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California poised to raise the stakes for antitrust offenses

Proposed amendments to California's antitrust laws could affect both state and federal enforcement, with potential consequences for antitrust federalism.

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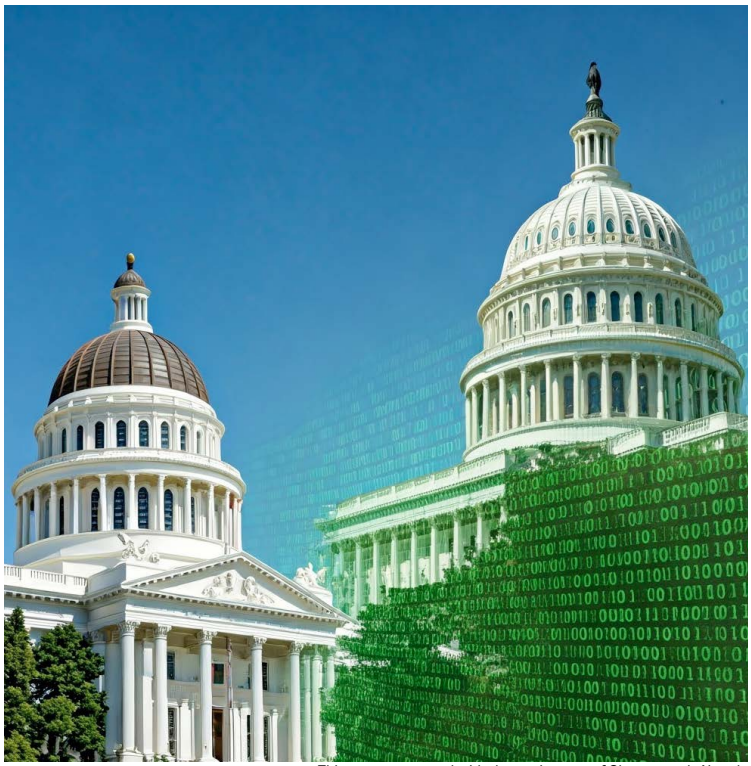
In the United States, civil antitrust enforcement is a relatively active and decidedly federalist endeavor. The U.S. DOJ, FTC, and state attorneys general enforce federal civil antitrust laws. State AGs also enforce their states' own civil antitrust laws, which, in many instances, are harmonized with federal law.

By contrast, the U.S. DOJ alone is responsible for federal criminal antitrust enforcement. And while at least 38 states have their own criminal antitrust laws in some form, state antitrust prosecutions have historically been quite rare.

However, an announced policy shift in California - coupled with the possible consequences of a recently proposed legislative expansion of state antitrust law - could potentially increase the significance of state antitrust actions and change the dynamics of criminal antitrust enforcement.

Paula Blizzard, head of California DOJ's antitrust section, said in 2024 that, after a 20-year hiatus, California would begin bringing criminal antitrust prosecutions under the Cartwright Act. While no actions have yet been filed, California AG Rob Bonta is calling for the legislature to enhance Cartwright Act penalties.

Meanwhile, the staff of the California Law Revision Commission recently recommended expanding the Cartwright Act to reach unilateral (single firm) anticompetitive conduct.



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Proposed increases in state civil and criminal antitrust penalties

California Senate Bill 763 would add a specific civil penalty provision to the Cartwright Act. Conduct that violates the Cartwright Act also violates the state's Unfair Competition Law, which carries a $2,500 fine per violation. *Mfrs. Life Ins. Co. v. Super. Ct.*, 10 Cal.4th 257 (1995). SB 763 would significantly raise the stakes by creating a separate, cumulative Cartwright Act penalty of up to $1 million for each violation.

State criminal penalties would also increase. Instead of the current fines of up to $1 million for corporations and $250,000 for individuals, defendants could face fines of up to and even beyond $100 million for corporations and $1 million for individuals. Like the Sherman Act, the Cartwright Act also provides an "alternative" maximum fine of double the gross pecuniary gain or loss derived from the violation. Depending on the conspiracy, that could potentially exceed $100 million. (The largest federal antitrust fine to date is $925 million.) Finally, SB 763 would increase the state's maximum available prison sentences from three to five years for state antitrust crimes. Pending legislation in New York would implement similar changes.

In short, the prospect of large antitrust fines may soon no longer be limited to federal criminal antitrust enforcement.

Proposed substantive expansion of state antitrust law

There are also efforts in some states, including California, to broaden the substantive reach of state antitrust laws.

Similar to Section 1 of the Sherman Act, the Cartwright Act currently reaches only concerted conduct. There is no Cartwright Act counterpart to the Sherman Act's monopolization prohibition - though other state laws may touch upon anticompetitive unilateral conduct.

Law Revision Commission staff recently recommended, among other things, that the state legislature add a European-style "abuse of dominance" prohibition to the Cartwright Act. This would expand state law to reach conduct that is beyond current federal monopolization law, potentially triggering liability for anticompetitive conduct by single firms with market shares that are lower than what is generally required for a federal monopolization violation. New York, again, has similar legislation pending.

Potential consequences

If enacted, SB 763 would increase potential monetary exposure result-

ing from an antitrust violation. This, coupled with stepped-up state criminal enforcement, could have significant consequences for California antitrust defendants. The proposed penalty amendments would be even more consequential if they were to be applied to the proposed abuse of dominance violation. Indeed, Blizzard said that she "will work on" gaining the ability "to bring a criminal monopolization case." (She also recently raised the prospect of states cooperating with each other in criminal investigations but filing separate parallel criminal actions.)

All of this would occur in a criminal enforcement field already largely occupied by the U.S. DOJ. Yet the Supreme Court has long held that state antitrust laws are generally not preempted, but instead supplement, their federal counterparts. *California v. ARC Amer.*, 490 U.S. 93 (1989). Further, the Dual Sovereign Doctrine allows states to prosecute state criminal offenses that parallel federal criminal charges. *Grable v. United States*, 587 U.S. 678 (2019).

The U.S. DOJ's *Petite* Policy at least introduces a degree of uniformity to decisions about whether to bring parallel federal criminal charges. Unless California prosecutors follow a similar policy, the decision of whether to compound a defendant's criminal exposure by bringing a parallel state prosecution may depend in part on individual acts of prosecutorial discretion. In a recent speech, Blizzard indicated that California would focus "on crimes that affect our population directly," such as state procurement crimes, rather than crimes that affect the country generally. (The U.S. DOJ has targeted these crimes through its Procurement Collusion Strike Force.)

Newly invigorated state-level criminal antitrust enforcement could also have potential consequences for the effectiveness of the U.S. DOJ's antitrust leniency program, which is designed to encourage self-reporting of criminal antitrust violations. If state prosecutors do not grant leniency in parallel with federal prosecutors, companies would face a substantial risk that their disclosure to the U.S. DOJ could also constitute an admission of a state crime for which they and their cooperating employees are not immunized. The *Petite* Policy does not generally apply at the investigatory stage, so the prospect of concurrent investigations is real. At the very least, a high level of federal-state coordination (not to mention trust and predictability) would be necessary to retain the effectiveness of the U.S. DOJ's leniency program in these situations.

Judge Richard A. Posner once observed "the tendency of antitrust litigation to create multiple lawsuits out of a single dispute." He called this accumulation of potential liability the "cluster-bomb effect." It is in this light that practitioners should understand the consequences of these potential changes in the law.

In short, California antitrust lawyers should keep their eyes trained on developments in Sacramento as well as Washington, D.C.

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