to Open Competition for Lidoderm, (February 01, 2018)

A coalition of 23 state attorneys general, led by California, reached a settlement agreement with Teikoku Seiyaku and Teikoku Pharma USA on a 20 year injunction to prohibit anticompetitive policies.9 Teikoku allegedly entered into agreements with competitors not to compete in the market for Lidoderm, also sold as lidocaine 5% patches, in violation of the Sherman Act. 10





A Coalition of 43 State Attorneys General Advise FTC on Consumer Protection on **Digital Platforms** (June 12, 2019)

The attorneys general of Texas and lowa led a coalition of 43 attorneys general in submitting ideas for merger enforcement in technology markets.¹¹ The proposals were submitted in response to the FTC's requests for public comments as part of its public hearings on Competition and Consumer Protection in the 21st Century. The coalition proposed ideas for increased merger enforcement.

No-Poach Agreements



AG Racine Leads Coalition of 18 AGs Urging Regulators to Protect Workers from (Allegedly) Harmful Anticompetitive Labor Practices (July 16, 2019)

A coalition of 18 attorneys general, led by the District of Columbia, submitted a comment letter to the Federal Trade Commission calling for greater consideration of labor issues in the enforcement of antitrust laws. The letter addressed issues developing in no-poach agreements and ways in which State enforcers could, independently and in collaboration with federal actors, include labor considerations in merger reviews.¹²

AGs Ferguson and Healey Lead Multistate Investigation of Worker No-Poach **Agreements at National Fast Food Franchises**, (July 09, 2018)

Washington State Attorney General Robert Ferguson and Massachusetts Attorney General Maura Healy led a coalition of 14 attorneys general in an investigation into no-poach agreements that allegedly restricted the ability of fast food workers to seek employment from competing restaurant chains.¹³ The investigation follows joint guidance from the Department of Justice and the Federal Trade Commission which took the position that naked agreements between companies not to compete for each other's employees are per se illegal under the antitrust laws. 14 In March, four of the chains involved in the investigation—Dunkin' Donuts, Arby's, Five Guys and Little Caesar reached settlements in the multi-state investigation, agreeing to drop no-poach provisions in their employment agreements.15

State Trade Practice Law



D.C's AG Sues Marriott

The District of Columbia through its newly-established office of Attorney General filed suit against Marriott International, Inc. for violations of the District of Columbia's Consumer Protection Procedures Act. The complaint alleged that Marriot engaged in price deception through the unlawful trade practice of "drip pricing" whereby a portion of a hotel room's daily rate is initially hidden from consumers. The hidden portion of the rate is often called a "resort fee," amenity fee" or destination fee." The complaint sought to enjoin Marriott from continuing to engage in the allegedly deceptive conduct and civil penalties. 16

Attorney General Stein Statement on Chesapeake Energy Ruling (March 15, 2019)

On March 15, 2019, an en banc panel of Pennsylvania's Commonwealth Court allowed the Commonwealth of Pennsylvania to pursue claims alleging violations of antitrust law under

Pennsylvania's Unfair Trade Practices and Consumer Protection Law.¹⁷ The Commonwealth Court held that some, but not all common law antitrust violations may be actionable under Pennsylvania's UTPCPL. The complaint was originally filed by the Pennsylvania Office of the Attorney General and alleged in part that Chesapeake Energy Corporation and its affiliates and Anadarko Petroleum Corporation and its affiliates committed antitrust violations in their efforts to secure subsurface mineral rights leases from private landowners.

Financial Services (\$)



New York AG Leads Settlements With Major Banks For Manipulating Interest Rate Benchmarks, (June 15, 2018)

A coalition of more than 40 states opened an investigation into the manipulation of the LIBOR benchmark interest rate. In the investigation, led by New York, the states claimed that financial institutions unjustly benefited from misrepresenting the integrity of the LIBOR benchmark interest rate.¹⁸ Barclays, UBS, Citibank and Deutsche Bank are among the major institutions to have reached settlements with the states as a result of the investigation. Citibank and UBS respectively entered into \$100 million and \$68 million settlements.¹⁹

Energy 🕺



Following AG Investigation, Marathon Petroleum corp. Agrees to Divest 5 Upstate Gas Stations to Preserve Local Competition, (October 24, 2018)

The Federal Trade Commission worked closely with the New York Attorney General's office in an investigation into the acquisition of Express Mart, a Syracuse based operator of retail fuel outlets by Marathon Petroleum Corporation, an Ohio based energy company.²⁰ As a condition to the acquisition, Marathon was required to divest its retail fuel assets to Sunoco in five local markets in New York state. According to the complaint, which was filed on October 23, 2018, without the divestures, the acquisition would have increased Marathon's market power in those five markets, leading to the likelihood of increased prices for consumers.

Price-Fixing



Samsung to Pay \$29M for Alleged Price-fixing Scheme Affecting Millions of Washingtonians, (September 04, 2018)

On September 4, 2018, Samsung entered into a consent decree with the State of Washington, agreeing to pay \$29 million to resolve claims of price fixing in the market for cathode ray tubes, or CRTs, a technology most often used in television screens and monitors.²¹ The lawsuit claimed that

Samsung and seven other CRT manufacturers engaged in a 12-year long price fixing scheme that resulted in Washington consumers being overcharged for CRT televisions and computer monitors.²² The six other manufacturers paid a total of \$10.65 million to Washington.

The Attorneys General of Washington and Illinois Announce Process for Distribution of **LCD Screen Price Fixing Recovery**

In January of 2018, the state of Illinois reached a settlement and distribution agreement with manufacturers of LCD screens.²³ The state of Illinois, through its attorney general, originally filed a complaint in 2013 against manufacturers of LCD panels, alleging that they agreed to fix the prices of and limit the production of LCD panels throughout an eight-year period and charged unlawfully inflated prices for the LCD panels.²⁴ The state of Washington filed a similar suit against manufacturers of LCD screens in 2010.25

New York Busts Alleged Broome County Waste Management Cartel For Colluding To Rig Bids And Fix Prices, (April 09, 2018)

After an investigation commenced by the New York Attorney General's office, two New York trash collection firms²⁶, Bert Adams Disposal Inc. and Taylor Garbage Service Inc. were found to have engaged in collusive conduct in violation of New York's Donnelly Act, including agreeing to not solicit one another's existing customers, arranging bids, and exchanging information about rates. 27

New York Announces Indictment In Bid-Rigging Scheme, Charging Two Defendants With Colluding To Fix Construction Prices For Luxury Brooklyn Building, (March 29, 2018)

A New York grand jury indicted two individuals for violations of the Donnelly Act by allegedly participating in a bid rigging scheme during the construction of a luxury building in Brooklyn.²⁸



Miller asks court to strengthen conditions of Bayer-Monsanto agreement, (August 10, 2018)

Led by the State of California, the attorneys general of Oregon, California, Iowa, Massachusetts and Mississippi submitted comments in response to a proposed final judgment filed in *United States v*. Bayer AG et al.²⁹ The complaint was originally filed by the United States Attorney General as a civil antitrust action to prevent Bayer AG from acquiring its rival Monsanto Company in a \$66 billion deal. In their comments, the state attorneys general urged the Court to provide additional measures as a condition to approving the Bayer Monsanto merger, including preventing Bayer and Monsanto

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from reacquiring divesture assets for a full ten years and the appointment of a monitoring trustee for the deal.

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State of New York et al. v. Deutsche Telekom AG et al., No. 1:19-cv-05434-VM, (S.D.N.Y. filed Jun. 25, 2019) (No. 65, "Redacted Amended Complaint"). (The complaint is being led by New York and California. The States of Colorado, Connecticut, the District of Columbia, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, Virginia, and Wisconsin have joined the complaint).

Connecticut et al. v. Teva Pharmaceuticals USA, Inc., No. 3:19-cv-00710-MPS (D. Conn. filed May 10, 2019). (In addition to Connecticut, Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Puerto Rico have joined the suit).

³ In re: Generic Pharmaceuticals Pricing Antitrust Litigation, No. 2:16-md-02724-CMR (E.D. Pa. filed Aug. 5, 2016).

⁴ State of Colorado v. UnitedHealth Group Inc., et al. (Colo. Dist. Ct., El Paso Cty.).

⁵ State of Colorado v. UnitedHealth Group Inc., et al. (Colo. Dist. Ct., El Paso Cty. filed Jun. 18, 2019).

⁶ People of the State of California, v. Sutter Health, 2018 WL 1584066 (Cal. Super. Ct. filed Mar. 29, 2018).

United States of America et al. v. The Charlotte-Mecklenburg Hospital Authority, No. 3:16-cv-0311-RJC-DCK (W.D.N.C. filed Jun. 9, 2016).

⁸ United States of America et al. v. The Charlotte-Mecklenburg Hospital Authority, No. 3:16-cv-0311-RJC-DCK (W.D.N.C. filed Nov. 15, 2018).

States that were party to the class action included California, Alabama, Arkansas, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Oklahoma, North Dakota, Ohio, Rhode Island, Washington, Wisconsin and Virginia.

¹⁰ State of California et al., v. Teikoku Seiyako Co., Ltd. et al., No. 18-cv-00675 (N.D. Cal. filed Jan. 31, 2018).

Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century: Public Comments of 43 State Attorneys General, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, Jun. 11, 2019,

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https://www.doj.state.wi.us/sites/default/files/news-media/6.12.19 FTC Comments Submission.pdf. (The coalition was led by the attorneys general of Texas and Iowa included the attorneys general of Alaska, California, Colorado, Connecticut, Delaware, the District of Columbia, Guam, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington and Wisconsin).

- Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century: Public Comments of 18 State Attorneys General, Jul. 15, 2019, https://oag.dc.gov/sites/default/files/2019-07/State AGs Comments to FTC on Labor Issues in Antitrust.pdf. (The Attorney General of the District of Columbia was joined by the Attorneys General of the states of California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, and Washington in submitting comments).
- Letter, "Re: Request for Information Regarding Franchise Agreements," Massachusetts Office of the Attorney General (2018), https://www.mass.gov/files/documents/2018/07/09/NPNH Letter.pdf. (Massachusetts was joined by the attorneys general of California, the District of Columbia, Illinois, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, and Rhode Island in leading the investigation. Iowa, North Carolina and Vermont have joined in subsequent settlement agreements).
- 14 Antitrust Guidance for Human Resource Professionals, DEPARTMENT OF JUSTICE ANTITRUST DIVISION, FEDERAL TRADE COMMISSION, Oct. 2016 at 3, https://www.justice.gov/atr/file/903511/download.
- Settlement Agreement Between the State of Massachusetts et al., and Arby's Restaurant Group, https://www.nj.gov/oag/newsreleases19/Arbys-Agreement Executed.pdf. (In addition to Massachusetts, the states of California, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon and Pennsylvania were party to the settlement with Arby's); Settlement Agreement between the State of Massachusetts et al., and Dunkin' Brands, Inc., https://www.nj.gov/oag/newsreleases19/Dunkin-Brands Executed.pdf. (In addition to Massachusetts, the states of California, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Vermont and the District of Columbia were party to the settlement with Dunkin' Brands, Inc.); Settlement Agreement between the State of Massachusetts et al., and Five Guys-Agreement Executed.pdf. (In addition to Massachusetts, the states of California, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont and the District of Columbia were parties to the settlement with Five Guys); Settlement Agreement between the State of Massachusetts et al., and Little Caesar Enterprises, Inc., https://www.nj.gov/oag/newsreleases19/Little-Caesar-Settlement-Agreement Executed.pdf. (In addition to Massachusetts, the states of California, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and the District of Columbia were parties to the settlement with Little Caesar).
- ¹⁶ District of Columbia v. Marriott International, Inc., (D.C. Superior Court, Civil Div. filed Jul. 9, 2019).
- ¹⁷ Anadarko Petroleum Corp. et al. v. Commonwealth of Pennsylvania, No. 58 C.D. 2018, No. 60 C.D. 2018 (Pa. Commw. Ct. 2019).
- 18 Citibank Settlement Agreement, https://ag.ny.gov/sites/default/files/citi settlement agreement.pdf. (The Attorneys General of the States and Commonwealths of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin were party to the settlement agreement with Citibank).
- UBS Settlement Agreement, https://ag.ny.gov/sites/default/files/ubs settlement agreement.pdf. (The Attorneys General of the States and Commonwealths of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wisconsin were parties to the settlement agreement with UBS).

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- ²⁰ In the matter of Marathon Petroleum Corp. et al., No. C-4661, https://www.ftc.gov/system/files/documents/cases/c4661_181_0152_marathon_do_redacted_public_version.pdf; In the matter of Marathon Petroleum Corp. et al., No. C-4661, https://www.ftc.gov/system/files/documents/cases/1810152 marathon_complaint_0.pdf.
- Washington State v. LG Electronics Inc. et al., "Settlement and Consent Decree Against Samsung SDI Defendants," No. 12-2-15842-8 SEA, (Wash. Super. Ct. filed Aug. 29, 2018).
- ²² Washington State v. LG Electronics Inc. et al., No. 12-2-15842-8 SEA, (Wash. Super. Ct. filed May 12, 2012).
- 23 State of Illinois v. AU Optronics Corp. et al., No. 10 CH 34472, "Order Granting the State of Illinois' Motion for Final Distribution of the Settlement Funds," (Ill. Ch., Cook County, filed Jan. 8, 2018).
- ²⁴ State of Illinois v. AU Optronics Corp. et al., No. 10 CH 34472, "Amended Complaint," (Ill. Ch., Cook County, filed Feb. 15, 2013).
- ²⁵ State of Washington v. AU Optronics Corp. et al., No. 10-2-29164-4, (Wash. Superior Ct. filed Aug. 16, 2010).
- ²⁶ The People of the State of New York v. Bert Adams Disposal Inc., No. CL00253218 (N.Y. Binghamton City Ct., Broome Cty. filed Apr. 5, 2018).
- ²⁷ In the matter of Investigation by Eric T. Schneiderman, of Taylor Garbage Service, Inc., Assurance No. 18-026, https://ag.ny.gov/sites/default/files/taylor_garbage_assurance_of_discontinuance.pdf.
- ²⁸ The People of the State of New York v. Christopher Chierchio et al., Indictment no. 769-2018, (N.Y. Sup. Ct. filed Mar. 27, 2018).
- Letter from the office of Xavier Becerra, Attorney General, State of California to Kathleen S. O'Neill, Chief Transportation & Agriculture Section, Antitrust Division (Aug. 10, 2018), https://www.iowaattorneygeneral.gov/media/cms/States Tunney Act Comments Letter 0 820D9629BD936.pdf; United States of America v. Bayer AG et al., No. 1:18-cv-01241 (D.C. Cir. filed May 29, 2018).