

2025 BATES WHITE ANTITRUST SYMPOSIUM

Summary of panel discussions



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On September 30, 2025, Bates White hosted its Antitrust Symposium, bringing together distinguished antitrust practitioners, academics, and enforcers to hear two panels covering topics at the frontiers of antitrust enforcement. The first panel discussed how state antitrust enforcement is evolving, and the second panel focused on how the boundaries of antitrust have been tested in recent years. A summary of the discussions can be found below.¹

I. PANEL 1: STATE ANTITRUST ENFORCEMENT

I.A. Summary

The first panel at the conference discussed the evolving landscape of state antitrust enforcement. The panelists included Steve Kaufmann, Deputy Solicitor General for Consumer Protection in Colorado; Dylan Carson, Antitrust Partner at Manatt, Phelps & Phillips in Washington, DC; Mike Jorgenson, Supervising Deputy Attorney General for Antitrust at the California Attorney General's Office; and Nitin Dua, Partner at Bates White. The panel was moderated by Mathis Wagner, Partner at Bates White.

The panelists discussed states' involvement in major technology, healthcare, and consumer protection cases; merger review practices, and the increasing significance of state-level policy initiatives. While resources for states remain limited relative to the Department of Justice (DOJ) and Federal Trade Commission (FTC), panelists agreed that states have developed robust enforcement capacity and are increasingly coordinating to pursue complex antitrust cases. The panelists also highlighted that states focus on the impact of mergers and unilateral conduct cases on local markets and consumer protection, which explains why states are sometimes motivated to pursue cases independently.

I.B. Recent enforcement actions

The panel started by discussing recent cases in Colorado and California. Colorado has been particularly active in technology and consumer protection cases. The state is participating in multi-state actions against Google involving search and advertising practices and has taken part in litigation concerning Google's in-app purchase policies. Colorado also joined the consumer protection settlement with Amazon and is pursuing two cases involving Live Nation. On the merger front, Colorado played a leading role in reviewing local market impacts of the Kroger–Albertsons merger, reflecting the growing view that state enforcers are best positioned to evaluate local competitive effects.

California also continues to expand its antitrust enforcement across the technology, healthcare, and agriculture industries. The California Attorney General's (AG) Office was recently involved in an Amazon settlement and remains engaged in numerous tech and healthcare investigations. Panelists noted that states have even begun enforcing the Clayton Act independently, implying a willingness to challenge conduct without waiting for federal agencies to act.

I.C. Expanding state enforcement actions

The panel then turned to the recent development of expanding state enforcement. For example, Colorado has recently adopted a "mini-HSR" law that requires merging parties to submit premerger filings to the state for mergers that might affect Colorado markets. The state-specific HSR review period allows the state to assess merger transactions independently of the federal agencies' review. This reform reflects a broader national trend toward enhanced state scrutiny of mergers. Panelists also noted that more resources have been shifted toward

¹ Views expressed by panelists represented their personal perspectives and not the views of any institutions. This summary does not attribute views to any individual panelist or other participants.

state AG enforcement, supplementing the possible decline in federal enforcement. For example, Colorado's AG's Office has developed a strong and robust in-house antitrust litigation team capable of bringing cases to trial, while other states may rely on outside counsel or work with other AGs.

States frequently coordinate with federal enforcers, but states retain discretion to pursue their own theories of harm. The states' decision to file jointly or separately depends on the nature of the case and the impact on local consumers. Panelists noted that the most affected states typically lead in forming coalitions, supported by an executive committee structure to allocate litigation responsibilities. While resource constraints remain a challenge for the states, collaborations among them have proven effective.

I.D. States' focus on local markets and consumer protection

The panel then discussed how consumer protection and local economies remain a central focus of state enforcement. For example, Colorado challenged an anesthesia provider's monopolization in Denver. The lawsuit resulted in divestitures at the state level and has demonstrated how a state's active enforcement can protect local consumers even where federal enforcers have not intervened. In California, several investigations in healthcare and energy markets also highlight the state's emphasis on local anticompetitive effects and consumer protection. California laws frequently address state-level antitrust concerns in the healthcare, technology, and energy industries. Several bills have also been passed in California relating to algorithmic collusion and AI price-setting tools to protect consumers.

Panel members concluded that state antitrust enforcement will continue to expand as AGs assume a more active role in policing both mergers and anticompetitive conduct cases. While federal merger enforcement trends remain uncertain, panelists agreed that state involvement will remain strong—particularly in sectors with local market impacts such as healthcare, agriculture, and technology.

II. PANEL 2: THE ROLE OF ANTITRUST AND ITS BOUNDARIES

II.A. Background

This panel focused on discussing how the boundaries of antitrust have been tested in recent years, where this effort stands, where it should go, and the question of what, if anything, was wrong with the old understanding. The panelists included Diana Moss, Vice President and Director of Competition Policy at the Progressive Policy Institute; Henry Liu, Partner and Co-Chair of Covington's Antitrust Practice and former Director of the Bureau of Competition at Federal Trade Commission (FTC); Kathy O'Neill, Partner at Fried Frank and former Senior Director of Investigations and Litigation at the Department of Justice's (DOJ) Antitrust Division; and Randy Chugh, Principal at Bates White. The panel was moderated by Eric Emch, Partner at Bates White.

Following a long period of relative bipartisan consensus, the past decade has seen increasing calls from antitrust scholars and practitioners for enforcers to push beyond the "traditional" bounds of antitrust toward a more expansive conception of what antitrust can and should achieve. This expansion of boundaries began manifesting during the Biden administration, e.g., in the FTC's policy statement that FTC Act Section 5 would be used to attack "unfair" competition beyond the reach of traditional antitrust enforcement. Furthermore, the 2023 Merger Guidelines explicitly incorporated measures like harm to labor that were not traditionally a focus of antitrust under the consumer welfare standard.

The Trump administration has maintained some of the focus of the previous administration on labor markets and retained the 2023 Merger Guidelines but has been pushing the bounds of antitrust in different directions, e.g., through a focus on "free speech" competition and "collusion" related to advertising boycotts or environmental standards.

II.B. Consumer welfare standard

The panel addressed the consumer welfare standard as both a theoretical framework and a practical tool for antitrust enforcement. Panelists explained its traditional interpretation: protecting consumers within a well-defined antitrust market by preventing significant price increases, quality reductions, or diminished choice. The traditional framework arguably excludes other possible merger effects, such as welfare impacts to trading partners that are not end customers (labor, suppliers), externalities, benefits to firms that may offset harms to consumers, and potential costs to “bigness” other than through price or quantity.

The panel discussed ways in which recent cases have arguably pushed the bounds of the traditional consumer welfare standard. For example, in the JetBlue/Spirit merger case, the court recognized the loss of an ultra-low-cost carrier as having amplified effects on price-sensitive consumers, even though such consumers were not defined as a separate market. In the Penguin/Random House case, a central concern of the DOJ was that the merger would lead to less favorable compensation for authors. Panelists noted that non-price effects on consumers, such as quality degradation through authors’ lessened ability to publish books, occurred over longer time periods compared to the direct price effects on authors and were less of a focus of the case.

Panelists also debated the tradeoffs between a narrowly defined consumer standard versus a broader interpretation. A broad interpretation of consumer welfare can adapt to the changing economy and account for the industry-specific competition dynamics, but it opens up the possibility of antitrust being used to advance policy objectives around which there may be less consensus or that may conflict with one another. A strictly defined standard could be used to regulate a narrower set of competition objectives under a clearer set of criteria but may sacrifice flexibility.

II.C. Marketplace of ideas

One novel area of antitrust concern discussed by the panel was competition in the “marketplace of ideas” and the recent role of free speech issues in antitrust enforcement. Enforcers’ recent efforts to challenge dominant tech platforms for allegedly suppressing the free exchange of ideas raised questions about whether such concerns could fit into the consumer welfare framework. While some argued that degraded free speech capabilities could theoretically harm consumer welfare if free speech is deemed a core dimension of quality, others noted the difficulty of empirically proving causation in such cases and litigating these harms under antitrust laws.

Discussions of recent mergers, including the FTC’s review of Omnicom/IPG, highlighted the challenges of crafting behavioral remedies where the focus was not on price-based competitive harm. Panelists generally agreed that antitrust should avoid overreach into politically sensitive areas and cautioned against using antitrust laws to advance unrelated policy goals. They emphasized focusing enforcement on concrete competitive harm rather than ideological biases or generalized concerns about firm conduct.

II.D. Antitrust and labor markets

Labor markets have emerged as an increasing focus of antitrust enforcement, with bipartisan interest in addressing issues ranging from non-compete clauses and no-poach agreements to mergers’ impacts on wages and worker bargaining power. Panelists mentioned FTC initiatives focusing on labor harms in merger contexts, such as in Kroger/Albertsons, which examined reduced competition for workers and harms to union bargaining.

However, panelists acknowledged the challenges in prosecuting labor cases, particularly with limited agency resources. They highlighted the difficulty of proving both upstream labor harm and downstream consumer harm in tandem. Further, they discussed claims of labor harm often being complicated by incomplete and unreliable data. With improvements in analytical tools and increasing agency focus, panelists expressed optimism for continued attention on labor markets in future antitrust enforcement.

II.E. Private equity: Traditional enforcement or beyond?

Private equity (PE) firms have become a focal point of recent antitrust scrutiny, generating discussions on whether these entities should face treatment beyond traditional enforcement due to their unique business models and market strategies. During the Biden administration, antitrust officials expressed concerns regarding the consequences on competition from PE activity. Through the business strategies of serial acquisitions, cost stripping, and selling firms in quick succession, PE firms can impose harm to consumers in key sectors such as healthcare.

While the FTC majority labeled its settlement with Welsh Carson for consolidating anesthesia practices a novel treatment of private equity defendants, the panelists debated whether focused antitrust scrutiny of PE firms was appropriate. Some argued that antitrust laws should remain general without invoking special scrutiny for specific market players, while others noted that sector-specific impacts, such as the conflict between PE's business framework and the emphasis on quality in healthcare, might merit closer scrutiny of particular types of firms in particularly sensitive areas, like healthcare.

II.F. Evolution of remedies

In response to audience questions, the panel reflected on remedies in antitrust enforcement and how they have evolved over time. Structural remedies, such as divestitures, and behavioral remedies aimed at regulating firm conduct were discussed, with panelists highlighting the difficulties of achieving adequate remedies without introducing unintended consequences. Recent merger cases, including Illumina/Grail and United/Change, underscore the importance and challenges of proving competitive harm while designing remedies that effectively preserve competition.

The panel discussed past failed remedies, such as those in Albertsons/Safeway, Sprint/T-Mobile and Live Nation/Ticketmaster, as lessons for future enforcement. Panelists noted that behavioral remedies, which rely on firms' compliance with a fixed set of rules in sometimes dynamic markets, tend to be less effective than structural solutions, which ideally create a market structure that facilitates competition rather than a set of rules overseen by a court.



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