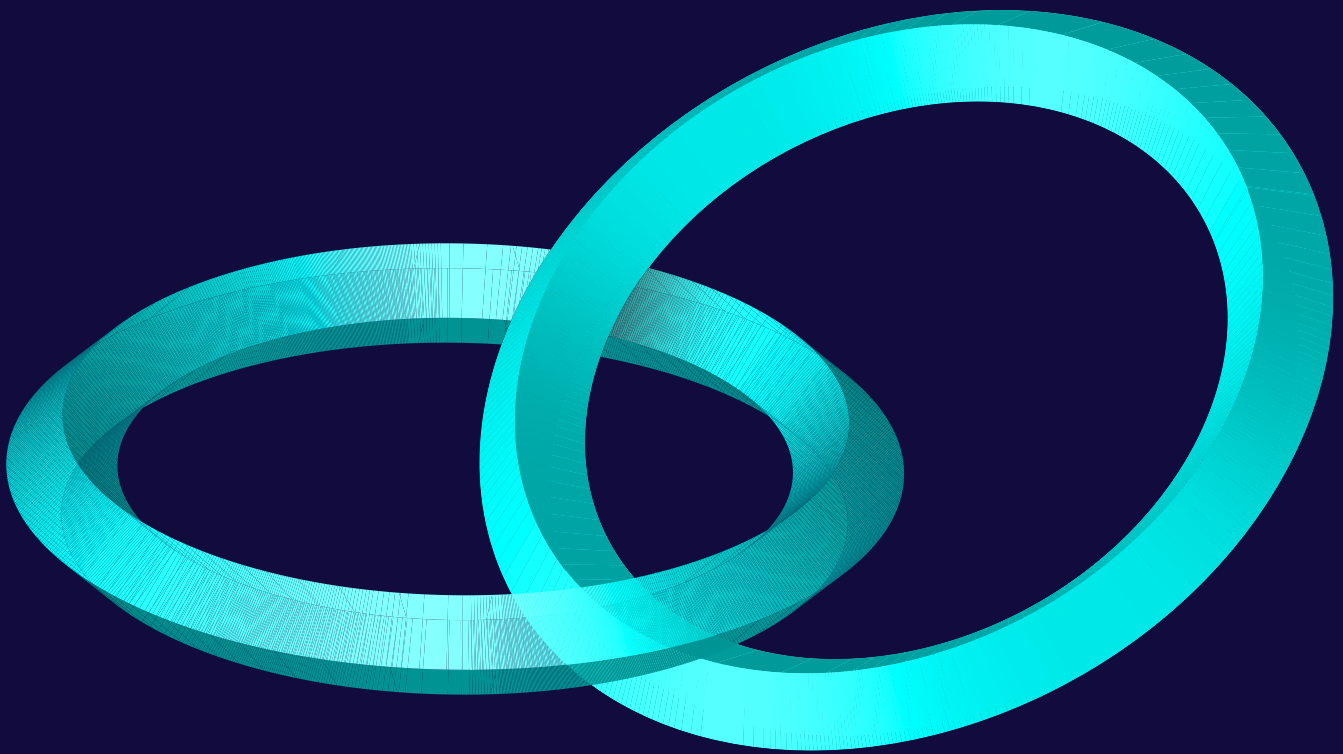


THE FUTURE OF STATE AG ANTITRUST ENFORCEMENT AND FEDERAL-STATE COOPERATION



BY MILTON MARQUIS, MEGHAN STOPPEL & KETURAH TAYLOR¹



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This article reviews state AGs' historic and contemporary role as enforcers of their states' antitrust statutes. After briefly discussing the source of state AGs' antitrust authority and their inclination to collaborate with both one another and their federal counterparts at the U.S. Department of Justice and the Federal Trade Commission, the article considers recent AG antitrust priorities across a range of industries, including agriculture, transportation, healthcare, and Big Tech. These priorities are discussed in the context of historical AG enforcement actions, newly enacted state and federal legislation, and even the recently announced 50-state settlement with Google. The article concludes by offering some thoughts about the future of state antitrust enforcement.

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State attorneys general are playing an increasingly prominent role enforcing the state laws that most impact businesses and consumers across the country. The field of antitrust is no exception.

Through authority conferred on them by both state and federal antitrust laws, including powerful investigative tools, state AGs have a rich history of antitrust enforcement. Whether working alone, in partnership with other AGs, or with their counterparts at the Federal Trade Commission or U.S. Department of Justice, state AGs continue to focus their antitrust enforcement efforts across a variety of industries, including healthcare, technology, and agriculture.

This article provides a brief overview of the scope and sources of state AG antitrust authority, analyzes recent significant AG enforcement actions with implications reaching beyond each individual case, and engages in a bit of prognostication about the future of state antitrust enforcement.

I. WHERE DOES STATE AG ANTITRUST ENFORCEMENT AUTHORITY DERIVE FROM?

State AGs possess broad powers to conduct antitrust investigations and intervene in proposed mergers. Under the Hart-Scott-Rodino Antitrust Improvement Act of 1976, state AGs may bring federal civil actions for injunctive relief and damages on behalf of natural persons residing in their state (as *parens patriae*) or on behalf of the state as a purchaser. In their *parens patriae* capacity, a state AG can seek damages on behalf of state residents,² or injunctive relief based on injury to the state's general economy.³

In addition to their authority to bring federal antitrust actions, the vast majority of AGs can enforce their state's antitrust statute(s). State antitrust laws are patterned generally after federal law, and grant enforcement authority in the same way their federal counterparts would.⁴ In many instances, such laws contain express provisions that they are to be construed "in harmony" with their federal counterparts.⁵ In some cases, state antitrust laws are more expansive than federal laws — for example, some state statutes explicitly provide that indirect purchasers have standing to pursue state antitrust claims, whereas state laws without such an explicit provision and the federal antitrust laws are effectively limited to claims by direct purchasers.⁶ These differences in state law, however, appear to have little impact on state AGs' willingness and ability to collaborate.

II. ANTITRUST ENFORCEMENT IS A BIPARTISAN ISSUE

State AGs continue to focus on antitrust enforcement and increasingly collaborate on multistate antitrust actions, invoking their respective laws to collectively address conduct that spans multiple states. Despite partisan polarization leading to gridlock in many elected levels of government, state AGs have generated significant bipartisan enforcement activity in certain industries. Whether they are partnering with federal enforcers, collaborating through multistate litigation, or acting in their individual enforcement capacity to advance their own state's antitrust agenda, AGs continue to wield their antitrust authority to address anticompetitive conduct and mitigate harm to consumers.

² 15 U.S.C. § 15c.

³ 15 U.S.C. § 26. A state AG may not seek damages in its *parens patriae* capacity for injuries to the state's general economy. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-64 (1972).

⁴ See NAAG, *STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES* 273-74 (Emily Meyers ed., 3d ed., 2013). Statutory antitrust authority varies from state to state. For example, Pennsylvania does not have a Sherman Act equivalent, but does have an anti-bid-rigging law. 62 Pa.C.S. § 4501.

⁵ See, e.g., Mass. Gen. Laws Ann. ch. 93 § 1 (requiring the Massachusetts antitrust law to be "construed in harmony with judicial interpretations of comparable federal statutes insofar as practicable").

⁶ See, e.g., N.Y. Gen. Bus. Law § 340 (providing that a person who sustains damages as a result of an antitrust violation shall not have their recovery limited due to the fact that that person "has not dealt directly with the defendant").

A. Collaboration Includes the Feds

Historically, AGs focused on matters specific to their state or geographic region, since these matters are likely to have a greater impact on their constituents.⁷ But while local enforcement continues to be a priority,⁸ AGs are increasingly cooperating with their federal counterparts to address antitrust concerns impacting markets in multiple states.

For example, in 2021, seven state AGs joined the U.S. Department of Justice (“DOJ”) in filing a lawsuit to block American Airlines and JetBlue from participating in a joint venture that would have enabled the two airlines to allegedly function as a single carrier on routes to and from New York City and Boston in a “Northeast Alliance.”⁹ While this proposed agreement had a clear impact on the New York and Massachusetts markets, states outside of the northeast such as California were also able to join the suit because they could demonstrate that their residents who fly to the east coast would have paid higher airfares due to the proposed partnership.¹⁰ In May 2023, a Massachusetts federal district court agreed with the AGs and DOJ that the partnership was anticompetitive and permanently enjoined the airlines from implementing the Northeast Alliance.¹¹

The interstate nature of the commercial airline industry provides a unique avenue for the states to collaborate collectively and with their federal counterparts in bringing antitrust actions. In March 2023, seven state AGs again teamed up with the DOJ to block the potential merger of JetBlue and Spirit Airlines, arguing that the proposed acquisition would eliminate competition in the low-cost airline market in violation of Section 7 of the Clayton Act.¹²

State and federal antitrust partnership has also cropped up in the agriculture industry where state AGs have been very receptive to concerns raised by farmers about market concentration. In September 2022, a bipartisan group of 12 state AGs teamed up with the FTC to file a complaint challenging agricultural companies Syngenta and Corteva, alleging that they were excluding generic pesticide manufacturers from the market in violation of federal antitrust laws, as well as state competition laws like California’s Cartwright Act.¹³ This case continues to be litigated in the Middle District of North Carolina.

B. Multistate Collaboration Persists in Protracted Litigation

In addition to working with their federal counterparts, state AGs have a long track record of collaborating with each other to conduct multistate investigations and litigation — often without regard to partisan politics or support from their federal counterparts. This is especially true in cases where alleged anticompetitive behavior is causing, or is likely to cause, increased prices for consumers. In such cases, information sharing and coordination are critical and facilitated through the National Association of Attorneys General (“NAAG”) Multistate Antitrust Taskforce.¹⁴

Despite the information-sharing groups and other collaborative strategies developed by multistate coalitions, one result of such coordination may be an extended litigation timeline for the AGs and their targets. This delay is typically due to, among other things, the time necessary for the AGs to reach consensus on strategy or objectives, both of which can be further delayed following an election and change in an AG administration. These complications of multistate coordination, however, should not be confused with a lack of resolve by the states, as career AG staff often remain constant throughout changing administrations and even protracted multistate litigation.

7 The vast majority of state AGs are elected. State AGs are appointed by the Governor in Alaska, Hawaii, New Hampshire, New Jersey, Puerto Rico, the U.S. Virgin Islands, and Wyoming. In Tennessee, the Tennessee Supreme Court appoints the State AG, and in Maine the legislature elects the State AG. See Attorney General Elections, NAAG (2023), <https://www.naag.org/news-resources/research-data/attorney-general-elections/>.

8 See Press Release, Wa. State Off. of the Att’y Gen., *AG Ferguson Wins \$35 Million and Counting for Washingtonians from Co-Conspirators in Chicken Price-Fixing Case*, (Apr. 5, 2023), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-wins-35-million-and-counting-washingtonians-co-conspirators-chicken> (announcing the recovery of \$35 million as a result of price-fixing claims in the poultry industry).

9 Compl., *U.S. v. Am. Airlines Group Inc.*, Case No. 1:21-cv-11558 (D. Mass. Sept. 21, 2021), https://www.justice.gov/d9/press-releases/attachments/2021/09/21/1-complaint_0.pdf.

10 See Press Release, Cal. Dep’t of Justice, *Attorney General Bonta Joins Bipartisan Coalition in Suing American Airlines and JetBlue Over Launch of Anticompetitive Alliance* (Sept. 21, 2021), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-joins-bipartisan-coalition-suing-american-airlines-and>.

11 *U.S. v. American Airlines Group Inc.*, Case No. 21-11558-LTS, 2023 WL 3560430 (D. Mass. May 19, 2023)

12 See Am. Compl., *U.S. v. Jetblue Airways Corp.*, Case No. 1:23-cv-10511-WGY (D. Mass. Mar. 31, 2023) (amending Complaint to add California, Maryland, New Jersey, and North Carolina to join Massachusetts, New York, the District of Columbia, and the DOJ as plaintiffs).

13 See Am. Compl., *FTC et. al. v. Syngenta Crop Protection AG et. al.*, Case No. 1:22-cv-00828-TDS-JEP (M.D.N.C. Dec. 23, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/amended_complaint_public_redacted.pdf.

14 See generally NAAG, *Multistate Task Force*, <https://www.naag.org/issues/antitrust/multistate-task-force/> (last visited July 10, 2023).

In 2016, for example, a bipartisan coalition of 42 AGs filed suit against Indivior, the manufacturer of popular opioid addiction treatment drug Suboxone. This litigation was brought collectively by the AGs under their respective state antitrust laws, as well as federal antitrust laws, in federal court. The states finally settled with the drugmaker in June 2023 for \$102.5 million to resolve their claims that Indivior engaged in a pattern of anticompetitive conduct that allowed it to unlawfully maintain and/or achieve monopoly power injuring consumers.¹⁵ This resolution demonstrates that AGs are not afraid of long term litigation, and can effectively carry out major multistate enforcement actions through multiple administration changes within AG offices and with no involvement from federal enforcers.

III. ENFORCEMENT PRIORITIES: NATIONAL AND GLOBAL HEADLINES MATTER

While some areas of antitrust such as mergers and acquisitions remain evergreen priorities for enforcement, state AG priorities are also influenced by current events, economic fluctuations, and national or even global politics and discourse. Below we consider historic areas of focus in more details, in addition to some of the trends that have led AGs to more closely scrutinize certain antitrust considerations in labor and employment, and continue their inquiry into and enforcement activities in the technology marketplace.

A. Mergers and Acquisitions – A Perennial Favorite

State AGs are always on the lookout for proposed mergers or acquisitions that may reduce competition and thereby harm consumers. For example, the 2018 announcement of the proposed merger of T-Mobile and Sprint — then two of the largest wireless carriers in the United States — was met with immediate scrutiny by AGs, which continued even after the FCC and DOJ each approved the merger. While several AGs independently negotiated settlements to ensure competition in their respective states,¹⁶ a coalition of fourteen Democratic AGs took their challenge to trial in late 2019. After the federal court refused to block the merger,¹⁷ the AGs agreed not to appeal the federal court's decision, in exchange for settlements with 13 of the 14 AGs addressing certain concerns surrounding availability of low-cost plans, pricing commitments, and employment, among other things.¹⁸

Not surprisingly, state AGs are constantly looking to improve upon the tools at their disposal to review and intercede in mergers or acquisitions with potentially harmful effects. Some states have begun taking a more preemptive approach by requiring pre-merger notification of material transactions and allowing state agencies to refer potential mergers to the AG for review, with the goal of weeding out harmful mergers prior to consummation. Such laws were recently enacted in both New York and California with regard to transactions in the healthcare space, and another California bill introduced in 2023 (which will carry over to 2024) proposes to further broaden the AG's healthcare merger review authority.¹⁹ These laws also demonstrate state legislatures' support of more proactive M&A enforcement by their respective AGs.

B. Labor and Employment – Trending Upwards

In addition to scrutinizing merger and acquisition activity that may result in decreased competition, higher prices, and even lower wages, AGs are increasingly using their enforcement authority to address conduct outside of mergers review that they perceive reduces labor competition, limits worker mobility, or depresses wages. Non-compete and no-poach agreements in particular have drawn scrutiny from AGs over the past five

15 Stip. Final J., *Wisconsin et. al. v. Indivior Inc. et. al*, No. 2:16-cv-05073-MSG (E.D.Pa. Jun. 2, 2023), ECF No. 2, <https://www.doj.state.wi.us/sites/default/files/news-media/6.2.23%20Suboxone%20Stipulated%20Final%20Judgment%20as%20Filed.pdf>.

16 See e.g. Press Release, Tex. Att'y Gen., *AG Paxton Announces Settlement Agreement with T-Mobile on Sprint Merger* (Nov. 25, 2019), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-settlement-agreement-t-mobile-sprint-merger>; David Shepardson, *Mississippi Will Back Sprint, T-Mobile Merger and Drop Court Challenge*, Reuters (Oct. 9, 2019), <https://www.reuters.com/article/us-sprint-corp-m-a-t-mobileus/mississippi-will-back-sprint-t-mobile-merger-and-drop-court-challenge-idUSKB-N1W02Q3/>.

17 Matthew Perlman, *T-Mobile, Sprint Beat State-Led Merger Challenge*, Law360 (Feb. 11, 2020), <https://www.law360.com/articles/1242797/t-mobile-sprint-beat-state-led-merger-challenge>.

18 See Press Release, Pa. Att'y Gen., *Attorney General Shapiro Announces T-Mobile, Sprint Merger Settlement* (March 11, 2020), <https://www.attorneygeneral.gov/taking-action/attorney-general-shapiro-announces-t-mobile-sprint-merger-settlement/>; Press Release, Cal. Att'y Gen., *Attorney General Becerra Announces Settlement Ending the State's Challenge to T-Mobile, Sprint Merger* (March 11, 2020). The fourteenth state—New York—reportedly dropped its challenge to the merger prior to the settlements reached by the other thirteen AGs. See Hilary Russ, *New York Drops Fight Against T-Mobile–Sprint Merger*, Reuters (Feb. 17, 2020).

19 See N.Y. Pub. Health Law §§ 4551–4553 (2023) (the state Department of Health will share a copy of the notice of material transaction and supporting documentation with the antitrust bureau of the AG's office, and can notify the AG's office that an investigation “into whether the healthcare entities have engaged in unfair competition or anti-competitive behavior” is warranted); Cal. Health & Safety Code, Ch. 2.6 § 12700.5(o)(3) (2022) (referring transactions that may reduce market competition or increase costs to the AG for further review); Cal. A.B. 1091, 2023–2024 Reg. Sess. (Cal. 2023).

years, starting with the Washington AG's crusade against no-poach agreements among fast food franchisors beginning in 2018.²⁰ AGs continue to investigate and prosecute this conduct across industries: New York AG Letitia James reached a settlement with Fidelity National Financial, Inc. in March 2023 over no-poach agreements with other title insurance companies, which AG James argued "effectively reduced career opportunities and wages for workers."²¹

In contrast, DOJ has found little success in bringing criminal prosecutions for similar alleged labor violations.²² Given the AGs' comparative success in advancing these same allegations in civil actions, it is unlikely the AGs will pivot to criminal prosecution of non-compete or no-poach agreements any time soon. Additionally, state AGs continue to add enforcement tools to their toolbox—California recently passed a law that will expand its existing prohibition on non-compete agreements to extend to contracts signed outside the state, effective January 1, 2024.²³

Compliance counsel would do well to stay attuned to state AG antitrust actions in the labor space, particularly because AGs have their own unique set of labor enforcement tools. For example, Maryland law prohibits non-compete agreements for workers earning less than \$15 per hour.²⁴ At least 18 state AGs have also expressed their support for the FTC's recent proposed rule which would ban non-competes altogether.²⁵ Given these trends, it is highly likely that AGs will become even more aggressive in their enforcement strategies in the labor market going forward.

C. Big Tech - Staying in the Crosshairs

Another trend in AG antitrust enforcement which has recently dominated headlines is their enforcement efforts in the technology marketplace. One of the driving forces behind the resurgence of state AG antitrust enforcement has been the meteoric rise of "Big Tech." As one federal judge put it, "[a]s the pillars of our national economy have shifted from the concrete to the virtual, so too have the targets of government antitrust action."²⁶ State AGs are leading efforts to address what many of them view as anticompetitive conduct by technology companies and the harmful effects of market concentration, as demonstrated by the December 2023 settlement reached by 53 AGs to resolve allegations that Google violated antitrust laws by restricting competition for Android app distribution and in-app payment processing, the terms of which require Google to pay \$630 million in consumer restitution and \$70 million in penalties.²⁷

While that particular multistate action against Google has concluded, there continues to be ongoing litigation following a lengthy trial in D.C. in a case brought by the DOJ and numerous AGs against Google over alleged monopolization of the search engine and search advertising markets, among other antitrust actions against the search giant.²⁸ The ongoing state AG antitrust actions against Google demonstrate how AGs are deploying different strategies to grapple with anticompetition concerns related to Big Tech.

Strategies for tackling Big Tech include partnering with federal enforcers and fighting the defendants' attempts to forum shop. For example, eight state AGs joined the DOJ in suing Google in federal court in January 2023 for allegedly monopolizing the digital advertising industry.²⁹ The court denied Google's motion to transfer the action to the Southern District of New York to consolidate it with similar multidistrict

20 See *Washington Attorney General Reaches Settlement with Seven Fast Food Franchisors Over "No Poach" Provisions in Franchise Agreements*, THE STATE AG REPORT (July 12, 2018), <https://www.stateagreport.com/news/the-state-ag-report-weekly-update-july-12-2018/>.

21 See Press Release, *Attorney General James Ends Harmful Labor Practices at Largest U.S. Title Insurance Company*, (Mar. 29, 2023), <https://ag.ny.gov/press-release/2023/attorney-general-james-ends-harmful-labor-practices-largest-us-title-insurance>.

22 See e.g., *United States v. Patel*, No. 3:21-cr-220, 2023 WL 3143911 (Apr. 28, 2023) (granting defendants' motion for judgment of acquittal for criminal violation of the Sherman Act over alleged agreements among companies to restrict the hiring and recruiting of engineers and other skilled-labor employees).

23 See S.B. 699 (Cal. 2023).

24 See Md. Code, Lab. & Empl. § 3-716.

25 See Public comments of 18 State Attorneys General on Notice of Proposed Rulemaking, *Non-Compete Clause Rule*, 88 FED. REG. 3482 (Jan. 19, 2023), https://www.ag.state.mn.us/Office/Communications/2023/docs/AGs_Comment_FTC_NonCompeteRule.pdf.

26 *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 13 (D.D.C. 2021).

27 See *In re Google Play Store Antitrust Litigation*, No. 3:21-md-02981-JD (N.D. Cal.), Settlement Agreement and Release, ECF No. 522-2 (Dec. 18, 2023).

28 See *United States v. Google*, No. 1:20-cv-03010-APM (D.D.C.). For a detailed explanation on the origins of the older cases currently still in progress, see Milton Marquis, Ann-Marie Luciano & Gianna Puccinelli, *Recent Trends and Insights in State Attorney General Antitrust Enforcement*, CPI ANTITRUST CHRONICLE (Aug. 2021), <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/08/3-Recent-Trends-and-Insights-in-State-Attorney-General-Antitrust-Enforcement-By-Milton-A.-Marquis-Ann-Marie-Luciano-Gianna-Puccinelli.pdf>.

29 Compl., *United States v. Google LLC*, No. 1:23-cv-00108 (E.D.V.A. Jan. 24, 2023) (listing state AGs from California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia as plaintiffs).

litigation, and subsequently denied Google's motion to dismiss in April 2023, allowing the lawsuit to proceed in the Eastern District of Virginia's notorious "rocket docket," where the parties are currently proceeding with discovery.

Google's attempts to consolidate antitrust litigation also failed in the Texas-led multistate lawsuit brought by 17 state AGs over Google's alleged monopolization of the digital advertising market, in which the Judicial Panel on Multidistrict Litigation agreed to transfer the case from New York back to Texas, in light of a recent change in the federal law rendering AG antitrust actions exempt from multidistrict litigation (like their federal counterparts).³⁰ Google unsuccessfully appealed this decision to the Second Circuit.

While not unexpected, Google's appeal is a reminder that the AGs' determination to tackle Big Tech has involved a significant degree of trial and error. And the states are not always treated as favorably as their federal counterparts. In 2023, 48 state AGs were dealt a heavy blow when the U.S. Court of Appeals for the D.C. Circuit affirmed the District Court's dismissal of their case against Facebook over the company's acquisitions of Instagram (in 2012) and WhatsApp (in 2014).³¹ There, the AGs alleged the aforementioned acquisitions gave Facebook an unlawful monopoly over social networking services, among other things. The federal courts agreed with Facebook that the AGs had waited too long to file their 2020 lawsuit, and that the AGs' other claims relating to Facebook's policies for using the platform did not constitute a cognizable antitrust violation.

Regardless of whether state AGs prevail or are defeated in pending Big Tech cases, those outcomes will certainly inform AG antitrust enforcement strategy going forward. If the AGs are unsuccessful in these efforts, they may react by seeking legislative changes at either the state or federal level to improve the antitrust enforcement tools available to them, in order to effectively address anticompetitive conduct and consumer harm by Big Tech.

IV. EXPECT AGGRESSIVE EFFORTS TO CONTINUE

With state AG antitrust enforcement reaching its zenith and encountering new challenges in emerging digital markets, AGs are entertaining new strategies and openly discussing the need for reform. For example, during a December 2022 NAAG meeting, the Colorado and Nebraska AGs held a dialogue with Margrethe Vestager, the Executive Vice President and Commissioner for Competition at the European Commission ("EC"), about the EC's new Digital Markets Act and antitrust concerns in the digital marketplace transcending partisanship. The AGs acknowledged during this conversation that the EC has generally been ahead of the United States in addressing the anticompetitive conduct of Big Tech, perhaps indicating that a similar model may be the future for antitrust regulation of digital markets in the United States.³²

With Big Tech trials playing out in the headlines and more looming on the horizon, many have expressed concerns with the current system of antitrust enforcement and have called for legal reform, including the abandonment of the consumer welfare standard. We will be keeping a close eye on this debate and its potential impact on antitrust enforcement. At this point, all signs point to state AGs remaining active in their enforcement efforts, while finding innovative ways to use the tools already at their disposal to ensure competition in the market. Whether through individual action, coordination with federal counterparts, or multistate action, expect state AGs to continue their efforts to aggressively pursue and punish anticompetitive conduct, particularly in the technology, agriculture, and healthcare sectors.

³⁰ The panel issued the remand order June 5, 2023 based on the State Antitrust Enforcement Venue Act, passed last December, rejecting Google's contention that the provision could not be applied retroactively. See Remand Order, *In Re: Google Digital Advertising Antitrust Litigation*, MDL No. 3010 (J.P.M.L. Jun. 5, 2023), <https://assets.law360news.com/1684000/1684843/remandorder.pdf>; see also 28 U.S.C. § 1407(g).

³¹ *New York v. Meta Platforms, Inc.*, 66 F.4th 288 (D.C. Cir. 2023).

³² See Keturah Taylor, *State AGs, Federal Regulators Gather to Discuss Tech Competition, ESG, Privacy, and More*, THE STATE AG REPORT (Dec. 14, 2022), <https://www.stateagreport.com/news/state-ag-federal-regulators-gather-to-discuss-tech-competition-esg-privacy-and-more/>.



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