Yale University

Thurman Arnold Project

2026 Student Papers
Paper 04

Funding State Antitrust Enforcement

July 2026

Eleri Phillips

Rena Liu

Summary

State antitrust enforcement is critical to reviewing proposed mergers, investigating anticompetitive behavior, and litigating both. Antitrust enforcement at the state level is carried out by state attorneys general. We review ways that states are currently funding antitrust enforcement, discuss case studies, and recommend practices and policy ideas that can be adopted nationwide. Topics cover custodial funds, legislative appropriations, grants, civil and criminal penalties, partnerships with outside counsel and private plaintiffs, expert costs, and litigation with other states and US Attorneys' offices.

Introduction

To challenge the merger of Kroger and Albertsons, the Washington Attorney General's Office obtained 96 million pages of documents; deposed 79 witnesses, including nine experts; and logged 17,074 hours of work.[1] As this case demonstrates, antitrust actions are "some of the most complex cases to prosecute."[2] Defendants can be the largest companies in the country. Predicting merger effects can require economic analysis of entire industries. Though upfront enforcement costs can be high, they are often clearly outweighed by the benefits: by blocking the Kroger-Albertsons merger, the Washington AG's office prevented price increases that would have left Washington consumers paying $800 million more *each year* for their groceries.[3]

State AG offices have played a critical role in antitrust enforcement for decades. State AGs have shaped some of the most important antitrust cases in recent history, such as joining the Department of Justice (DOJ) in litigation against Google for monopolization of the Internet search and search advertising markets.[4]

In recent years, states have aimed to build their enforcement capacity and have sometimes diverged from the federal government.[5] A coalition of 13 state AGs filed a motion to intervene in the court's review of a federal settlement in a merger case involving Hewlett Packard Enterprise Co. and Juniper Networks.[6] After the DOJ settled with Live Nation in 2026, 34 states continued prosecuting the case and won.[7]

---

[1] State's Petition for Attorneys' Fees and Expenses Cause at 3, State of Washington v. Kroger, No. 24-2-00977-9 SEA (Wash. Super. Ct. Mar. 14, 2025); Findings of Fact, Conclusions of Law, and Order on State's Cost Bill and Petition for Attorneys' Fees and Expenses Cause at 9, State of Washington v. Kroger, No. 24-2-00977-9 SEA (Wash. Super. Ct. Aug. 19, 2025). The final hours requested are different on the order of a few hundred hours, because Washington corrected data entry errors and voluntarily disclaimed hours. The state also worked with outside counsel, who provided 13,439.5 additional hours of work. *See* Findings of Fact, Conclusions of Law, and Order on State's Cost Bill and Petition for Attorneys' Fees and Expenses Cause at 14.

[2] Findings of Fact, Conclusions of Law, and Order on State's Cost Bill and Petition for Attorneys' Fees and Expenses Cause, *supra* note 1, at 46.

[3] *Id.* at 7.

[4] United States v. Google LLC, 803 F. Supp. 3d 18, 2025 U.S. Dist. LEXIS 170459, 2025 LX 336295, 2025 WL 2523010 (United States District Court for the District of Columbia. 2025). Several states have also joined private class action plaintiffs in a joint case against Google for app store monopolization. *See* In re Google Antitrust Litig., 521 F. Supp. 3d 1358, 2021 U.S. Dist. LEXIS 21955, 2021 LX 61703, 2021 WL 409555 (Judicial Panel On Multidistrict Litigation. 2021).

[5] For instance, Oregon's AG's office is seeking to triple its antitrust unit. *See* Shaanth Kodialam Nanguneri, *Oregon Attorney General Seeks to Double Antitrust Team to Fill Federal Enforcement Void*, OR. CAPITAL CHRONICLE, May 14, 2026, https://oregoncapitalchronicle.com/briefs/oregon-attorney-general-seeks-to-double-antitrust-team-to-fill-federal-enforcement-void/.

[6] Motion for Intervention, United States v. Hewlett Packard Enterprise Co., (No. 5:25-cv-00951-PCP), https://www.mass.gov/doc/motion-to-intervene-0/download.

[7] Ben Sisario, *Jury Finds Live Nation Acts as a Monopoly in a Victory for States,* N.Y. TIMES, April 15, 2026, https://www.nytimes.com/2026/04/15/arts/music/live-nation-antitrust-trial-verdict-monopoly.html

On a regional level, state AGs are well-positioned to address the issues posed by anticompetitive conduct in their local markets.[8] Since 2000, 43 states have had "red zone" hospital mergers deemed likely to raise prices by lessening competition.[9] The reporting threshold for merger review under the Hart-Scott-Rodino Act has allowed dialysis clinic mergers to fly under the radar, resulting in higher mortality rates for patients in affected geographies.[10]

This paper focuses on how state AGs can access the funds and expertise needed for vigorous antitrust enforcement. First, we discuss the current status of state antitrust enforcement: how different state AG's offices are funded and what recoveries are available from an antitrust case. This leads into the first section on expanding existing sources of antitrust enforcement funding. Sections 2 and 3 cover partnerships with outside counsel, private plaintiffs, other states, and US Attorneys' offices. Section 4 is on reducing expert costs. Section 5 discusses two avenues for further research: legislation to modernize antitrust law and third-party litigation finance.

The Current Status of State Antitrust Enforcement

Outside of the federal government, US states and territories are empowered to bring antitrust cases through their Offices of Attorneys General. States can bring antitrust cases both through their *parens patriae* authority, or as a litigant on behalf of the state government or a relevant agency; for instance, when the state itself is a direct purchaser.[11]

Recent research has shown that antitrust enforcement is below optimal levels in the US. Currently, the Federal Trade Commission and Department of Justice bring between 30 and 60 civil actions a year.[12] From 1968 to the present, states have brought 813 antitrust cases.[13] Some enforcers and academics have recommended increasing the federal antitrust budget by $600 million, which would allow for 60 to 100 more cases to be brought annually.[14] This is likely an

---

[8] In past expert analysis, the use of average effects across large areas can mask harm to smaller regions.

[9] Zack Cooper, Andrea Harris & Mathilda Hill, *A Ranking of All 50 States by Hospital Consolidation*, HEALTH CARE AFFORDABILITY LAB AT YALE (Mar. 9, 2026), https://www.healthcareaffordabilitylab.org/commentary-press-release-posts/a-ranking-of-all-50-states-by-hospital-consolidation.

[10] Thomas G. Wollmann, How to Get Away with Merger: Stealth Consolidation and Its Effects on US Dialysis (Feb. 5, 2024), https://questromworld.bu.edu/thomas-wollmann/wp-content/uploads/sites/70/2026/03/how_to_get_away_with_merger_2024.pdf.

[11] Nick Cordova, Note, *Parens Patriae and State Attorneys General: A Solution to Our Nation's Opioid Litigation?*, 44 HARV. J.L. & PUB. POL'Y 339 (2021). See Minnesota as an example: "The Attorney General may bring claims on behalf of the State, its agencies, on behalf of political subdivisions, or on behalf of the people of the state as parens patriae." in Minn. Stat. § 325D.59

[12] Bill Baer, Jonathan B. Baker, Michael Kades, Fiona M. Scott Morton, Nancy L. Rose, Carl Shapiro & Tim Wu, *Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress*, WASH. CTR. FOR EQUITABLE GROWTH (Nov. 2020), https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/ at 16.

[13] *State Antitrust Litigation and Settlement Database*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/issues/antitrust/state-antitrust-litigation-and-settlement-database/results/

[14] Baer et al., *supra* note 12.

underestimate of the true scope of the antitrust enforcement deficit in the U.S. This paper takes as its starting point the idea that more antitrust enforcement is needed along four axes:

1. Mergers that are presumed illegal under current merger guidelines. These mergers include roughly thirteen every year involving hospitals alone, and there are likely hundreds more annually nationwide across all industries.[15]

2. National cases brought under Sections 1 or 2 of the Sherman Act, particularly against large firms that operate nationwide. Recent examples include litigation against Meta, Google, and Live Nation.

3. Local cases involving anticompetitive behavior or mergers involving firms that operate within a single state, or a small number of states. For instance, New York brought antitrust claims against ski resorts in the Syracuse area.[16]

4. "Stealth mergers" that fall under Hart-Scott-Rodino Act (HSR) reporting guidelines.[17] These mergers may be part of a series of acquisitions or cause a highly localized market to become less competitive. For instance, dialysis clinics across the country have consolidated in the past decade, through hundreds of acquisitions that fell under HSR reporting thresholds.[18] There are likely several hundred of these stealth mergers annually, which would entail dozens in each state.

State enforcement activity has varied widely over recent years. Recently, the number of state enforcement and settlement actions has risen from its low point of just 3 cases in 2021, while still falling short of its 2019 peak. States have been successful – and will continue to be – in providing antitrust leadership despite resource constraints: Washington's antitrust section, relatively large compared to the rest of the nation, has fifteen in-house attorneys.[19] Nationwide, resources vary widely, and some states have no dedicated antitrust section at all.[20]

---

[15] 238 such mergers recorded from 2002 to 2020, averaged as 13 annually. *See* Zarek Brot et al., *Is There Too Little Antitrust Enforcement in the US Hospital Sector?*, 6 AMERICAN ECONOMIC REVIEW: INSIGHTS 526 (2024), https://pubs.aeaweb.org/doi/10.1257/aeri.20230340.

[16] *Attorney General James Wins Case Against Central New York Ski Resort Owner for Illegally Shutting Down Competition*, N.Y. Att'y Gen. (Mar. 10, 2025), https://ag.ny.gov/press-release/2025/attorney-general-james-wins-case-against-central-new-york-ski-resort-owner.

[17] Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AMERICAN ECONOMIC REVIEW: INSIGHTS 77 (2019), https://www.aeaweb.org/articles?id=10.1257/aeri.20180137.

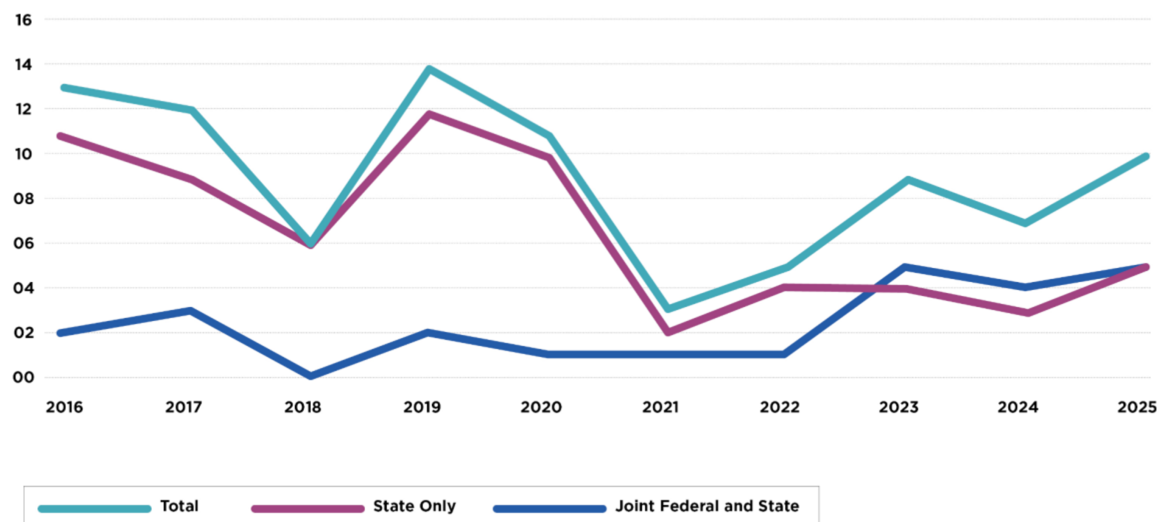
[18] Wollmann, *supra* note 10..

[19] State's Petition for Attorneys' Fees and Expenses Cause, *supra* note 1.

[20] *Modern Antitrust Enforcement,* THURMAN ARNOLD PROJECT, https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement

Active litigation is an equilibrium outcome; if more vigorous state antitrust enforcement became common, many of these mergers would not be proposed in the first place or would be abandoned when an investigation began. In this world, effective state enforcement would not manifest itself in cases or settlements, but in thriving state economies that deliver low prices and high quality to citizens.

Figure 1. State Enforcement and Settlement Activity (2016–2025)



Herbert Smith Freehills Kramer LLP 2026.[21]

With this in mind, our paper presents a roadmap to increasing antitrust enforcement across all axes and advancing competition in the US.

1. Existing Sources of Funding for Antitrust Enforcement

In contrast with federal authorities, which fund antitrust enforcement primarily through merger filing fees under the Hart-Scott-Rodino Act, states must rely on other sources of funding.[22, 23] Each AG's office is funded through a blend of legislative appropriations and recoveries from

---

[21] Abbe Dienstag, Roy Englert Jr. & Randal Murdock, *On the Continuing Relevance of State Antitrust Enforcement in the US*, HERBERT SMITH FREEHILLS KRAMER (Jan. 9, 2026), https://www.hsfkramer.com/en_US/insights/2026-01/on-the-continuing-relevance-of-state-antitrust-enforcement-in-the-us.

[22] Federal Trade Commission, *Agency Financial Report for Fiscal Year 2025* (2026), https://www.ftc.gov/reports/agency-financial-report-fy2025.

[23] Department of Justice, *Appropriation Figures for the Antitrust Division Fiscal Years 1903-2025* (2025), https://www.justice.gov/atr/appropriation-figures-antitrust-division.

enforcement actions.[24] Legislative appropriations must be renewed periodically, and are vulnerable to state politics and budgetary pressures. It is therefore compelling to have other sources of funding that can be used for enforcement. Of the money recovered from enforcement actions, only designated types of recovery are payable to an AG's office for its own use.[25] The typical regime is as follows: Damages first go to harmed parties, penalties go to state General Funds, and AG's offices receive attorneys fees and costs.[26]

There are two variations on the above structure. First, settlements or court judgments often reserve a share of recovery to fund future enforcement.[27] For example, as part of a $700 million settlement in the state-led antitrust case against Google for monopolization regarding Google Play Store, 10% —$70 million—was set aside as part of a "States' Monetary Fund," to be distributed amongst the states.[28] The States' Monetary Fund could be used to bring future antitrust or consumer protection cases.[29]

Second, a state statute can designate a portion of total recovery for an AG's use. Florida, for example, keeps 30% of recoveries from antitrust cases in a revolving fund, including penalties awarded to private plaintiffs the state represented in its *parens patriae* capacity.[30] Florida's Legal Affairs Revolving Trust Fund provided $5.6 million for state antitrust enforcement in 2025.[31] In 2024, California, in its 2025 Senate Bill 763, amended its statute to retain 100% of civil penalties

---

[24] Washington State, which is fully funded through recoveries as opposed to legislative appropriations, also has a history of negotiating consent decrees and settlements with firms that set aside money for future litigation: RealNetworks reimbursed the Washington AG's office $400,000 for legal expenses as a result of settling a consumer protection lawsuit. See RealNetworks, Inc., *Current Report Form 8-K* (May 24, 2012), https://www.sec.gov/Archives/edgar/data/1046327/000129993312001312/htm_45195.htm.

[25] Antitrust violators are subject to criminal penalties (fees and jail time), and civil remedies. When parties sue on antitrust grounds, as with any civil case, they can seek legal and equitable relief. Equitable relief, which is where the court requires a particular action from the defendant, can include injunctions on behavior. Legal relief includes monetary damages to compensate for harm, and penalties for punishment and/or deterrence. In antitrust cases, monetary damages are trebled. These damages can go into the aforementioned state funds that are again used to fund antitrust cases. See ANDREW GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (4 ed.).

[26] Colo. Rev. Stat. § 6-4-113 (2024).

[27] Section 7 of the Sherman Act, as amended by Section 4 of the Clayton Act, awards treble damages plus costs to successful claims of antitrust injury. State statutes largely resemble federal statutes, with some variations. A few states limit recovery to actual or double damages only. Overall, Defendants in antitrust cases may pay money in the following ways: disgorgement, restitution, fines or penalties, and attorneys' fees. The exact monies that states can recover from antitrust litigation processes varies by state.

[28] Settlement Agreement and Release, In re Google Play Store Antitrust Litigation at 13, No. 3:21-md-02981-JD (N.D. Cal. Dec. 18, 2023), ECF No. 522-2.

[29] *Id.* at 18.

[30] Fla. Stat. § 16.53, subsection 2.

[31] Florida SB 2500-E - Appropriations (801764), Regular Session 2025 at 260.

in its antitrust account.[32] Michigan has proposed legislation to create a new antitrust revolving fund funded through a tiered system based on the total recovery amount.[33]

There are a number of approaches to increasing the funds available for antitrust enforcement that states have used successfully.[34] We review them here.

A. Creating Custodial Funds

A state can establish a custodial fund for antitrust enforcement. These funds allow legislative appropriations to be supplemented by settlements, attorneys fees and costs from past cases, and sometimes a portion of recoveries, depending on state statute.

The table below provides a non-exhaustive list of examples of state funding models. States can tailor the specific provisions of their statutes to keep a larger share of recoveries (for instance, allowing a larger percentage of civil penalties to stay in the fund).

Table 1. State Funding Model Examples

State	Fund Name	Statutory Authority	Funding Sources
Florida	Legal Affairs Revolving Trust Fund	Fla. Stat. § 16.53	30% of all recoveries or attorneys' fees/costs (whichever is greater).[35]
Michigan	Consumer Protection and Antitrust Revolving Enforcement and Education Fund	SB 134 (*proposed*)	100% of attorneys fees, costs, and proceeds up to $500,000; 50% of the next $500,000 to $1 million, 10% of the remainder
Missouri	Antitrust Revolving Fund	RSMo § 416.081	10% of all recoveries; attorneys' fees/costs

[32] California SB 763 Section 1 16755 (c)).

[33] Michigan SB 134.

[34] Some argue that differences in funding models can influence the types of cases that states choose to pursue. While a structure that is funded primarily by recoveries ensures that a state's antitrust division can be essentially self-supporting, it can warp incentives in favor of pursuing cases that are expected to have a high financial return. Important types of antitrust cases only involve suing for injunctive relief, but fewer of these sorts of cases may be brought if a state depends heavily on recoveries for its funding. Most prominently, merger investigations and challenges are an example of an antitrust action that yield no monetary recovery, but are critical to promoting competition and protecting consumers. Increasing funding through appropriations and recoveries jointly is a path to balancing these incentives.

[35] Funds in excess of 3 times the annual budget for the antitrust, consumer protection, and racketeering sections are returned to the general fund at the end of the year.

California	Attorney General Antitrust Account	SB 763 (2025) § 16762	100% of civil penalties; attorneys' fees/costs
Illinois	Antitrust Enforcement Fund	740 ILCS 10/13	100% of civil penalties; attorneys' fees/costs
Iowa	Antitrust Fund	Iowa Code § 553.19	100% of damages sustained by the state, penalties, attorneys' fees/costs. $500,000 cap on the amount state antitrust enforcers can appropriate each year.

There are practical steps that states have taken to increase recoveries from antitrust cases.

1. Any settlements or court orders should specify that **unclaimed damages are kept by the state or otherwise used for the benefit of harmed parties**, not refunded to the defendant.

2. States have argued for **higher lodestar multipliers on attorneys' fees** in antitrust cases that they litigate. A lodestar multiplier is a multiplier on base hourly rates that is used by courts to adjust the total fee awarded. The size of the multiplier can be used to compensate attorneys for taking on a high-risk case or obtaining exceptional results. For example, the court awarded the Washington AG's office a 2.0x multiplier on attorneys' fees for their work on the Kroger-Albertsons merger.[36] The state's petition is publicly available.[37]

B. *Cy Pres* Distributions

Antitrust damages and settlements are typically paid out to compensate injured parties. However, a portion of funds may go undisbursed or unclaimed because the injured parties cannot easily be identified. Or, in some cases, harm is so dispersed that distribution is impractical. Traditional approaches to these unclaimed funds have included returning them to the defendant or distributing them amongst class members that did submit claims. However, these approaches have been criticized on the grounds that returning the funds undermines the deterrent effect of

[36] Findings of Fact, Conclusions of Law, and Order on State's Cost Bill and Petition for Attorneys' Fees and Expenses Cause, *supra* note 1, at 47.
[37] State's Petition for Attorneys' Fees and Expenses Cause, *supra* note 1.

the suit, and distributing funds amongst a small number of class members unfairly overcompensates them.[38]

The *cy pres* doctrine allows courts to allocate undistributed or unclaimed funds to be allocated to the nearest-possible use to provide indirect prospective benefit to a class of consumers. In antitrust cases, courts have authorized the use of *cy pres* funds to be used for promoting competition generally; for example, by funding organizations like the American Antitrust Institute,[39] or by allocating the funds to AG's offices to fund future enforcement.[40]

As another example, the 2012 consent decree between the Washington AG and RealNetworks Inc. specified that of the $2 million restitution fund, unclaimed funds up to $500,000 would be paid to the AG's office, and any remaining funds would be returned to the defendant.[41] We do not think funds should be returned to defendants. Instead, states should adopt *cy pres* policies that allow state AG's offices to use funds for future enforcement.

Allocating unclaimed funds from *parens patriae* actions to AG's offices for future antitrust enforcement is a natural use of the *cy pres* doctrine. After claims by class members are fulfilled, paying remaining funds to AG's offices benefits citizens by promoting competition and preserving the deterrent purpose of antitrust restitution.

C. Increasing Legislative Appropriations

In May 2026, Oregon announced its intention to triple the number of attorneys in its antitrust section through increased funding from the Oregon Emergency Board, a legislative committee that operates when the state legislature is not in session.[42] There are especially urgent arguments for increased antitrust enforcement in 2026. In Oregon, for example, there has been a 49% increase in mergers in the year 2024.[43] If states have budget surpluses or legislatures that are friendly to increasing funding for AG's offices, increasing legislative appropriations is the most direct way to expand antitrust enforcement.

---

[38] John H. Beisner, Jessica Davidson Miller & Jordan M. Schwartz, *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, U.S. CHAMBER INST. FOR LEGAL REFORM (Oct. 2010), https://instituteforlegalreform.com/wp-content/uploads/2020/10/cypres_0.pdf.

[39] Albert A. Foer, *Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices*, 24 ANTITRUST 86 (Spring 2010).

[40] Susan B. Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 404 (1999).

[41] RealNetworks, Inc., *supra* note 24.

[42] Elizabeth Hayes, *Rayfield Asks for 16 New Antitrust Employees amid 49% Surge in Mergers*, PORTLAND BUSINESS JOURNAL, May 11, 2026, https://www.bizjournals.com/portland/news/2026/05/11/rayfield-antitrust-attorney-general-anticompetitiv.html.

[43] *Id.*

Key arguments for why a legislature should increase antitrust enforcement funding include the following:

1. More antitrust enforcement is needed to **match a larger economy**. Since 2010, the US Gross Domestic Product has grown 38%, but federal antitrust funding has only grown 4%.[44] A similar case is likely to be true for states.[45]

2. Antitrust enforcement has **large returns to investment.** As aforementioned, Washington's action to block the Kroger-Albertsons merger cost $28,373,132.61 but prevented an estimated $800 million of harm to consumers annually. If one considers even a single year of harm averted, each dollar spent litigating the case returned $28 to the state's consumers.[46]

   Empirical studies also increasingly reveal the importance of antitrust enforcement. For instance, hospital mergers that meet the structural presumption for being anticompetitive are estimated to increase prices by 5%; increases in hospital prices decrease labor income, increase unemployment, and reduce tax revenues.[47]

States of varying sizes have been able to increase legislative appropriations for antitrust. Below, we cover the cases of Minnesota and California.

---

[44] Baer et al. *supra* note 12, at 15.

[45] Note that for some states, funding for the state AG's office has roughly kept pace with GDP. From 2010 to 2025, Tennessee's AG funding increased 117%, while GDP increased 125%. *See* U.S. Bureau of Economic Analysis, *Gross Domestic Product: All Industry Total in Tennessee [TNNQGSP]*, retrieved from FRED, FEDERAL RESERVE BANK OF ST. LOUIS; https://fred.stlouisfed.org/series/TNNQGSP, May 24, 2026. and *Budget Volume 1 | Finance & Administration | Tennessee State Library and Archives*, TENNESSEE STATE LIBRARY AND ARCHIVES, https://digitaltennessee.tnsos.gov/fa_budget_vol_1/ (last visited May 24, 2026).

[46] Using $28,373,132.61 as the cost of the lawsuit, as this is the figure the court awarded Washington for its cost bill and petition for attorneys' fees and expenses. *See* Findings of Fact, Conclusions of Law, and Order on State's Cost Bill and Petition for Attorneys' Fees and Expenses Cause, *supra* note 1, at 49.

[47] Brot et al., *supra* note 15. ; *see also* Zarek Brot-Goldberg et al., *Who Pays for Rising Health Care Prices? Evidence from Hospital Mergers* (June 2024), https://www.nber.org/papers/w32613, which finds that "at the county level, a 1% increase in health care prices reduces labor income by 0.27%, increases flows into unemployment by 1%, and lowers federal income tax receipts by 0.4%."

Case study: Minnesota

In 2023, Minnesota more than doubled the size of its antitrust practice, adding 3 FTEs to its previous staff of 2.5 FTEs.[48] This increase was budgeted to cost $578,000 per fiscal year.[49] Minnesota's legislative request, which is publicly available, demonstrates how the state made an argument for how increased antitrust enforcement would improve the state's economy and potentially generate positive returns for the state's general fund.[50] Strategies that Minnesota has used in the legislative appropriations process include the following:

1. Spotlighting cases where state-level antitrust enforcement was critical. For instance, in a case from 2015 to 2018, the Minnesota AG increased access to virtual hospital services in the state by intervening in a potential market allocation scheme involving the Children's Hospitals and Clinics of Minnesota (CHCM).[51]

2. Emphasizing that antitrust enforcement could recover monies for the state general fund. In its budget recommendation, the Minnesota AG said increased antitrust staffing would increase the "recovery of damages and civil penalties by the state, which, except for consumer restitution, are deposited in the general fund pursuant to Minn. Stat. § 16A.151."[52]

Case study: California

As of 2020, California had the largest antitrust enforcement section in the country, in part because of decades of legislative appropriations increases.[53] The state tripled its Antitrust Section from roughly 10 attorneys in 1988 to 35 attorneys and legal staff in 2022.[54] In the 2023-2024 fiscal year, the California AG's office successfully achieved funding for 20 additional antitrust positions and had a total budget of $7.956 million for antitrust.[55]

---

[48] Mike Cook, *State Government Committee Learns Details of House, Senate Agreement - Session Daily - Minnesota House of Representatives*, MINNESOTA HOUSE OF REPRESENTATIVE SESSION DAILY, June 24, 2021, https://www.house.mn.gov/SessionDaily/Story/15991. FTE refers to "full time equivalents" denoting one full-time employee's work.

[49] *Minnesota Attorney General's Office*, in Governor's Revised Budget: FY 2022–23 Biennial Budget, Minn. Mgmt. & Budget (Mar. 2021), https://mn.gov/mmb-stat/documents/budget/2022-23-biennial-budget-books/governors-revised-march/attorney-generals-office.pdf at 17.

[50] *Id.*

[51] *Id.* at 19.

[52] The MN AG investigated a potential market allocation scheme and successfully obtained an Assurance of Discontinuance from CHCM. *Id.*

[53] *Modern Antitrust Enforcement, supra* note 20.

[54] Kathleen Foote, *Kathleen Foote's Recollections of Antitrust Enforcement Under Seven California Attorneys General*, CALIFORNIA LAWYERS ASSOCIATION (Apr. 16, 2024), https://calawyers.org/antitrust-and-consumer-protection/kathleen-footes-recollections-of-antitrust-enforcement-under-seven-california-attorneys-general/.

[55] *Department Report: Department of Justice*, 2023-24 STATE BUDGET — LEGISLATIVE, JUDICIAL, AND EXECUTIVE https://ebudget.ca.gov/2023-24/pdf/Enacted/GovernorsBudget/0010/0820.pdf at 3 and 28. Note that this funding was

Takeaways from California regarding the legislative appropriations process include the following:

1. California's AG targeted antitrust enforcement for specific sectors where consolidation may be particularly harmful to consumers. In the 2023-2024 fiscal year, California's AG requested increased resources to advance competition in the technology, gasoline and oil, and agriculture sectors.[56]

2. California allowed for legislative oversight of funds allocated to antitrust enforcement.[57] In particular, tracking time billed and recoveries and penalties are data points that can be used to make arguments regarding the return on investment of enforcement.

3. In California, state legislators championed antitrust legislation year after year. Assemblymember Buffy Wicks has sponsored antitrust-related legislation since at least 2021 and is currently chair of the Appropriations Committee.[58] Assemblymember Cecilia Aguiar-Curry has pushed to pass an act modernizing California's antitrust laws since 2025.[59]

4. California's AG provided a "proof of concept" for how increased antitrust funding could benefit the state: The AG's office redirected six existing unfunded attorney positions to antitrust specifically, which enabled California to bring a new tech investigation with the potential for a significant settlement.[60]

---

draw from California's antitrust custodial fund, which is subject to legislative oversight as of 2023. Thus, funds drawn from the antitrust custodial fund are considered in the legislative process. However, it might be possible that it was easier for California to fund 20 attorneys because they were pulling from the custodial fund, as opposed to the state's General Fund. *See also* Anita Lee, *The 2024-25 Budget: Department of Justice*, LEGISLATIVE ANALYST'S OFFICE (Feb. 9, 2024), https://lao.ca.gov/Publications/Report/4831.

[56] Anita Lee, *The 2023-24 Budget: Department of Justice Budget Proposals*, LEGISLATIVE ANALYST'S OFFICE (Feb. 23, 2023), https://lao.ca.gov/Publications/Report/4701.

[57] *Id*. Specifically, "DOJ temporarily redirected six existing unfunded attorney positions within the Public Rights Division to the Antitrust Law Section in 2021-22 and supported them using a total of $1.4 million in General Fund, Antitrust Account, and UCL Fund savings."

[58] Erin Ivie, *Legislation to Tackle Ticketmaster Monopoly, Empower Fans, Unveiled by Asm. Wicks, Musicians, Community Leaders*, BUFFY WICKS: ASEEMBLYMEMBER, DISTRICT 14 (Apr. 8, 2024), https://wicks.asmdc.org/press-releases/20240408-legislation-tackle-ticketmaster-monopoly-empower-fans-unveiled-asm-wicks, Assem. Bill ACR-95, 2021-2022.

[59] Gibson Martucci, *Assembly Passes AB 325 to Crack Down on Algorithmic Price Fixing, Protecting California Consumers and Small Businesses |Assemblymember Cecilia Aguiar-Curry Representing the 04th California Assembly District*, CECILIA AGUIAR-CURRY: ASSEMBLY MAJORITY LEADER, DISTRICT 4 (June 2, 2025), https://aguiar-curry.asmdc.org/press-releases/20250602-assembly-passes-ab-325-crack-down-algorithmic-price-fixing-protecting.

[60] Lee, *supra* note 56.

Increased legislative appropriations will require the state to expend from its general fund, which is contingent on the right political headwinds and budget conditions. While increased legislative appropriations for antitrust enforcement is the most direct way to expand enforcement, other mechanisms that do not increase general fund expenditures are also viable ways to increase funding for antitrust enforcement.

D. Increasing Civil and Criminal Penalties

Civil and criminal penalties for antitrust violations usually contribute to either states' general funds or custodial funds for civil litigation. Adjusting these penalties should be a consideration for states, both for how penalties can deter future antitrust violations, and because penalties can be an important form of recovery. For instance, in the 2000s, a task force headed by antitrust attorneys brought in $5.3 billion worth of recoveries for California.[61]

In some states, penalties for antitrust violations have not changed in decades, despite the economy growing and corporations becoming larger.[62] Penalties should scale as the size of the economy scales and antitrust enforcement becomes more complex. For states that have criminal enforcement power, criminal penalties should also increase. Penalties should be scaled at the rate of inflation, according to a metric like the Consumer Price Index.[63] Finally, penalties should also be scaled with company size; for instance, for firms worth more than $50 million, an additional $50,000 in penalties could be assessed for every $1 million in firm value.

Forty-five states currently have civil penalties provisions for antitrust enforcement, and states have began increasing penalty amounts.[64] In 2025, California passed a law that gave the state the authority to impose civil penalties for up to $1 million for antitrust violations in actions brought by the AG or district attorneys.[65] Colorado also increased criminal penalties to $5 million per violation in its Antitrust Act of 2023.[66]

---

[61] Thomas Greene, Robert C. Fellmeth, Thomas A. Papageorge and Kathleen J. Tuttle, *A Century Of Government Antitrust Enforcement Under The Cartwright Act*, 17 COMPETITION JOURNAL OF THE ANTITRUST AND UNFAIR COMPETITION LAW SECTION OF THE CALIFORNIA LAWYERS ASSOCIATION (2008) at 203.

[62] *SB 763 Analysis,* SENATE JUDICIARY COMMITTEE (Feb. 21, 2025) https://sjud.senate.ca.gov/system/files/2025-04/sb-763-hurtado-sjud-analysis.pdf at 10-11, analyzing California's penalties before SB 763.

[63] This is what the 2019 Merger Enforcement Improvement Act, for instance, used to scale merger filing fees according to inflation. *See* State Antitrust Enforcement Venue Act of 2019, S. 306, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/306/text.

[64] https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202520260SB763 *Senate Floor Analysis 2025 for SB-763 Conspiracy against trade: punishment.,* CALIFORNIA LEGISLATIVE INFORMATION (Sep. 12, 2025) at 8.

[65] Cal. S.B. 763, 2025–2026 Reg. Sess. (Cal. 2025)

[66] Carsten M. Reichel, Vic Domen, Jeffrey Tsai, Mandy Chan & William Conway, *Three State-Level Developments Could Change the US Criminal Antitrust Enforcement Landscape*, DLA PIPER (Apr. 28, 2025), https://www.dlapiper.com/en-us/insights/publications/2025/04/three-state-level-developments.

E. Grants

Finally, some grant funding is available for direct support of antitrust enforcement, which philanthropic organizations and private foundations could consider donating to or endowing funds to support.

The National Association of Attorneys General stewards a "Milk Fund" — so named because it was created from proceeds from a milk industry settlement — that provides grants to states for economists and other experts in multistate antitrust investigations.[67] The grant process is administered by a committee of AGs, and the fund is replenished through contributions and repayments from settlements.[68]

The State Center's Panel of Economists provides state officials with free access to economic expertise at the initial stages of investigating antitrust and consumer protection matters, for up to 20 hours per matter.[69] The State Center also runs a grant application process for financial assistance with longer term advice or testimony by experts. The State Center is funded primarily by *cy pres* awards, residual funds from settlements, and individual contributions. It does not receive corporate funding, and has a bipartisan Board of Directors.[70]

These grant programs should be continued, and more private foundations could consider donating to programs like the State Center to make more funding available for antitrust enforcement.

Goal:
Increase funds available for state antitrust enforcement.

Recommendations:
1. Create a state custodial fund to reserve a portion of recoveries for future enforcement.
2. Make the case for increased legislative appropriations. See California and Minnesota as case studies.

---

67 Nat'l Ass'n of Att'ys Gen., *Annual Report: Fiscal Year June 30, 2018 – December 31, 2019* (2019), https://www.naag.org/wp-content/uploads/2021/02/2018-2019-Annual-Report-FINAL-1.pdf.

68 Wendy Arends & Vic Domen, *Optimizing Multistate Merger Reviews: Cooperation, Communication, and Coordination*, ANTITRUST SOURCE (Aug. 2019), https://awards.concurrences.com/docrestreint.api/pdf/08-2019_optimizing_multistate_merger_reviews_the_antitrust_source_warends_authored.pdf.

69 *Panel of Economists*, THE STATE CTR., https://thestatecenter.org/grants/panel-of-economists/

70 Cynthia Coffman & Greg Zoeller, *How the State Center Supports the Antitrust and Consumer Protection Efforts of the Attorney General Community*, NAAG ATT'Y GEN. J. (Feb. 25, 2022), https://www.naag.org/attorney-general-journal/how-the-state-center-supports-the-antitrust-and-consumer-protection-efforts-of-the-attorney-general-community/.

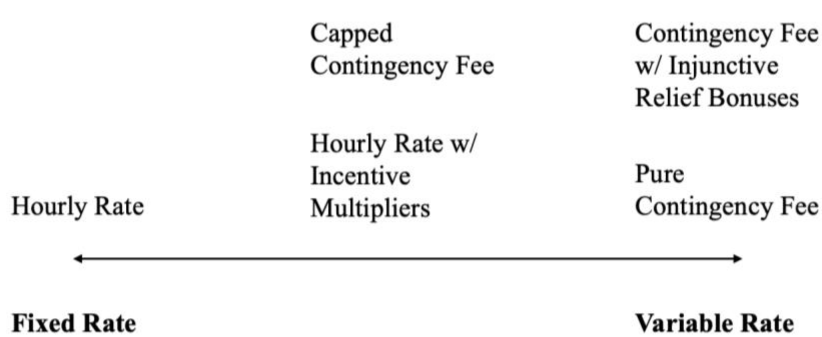
3. Allocate unclaimed restitution towards future enforcement using the *cy pres* doctrine.
4. Increase penalties and update them to grow at the rate of inflation.
5. Seek grant funding in partnership with nonprofits like the State Center.

2. Outside Counsel Partnerships

Outside counsel is often needed for antitrust cases due to the specialized nature of antitrust litigation, limited in-house expertise, and variable staff needs. Additionally, cases are often long and costly. Contingency fee arrangements, whereby private counsel is only paid if plaintiffs prevail, reduce upfront costs for hiring outside counsel. Contingency fees tend to be set at 33%.[71]

Antitrust cases categorically differ in their remedies and risk, which has implications for what types of financing structures are suitable. Since states are entitled to treble damages for antitrust injury, and injury is straightforward to argue in cartel cases, these are a natural fit for private counsel paid on contingency, whereby counsel is only paid if plaintiffs prevail. Monopolization cases are harder to prove, but can likewise yield treble damages. While in cartel cases the sought-after relief is straightforward (i.e. cease collusion and pay fines and damages), monopolization cases typically seek more complex remedies that combine recoveries with injunctive relief. How best to structure agreements to incentivize private counsel to pursue these desired remedies, particularly injunctive relief, is a question that we consider below. Merger cases, which seek to prevent harm preemptively (and therefore do not usually yield monetary damages), are not well suited for traditional contingency fee agreements. We discuss other possibilities.

Figure 2: Types of Fee Arrangements with the Plaintiffs' Bar



Fee arrangements vary on the basis of how much they depend on recoveries from a case. Aside from the standard practices of hourly rates and pure contingency fee structures, there are

[71] *See* Nora Freeman Engstrom, Attorney Advertising and the Contingency Fee Cost Paradox, 65 STAN. L. REV. 633, 667 n.188 (2013).

variations that can be leveraged to align private counsel incentives with state goals. Finally, any kind of fee arrangement with outside counsel requires careful compliance with ethics laws. See New Jersey's guidelines for outside counsel for a template of what compliance agreements can contain.[72]

A. Contingency Fee Caps for Cases with Large Recoveries

Many states have capped their contingency fees, so as to avoid large settlements with potentially millions of dollars going towards private counsel. New Jersey's Outside Counsel Guidelines specify that a fee cap may be part of the contract between the state and outside counsel.[73] The exact fee cap is up to the New Jersey AG's office to decide. Some states have implemented exact fee caps. See the Utah Code as an example.[74] Other states, like Arizona, ensure transparency by requiring that contingency fee arrangements be publicly posted.[75]

For some cases where the potential size of recovery is very high, and the contribution from private counsel is relatively small, standard percentage based contingency fees may not make sense at all. An alternative to percentage-based contingency fees is multipliers on hourly rates or fee bonuses expressed in dollar amounts.

B. Discounted Hourly Rates and Performance-Based Bonuses for Cases with Little to No Recovery

Hourly multipliers or dollar bonuses can be applicable even in cases that yield little or no damages (i.e. mergers). Private counsel may agree to work at a discounted rate in exchange for a performance-based bonus if they win. As discussed below, adding bonus fee provisions for obtaining desired results (injunctive relief, divestitures, etc.) can improve alignment. Of course, if a case yields no damages, bonus fees based on other outcomes must still be paid from the state's pocketbooks, so would not reduce the overall budgetary burden of enforcement. This model may still be attractive since it reduces upfront costs and incentivizes outside counsel to do a good job.

---

[72] N.J. Off. of the Att'y Gen., *Outside Counsel Guidelines* (eff. Nov. 1, 2022), https://www.nj.gov/oag/law/pdf/rfqs/Revised_Outside_Counsel_Guidelines_2022.pdf.
[73] N.J. Off. of the Att'y Gen., *supra* note 72, at 6.

[74] Utah Code Ann. § 67-5-33 (2024), https://le.utah.gov/xcode/Title67/Chapter5/67-5-S33.html; West Virginia has an almost-identical statute (WV Code § 5-3-3a (2025)).
[75] Ariz. Rev. Stat. § 41-4803 (2024).

C. Incentivizing Injunctive Relief

A key concern associated with contingency fee arrangements is that they may incentivize counsel to pursue monetary relief against consumers' best interests. Namely, by tying attorneys' pay exclusively to a monetary outcome, contingency fee arrangements may incentivize outside counsel to settle prematurely for a known payout rather than choosing to pursue a long and uncertain legal battle for injunctive relief that will not increase their financial award.

States can mitigate this concern by layering additional incentives for injunctive relief on top of a traditional contingency fee arrangement. This approach is being used by the Nevada AG's office to retain outside counsel in the Social Media Platforms Investigation and Litigation case.

Case Study: Nevada Social Media Platforms

Contract details:

The State of Nevada is retaining Nachawati Law Group, WH Law, and Kemp Jones LLP as outside counsel on a contingency fee basis to represent the State in its investigation and possible litigation of claims involving harms caused by social media platforms.[76]

Key provisions of the contract include the following:

First, contingency fees scale based on the length of litigation. Outside counsel are awarded 6% for recovery before the commencement of discovery, 10% for recovery within the first 90 days after litigation commences, and 15% for recovery thereafter. This feature avoids excessively large payments to outside counsel for litigation that resolves quickly and requires comparatively few attorney hours. If recovery is negotiated solely by the Attorney General without participation of outside counsel, the base fee of 15% applies.

Second, contingency fee bonuses are allocated for different categories of injunctive relief. In particular, the contract specifies that outside counsel will receive an additional 1.3% of recovery for each of 5 specified items of injunctive relief that the State obtains. They are:

1. Elimination of harmful design elements and features;
2. Reduction/elimination of advertising and personal information collection on youth accounts;
3. Time restrictions and parental controls;

[76] Contingent Fee Contract for Legal Services Between the State of Nevada and Nachawati Law Group, WH Law & Kemp Jones, LLP (Dec. 4, 2023), https://ag.nv.gov/uploadedFiles/agnvgov/Content/Issues/2023%201204%20SMP%20Contingent%20Fee%20Contract.pdf.

4. Account creation and maintenance including improvements to existing age restrictions and age verification enhancements; and
5. Public availability of data and research and establishment of a third party monitor.

The Nevada AG can add additional forms of injunctive relief, but the total contingency fee cannot exceed 21.5%. The maximum injunctive relief bonus, at 6.5%, thus comprises 30% of the total. If and when trial proceeds to verdict, outside counsel receives these injunctive relief bonuses based on each category of injunctive relief *sought*, even if relief is not ultimately obtained. This distinction reflects the high degree of uncertainty and significant investment by outside counsel required to reach this stage. In the event that the resolution of the trial is limited to only injunctive relief or other non-monetary compensation (e.g. provision of goods/services), outside counsel is reimbursed for litigation costs and attorneys' fees at fair market value.

Discussion:
The Nevada Social Media Platforms partnership with outside counsel provides one model for how states can design contracts with outside counsel to promote the goal of obtaining injunctive relief for their constituents. A state could consider different variations on this fee breakdown, depending on how heavily it wishes to prioritize injunctive relief over damages. Since the injunctive relief bonuses are calculated as a percentage of damages in the Nevada contract, outside counsels' fees are still largely determined by their ability to maximize monetary recovery.

In cases where injunctive relief is a bigger priority, or the expected monetary recovery is low, alternative fee structures could further incentivize the pursuit of injunctive relief. For example, a state could assign fixed dollar incentive values per item of relief obtained. Or, bonuses could be based on an hourly multiplier of attorney's fees (e.g. attorneys receive base fees, plus X% for each category of injunctive relief that is awarded). Lastly, though the Nevada case weighs all categories equally, states could alternatively consider assigning higher fee amounts to higher priority categories of desired relief.

Goal #1:
Ensure partnerships with outside counsel are aligned with public interests.

Recommendations:
1. For cases with potential for very large recoveries, consider a capped contingency fee or multiplied hourly rate.
2. For cases that yield little or no damages, consider hiring private counsel at a discounted hourly rate with performance-based bonuses.
3. Add incentives for seeking injunctive relief into contracts.

D. Hiring Outside Counsel vs. In-house Hires

When deciding how to use their funds, states may consider the choice between retaining outside counsel versus hiring in-house attorneys. Outside counsel can conveniently fill short-term needs, and contingency fee arrangements can reduce upfront costs. A consistent pattern of retaining outside counsel may not be more cost-effective, and can result in a cycle of dependence on outside counsel as states' in-house enforcement abilities decline. Hiring in-house attorneys requires more consistent funding over time; however, it allows attorneys to gain experience and engage in proactive enforcement. That is, a larger in-house staff has a greater ability to actively monitor for competition issues in their jurisdiction. Proactive enforcement by state authorities increases the likelihood that antitrust violations are detected and more effectively promotes competition in a state. We find that in-house hiring is likely to be cost-effective.

Consider the following calculation. An Assistant Attorney General in New York with 10 to 19 years of post-graduate legal experience earns roughly a $150,000 annual salary.[77] Conservatively assuming that the true cost of hiring a new attorney is 1.5x the base salary when accounting for hiring costs, payroll taxes, and attorney benefits, we can take the total cost of hiring an experienced in-house attorney to be $225,000 per year.

Now, we can find the break-even point with hiring outside counsel. According to the Laffey Matrix,[78] a benchmark standard for legal fees, the hourly rate for an attorney with 11-19 years of experience is over $1000.[79] Since states sometimes get discounted hourly rates, we take $500 per hour as a conservative estimate. Compared to a $500 hourly rate for outside counsel, an in-house attorney would need to work just 450 billable hours to break even; any work above 450 hours would reduce costs for the state. This is equivalent to less than 12 weeks of full-time work.

Despite the financial attractiveness of in-house hires, challenges remain. Due to the cyclical nature of antitrust enforcement, a state may not wish to take on additional full-time employees for a temporary influx of work. Additionally, some AG's offices may have staffing limits that constrain the number of full time attorneys they are able to hire. These challenges can be mitigated by hiring attorneys on fixed-term contracts, or retaining special attorneys for the duration of a particular case. For example, Jonathan Sallet was hired by the Colorado AG's Office as Lead Counsel for the Google Search case.[80] Since such complex, ambitious cases often

---

[77] N.Y. Off. of the Att'y Gen., *Assistant Attorney General Compensation*, https://ag.ny.gov/sites/default/files/assistant_attorney_general_compensation.pdf

[78] *The Laffey Matrix*, http://www.laffeymatrix.com/see.html

[79] Washington's AG retained Munger, Tolles & Olson (MTO) as counsel to challenge the Kroger-Albertsons merger. The court found the following schedule of billing rates for MTO attorneys reasonable: $1,190 for partners, $735 for associates, and $475 for staff attorneys. *See* Findings of Fact, Conclusions of Law, and Order on State's Cost Bill and Petition for Attorneys' Fees and Expenses Cause, *supra* note 1, at 13.

[80] Cecilia Kang, *Who's Who in the Google Monopoly Trial,* N.Y. Times (Sept. 11, 2023), https://www.nytimes.com/2023/09/11/technology/google-trial-judge-plaintiffs.html.

last multiple years, these types of special hires can be well worth the cost. Another challenge is that hiring timelines may be too slow to fulfill urgent short-term needs. To reduce hiring friction, AG's offices can communicate amongst themselves when their office has an urgent staffing need or a staff attorney nearing the end of a fixed-term contract.

Hiring In-House Economists

To build the capacity to conduct economic analysis and testify in court, several states have hired in-house economists with doctorates in the field.[81] State AGs have also hired statisticians, financial analysts, and other roles to provide quantitative analysis. Similar analysis can be applied to assessing whether to hire an in-house economist or work with an outside expert.

In 2025, the annual salary of the Chief Economist for the New York AG's Economic Justice Division was advertised as $156,724; the salary for an economist in Colorado's Antitrust and Consumer Protection Section had an upper range of $96,768.00.[82] In Washington's action to block the Kroger-Albertsons merger, the state paid an economist "$5,390,562.01 for his expertise in antitrust economics, which culminated in multiple expert reports, depositions, and his trial testimony in the State's case-in-chief as well as in its rebuttal."[83] Working with outside experts allows an AG's office to access a team of data analysts and the resources of a firm with experience preparing experts for testimony. A hypothetical state counterpart would be a team of five conducting economic analysis, two of whom are PhD economists. Using the New York salary for economists and a $65,000 salary for three supporting analysts, it is notable that $5,390,562.01 would be equivalent to ten and a half years of retaining the state team.[84]

Goal #2:
Build in-state enforcement capacity.

Recommendations:
1. When limited by caps on full-time employees, hire attorneys on fixed-term contracts.

---

[81] See New York as an example: *Attorney General James Announces Oregon Joins Lawsuit To Block T-Mobile And Sprint Megamerger*, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL (Aug. 12, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-announces-oregon-joins-lawsuit-block-t-mobile-and-sprint. New York's expert has testified in the state's cases before. Based on authors' own research on LinkedIn, Texas also has an economist in their AG's office. Oregon has sought funding for an economist as well. *See* Alicia Temple & Leslie Wu, *Antitrust Regulations Protect Oregonians and Keep Markets Fair*.

[82] *Economist, Antitrust and Consumer Protection*, COLORADO ATTORNEY GENERAL, https://web.archive.org/web/20250916225700/https://coag.gov/careers/position/economist-antitrust-and-consumer-protection/; *Economic Justice Division Chief Economist – New York City Reference No. DEJ_CFE_NYC _6403,* New York State Attorney General https://ag.ny.gov/sites/default/files/2025-10/dej_cfe_nyc-6403-web.pdf

[83] Findings of Fact, Conclusions of Law, and Order on State's Cost Bill and Petition for Attorneys' Fees and Expenses Cause, *supra* note 1, at 18.

[84] Funding this hypothetical five-person team, including 2 economists, would cost $508,448.00 annually.

2. Hire special attorneys for large cases.
3. Find breakeven points for hiring in-house attorneys and economists.

3. Enforcement Partnerships

Enforcement partnerships, where multiple plaintiffs jointly bring an antitrust action, can be cost-effective because they eliminate duplicated efforts and enable plaintiffs to pool different sources of financing and expertise. In this section, we discuss three types of enforcement partnerships: public-private joint litigation (between AG's offices and private entities), federal-state & multi-state actions, and partnerships with US Attorneys' offices on antitrust crimes affecting government procurement. Throughout, we consider how such partnerships can be structured to operate efficiently and protect constituents' best interests.

A. Public-Private Joint Litigation

Public and private actors both have powers to prosecute antitrust claims in court. According to the Supreme Court, "Congress created the Sherman Act's private cause of action not solely to compensate individuals, but to promote 'the public interest in vigilant enforcement of the antitrust laws.'"[85] Private cause of action increases the chances that meritorious suits are pursued, anticompetitive conduct is ceased, and harmed parties are awarded damages in the court of law. Public and private antitrust activities often move closely together. Private enforcement frequently proceeds in the form of "coat-tail class actions," which are private suits that follow from the announcement of public enforcement. Public enforcement can follow when private actions alert regulators of potentially anticompetitive conduct. In some cases, private counsel joins forces with public representation to prosecute a joint case. Such joint actions can increase resources for public enforcement as well as avoiding free-rider problems and duplication of efforts that can emerge from public and private cases proceeding in sequence or parallel.

Case Study: *Epic Games v. Google* (App Store)

In 2020, Epic Games filed a complaint against Google, alleging illegal anticompetitive conduct related to app store fees.[86] Within days, plaintiff-side consumer counsel filed antitrust claims on behalf of a nationwide class.[87] Eleven months later, states filed follow-on litigation, and entered

---

[85] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[86] Complaint for Injunctive Relief, Epic Games, Inc v. Google LLC, 3:20-cv-05671 (N.D. Cal. 2020), https://storage.courtlistener.com/recap/gov.uscourts.cand.364325/gov.uscourts.cand.364325.1.0.pdf.

[87] Counsel for Consumer Plaintiffs' Renewed Motion for Attorneys' Fees and Awards, *In re Google Play Store Antitrust Litigation*, No. 3:21-md-02981-JD (N.D. Cal. Dec. 1, 2025), ECF No. 1129,

into a Cooperation and Joint Prosecution Agreement (JPA) with consumer counsel, in which they agreed to jointly litigate the case in a public-private partnership.[88]

There were originally five cases in total. These included the *Epic Games v. Google* case, which pursued injunctive relief, and the joint case between state AGs and a class of consumer plaintiffs that pursued damages for consumer overcharges.[89] There was also a suit by a class of developer plaintiffs and a suit by Match Group.[90] All but Epic settled.[91] This batch of cases was a public-private collaboration on multiple fronts. Epic's litigation brought awareness to the issue and prompted the follow-on litigation.[92] There was also direct collaboration in the form of joint litigation between the states and private class plaintiffs. Lastly, Plaintiffs' counsel in both the Epic and states' cases collaborated throughout the litigation process, notably by routinely exchanging lists of "hot documents."[93] Consumer counsel led depositions of key witnesses that Epic cited in its trial.[94]

The collaboration between the state AGs and private consumer counsel replicated many of the advantages of a *parens patriae* case led by federal authorities. It combined the resources of private counsel with the *parens patriae* authority of the states. The suit was originally filed by 37 AGs and class counsel.[95] Consumers were divided into those with "Covered Claims" if their state AGs participated in the suit, and "Non-Covered Claims" if not.[96] Consumer counsel effectively took the role of representing class members from states whose AGs did not participate in the case. Since attorneys fees were calculated based on contribution and total recovery amount (and had no relationship to the size of each category of claim), state and consumer counsel agreed to

---

https://www.googleplaystateagantitrustlitigation.com/assets/Docs/1129_Counsel%20for%20Consumer%20Plaintiffs%E2%80%99%20Renewed%20Motion%20for%20Attorneys%E2%80%99%20Fees%20and%20Awards.pdf.

[88] *Id.*

[89] *Utah et al. v. Google LLC*, No. 3:21-cv-06227 (N.D. Cal. filed July 7, 2021)

[90] *MatchGroup, LLC v. Google LLC*, No. 3:22-cv-02746 (N.D. Cal. filed May 9, 2022)

[91] Dechert LLP, *Historic Jury Verdict Finds Google Monopolized Google Play Store and Google Play Billing*, Dechert OnPoint (Dec. 13, 2023), https://www.dechert.com/knowledge/onpoint/2023/12/jury-verdict-finds-google-monopolized-google-play-store.html.

[92] Counsel for Consumer Plaintiffs' Renewed Motion for Attorneys' Fees and Awards, *In re Google Play Store Antitrust Litigation*, No. 3:21-md-02981-JD (N.D. Cal. Dec. 1, 2025), ECF No. 1129, https://www.googleplaystateagantitrustlitigation.com/assets/Docs/1129_Counsel%20for%20Consumer%20Plaintiffs%E2%80%99%20Renewed%20Motion%20for%20Attorneys%E2%80%99%20Fees%20and%20Awards.pdf.

[93] Consumer Plaintiffs' Renewed Fee Motion, *supra* note 87.

[94] Consumer Plaintiffs' Renewed Fee Motion, *supra* note 87, at 5.

[95] Complaint, Utah et al. v. Google LLC, 3:21-cv-05227 (N. D. Cal 2021), https://www.naag.org/multistate-case/utah-et-al-v-google-llc-no-321-cv-05227-n-d-cal-july-7-2021/.

[96] Cooperation and Joint Prosecution Agreement, *In Re Google Play Store Antitrust Litigation,* No. 3:21-md-02981 https://www.googleplaystateagantitrustlitigation.com/assets/Docs/1129-2_Exhibit%201_Cooperation%20and%20Joint%20Prosecution%20Agreement.pdf

jointly pursue Covered and Non-Covered Claims.[97] All state AGs did eventually join the case; this split ensured that the case covered the entire nation from the start.[98]

Key terms of the collaboration included that total attorneys' fees would not exceed what they would otherwise be entitled to under relevant Ninth Circuit authority for class action litigation. Ultimately, consumer counsel contributed 73% of total review hours and requested $85 million in attorneys' fees for 13.5% of the $630 million common fund, with an implied lodestar multiplier of 1.34 (on the low end for comparable cases).[99]

There are a few key takeaways from the collaboration between Epic, consumer counsel for the class plaintiffs, and the states. First, states can learn from private antitrust action to find out about antitrust violations and file follow-on suits on behalf of their constituents. Second, *parens patriae* actions by state AGs can be filed jointly with class action plaintiffs to effectively replicate the scale of a federal case.

B. Resource Pooling: Federal-State, and Multi-State

Joint litigation between multiple public authorities has advantages of scale and incentive alignment. Federal and state authorities have the same fundamental goal: representing the interests of their constituents. However, communication and cooperation are needed to ensure that joint actions proceed as efficiently as possible. NAAG and the FTC's *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General* sets forth frameworks for collaboration on merger review, thus we will not discuss details at length.[100] Key principles remain the same between merger review and other types of enforcement actions. During a joint enforcement process, AGs may request settlement conditions or seek relief different from what is requested by the federal government or other states. Parties should assess the possibility of divergent resolutions and proceed accordingly.

One obstacle to resource pooling is that some states may have confidentiality restrictions that slow or limit collaboration with other federal and state enforcers. Delaware Senate Bill 296 is a proposed amendment to the Delaware Antitrust Act that, among other things, modifies

---

[97] *Id.*, at 3.

[98] States' Unopposed Motion to Give Notice of Proposed Parens Patriae Settlement; Memorandum of Points and Authorities in Support Thereof, State of Utah et al. v. Google LLC et al., Case No. 3:21-cv-05227-JD, (N.D. Cal 2021), https://www.googleplaystateagantitrustlitigation.com/assets/Docs/522-States'%20Moption%20for%20Leave%20to%20Give%20Preliminary%20Approval.pdf at 1.

[99] Consumer Plaintiffs' Renewed Fee Motion, *supra* note 87.

[100] *Protocol for Coordination in Merger Investigations*, FEDERAL TRADE COMMISSION (July 31, 2013), https://www.ftc.gov/advice-guidance/competition-guidance/protocol-coordination-merger-investigations.

confidentiality restrictions to allow materials to be shared with other enforcers and agents of the Attorney General (e.g. consultants, experts, and economists).[101]

35% of state-only enforcement actions from 2016 to 2025 were multi-state.[102] Multiple states pooling resources functions essentially the same way as one well-funded plaintiff, and can produce resource efficiencies. State resources are often complementary; for example, some states may be able to contribute staff, while others make financial contributions. Multi-state actions can be especially effective in the following cases: 1) for large, national cases (e.g. Google Play Store, generic drugs litigation) where state interests are aligned and 2) smaller, regional cases that span multiple states (such as mergers of regional hospital systems).

C. Shared Templates

Beyond collaborating on enforcement, states should also share expertise. As states gain experience challenging common types of mergers — dialysis clinics, grocery stores, and hospitals — their experience can help other states replicate enforcement actions in their own jurisdictions. Sharing an expert on a series of similar cases could help states spread the cost of economic analysis. Other synergies could come from sharing model complaints and template expert reports so that other states can more easily bring similar cases. Using a state resource pack like the one that the Thurman Arnold Project has made for dialysis can also help lower initial costs.

D. Procurement Enforcement Partnerships with US Attorneys' Offices

Since 2019, the Department of Justice's Antitrust Division has partnered with regional US Attorneys' offices to investigate and prosecute antitrust crimes through its Procurement Collusion Strike Force. Over the past seven years, this initiative has resulted in "$615 million worth of government contracts and kickbacks, resulting in more than $70 million in criminal fines and restitution."[103] To date, however, state AGs have not formally joined the initiative. Since US Attorneys' Offices specialize in criminal prosecution, antitrust crimes are an area of overlap wherein collaboration can allow state AG's offices to access an additional pool of resources and expertise. A focus on government procurement has an additional advantage of returning restitution and fines to the state itself, which can further expand resources for future enforcement.

---

[101] Del. S.B. 296, 153d Gen. Assemb. (Del. 2025).

[102] Dienstag, Englert & Murdock, *supra* note 21.

[103] U.S. Dep't of Justice, Antitrust Division, *FY 2027 Performance Budget: Congressional Submission* (2026), https://www.justice.gov/jmd/media/1434166/dl?inline at 10.

Goal:
Jointly litigate with other entities that have common interests. Ensure such partnerships are fair, efficient, and effective in delivering results for constituents.

Recommendations:
1. When relevant private antitrust litigation occurs, consider filing follow-on suits.
2. Litigate multi-state *parens patriae* actions jointly with class action plaintiffs to replicate the scale of a federal case.
3. Amend policies to streamline confidentiality protections to better allow for collaboration with other enforcers.
4. Share expertise (e.g. model complaints, and expert reports) so that other states can bring similar cases, especially for common merger types like hospitals, dialysis clinics and grocery stores.
5. Pursue enforcement against procurement collusion in partnership with US Attorneys' Offices.

4. Reducing the Cost of Economic Analysis

The cost of experts borne by states during pre-merger investigations and during litigation can be exorbitant. Expert testimony in a single antitrust case can cost over $30 million.[104] As mentioned above in Part 2 of this paper, several states are hiring in-house economists to provide testimony and expert analysis. Beyond this step, there are additional policies that could reduce the cost of economic analysis, which are described below.

A. Bill Expert Costs to Merging Parties

Courts have held that expert costs to bring litigation are included in attorneys' fees and costs.[105] However, not all merger investigations continue to the litigation phase; yet, economic analysis is needed throughout the review of a merger. Billing expert costs to merging parties is one way to reduce the cost of merger review for states. Such a provision can be added to a state's existing antitrust enforcement statute, and it can be done relatively quickly and parsimoniously.

---

[104] Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Division, Farewell Address (Dec. 17, 2024), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-farewell-address.

[105] Findings Of Fact, Conclusions Of Law, And Order On State's Cost Bill And Petition For Attorneys' Fees And Expenses Cause, *supra* note 1 at 40.

New Hampshire is, to our knowledge, the only state with a statutory provision to bill expert costs to defendants, regardless of whether the merger review proceeds to litigation.[106] New Hampshire introduced House Bill 1439 in 2014, and the bill was passed without opposition in the same legislative year. The governor signed the bill, and it was enacted on July 26, 2014.[107] The law, codified as NH Rev Stat § 356:10, states:

> "In any investigation authorized under this section, the attorney general shall have the authority to engage the services of consultants, experts, accountants, economists, analysts, and other assistants. When the investigation constitutes the review of a proposed merger of 2 or more entities and is conducted prior to the merger, the reasonable expenses related to these assistants shall be a direct charge to the parties proposing the merger. In any action to enforce this chapter pursuant to RSA 356:4-a, the expenses related to these assistants shall be added to the reasonable costs of the enforcement action and shall be recoverable as set out in RSA 356:4-b."[108]

Public records on investigations show that New Hampshire has been able to access considerable expertise in merger cases. For instance, to block the Dartmouth-Hitchcock Health system's acquisition of Granite Health in 2022, New Hampshire's Consumer Protection and Antitrust Bureau retained "several consultants including a law firm with expertise in health care antitrust law, a firm specializing in antitrust economics, and a firm that employs specialists in health care data analytics" to empirically analyze data and evaluate the effects of the merger.[109]

All states could consider adding a provision like NH Rev Stat § 356:10 as an addition to their antitrust statutes.[110]

B. Court-Appointed Neutral Experts

A court-appointed expert can replace the need for both plaintiffs and defendants to call—and bear the cost of—an expert(s) for each side.[111] This can be accomplished by a state analog to Rule 706 of the Federal Rules of Evidence. Rule 706 "provides the court broad discretion to

---

106 N.H. Rev. Stat. Ann. § 356:10.

107 2014 NH ALS 64, 2014 NH Ch. 64, 2013 NH HB 1439 (May 27, 2014).

108 See model bill: N.H. H.B. 1439, 2014 Reg. Sess. (N.H. 2014), https://gc.nh.gov/BillHistory/SofS_Archives/2014/house/HB1439H.pdf.

109 NEW HAMPSHIRE DEPARTMENT OF JUSTICE CHARITABLE TRUSTS UNIT, PROPOSED ACQUISITION TRANSACTION INVOLVING GRANITEONE HEALTH, DARTMOUTH-HITCHCOCK HEALTH, AND RELATED ORGANIZATIONS (2022), at 8.

110 The Uniform Laws Commission also provides draft legislation for state merger review. *See Uniform Antitrust Pre-Merger Notification Act*, Uniform L. Comm'n, https://www.uniformlaws.org/committees/community-home?communitykey=6bf5d101-d698-4c72-b7c1-0191302a6a95

111 Antitrust cases often involve each side calling several experts. A court-appointed expert could substitute for at least some of the experts; for instance, if both sides each call an expert to argue for alternative market definitions or propose different quantities of damages.

appoint an expert witness either 'on its own motion or on the motion of any party,'" and has been used successfully in patent litigation.[112]

To ensure the expert's neutrality, choosing an economic expert can be done similar to a jury-selection process, where attorneys from both sides could strike from consideration economists who would be biased against their side.[113] The adversarial selection process would ideally allow for the appointment of a neutral expert.[114] Alternatively, the plaintiff and defendant could each choose an expert, and the experts would confer and choose a third expert, whom the court will appoint for the litigation.[115]

Rule 706 empowers the court to decide reasonable compensation for the expert.[116] Paired with a statute to bill expert costs to merging parties, a neutral economic expert could allow for substantial state savings through reduced expenditures on experts.[117]

Goal:
Decrease cost barriers to antitrust enforcement.

Recommendations:
1. Directly bill expert costs to the merging parties when investigating proposed mergers.
2. Using court-appointed neutral experts through adopting a state version of Rule 706 of the Federal Rules of Evidence.[118]

---

[112] J. Gregory Sidak, *Court-Appointed Neutral Economic Experts*, 9 JNL OF COMPETITION LAW & ECONOMICS 359 (2013), https://doi.org/10.1093/joclec/nht011 at 361. Rule 706 holds that either party can depose and cross-examine the expert, as well as call the expert to testify.

[113] Preemptory strikes are proposed at 1301: Rebecca Haw Allensworth, *Adversarial Economics in AntiTrust Litigation: Losing Academic Consensus in The Battle of the Experts*, 106 NORTHWESTERN UNIVERSITY LAW REVIEW 1261 (2012), https://scholarship.law.vanderbilt.edu/faculty-publications/903.

[114] After the expert is appointed, to ensure the parties do not bias the expert's findings, the parties should only be allowed to communicate with the expert through the court (for instance, to provide data or other evidence required for the expert to complete their analysis).

[115] Allensworth, *supra* note 113, at 1296.

[116] FED. R. EVID. 706(c), mentioned in J. Gregory Sidak, *COURT-APPOINTED NEUTRAL ECONOMIC EXPERTS*, 9 JNL OF COMPETITION LAW & ECONOMICS 359 (2013), https://doi.org/10.1093/joclec/nht011 at 383.

[117] Another approach to reducing expert costs is to require joint economic evidence in multi-defendant competition cases, so that only one expert is admitted for all defendants. It is unclear whether defendants using multiple experts creates significant additional costs to plaintiffs, so we have omitted additional discussion of this topic in this report. For more information about joint economic evidence, though, see a case where a court in the United Kingdom implemented it here: *The Court of Appeal Vindicates the Use of Joint Expert Evidence in Competition Claims*, Legal 500 (Sept. 1, 2024), https://www.legal500.com/developments/thought-leadership/the-court-of-appeal-vindicates-the-use-of-joint-expert-evidence-in-competition-claims/.

[118] Sidak., *supra* note 112.

5. Avenues for Further Research

Finally, we discuss two topics for further research, third-party litigation finance and changes to antitrust law. These are ambitious proposals that could greatly increase the capacity for states to increase their enforcement capacities, if significant legal and legislative hurdles are overcome.

A. Legislation to Modernize Antitrust Enforcement

In general, creating presumptions in favor of plaintiffs is likely to lower the costs of enforcement.[119] Since 2021, Senator Amy Klobuchar has been championing a bill that would align antitrust law with the economic consensus of the past decades.[120] This bill, the Competition and Antitrust Law Enforcement Reform Act (the "CALERA Act"), could make it easier for plaintiffs to win antitrust cases through changing judicial precedent and shifting the burden of proof onto merging parties in merger cases.

States have started adopting analogs of the CALERA Act, and all fifty states should consider introducing it through their state legislatures.[121] Examples of states updating their antitrust statutes and incorporating parts of CALERA include California's COMPETE Act, and New York's 21st Century Antitrust Act.[122]

B. Third-Party Litigation Finance

Third-party litigation finance is the practice of a law firm contracting with an investor to provide financing for litigation.[123] Investors provide funds to the law firm on a non-recourse basis, such that the law firm will only pay investors if the law firm wins.[124] Litigation finance unlocks funds for civil litigation because each case becomes an asset that capital markets can value and trade.[125] Institutional investors buy into litigation finance as an asset class. In the best-case scenario, third-

---

[119] Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 Antitrust 33 (Summer 2021), https://faculty.haas.berkeley.edS.225 - Competition and Antitrust Law Enforcement Reform Act of 2021 117th Congress (2021-2022)u/shapiro/fixingantitrust.pdf.

[120] S. 225, 117th Cong. (2021). https://www.congress.gov/bill/117th-congress/senate-bill/225

[121] C. Scott Lent, Daniel B. Asimow, Andrew Gaverola & Tim Roche, *Coast to Coast: California and New York Push to Expand State Antitrust Laws*, Arnold & Porter (Feb. 27, 2025), and Cal. Law Revision Comm'n, *Antitrust Law: Initial Recommendations for ACR 95 Questions*, Memorandum 2025-11 (Jan. 13, 2025), https://www.clrc.ca.gov/pub/2025/MM25-11.pdf.

[122] Crowell & Moring LLP, *California Considering a Massive Expansion of Its Antitrust Laws*, Client Alert (Mar. 24, 2026), https://www.crowell.com/en/insights/client-alerts/california-considering-a-massive-expansion-of-its-antitrust-laws.

[123] Investors include firms like Burford Capital and Certum Group.

[124] Andew Stulce & Jonathan Parente, *Demystifying the Litigation Funding Process*, BLOOMBERG LAW, June 16, 2021, https://news.bloomberglaw.com/us-law-week/demystifying-the-litigation-funding-process.

[125] John Pierce & David Burnett, *The Emerging Market for Litigation Funding*, THE HEDGE FUND JOURNAL, June 2013, https://thehedgefundjournal.com/the-emerging-market-for-litigation-funding/.

party litigation finance could give states the ability to access more funding and bring cases that are urgent but risky. However, the ethics and legality of third-party litigation finance for public antitrust enforcement are areas where further research is needed.[126] Detractors argue that the practice could be illegal for states and other public entities to participate in, because a third-party investor could influence the cases that the government chooses to bring and would be profiting from government litigation. It may be the case that states are already exposed to third party litigation finance. For instance, exposure can happen if a plaintiff's firm the state contracts with makes use of third party litigation finance to support some of its cases. Third-party litigation finance in the public context should be approached with caution and transparency.

6. Conclusion

In this paper, we have provided a number of recommendations that can increase resources available for state antitrust enforcement. These recommendations include some that can be more easily implemented in the short-term, such as suggestions for how to structure contracts with outside counsel to incorporate incentives for injunctive relief. We have also considered policy proposals that can be passed if a state has a supportive legislature. Legislative appropriations are the most straightforward way of increasing enforcement resources. We have provided examples of states that have successfully argued for increased antitrust budgets in the past, and described key aspects of their proposals. New Hampshire House Bill 1439 allows the cost of economic experts for merger review to be billed to the merging parties; we think this is an especially compelling option for states that want to increase enforcement but may not be able to increase appropriations. Throughout the paper, we have provided case studies and models from many different jurisdictions. We hope that states in a range of political and economic circumstances will be able to find practicable recommendations.

[126] To our knowledge, there are no published pieces on the topic of using third-party litigation financing ("TPLF") for antitrust in particular. However, there is a growing body of literature on TPLF for civil litigation generally. Current guides to third-party litigation finance include the American Bar Association's *Best Practices* report and recent casebooks on the subject. *See American Bar Association Best Practices for Third-Party Litigation Funding,* AMERICAN BAR ASSOCIATION, (Aug. 4, 2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf and *see also* ANTHONY J. SEBOK, THIRD-PARTY LITIGATION FINANCE: LAW, POLICY, AND PRACTICE (2024).