AMERICAN ECONOMIC LIBERTIES PROJECT

Reforming Antitrust Policy to Challenge Corporate Power:

A Guide for State Lawmakers

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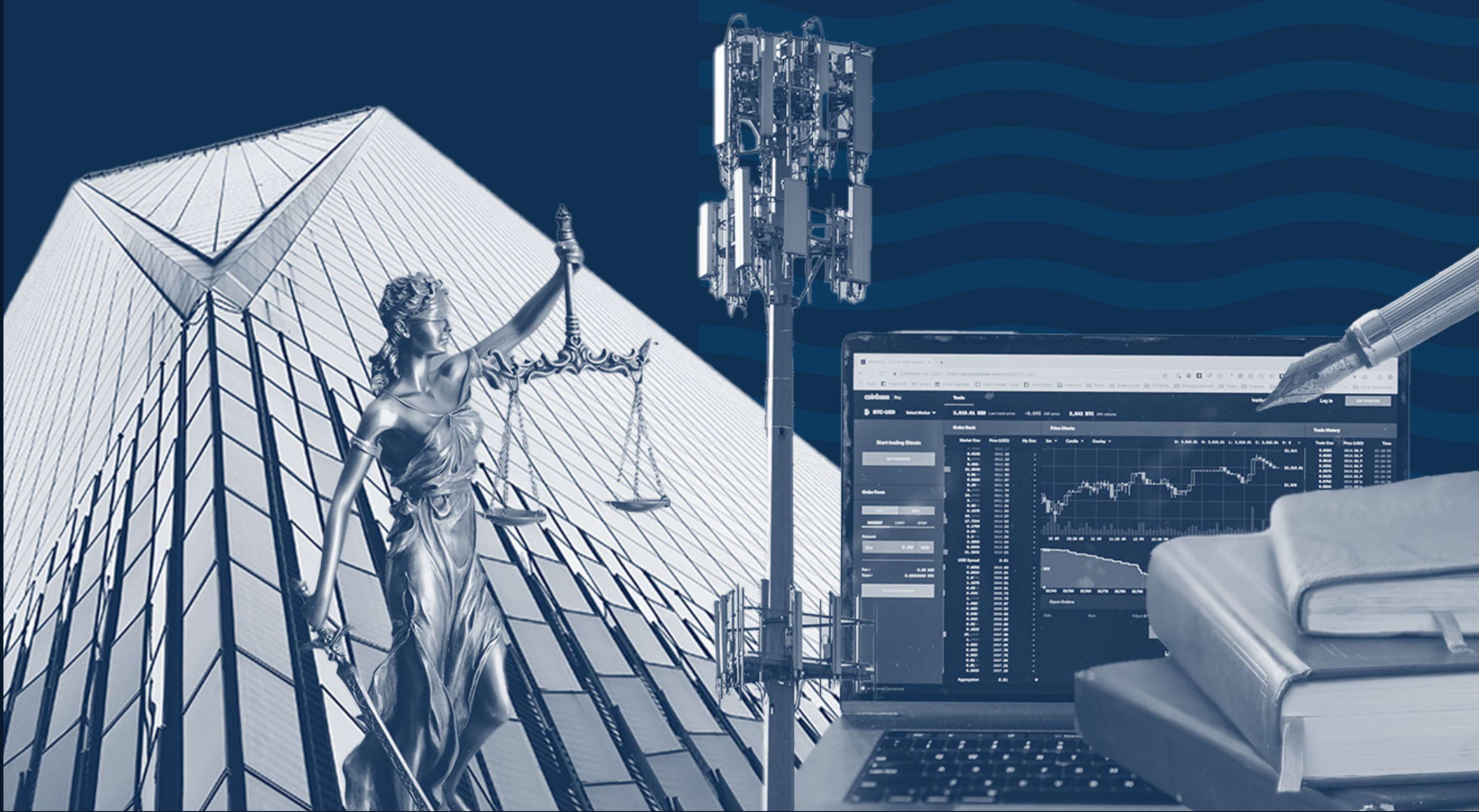

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INTRODUCTION

America is facing a crisis of corporate concentration.[1] In the U.S., 75% of industries are now controlled by a smaller number of large corporations than they were just 20 years ago.[2] The extreme power of dominant corporations is evident in major sectors of our economy, from technology platforms to telecommunications, banks, health care, retail, airlines, and more. Even in niche sectors like contact lenses, cat food, mattresses, and meat, a few powerful corporations dominate the market.[3] Corporate concentration has depressed wages for working people, threatened the supply of critical goods, undermined small businesses, and jeopardized the well-being of entire communities.[4]

As long as there have been dominant corporations in America, so too have state governments led the way to promote innovation and fair competition, protect workers from abusive working conditions, and prevent illegal price fixing. Prior to the adoption of the first major federal antitrust law in the United States, the Sherman Act of 1890, at least 13 states had already adopted antitrust statutes. An additional 14 states and territories had adopted constitutional prohibitions on monopolies or other anti-competitive business forms.[5] The federal adoption of the Robinson-Patman Act in 1936 (protecting small businesses from discriminatory pricing) was preceded by a flurry of state legislative action to do the same.[6] Throughout the history of antitrust law, it was envisioned that federal law would supplement — not replace — the enforcement of established state rules. Time and time again, a groundswell of local support led state policymakers to take action, which in turn laid the groundwork for federal actors to follow.

State actors have also played a critical role in enforcing both federal and state antitrust laws.[7]

1 "Confronting America's Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All," American Economic Liberties Project, July 2020.
2 White House 2021 Executive Order on Promoting Competition in the American Economy.
3 "Confronting America's Concentration Crisis," supra note 2.
4 *Id.*
5 Gavil, Andrew I., "Reconstructing the Jurisdictional Foundation of Antitrust Federalism." 61 Geo. Wash. L. Rev. 658, March 1993.
6 *Id.*
7 Kovacic, William E. "Article: Reagan's Judicial Appointees and Antitrust in the 1990s." 60 Fordham L. Rev. 49, 1991. See also Flexner, Donald L. and Racanelli, Mark A., "Merger Control and State Aids Panel: State and Federal Enforcement in the United States: Collision or Harmony?" 9 Conn. J. Int'l L. 501, 1994.

Armed with new powers and funding conferred upon them by the Hart-Scott-Rodino Act in 1976, an alliance emerged among state attorneys general to enforce antitrust laws. During the subsequent Reagan era of unprecedented federal nonenforcement, state AGs reasserted themselves as enforcers of both federal and state antitrust laws, focusing in particular on challenging mergers and vertical restraints.[8] State regulators and enforcers became the focal point for protecting small businesses and consumers from the abusive practices of large corporations.

Reinvigorating antitrust law is fundamental to our democracy.[9] Instead of competing for relevance in the marketplace, dominant corporations now spend their dollars in the political arena in order to purchase rules that rig markets in their favor and allow them to extract resources from local communities. Lobbying expenditures are at all-time highs,[10] industry groups have used corporate-friendly courts to reshape labor laws,[11] and digital advertising monopolies have decimated newspapers, magazines, and other information outlets.[12]

Nearly 50 years after the last major changes to federal antitrust law, and in the wake of decades of lax and ineffective enforcement — aided by a series of legal opinions making it more difficult to bring cases in the first place — states can take the lessons we've learned and translate them into action. Decentralizing economic power is a key part of the effort to redistribute power in our society, tackle historic levels of wealth inequality, and create an inclusive, robust democracy.[13] State governments and enforcers have the power — and the historical record — to work together and explore new models for protecting workers, consumers, and small businesses across the country.

This guide for state lawmakers sets forth a number of policy proposals that will have immediate, tangible impacts. They are informed by observed real-world harms, best practices gleaned from various stakeholders, and recognized gaps in federal antitrust law — and they are designed to reinvigorate a national conversation about how best to confront the crisis of corporate concentration.

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8 *Id.*
9 "Confronting America's Concentration Crisis," *supra* note 2.
10 "Amazon Breaks Lobbying Record Amid Antitrust Fight." Bloomberg, July 2022. 11 Epstein, Lee; Landes, William M.; and Posner, Richard A. "How Business Fares in the Supreme Court." Minnesota Law Review, 2013.
12 "The Expanding News Desert." UNC Hussman School of Journalism and Media, 2018.
13 "Confronting America's Concentration Crisis," *supra* note 2.

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Establishing an Abuse of Dominance Standard of Antitrust

THE PROBLEM

State antitrust law, like that at the federal level, is inadequate for challenging the actions of dominant corporations. As described in the introduction, this is largely the result of decades of bad case law and bipartisan neglect. Because enforcers and judges have focused almost exclusively on what's known as the "consumer welfare standard," antitrust cases hinge on consumer prices and so-called "efficiency" within businesses, rather than antitrust law's traditional role of protecting workers and small businesses from abusive or anti-competitive tactics by powerful firms.[14]

Effective enforcement against unilateral anti-competitive conduct has been impeded by courts. A brief survey shows how courts have adopted narrow definitions of monopolization in a manner that excludes scrutiny of powerful firms,[15] turned a blind eye to anti-competitive "vertical" restraints that stymie competition,[16] limited the scope of unilateral conduct covered by federal antitrust laws,[17] and heightened the pleading standards that plaintiffs and government enforcers must overcome in order to have their day in court.[18]

By adopting a narrower view of the very definition and impact of monopolization, the United States has differentiated itself from parts of the world with more robust regulation and enforcement against unfair anti-competitive conduct.[19] This gradual winnowing of antitrust regulation and enforcement has harmed workers, small and midsized businesses, and consumers. A few large corporations have become dominant in many sectors of the economy, and regularly leverage — or abuse — that dominance to box out would-be competitors.

THE SOLUTION

State lawmakers should adopt an "abuse of dominance" standard for state antitrust or unfair competition laws, thereby dispensing of the narrow consumer welfare standard, which has allowed rampant consolidation and anti-competitive behavior to occur, unchecked, for decades. In doing so, state lawmakers should set forth an objective and quantifiable definition of "dominance," which lowers the high threshold under current law for showing a firm has

14 "The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach." American Economic Liberties Project, January 12, 2021.

15 *United States v. Grinnell Corp.*, 384 U.S. 563 (1971) (rejecting the possibility of liability for no-fault monopolization, even in the presence of excessive pricing)..

16 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (merchant gag orders imposed by American Express did not "unreasonably restrain trade" even though they were anti-competitive and raised prices on consumers).

17 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (ruling, in pertinent part, that restraints of trade are subject to scrutiny "only when they pose a danger of monopolization").

18 *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) (heightening the pleading standard for plaintiffs alleging illegal price fixing).

19 Waller, Spencer Weber. "The Omega Man, or The Isolation of U.S. Antitrust Law." Submission to the House Judiciary Committee, Subcommittee on Antitrust, 2018.

monopoly power. Once dominance is demonstrated, dominant corporations are subject to greater scrutiny to ensure that they do not stifle competition.

MODEL LEGISLATION

Model “abuse of dominance” legislation would:

- Establish “dominance” or “a dominant position” as a corporation having a share of 40% or more of a relevant market for sellers, and 30% or more of a relevant market for buyers[20] (recognizing that “dominance” is not per se unlawful but establishes a threshold capacity to abuse a dominant position).

- Alternatively allow for dominance to be shown through direct evidence, such as the ability to unilaterally change prices, degrade quality, or change contract terms without compensation.

- Once dominance is established, generally set forth the types of conduct that would qualify as an abuse of that dominance, such as:

    - Imposing unfair purchase or selling prices, or other unfair trading conditions, for instance, when a price poses no reasonable relation to the economic value of the product supplied;

    - Conduct that tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete, such as leveraging a dominant position in one market to limit competition in a separate market;

    - Tying or bundling goods or services in a manner that coerces a buyer into purchasing a second good or service it may not want, or which it prefers to purchase from a different seller;

    - Refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors;

    - Applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage; and

20 One important distinction between monopoly and monopsony is the market share needed to infer significant, or dominant, power. Retailers with as low as a 20% market share can enjoy significant buyer power over sellers. See Stucke, Maurice E. “Looking at the Monopsony in the Mirror.” 62 Em. L.J. 1509, 2013; citing Carstensen, Peter C. “Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers.” 53 Antitrust Bull. 271, 2008.

    - Predatory pricing, including cutting prices below costs, without a legitimate reason, or for the sake of eliminating or disciplining one or more competitors.[21]

- Address the impact of labor market dominance on workers by barring dominant employers from:

    - Imposing “noncompete” contracts by which a person is restrained from engaging in a lawful profession, trade, or business of any kind, and

    - Restricting the freedom of workers and independent contractors to disclose wage and benefit information.

- Prohibit the introduction of pro-competitive effects or a benefit to the consumer to offset or cure other demonstrable harms of anti-competitive behavior.

- Empower citizens to join class action suits to enforce their rights.

- Enhance criminal penalties for antitrust violations.

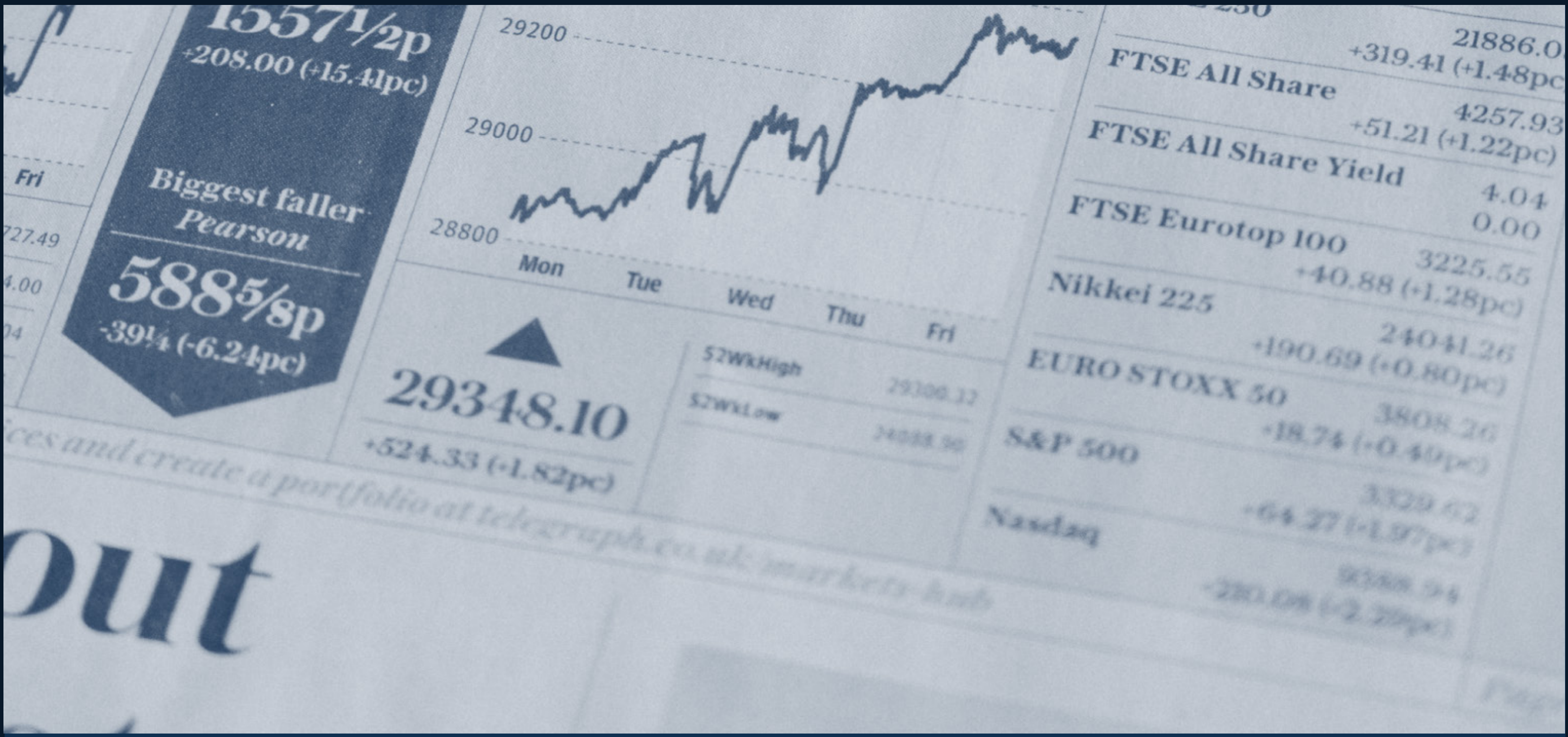
THE PUSHBACK

Critics may claim that an abuse of dominance standard, while aimed at major corporations, will sweep up smaller firms. But most small and midsized businesses simply do not have enough market share or sufficient power to be considered dominant. Crucially, being found dominant is not in and of itself illegal — what’s illegal is abusing that dominance by foreclosing opportunities for other businesses, using power to unilaterally push down wages or otherwise restrict workers’ ability to sell their labor in a free market, or engaging in any of the above-referenced types of conduct.

Critics may also be concerned about the impact of an abuse of dominance standard on collective bargaining or project labor agreements. Model legislation can be drafted to explicitly protect labor organizing and exempt any consideration of collective bargaining or project labor agreements as evidence on their own of an abuse of dominance.

Example Law: New York Senate Bill S933C, the “21st Century Antitrust Act” (*link*); Pennsylvania House Bill 2677, the “Open Markets Initiative” (*link*)

21 See Waller, supra note 19, for a more exhaustive survey of the history and prevalence of “abuse of dominance” standards in other jurisdictions, including those outside of the United States.



Cracking Down on Illegal Price Fixing

THE PROBLEM

Price fixing occurs when sellers of the same product or service agree to set actual prices, establish limits on prices or discounts, or fix price-related terms of sale. Usually this means acting together to increase prices on consumers beyond what would be expected under competitive market conditions. The problem is, direct evidence of an actual agreement is hard to find, particularly in the real world, where "agreements" occur informally, but no less obviously, at trade association meetings or on earnings calls.

Price fixing tends to occur in industries that have already seen a lot of consolidation, which makes practical sense because it's easier for a smaller number of actors to come to agreement.[22] Fewer actors also means more direct accountability among the agreeing parties and therefore less risk that another corporation will undermine the agreement. When consolidation among dominant firms is paired with under-enforcement of laws that prohibit anti-competitive behavior, price fixing occurs in plain sight.

Like other antitrust laws, existing laws against price fixing have been watered down in a manner that has deterred enforcement and allowed for violations to occur with impunity. Key to this development was the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly.*[23] In that case, the Court placed the burden on victims of price fixing to plead exceptionally detailed facts about conspiracies between dominant corporations at the outset of litigation. This standard requires plaintiffs to provide proof before even being able to compel evidence, even when litigation would later prove that the defendants illegally fixed prices. This sets a harmful precedent that has all but barred victims of price fixing from seeking relief. The Supreme Court's decision aligned with a problematic history of cases, wherein circumstantial evidence makes a strong case that dominant corporations have worked together to fix prices, but courts have nevertheless rejected otherwise meritorious price-fixing cases from advancing beyond the earliest stages of litigation.[24]

In the end, dominant corporations and cartels have been let off the hook while buyers — and regular consumers — pay the unfair price. The uniquely high burden to definitively prove price fixing at the outset of a case has been used to shield large corporations, deter enforcement, and leave victims of price fixing with an unclear path toward relief.

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21 As described in the introduction to this toolkit, consolidation has occurred across the vast majority of markets, see White House 2021 Executive Order, *supra* note 2.

23 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007).

24 See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993); In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999); In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015); Valspar Corp. v. E.I. DuPont De Nemours and Co., 873 F.3d 185 (3d Cir. 2017); Kleen Prods. LLC v. Georgia-Pacific LLC, 910 F.3d 927 (7th Cir. 2018); In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig., No. 21-15125, 2022 WL 665236 (9th Cir. Mar. 7, 2022).

THE SOLUTION

States can make it possible for victims of price fixing to assert illegal price fixing in the early stages of a case, in such a way that the burden is on dominant corporations to prove that they haven't engaged in illegal price fixing.

MODEL LEGISLATION

Model legislation to combat rampant illegal price fixing would:

- Create a presumption that illegal price fixing has occurred, based on parallel pricing and other indicators suggestive that price fixing was the result of an agreement among dominant corporations.
- Allow cases to survive motions to dismiss or motions for summary judgment when plaintiffs allege circumstantial evidence of collusion and communication (i.e., even if that behavior is consistent with "conscious parallelism").
- Shift the burden of proof to dominant corporations to demonstrate that they did not engage in illegal price fixing.
- Empower courts to bar people who violate price fixing laws from returning to the industries in which they committed illegal acts.
- Give victims of price fixing their day in court, rather than force them to go through arbitration proceedings, which tend to favor dominant corporations.
- Establish a whistleblower bounty program, shielding those who come forward with information of price fixing from retaliation by employers, buyers, or sellers.

Example Law: Economic Liberties Model Legislation to Stop Monopoly Price Hikes (*link*); Pennsylvania House Bill 2642 (the "Stop Price Fixing Act"; *link*).

Protecting the Real Victims of Antitrust Laws with *Illinois Brick* Repealers

THE PROBLEM

When working people are harmed by monopolies or cartels charging unfairly high prices, they should have an opportunity to challenge the illegal behavior that caused that harm. Unfortunately, the “Indirect Purchaser” doctrine of antitrust law is a barrier to relief for those consumers, who are often considered “indirect purchasers” in the supply chain. The doctrine is associated with the Supreme Court’s 1977 decision in Illinois Brick v. Illinois, and limits recovery (and the ability to bring enforcement actions in the first place) to only those parties who first purchased from an abusive corporation.[25]

For example, if a cartel of tire manufacturers coordinates illegally to increase the price of tires to automobile manufacturers, the end-buyer of the car itself is prohibited from seeking relief — even if the automobile manufacturer successfully recovers the increased cost they paid for tires via a higher price to the purchaser of the car. Particularly if consolidation occurs at multiple points in the vertical supply chain, the situation is such that the consumer has little or no alternative for avoiding those increased costs.

Because direct purchasers are often able to recoup excess costs by passing on higher prices to the end consumer, direct purchasers are not incentivized to bring enforcement actions. If only direct purchasers are permitted to sue for damages, then the final consumers who were ultimately harmed by a violation of antitrust laws — the indirect purchasers — will remain uncompensated.

THE SOLUTION

In the years following the Illinois Brick case, a number of states passed laws — often referred to as “Illinois Brick Repealers” — that allow consumers at all stages of the supply chain to pursue relief under state antitrust laws. Following a preemption challenge, the Supreme Court ultimately confirmed the right of states to pass these important consumer protection laws, but stopped short of overturning their earlier precedent to make it the law of the land.[26]

Approximately 28 states (and the District of Columbia) have adopted some form of Illinois Brick Repealer law, allowing for indirect purchasers to pursue relief in court.[27] Absent legislation, courts have also allowed indirect purchasers to seek relief in approximately seven more states.[28]

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25 *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

26 *California v. ARC America Corp.*, 490 U.S. 93 (1989).

27 The following 28 jurisdictions have adopted some version of indirect purchaser standing: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Dakota, Oregon, Rhode

28 Courts have acknowledged indirect purchaser standing in the following states: Arizona, Florida, Iowa, Massachusetts, New Hampshire, North Carolina, and Tennessee. Island, South Dakota, Utah, Vermont, Washington, and Wisconsin.

Even among states that have already adopted laws that allow for indirect purchaser standing, there remains significant variability among those statutes, despite agreed-upon best practices. State actors seeking to bolster antitrust laws, including in any of the ways set forth in this toolkit, can and should include amendments that codify best practices and allow for indirect purchaser standing.

MODEL LEGISLATION

Jurisdictions should consider passing so-called *Illinois Brick* Repealers, or strengthen their existing indirect purchaser standing laws, to:

- Allow indirect purchasers (e.g., corporations and people who buy a product somewhere down the supply chain, for example, through a middleman) to bring cases alleging violations of state antitrust or unfair competition laws.
- Refrain from restricting indirect purchaser standing only to specific categories of products.
- In addition to recovery of reasonable attorneys' fees, allow for the award of treble damages, and reject claims that this could lead to duplicative or redundant relief — *it will not!*[29]
- Prevent damages paid to direct purchasers from offsetting damages to indirect purchasers.
- Allow corporations *and* natural individuals to bring causes of action.[30]

THE PUSHBACK

The most common criticism of the current system of multiple enforcers and multiple remedies is that it could lead to duplicative payouts. If both direct purchasers and indirect purchasers can pursue treble damages, and those damages are on top of disgorgement, criminal fines, and other penalties sought through state action, penalties could theoretically be sixfold or even tenfold the actual damages caused by the unlawful conduct.

29 Courts have acknowledged indirect purchaser standing in the following states: Arizona, Florida, Iowa, Massachusetts, New Hampshire, North Carolina, and Tennessee.

30 For a thorough survey of Illinois Brick Repealers and an analysis of best practices, see Lande, Robert H., "New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations." 61 Ala. L. Rev. 447, 2010.

Even though most of the antitrust community concedes that treble damages achieve optimal deterrence, the reality is that treble damages are rarely awarded. This is true even in situations where multiple enforcement authorities have standing. More often, when cases proceed beyond initial pleadings, the settlements reached are far below treble damages. A separate theory of antitrust damages contends that damages should greatly exceed their harms, because not all antitrust violations are detected.[31]

In short, the danger of more than treble damages only exists in theory. Any reassessment of antitrust damages should establish a floor and increase the theoretical ceiling if optimal deterrence is to be achieved.[32]

Example Law: Kansas Stat. Ann. §50-161; 10 Maine Rev. Stat. §1104; California Bus. & Prof. Code §16750

31 See Lande, *supra* note 29.
32 *Id.*

Protecting Against Abuses of Monopsony and Buyer Power

THE PROBLEM

Unlike a monopoly, which is typically characterized as the only (or dominant) seller in a market, monopsony exists where there is a single or dominant buyer in a market. Whereas monopolies can raise prices above competitive levels, the monopsonist tends to lower the price of the goods and services it buys below competitive levels. As a result, the sellers of goods or services are left with nowhere to go when their wares are underpriced.

Abuses of buyer power occur across industries, from agriculture to health care to retail.[33] For example, a dominant purchaser of livestock can depress the prices of crops or animals below competitive levels.[34] Abuses of buyer power are also ubiquitous in labor markets. Massive employers like Amazon and Walmart have been found to depress wages when moving into new regional markets, [35] while thousands of their workers subsist on federal social safety net programs.[36] Dominant hospital systems and health insurers can exert monopsony power over medical providers if those providers have very few alternative purchasers for their services. [37]

Despite recognition that antitrust laws are as concerned about abuse of monopsony power as they are about abuse of monopoly power — and that sellers to a monopsony have been harmed as much as buyers from a monopoly[38] — federal jurisdictions have challenged few instances of monopsony or buyer power.

Abuses of buyer power are not necessarily linked to market dominance or market share. Retailers with relatively low market share can exert significant buyer power over sellers, particularly if a retailer has a simultaneous higher share in a local, harder-to-define market. Even in the absence of a monopsony (as defined by federal law), buyers price discriminate through all-or-nothing contracts, whereby sellers must commit to selling a specific volume at a specified price, or the monopsonist buys nothing. Facing less income and increased uncertainty over future earnings, suppliers may have less incentive to innovate or invest in their equipment. As a result, quality and consumer choice deteriorate.

Still, federal antitrust law requires proof that a defendant possess monopsony power before proceeding with a case alleging abuse of buyer power. This is further complicated by

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33 "Courage to Learn," *supra* note 14, at p. 139.
34 *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323 (D. Vt. 2010) (unlawful creation of monopsony power in the milk distribution system through exclusive supply agreements).
35 Jones, Janelle and Zipperer, Ben. "Unfulfilled Promises: Amazon fulfillment centers do not generate broad-based employment growth." Economic Policy Institute, 2018 (noting that state and local governments that give away millions in financial incentives to lure Amazon warehouses don't get a commensurate return on that investment); see also, "Unfulfillment Centers: What Amazon Does to Wages," The Economist, January 20, 2018; see also, Dubit, Arindrajit; Lester, William T.; Eidlin, Barry, "A Downward Push: The Impact of Wal-Mart Stores on Retail Wages and Benefits," UC Berkeley Labor Center, 2007.
36 Millions of Full-Time Workers Rely on Federal Health Care and Food Assistance Programs." Report to US Government Accountability Office, October 2020.
37 *W. Penn Allegheny Health Sys., Inc.*, 627 F.3d 85 (2010).
38 *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 265 (2012).

requirements that monopsony power be demonstrated via a high market share held by the power buyer, which rarely exists, even when buyer power has created significant harms.[39] Having buyer power alone does not satisfy this monopsony requirement, even though the harm to the seller still exists.

MODEL LEGISLATION

State lawmakers should create or enhance existing laws against abuses of buyer power by:f

- Include explicit and distinct definitions of "monopsony" and "buyer power."
- Bar evidence of a lack of market share to offset, or as an affirmative defense to, an allegation that a buyer has abused their power over a seller.
- As an alternative to relying solely on market share thresholds, provide factors that a court may consider in determining monopsony or buyer power, including:
    - Evidence of inelasticity in the input market; and
    - An inability or unwillingness for new purchasers to enter the market, or for existing purchasers to expand their purchases in the market to levels consistent with a competitive market.
- Prohibit evidence of lower prices or other pecuniary gains to consumers to offset antitrust harms to workers.
- Allow for the introduction of direct or indirect evidence in cases alleging an abuse of monopsony or buyer power.

Example Law: New York Senate Bill S933C, the "21st Century Antitrust Act" (*link*)

39 See Stucke, *supra* note 20.

Reinvigorating Merger Challenges at the State Level

THE PROBLEM

One of the more pronounced indicators of the consolidation crisis in recent years is a wave of mergers that reached an all-time high of $5.8 trillion in 2021, aided by skyrocketing valuations and corporations wanting to sell.[40] Runaway mergers present a crisis for working people, who are hit with sweeping layoffs in their wake.[41] If they are fortunate enough to keep their jobs, they face the depressed wages, job insecurity, worse working conditions, and other compounded harms of eviscerated competition.[42]

Though mergers have gone unchecked across most sectors of the economy, they are perhaps most pronounced in the context of dominant tech platforms, which have collectively engaged in several hundred mergers between 2000 and 2019, thereby eliminating nascent competitors, closing off market entry, and undermining competition.[43] Officials have bemoaned having more mergers to review and fewer resources to review them.

At the state and local level, mergers frequently evade any review at all, mostly for the simple reason that they are valued below the premerger notification thresholds of the federal Hart-Scott-Rodino Act.[44] Other times, state enforcement authorities are simply too under-resourced to effectively investigate merger concerns, while federal enforcement authorities may be less aware of harms experienced at the local and regional level. Regardless, even small transactions can have large impacts on competition, which is particularly true of mergers in highl localized industries.[45]

State merger laws, to the extent they are at all prevalent, have tended to focus on concentration in the private health care industry. It goes without saying that states with rigorous premerger notification policies, investigative mandates, competition-based review criteria, and adequate remedies have opened more investigations and successfully challenged more anti-competitive mergers than states without.[46]

40 Miller, Sarah and Brown, Krista. "To Save Jobs and Slow Inequality, Stop the Merger Frenzy." American Economic Liberties Project, January 11, 2022.
41 *Id.*
42 *Id.*
"Investigation of Competition in Digital Markets." U.S. House Judiciary Committee, Subcommittee on Antitrust, 2020, at p. 387.Millions of Full-Time Workers Rely on Federal Health Care and Food Assistance Programs." Report to US Government Accountability Office, October 2020.
44 On January 24, 2022, the Federal Trade Commission updated thresholds for premerger notifications under Section 7A of the Clayton Act to $101 million.
45 Wollman, Thomas G. "Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act." American Economic Review: Insights, Vol. 1., No. 1, July 2019.
46 Fulton, Brent D., et al. "States' Merger Review Authority is Associated With States Challenging Hospital Mergers." Health Affairs, Vol. 40, No. 12: Hospitals, Workforce, Equity & More, December 2021.

THE SOLUTION

States have a critical role to play in addressing poorly functioning markets because federal antitrust enforcement is limited by resource constraints, high Hart-Scott-Rodino filing thresholds, less flexible merger review authority, and less knowledge of local market conditions.[47]

THEMODEL LEGISLATION

- Model legislation to reinvigorate state investigation, regulation, and enforcement against potentially anti-competitive mergers would:
- Require merging entities to provide concurrent notice of Hart-Scott-Rodino premerger notices to state attorneys general.
- Establish lower monetary value thresholds for triggering premerger notification, to better approximate the propensity for anti-competitive mergers at the state and regional level.
- Allow state attorneys general to initiate a waiting period before consummation of a merger, and to compel document production.
- Restructure and adequately fund state agencies to promote coordinated investigations of proposed mergers among antitrust and industry/subject matter experts.
- Provide specific competition-based review criteria for proposed mergers.
- Grant state enforcement agencies with the authority to approve, conditionally approve, or block proposed mergers.
- In rare cases, rather than block a merger entirely, provide for structural remedies, such as divestiture of facilities, to prevent anti-competitive price increases, anti-competitive contract clauses, or other abuses of market power.

47 Berenson, Robert A., et al. "Addressing Health Care Market Consolidation and High Prices." Urban Institute, January 2020.

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The American Economic Liberties Project is a new, independent organization fighting against concentrated corporate power to realize economic liberty for all, in support of a secure, inclusive democratic society.

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