

Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets

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I. INTRODUCTION

Not since the first federal antitrust law was enacted over 130 years ago has there been the level of public attention to the antitrust laws that we see today. Competition is on the front pages, as concerns over rising concentration, extraordinary profits accruing to the top slice of corporations, higher prices, lower quality, and less innovation, and widening income and wealth inequality have galvanized attention. Federal antitrust enforcers have intensified their enforcement efforts, state enforcers have become more active in bringing cases challenging potentially illegal consolidation or conduct, and private enforcement remains a major mechanism for obtaining restitution for victims of antitrust violations.

At the macroeconomic level, growing concerns over the state of competition in markets are revealed in three major metrics. One is rising market concentration, especially from mergers and acquisitions, in key sectors of the economy.¹ High concentration reduces competitive intensity as the result of the dominance of a single firm, or just a few firms with weak incentives to compete and strong incentives to coordinate. Most experts agree that competition lowers prices to consumers.²

There is a growing body of “retrospective” studies of consummated mergers that offer evidence of harmful outcomes in some cases. This is important evidence for antitrust enforcers and competition policymakers.³ Individual merger retrospectives cover a variety of sectors, including hospitals, consumer products, brewing, and airlines.⁴ Several have found that mergers, some of which were the subject of in depth *ex ante* antitrust reviews, had adverse effects on consumers. “Meta-analysis,” which studies the results of multiple merger retrospectives together, shows, for example, that prices for more than 60 percent of the products in past mergers increased after they were completed.⁵ Other studies reveal significant evidence of increased average firm markups resulting from consolidation.⁶

A second metric of declining competition the U.S. is slowing rates of market entry. High concentration can increase the barriers that smaller firms must overcome to successfully enter a new market. Many of those firms bring new technologies, innovative business models, and competitive pressure to the markets they enter. A 2016 report by the Council of Economic Advisors

¹ See, e.g., Exec. Order No. 13,725, 81 Fed. Reg. 23,417 (Apr. 15, 2016).

² See, e.g., William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persps. 43 (2000).

³ See, e.g., Press Release, Fed. Trade Comm’n, *FTC’s Bureau of Economics to Expand Merger Retrospective Program* (Sept. 17, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program>.

⁴ For a concise summary of retrospectives, see, e.g., Menesh S. Patel, *Merger Breakups*, 2020 Wis. L. Rev. 975 (2020).

⁵ John E. Kwoka, *Mergers and Product Prices*, in *Mergers, Merger Control, and Remedies* 83 (2015).

⁶ Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* (Federal Reserve, Working Paper No. 2016-82, 2016), <https://doi.org/10.17016/FEDS.2016.082>.

noted that the rate of firm entry in the U.S. has been in decline for almost 40 years.⁷⁸ Third, there is growing agreement that income and wealth inequality are growing problems in the U.S.⁹ A recent study shows that the “prime driver of wage inequality is the growing gap between the most- and least-profitable companies.”¹⁰

Competition enforcers have responses to concerns over rising concentration with a variety of policy tools. A leading development is the 2023 Merger Guidelines, issued by the U.S. Department of Justice and Federal Trade Commission in late 2023.¹¹ The guidelines expand the range of harmful effects of mergers, and the market settings in which they often occur. They also cite legal precedent in past merger cases that has advanced more vigorous enforcement.

The foregoing issues raise important economic, political, and social policy questions for California, which is the largest “sub-national” economy in the world. Indeed, if California were a sovereign nation, with an estimated \$3.6 trillion in gross state product (GSP) in 2022, it would rank as the fifth largest economy in the world.¹² This is a compelling reason for why the California Law Review Commission (CLRC) has asked for a chapter in this report dedicated to the issue of concentration in California. As its own economy, and vis-à-vis its place in the national U.S. and global economies, this inquiry is central to the importance of competition and its critical role for promoting the welfare of consumers and workers and spurring innovation and economic growth.

A survey of major sectors in the California economy, as measured by GSP and potential for employment and job growth, reveals sectors that have an outsized impact in California, national, and global markets. We focus in this chapter on a detailed assessment of competition issues in several of these sectors: agriculture, healthcare, and pharmaceuticals and entertainment. The digital sector (*e.g.*, e-commerce and internet publishing and software) also ranks highly in the California economy.¹³ Given resource constraints, however, this chapter leaves these issues to other working group or research projects. However, given the importance of labor markets in the California economy, the chapter also provides detailed coverage of competition issues involving

⁷ Council of Economic Advisers, *Benefits of Competition and Indicators of Market Power*, The White House at 5 (Apr. 2016); see also Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality: Presentation at “A Just Society” Centennial Event in Honor of Joseph Stiglitz*, Columbia University (Oct. 16, 2015).

⁸ Council of Economic Advisers, *supra* note 7, at 5.

⁹ See, *e.g.*, Thomas Piketty, *Capital in the Twenty-First Century* (2014); Joseph E. Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future* (2012); see also Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—And Turned Its Back on the Middle Class* (2012); Lawrence H. Summers, *The Inequality Puzzle*, 2014 *Democracy J.* 91; Bill Gates, *Why Inequality Matters*, Gatesnotes (Oct. 13, 2014), <http://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-Review>.

¹⁰ Greg Ip, *Behind Rising Inequality: More Unequal Companies*, Wall Street J. (Nov. 4, 2015), <http://www.wsj.com/articles/behind-rising-inequality-more-unequal-companies-1446665769>.

¹¹ U.S. Dep’t of Justice & Fed. Trade Comm’n, *2023 Merger Guidelines* (Dec. 2023); see also Diana L. Moss, *Antitrust Ideology and the 2023 Merger Guidelines*, in *The 2023 U.S. Merger Guidelines - A Review*, Concurrences (forthcoming).

¹² Ryan A. Hughes, *If California Were a Country*, Bull Oak Capital (June 8, 2023), <https://bulloakcapital.com/blog/if-california-were-a-country/>.

¹³ *The 7 Biggest Industries in California*, California.com (Jan. 19, 2024), <https://www.california.com/biggest-industries-california/>.

workers, which have attracted significant antitrust enforcement, legislative, and policy attention in recent years.

II. LABOR

A. Labor Markets, Competition, and Employer Power Over Workers

Healthy competition for workers is critical to addressing income inequality, stagnant wages, and broad-based economic growth. Threats to that competition include employer concentration, agreements among rival employers to not compete for each other's employees (so-called "no-poach" agreements), and anticompetitive contracts employers require their employees to sign.

In a traditional monopoly, the seller of a product has the ability to charge higher prices without losing customers because of the lack of competition from other firms selling the same or a substitutable product. Monopsony power is the mirror image on the purchaser side: A firm with monopsony power can purchase its inputs at lower prices because of the lack of competition from other firms purchasing the same inputs.

One such input is labor. Until relatively recently, "economists assumed that labor markets are fairly competitive."¹⁴ Most believed that employees—especially those in urban centers and/or working in low-skill jobs—had plentiful options for employment, and that any remaining market imbalances were being sufficiently mitigated by wage-and-hour law and labor law.¹⁵ But new and now widely accepted evidence demonstrates that this common assumption was largely incorrect, and "that many labor markets around the country are not competitive but instead exhibit considerable market power enjoyed by employers."¹⁶ Indeed, "[e]vidence that labor markets, particularly low-wage labor markets, are monopsonistic has been accumulating over the past two decades."¹⁷

One measure of monopsony power is market concentration; the more highly concentrated a market, the less competition there is. Labor market concentration refers to the degree to which a few firms dominate hiring in the labor market. According to a leading empirical study, 60 percent of U.S. labor markets are highly concentrated, representing 20 percent of U.S. employment, relying on the DOJ and FTC's standard measure of market concentration.¹⁸ Another recent study measured U.S. labor market concentration by using data from online job postings; the study found the elasticity of job applications to wages to be 0.43—which is highly inelastic—and even lower as labor markets became more concentrated, suggesting lower competition in such markets.¹⁹

¹⁴ Alan Krueger & Eric Posner, The Hamilton Project, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion* 6 (2018).

¹⁵ Suresh Naidu, Eric Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 541-43 (2018).

¹⁶ Naidu, *supra* note 15, at 538-39.

¹⁷ Naidu, *supra* note 15, at 560. For a summary of recent economic studies of monopsony, see *id.* at 564 ("[L]ow labor elasticities . . . are surprisingly common throughout the economy," and "[e]ven the residual supply of low-skill labor is relatively inelastic . . . despite the earlier conventional wisdom that inelastic labor markets were caused by the time and cost of obtaining education and specialized training, which low-skill workers, by definition, lack.").

¹⁸ Jose Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence From Online Vacancy Data* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24395, 2018).

¹⁹ Alan Manning, *Monopsony in Labor Markets: A Review*, 74 ILR Rev. 3, 6 (2020).

Similarly, a study of quit elasticity in the United States and the United Kingdom examined the number of quits and recruits in response to wage increases.²⁰ If the quit elasticity in relation to the wage is high, then there is less monopsony power; but if it is low, then employees are paid less than their value to the employer, implying monopsony power.²¹ The results showed “the implied elasticities are much smaller in magnitude than would be expected from a perfectly competitive model.”²²

Another study, using data from the U.S. Census Longitudinal Employer Household Dynamics, was able to directly estimate the effects of firm wages on the rate of new hiring and separations, and likewise found low residual labor supply elasticity.²³ Taken together, these studies (among others) show that “there seems to be a large amount of monopsony power,” and certainly “more than one might have expected a priori.”²⁴ Labor is often the highest input cost for companies, providing a very strong incentive to reduce competition.

B. Effects of Monopsony Power on Workers and the Economy

The DOJ and FTC have concluded that the effects of monopsony power in labor markets are just as pernicious as the effects of monopoly in project markets.²⁵ Leading scholars put it this way: a “lack of competition in the labor market enables employers to suppress the wages of their workers.”²⁶ That, in turn, harms the economy: “[T]he low wages force workers out of the workforce” and “suppress[] economic growth” by restricting the pool of available workers from which potentially new competitors can draw.²⁷ Wage suppression also enhances societal income inequality by separating those who work in concentrated markets from those who work in competitive labor markets.²⁸ Workers that already have low incomes are affected the most because they lack bargaining power and alternatives.²⁹

The empirical research has borne this out. An early study by Professors David Card and Alan Krueger found that a minimum-wage increase in New Jersey in 1992 did not affect employment levels in the fast-food industry.³⁰ In a competitive market, one would expect that workers were already being paid a wage equal to their value (referred to as marginal revenue product, or MRP), and that an employer’s rational response to a minimum-wage increase would be to reduce

²⁰ Naidu, *supra* note 15, at 561.

²¹ Alan Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. of Hum. Res. S324, S334 (2018).

²² Naidu, *supra* note 15, at 561.

²³ Naidu, *supra* note 15, at 562.

²⁴ Manning, *supra* note 19, at 6; *see also* Orley Ashenfelter, Henry Farber & Michael Ransom, *Labor Market Monopsony*, 28(2) J. of Lab. Econ. 203-210, 209 (2010) (“The remarkable common feature of all the studies reported here is the high ‘monopsony power’ implied by the firm-level estimates of labor supply.”).

²⁵ U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (2010) § 1; *see also* U.S. Department of Justice and Federal Trade Commission, *Merger Guidelines* (Dec. 18, 2023) § 10, available at <https://www.justice.gov/atr/2023-merger-guidelines>.

²⁶ Ioana Marinescu & Eric Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony 2*, (Roosevelt Institute, Working Paper, 2018).

²⁷ *Id.*

²⁸ Naidu, *supra* note 15, at 537.

²⁹ *Id.*

³⁰ David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 Am. Econ. Rev. 772 (1994).

employment. As it turned out, however, employers were able to absorb the wage increase without reducing employment. That result suggested monopsonistic wage suppression: “[I]f employers pay workers less than their marginal product, then a minimum wage hike—if not too great—will result in higher wages without disemployment.”³¹ In other words, the “finding that increases in minimum wages do not inevitably cost jobs” reflects the reality that many workers are currently being underpaid relative to their MRP.³²

Subsequent studies have found similar results. One study found that, after analyzing labor market concentration in the United States for various occupations, “higher concentration is associated with significantly lower posted wages.”³³ The study found that an increase in concentration by 10 percent in a given labor market is associated with a decrease in job vacancies’ posted wages by 0.4 percent to 1.5 percent.

Another study analyzing local labor market concentration’s effect on wages showed similar results.³⁴ Using data from the U.S. Census Bureau from 1978 to 2016, the study analyzed the manufacturing sector, controlling for standard measures of labor productivity. The results showed a negative relation between employer concentration and wages, meaning that “employers operating in areas with more concentrated labor markets thus appear able to exploit monopsony power in order to reduce employee wages,” and that the negative relation increases over time.³⁵ The study produced the same results even after controlling for factors that may affect wages, such as labor productivity, market size, and firm-by-year fixed effects.³⁶

A third study also analyzing the relation between local labor market concentration and wages across different demographics came to the same conclusion—namely, that “increased concentration reduces earnings” for workers.³⁷ The analysis used administrative data on firms from the Longitudinal Business Database between 1976 and 2015 and demographic information from surveys.³⁸ The data also showed that when measuring the 90th percentile against the 10th percentile of earnings distribution, increased concentration lead to greater income inequality.³⁹ Additionally, low-income populations were found to be more negatively affected by concentration changes.⁴⁰

The empirical evidence is well summarized by the United States Treasury Department: “[A] careful review of credible academic studies places the decrease in wages at roughly 20 percent

³¹ Naidu, *supra* note 15, at 546.

³² Manning, *supra* note 19, at 13; *see also* Dale Belman & Paul J. Wolfson, *What does the minimum wage do?* W.E. Upjohn Institute for Employment Research (2014); Doruk Cengiz, Arindrajit Dube, Attila Lindner & Ben Zipperer, *The effect of minimum wages on low-wage jobs*, 134 Q. J. of Econ. 1405 (2019).

³³ José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration*, 57 J. of Hum. Res. S167, S168 (2022).

³⁴ Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 57 J. of Hum. Res. S200 (2019).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, 57 J. of Hum. Res. S251, S254 (2022).

³⁸ *Id.* at S253.

³⁹ *Id.* at S254.

⁴⁰ *Id.*

relative to the level in a fully competitive market.”⁴¹ In sum, market concentration allows employers to use their market power to pay workers less, and employers are doing exactly that.

C. Increasing Regulatory Concern Over Labor Market Concentration

Given growing income inequality in the United States (and California), and the now widely accepted view that labor markets are not as competitive as previously thought, regulators have turned their attention to understanding and combatting employer monopsony power. For example, in 2016 the DOJ and FTC issued the now defunct “Antitrust Guidance for Human Resource Professionals,”⁴² stating that the antitrust laws apply to competition between employers in the labor market, and that employers may not enter into agreements to limit or fix terms of employment or share information about terms of employment, such as compensation. This Guidance was revolutionary at the time but has now been withdrawn as overly conservative. Recently, the DOJ began criminally prosecuting conduct that violates this guidance.⁴³

In 2021, the White House issued an Executive Order on Promoting Competition in the American Economy,⁴⁴ which noted that “over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality.”⁴⁵ As relevant to California’s Silicon Valley, the Order explicitly called out labor market concentration in the information technology sector.⁴⁶ The Order directed several federal agencies to investigate these issues and possible solutions, resulting in the March 2022 report “The State of Labor Market Competition” by the Treasury Department, in consultation with the DOJ, the Department of Labor, and the FTC.⁴⁷ The report summarizes the prevalence and impact of uncompetitive firm behavior in labor markets, including “the ways in which insufficient labor market competition hurts workers, document[ing] the proliferation of barriers to job mobility, and illustrat[ing] how a lack of labor market competition can hold back the broader macroeconomy.”⁴⁸

Most recently, on December 18, 2023, the DOJ and FTC issued updated Merger Guidelines, which for the first time address mergers between competing employers as purchasers of labor.⁴⁹ Specifically, new Guideline 10 states: “When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers . . . or Other Providers.”⁵⁰ Thus, proposed mergers between companies will now be scrutinized not just for potential monopoly in the product market, but also for monopsony in the labor market.

⁴¹ U.S. Dep’t of Treasury, *The State of Labor Market Competition* (Mar. 7, 2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

⁴² <https://www.justice.gov/atr/file/903511/download>.

⁴³ See, e.g., *United States v. Davita Inc.*, No. 21-cr-00229-RBJ (D. Co.).

⁴⁴ The White House, *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Treasury, *State of Labor Market Competition*, *supra* note 41.

⁴⁸ *Id.*

⁴⁹ U.S. Department of Justice and Federal Trade Commission, *Merger Guidelines* (Dec. 18, 2023) § 10, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

⁵⁰ *Id.*

D. Case Studies

1. Anticompetitive Agreements Between Rival Employers

Antitrust enforcers and private litigants have discovered and challenged agreements between rival employers not to compete for each other's employees. These so-called "no-poach" agreements are pervasive throughout the economy, and have appeared in many industries, including those based primarily in California and critical to its future.

The watershed enforcement action that launched these efforts was the DOJ's discovery of no-poach agreements among many of the world's top high-technology companies, all based in the San Francisco Bay Area: Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar. The DOJ exposed the misconduct in 2010, but did not seek penalties or fines, instead settling for a consent judgment that required defendants not to engage in similar agreements in the future.⁵¹ A civil class action followed, in which Plaintiffs' expert estimated that the challenged no-poach agreements suppressed employee pay by an average of 9.3 percent over the five years during which the agreements were in place. That case settled for a total of \$435 million, by far the largest resolution of employee claims against private employers. The case was the subject of a documentary, *When Rules Don't Apply*,⁵² that was funded by a related enforcement action by the California Attorney General regarding another no-poach agreement between Intuit and eBay, Inc.⁵³

A related case challenged no-poach agreements among major animation studios based in the Los Angeles area: Blue Sky Studios, DreamWorks Animation, ImageMovers Digital LLC, Lucasfilm, Pixar, Sony Pictures Animation, Sony Pictures Imageworks, and the Walt Disney Company.⁵⁴ In addition to no-poach agreements, the evidence showed that representatives of each company periodically met to discuss and exchange plans for future wage levels. Plaintiffs' expert estimated that the misconduct suppressed worker pay by a total of nearly \$700 million over ten years.⁵⁵ Recovery in that action, against mostly California defendants, totaled nearly \$170 million.

Other cases have exposed similar illicit agreements in various industries throughout the economy, including: higher education,⁵⁶ rail equipment manufacturing,⁵⁷ aerospace,⁵⁸ out-patient medical care,⁵⁹ and fast-food.⁶⁰ In the fast food industry, no-poach agreements among franchisees within the same consumer brand (e.g., McDonald's franchisees) were ubiquitous, before systematic

⁵¹ Final Judgment, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629-RBW (D.D.C. Mar. 18, 201), ECF No. 17.

⁵² The film is available at <https://www.whenrulesdontapply.com/>.

⁵³ *California v. eBay, Inc.*, No. 5:12-cv-05874-EJD (N.D. Cal.).

⁵⁴ *In re Animation Workers Antitrust Litig.*, No. 5:14-cv-04062-LHK (N.D. Cal.).

⁵⁵ *Id.*, ECF No. 215-6 at 85.

⁵⁶ *Seaman v. Duke Univ.*, No. 1:15-CV-00462 (M.D.N.C.).

⁵⁷ *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-00798-JFC (W.D. Pa.).

⁵⁸ *Borozony v. Raytheon Techs. Corp., Pratt & Whitney Div.*, No. 3:21-cv-01657-SVN (D. Conn.).

⁵⁹ *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 1:21-cv-00305 (N.D. Ill.).

⁶⁰ See, e.g., *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-04857 (N.D. Ill.); *Butler v. Jimmy John's Franchise, LLC et al.*, No. 3:18-cv-00133-NJR-RJD (S.D. Ill.); *Arrington v. Burger King Corp.*, No. 1:18-cv-24128-JEM (S.D. Fla.).

enforcement efforts led by the Attorney General of Washington State, which resulted in hundreds of franchisors removing no-poach provisions from their franchise contracts.⁶¹

Courts have generally applied the *per se* standard of liability in these cases, whereby plaintiffs carry their burden by proving the no-poach agreement existed, without the need to define a relevant market or to demonstrate market power by means other than measuring the effect of the misconduct on employee wages. An exception has been no-poach agreements in the fast-food industry, where certain courts have held that a higher burden should apply (the rule of reason), requiring plaintiffs to define a relevant market and demonstrate circumstantial market power.⁶² Recently, the Seventh Circuit held that this was error, and clarified that no-poach agreements, including in the fast-food franchise context, should be evaluated under traditional *per se* principles.⁶³

Other obstacles to enforcement include mandatory arbitration and class action waiver provisions that employers are increasingly requiring their employees to sign. As explained further below, the practical result is that these provisions effectively immunize anticompetitive conduct that harms workers.

2. Suppressing Competition Through Employer-Employee Agreements

Certain common provisions in employment agreements have the effect of curtailing competition. The most obvious is a non-compete, which are not enforceable in California.⁶⁴ However, employers continue to include non-compete clauses in their employment contracts, and research has shown that regardless of enforceability this has a deterrent effect on worker mobility.⁶⁵ Non-competes remain widespread, leaving California Attorney General Rob Bonta to issue an alert in March 2022 reminding employers that noncompete agreements are not enforceable in California.⁶⁶ This did not address the “in terrorem” effects of technically unenforceable non-competes that still threatened workers with costly private enforcement actions. This changed on January 1, 2024, with the addition of Section 16600.5 to the Business and Professions Code, which prohibits the agreements themselves, and prohibits any attempt to enter into such non-compete agreements or attempt to enforce them. Further, new Section 16600.1 requires employers to notify any employee

⁶¹ Wash. AG Press Release, *AG Report: Ferguson’s initiative ends no-poach practices at 237 corporate franchise chains* (June 16, 2020), <https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate>.

⁶² Memorandum & Order, *Butler v. Jimmy John’s*, No. 3:18-cv-00133-NJR-RJD (S.D. Ill. July 30, 2021), ECF No. 240; Memorandum Opinion & Order, *Deslandes v. McDonald’s*, No. 1:17-cv-04857 (N.D. Ill. July 28, 2021), ECF No. 372.

⁶³ *Deslandes v. McDonald’s USA, LLC*, 81 F.4th 699 (7th Cir. 2023).

⁶⁴ President Biden’s 2021 Executive Order (*supra* note 44) encouraged the FTC to exercise its rulemaking authority to “curtail the unfair use” of non-competes. A subsequent FTC/DOJ workshop on labor market competition in December 2021 suggests the agency is giving the matter serious review. See <https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>.

⁶⁵ Evan Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & Econ. 53 (2021); Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. Econ. & Org. 633 (2020).

⁶⁶ Cal. AG Press Release, *General Bonta Reminds Employers and Workers That Noncompete Agreements Are Not Enforceable Under California Law* (Mar. 15, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-reminds-employers-and-workers-noncompete-agreements-are>.

or former employee by February 14, 2024, in writing, whose employment contract includes or included a prohibited non-compete clause, that the non-compete clause is void.

Non-competes are not the only culprits. Other common provisions that operate to impede competition include non-disclosure agreements, training repayment provisions (“TRAPS”), mandatory arbitration and class action waivers, and misclassification of workers as independent contractors rather than employees.

Non-disclosure agreements (“NDAs”) lead to underreporting of unlawful conduct resulting from fears of retaliation and lawsuits over breaching these agreements.⁶⁷ Researchers found that by preventing outsiders from learning about undesirable firm employment practices, over-broad NDAs impose potential negative externalities on job seekers and competitor firms.⁶⁸ While California law renders NDAs that prevent sharing information about unlawful conduct unenforceable, in practice this presents the same problem as with non-competes: if the NDA is facially overbroad, employees will adhere to it regardless of enforceability. A better way to target overbroad NDAs is to require NDAs to explicitly carve-out sharing information about unlawful conduct; if they do not, the clause itself is actionable.

TRAPS are provisions that require an employee to repay the cost of training provided by an employer if they leave employment prior to a specified period of time. These provisions trap workers in low-paying jobs with subpar working conditions out of fear that if they leave, they will be in debt — for example, a case pending in California state court alleges that PetSmart dog groomers earning just above minimum wage can owe up to \$5,000.⁶⁹ Federal regulators are considering whether these kinds of TRAPS violate laws governing student loans,⁷⁰ and advocates have asked the FTC to include TRAPS in its proposed rule banning non-compete clauses.⁷¹

Mandatory arbitration clauses and class action waivers reduce the options that workers have within the legal system. Arbitration is less transparent than traditional litigation. Not only are most arbitration decisions non-public, but the mere existence of a decision is also rarely public, reducing awareness and potential deterrence and compliance effects associated with public results.⁷² And since class action lawsuits lower the per-plaintiff cost of dispute resolution, mandatory arbitration agreements with class action waivers tend to discourage employee-driven arbitration. This

⁶⁷ Jason Sockin, Aaron Sojourner & Evan Starr, *What happens when states limit nondisclosure agreements? Employees start to dish*, Washington Post (October 4, 2021), <https://www.washingtonpost.com/outlook/2021/10/04/nondisclosure-employee-reviews-study/>.

⁶⁸ Jason Sockin, Aaron Sojourner & Evan Starr, *Non-Disclosure Agreements and Externalities from Silence*, Upjohn Institute Policy and Research Briefs, Paper 22-360 (Aug. 9, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900285.

⁶⁹ Taylor Telford, *PetSmart offered free training. But it saddled employees with debt*, Washington Post (Aug. 4, 2022), <https://www.washingtonpost.com/business/2022/08/04/petsmart-dog-grooming-training-labor-lawsuit/>; PetSmart Complaint, *Scally v. Petsmart*, No. 4:22-CV-06210 (N.D. Cal. Oct. 19, 2022), ECF No. 1 (available at https://towardsjustice.org/wp-content/uploads/2022/07/PetSmart-complaint_file-1.pdf).

⁷⁰ *Advocate Urges Senate Banking Committee to Take Action on New Financial Products to Protect Consumers*, Consumer Federation of America (Sept. 13, 2022), <https://consumerfed.org/testimonial/advocate-urges-senate-banking-committee-to-take-action-on-new-financial-products-to-protect-consumers/>.

⁷¹ *Comments in Response to Proposed Ban on Non-Compete and De Facto Non-Compete Clauses*, Student Borrower Protection Center (last visited Mar. 11, 2024), <https://protectborrowers.org/comments-in-response-to-proposed-ban-on-non-compete-and-de-facto-non-compete-clauses/>.

⁷² Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679 (2018).

likewise has the effect of reducing the ability of the dispute resolution system to deter future misconduct. These information asymmetries allow firms to exert greater monopsonistic power by introducing additional search frictions for workers who may value knowing a firm’s prior dispute history with workers (or alternatively, current workers who may update their priors on the quality of their employee if they learned about disputes).

Finally, misclassification of workers as independent contractors rather than employees impacts labor market competition. Workers that are misclassified as independent contractors are deprived of most methods by which they can bargain for a greater share of labor market surplus. When the employer offloads the burdens of labor costs on to the worker (including taxes, unemployment insurance, and social security), while continuing to benefit from their productivity, the worker has very little recourse. The employer, on the other hand, gains a competitive advantage against rival firms because it has reduced its labor costs. As a result, the U.S. and California have increasingly seen entire industries transform so that many workers are classified as independent contractors — such as the “gig economy” — because any firm that does not follow suit cannot remain competitive. Workers in such industries have few rights.

III. FOOD AND AGRICULTURE

A. Consolidation in California Food and Agriculture Markets

Next to labor, the food and agricultural markets have a similarly dramatic impact on the California consumer’s wallet. The Bureau of Economic Analysis estimates that California’s average annual non-restaurant food cost per person is \$3,865. That equates to \$322.08 per person, per month. The average family of four could end up spending \$1,288 per month on groceries.⁷³ California food costs are also higher than the national average. A single adult spends an average of \$3,468 per year on groceries, \$228 more than the national average. For a family of four, the number jumps to an average \$10,016 per year, \$662 higher than the national average.⁷⁴

According to the California Department of Food and Agriculture, over a third of the country’s vegetables and three-quarters of the country’s fruits and nuts are grown in California.⁷⁵ But the size of California’s agricultural industry is only one small piece of how this industry impacts a consumer’s plate. From the level of farms, through the distribution channel, down to the retailers, California faces a consolidation crisis placing a stranglehold on the cost of food to consumers.

B. The Meat Processing Supply Chain

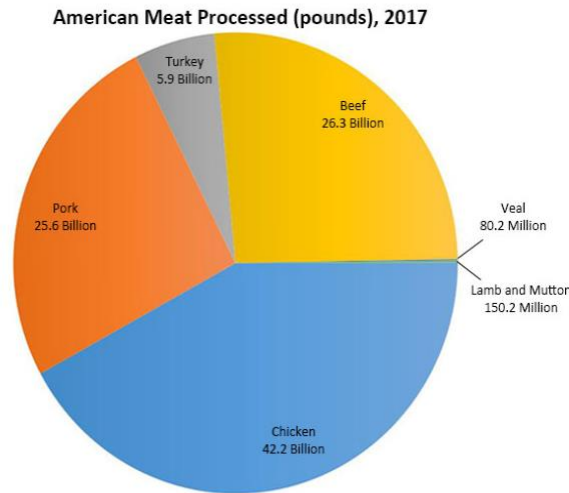
The consequences of consolidated industries are well documented—increasing prices, reduced competition, and a higher likelihood of collusion. But nowhere is this more apparent than in the protein industry where decades of consolidation has left meat subject to the control of a very small

⁷³ *Cost of Living in California*, SoFi.com (Mar. 13, 2023), <https://www.sofi.com/cost-of-living-in-california/#:~:text=How%20much%20should%20you%20plan,%241%2C288%20per%20month%20on%20groceries>.

⁷⁴ Jessica Leshnoff, *Cost of Living in California 2022*, OneMain Financial (June 1, 2022), <https://www.onemainfinancial.com/resources/everyday-living/cost-of-living-in-california>.

⁷⁵ *California Agricultural Production Statistics*, California Department of Food and Agriculture (last visited Sept. 1, 2023), <https://www.cdfa.ca.gov/statistics/>.

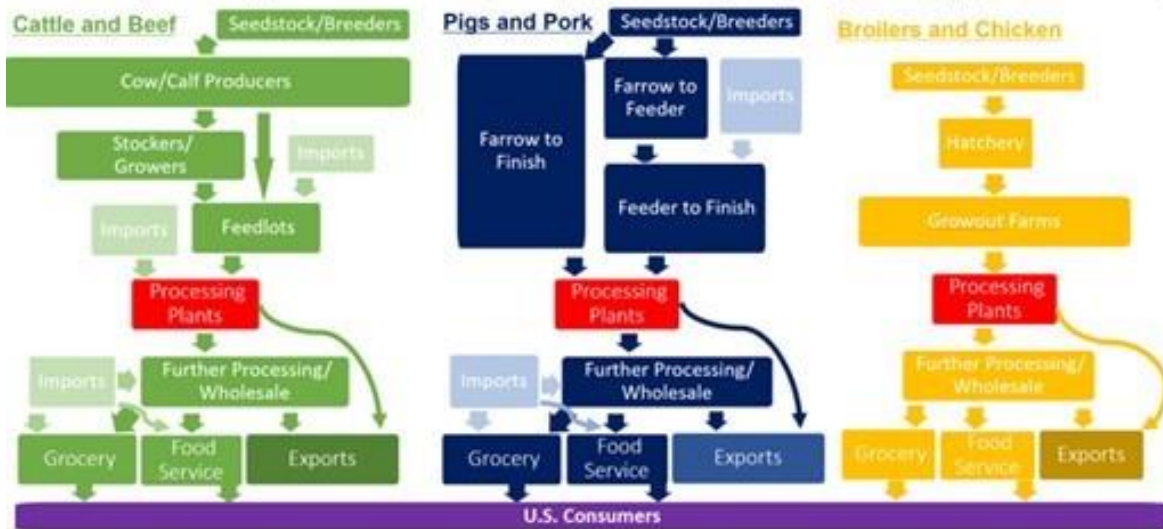
number of companies. American consumers' plates are dominated by four types of meat, turkey, pork, beef and chicken.



As rising grocery prices continue to have a growing impact on the consumer wallet, a recent study found that “meat prices are still the single largest contributor to the rising cost of food people consumer at home.”⁷⁶ The White House has emphasized how these processing companies represent a choke point in the supply chain:⁷⁷

U.S. Beef, Pork, and Broiler Supply Chains

Note: This is a simplification of supply chains and does not include, for example, inputs, chicken eggs, turkeys, sheep and lamb, supply chains in other countries, etc



⁷⁶ Brian Deese, Sameera Fazili & Bharat Ramamurti, *Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins*, The White House (Dec. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/>.

⁷⁷ Brian Deese, Sameera Fazili & Bharat Ramamurti, *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, The White House (Sept. 8, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>.

Four large conglomerates (Tyson, JBS,⁷⁸ Marfrig, and Seaboard) control 55 to 85 percent of the market for pork, beef, and poultry.⁷⁹ The change in consolidation over the last four decades is shocking. In 1977, the largest four beef-packing firms controlled just 25 percent of the market—that has risen to 82 percent today. In poultry, the top four processing firms controlled 35 percent of the market in 1986, compared to 54 percent today. And in pork, the top four hog-processing firms controlled 33 percent of the market in 1976, compared to 66 percent today.⁸⁰

C. Case Studies

1. The Poultry Industry: Allegations of Collusion

The protein industries have been the subject of intense governmental and civil scrutiny in recent years, with multiple trials and allegations regarding the operations of various cartels. These prosecutions have been met with varying success, but undoubtedly demonstrate the perils associated with a consolidated industry.

In 2016, the first civil lawsuit was brought against 26 poultry processors, alleging that they conspired to fix the price of chicken sold in the United States.⁸¹ The action alleged that the group of poultry processors, faced with financial difficulties in 2009, coordinated to suppress the supply of and increase the price of chicken.⁸² Eventually, the litigation grew to include three separate classes (direct purchaser, commercial restaurants, and consumers who purchased at retail grocery stores) and over 180 direct purchasers such as retail grocery stores and distributors, who opted out of the various classes. Settlements with the three classes totaled over \$575 million at the time of this writing.

California was one of the states represented in the End-User Purchaser Class, given that California provides standing to indirect purchasers (consumers that purchase at grocery stores). Evidence in the case showed that overcharges due to the cartel were passed through to end-purchasers at grocery stores at a rate of approximately 96 percent.⁸³ (That is, for every dollar overcharged due to the anticompetitive behavior, roughly \$0.96 was paid for by consumers at the grocery store.) In June 2023, the Court granted, in part, and denied, in part, motions for summary judgment. The sole California defendant, Foster Farms, was dismissed in the summary judgment proceedings.

⁷⁸ A more nuanced threat from consolidation in our food supply is the risk of foreign interests taking over the supply chain. One company, Brazil-based JBS S.A., has become dominate in the American meat sector. In 2007, JBS S.A. established a U.S. subsidiary—JBS USA—that purchased the American beef and pork processing company Swift Foods Co. Through a deal in 2008, JBS USA acquired the beef processing operations of Smithfield Foods. In 2009, JBS USA obtained the majority of the poultry processing operations of Pilgrim’s Pride. Additionally, JBS USA purchased Cargill’s pork processing operations in 2015. It is alleged that the Batista brothers, who run JBS, engaged in criminal conduct to secure loans from the Brazilian government, which were then used to purchase U.S. assets. See Kimberly Kindy, *This foreign meat company got U.S. tax money. Now it wants to conquer America*, The Washington Post (Nov. 7, 2019), https://www.washingtonpost.com/politics/this-foreign-meat-company-got-us-tax-money-now-it-wants-to-conquer-america/2019/11/04/854836ae-eae5-11e9-9306-47cb0324fd44_story.html.

⁷⁹ *Id.*

⁸⁰ Deese et al., *Addressing Concentration in the Meat-Processing Industry*, *supra* note 77.

⁸¹ *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, 2016 WL 4800162 (N.D. Ill. Sept. 14, 2016).

⁸² *Id.*

⁸³ *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, 2022 WL 1720468, at *19 (N.D. Ill. May 27, 2022) (certifying class).

The Court ordered a group of core defendants to face trial but pared back claims in the case to two sets of supply cuts in the 2008 to 2009, and 2011 to 2012 time periods.⁸⁴

The Court also dismissed rule of reason claims relating to the exchange of confidential information through an information sharing service, Agri Stats. In September 2023, after over seven years of litigation, the first civil case went to trial with a small minority of the plaintiffs and one remaining defendant, Sanderson Farms (the other defendants remaining after summary judgment having settled). The restaurant class settled with all defendants before the scheduled March 2024 trial. A third trial with the consumers who purchased at grocery stores (the end-users), including the California class, is scheduled for September 2024.

The civil case revealed many of the dangers associated with a concentrated industry. In its order denying summary judgment, in part, the District Court explained the characteristics which made the chicken industry particularly susceptible to collusion: (1) a commodity product (where any one defendant's chicken could easily be substituted for another); (2) vertical integration where the defendant-cartel was able to control the levers of supply; (3) a highly concentrated market where the top four producers controlled nearly 60 percent of the market; and (4) the existence of an information sharing service, called Agri Stats, which allowed for a wide flow of competitively sensitive information between the poultry processors.⁸⁵

As the experts testified in *Broilers*, in a market with these characteristics, an unusual production cut is likely the result of an anticompetitive agreement among the producers, given that in a competitive market a competitor is likely to “jump in and satisfy any supply decrease implemented unilaterally.”⁸⁶ The Court found sufficient evidence of production decreases in 2008-09 and 2011-12, which were inconsistent with historical averages, to deny summary judgment as to the majority of chicken processors.

Evidence of inter-defendant communications included clear evidence of collusion, including statements such as: “I know you’re the reason [the market is] tightening”; “I have taken care of you for 2 months brother, the market is going up daily making you \$\$\$”; and “They thanked us for taking the lead and told me that contrary to what we might hear regarding their company, they are following as are others. Courage . . . keep it up guys.”⁸⁷ Internal defendant documents referred to a “chicken mafia” and an employee who was described as the “stud of all studs” when it came to competitor contacts.⁸⁸

Allegations of collusion in the poultry industry are not limited to the *Broiler Chicken Antitrust Litigation*, however, which largely focused on traditional allegations of supply constraints and price-fixing. A concurrent criminal proceeding against a set of individuals and companies grew out of the civil litigation. In June 2019, the Department of Justice intervened in the civil case and

⁸⁴ *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, 2023 WL 4303476 (N.D. Ill. June 30, 2023).

⁸⁵ *Id.* at *3, *reconsideration denied*, No. 1:16-cv-8637, 2023 WL 5608001 (N.D. Ill. Aug. 4, 2023).

⁸⁶ *In re Broiler Chicken Antitrust Litig.*, No. 16 cv 8637, 2023 WL 7220170, at *3 (N.D. Ill. Nov. 2, 2023).

⁸⁷ *Id.* at *12, *13.

⁸⁸ Class Plaintiffs’ Submission Pursuant to the Court’s May 27, 2021, Order at 2, *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637 (N.D. Ill. July 9, 2021), ECF No. 4832.

requested a limited stay of all civil proceedings.⁸⁹ One defendant, Pilgrim's Pride Corporation (owned by JBS), pled guilty to a conspiracy to fix prices and rig bids for broiler chicken from as early as 2012 and continuing at least until 2017. Pilgrim's Pride paid \$107 million in criminal fines.⁹⁰

The DOJ held three separate trials against individual employees of the chicken companies who were alleged to have participated in the bid-rigging conspiracy, with two mistrials and an eventual acquittal.⁹¹ Despite the acquittals, Pilgrim's pled guilty to participating in a conspiracy which impacted the sales of chicken to KFC from 2015 through 2017, impacting at least \$361 million in purchases.⁹²

The tight knit poultry industry was also alleged to be engaged in a related conspiracy regarding fixing employee wages. In a case brought by civil plaintiffs, employees of the poultry processors (both chicken and turkey), the poultry processors were alleged to have conspired to suppress compensation through a series of roundtable meetings, information-exchange surveys, plant-to-plant direct communications, and further information sharing through the Agri Stats service.⁹³ After the civil case survived motions to dismiss, and had recovered over \$100 million for class members, the DOJ filed related actions and consent decrees with four of the defendants, prohibiting any surveys or meetings relating to competitively sensitive information (which included non-public information relating to price, cost including compensation, output, quality or innovation).⁹⁴ One of the consent decrees was with Webber, Meng, Sahl and Co., the company who had collected the wage information and conducted the surveys. The other consent decrees were with three protein companies, Cargill, Sanderson and Wayne Farms. To date, the civil action has recovered over \$200 million for the poultry workers.

But the allegations of harm on the price of chicken due to a stranglehold of the poultry processors are just one piece of the problems associated with consolidated industry. The increasing use of big data has led to a collision of anticompetitive cartels. In 2023, the DOJ brought a further civil action against Agri Stats, the Indiana company alleged to be behind many of the protein industry information sharing allegations. This suit was brought within months of the DOJ withdrawing its "safe harbor" guidance, which provided certain parameters for information exchanges that, if complied with, would not be prosecuted by the federal government. The DOJ commented at the time that the safe harbor guidelines were "overly permissive on certain subjects, such as

⁸⁹ The United States' Motion to Intervene and Stay Discovery, *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637 (N.D. Ill. June 21, 2019), ECF No. 2268.

⁹⁰ Press Release, U.S. Dept. of Justice Office of Public Affairs, *One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and is Sentenced to a \$107 Million Criminal Fine* (Feb. 23, 2021), <https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million>.

⁹¹ Greg Henderson, "Not Guilty" – *Chicken Price-Fixing Trial Ends*, Farm Journal (July 8, 2022), <https://www.agweb.com/news/livestock/poultry/not-guilty-chicken-price-fixing-trial-ends>.

⁹² Plea Agreement at 4, *United States v. Pilgrim's Pride Corp.*, No. 20-cr-00330 (D. Colo. Feb. 23, 2021), ECF No. 58.

⁹³ Memorandum Opinion at 7, *Jien v. Perdue*, No. 1:19-cv-02521 (D. Md. July 19, 2022), ECF No. 695.

⁹⁴ Proposed Final Judgment at 3-4, *United States v. Cargill Meat Solutinos Corp.*, No. 1:22-cv-01821 (D. Md. July 25, 2022), ECF Nos. 2, 3 (available at <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>).

information sharing” and indicated that the DOJ would proceed on a “case-by-case enforcement approach.”⁹⁵

In part, the withdrawal of this “outdated” guidance is a recognition that the advent of big data has replaced the years of face-to-face meetings of competitors. Information sharing services, such as Agri Stats, means that sensitively competitive data can be provided directly across large industries, reducing the need to arrange for regular meetings, increasing the amount of information that can be shared and dramatically lessening the chances of detection by enforcement agencies.

After the withdrawal of the “safe harbor” guidance, in late 2023, the DOJ brought a civil antitrust lawsuit against Agri Stats, the secretive company behind many of the information sharing schemes seen in the chicken, pork and turkey industry. The DOJ alleged that the weekly and monthly reports produced by Agri Stats for the meat processors were anticompetitive and were used by the protein industry to set prices and output levels.⁹⁶ It is noteworthy that the DOJ action again followed on civil actions which had for years alleged collusion in not only the chicken industry (referenced above), but also separately in the turkey and pork markets.

In *In re Pork Antitrust Litigation*, filed in 2018 (five years before the DOJ brought suit), the indirect purchaser plaintiffs brought allegations on behalf of a California state class of purchasers at grocery stores. The class was certified in March 2023.⁹⁷ The California class represents one of the largest, if not the largest, state in the indirect purchaser action and the damages analysis shows California consumers suffering harms in the hundreds of millions of dollars.

Competitive markets empower consumers and drive businesses to lower prices, improve product quality, innovate, and bring valuable new products to market. Ensuring markets that are able to function competitively is a critical piece to ensure food security for California citizens.

2. Retail Grocery: Consolidation and Soaring Prices

Concentration in the food retail area is another area of concern. In the United States, sales by the 20 largest food retailers totaled \$449.3 billion in 2013, accounting for 63.8 percent of U.S. grocery store sales.⁹⁸ It is estimated that only four retailers (Walmart, Kroger, Costco and Albertson’s) control roughly 69 percent of the US grocery market.⁹⁹

One chart alone shows how consolidation over the past few decades have resulted in the creation of the largest U.S. supermarket chain.

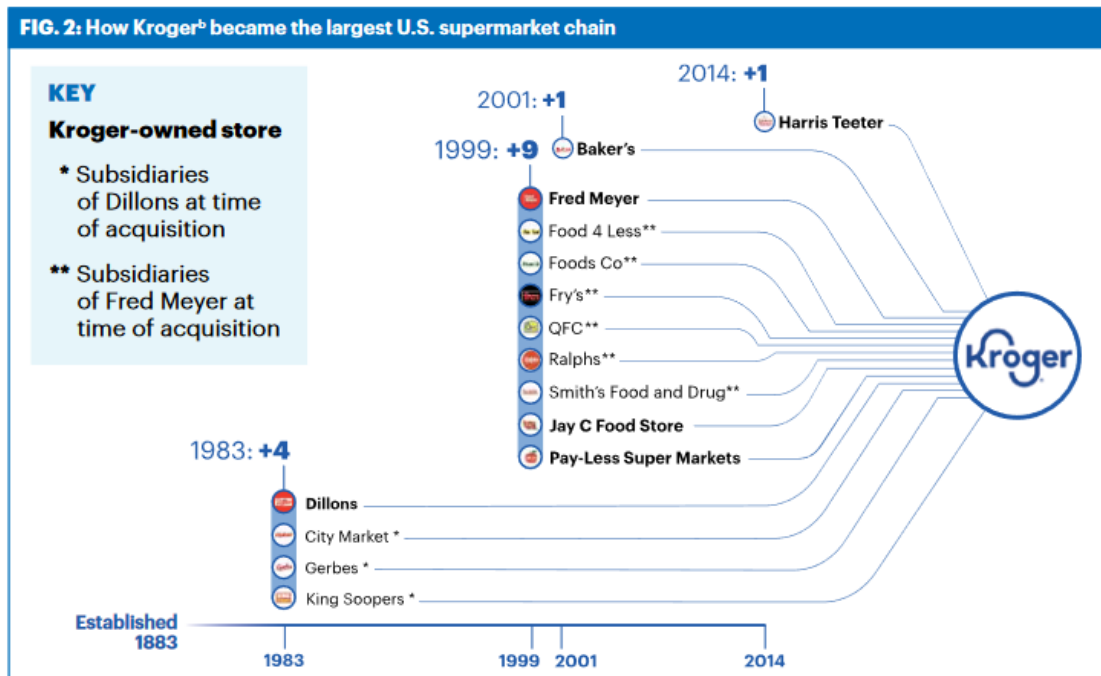
⁹⁵ DOJ Press Release, *Justice Department Withdraws Outdated Enforcement Policy Statements* (Feb. 3, 2023), <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements>.

⁹⁶ Complaint, *United States v. Agri Stats, Inc.*, No. 23-cv-03009 (D. Minn. Sept. 28, 2023), ECF No. 1 (available at https://www.justice.gov/d9/2023-09/agri_stats_complaint.pdf).

⁹⁷ *In re Pork Antitrust Litig.*, No. 18-1776 (JRT/JFD), 2023 WL 2696497, at *4 (D. Minn. Mar. 29, 2023).

⁹⁸ Tina L. Saitone & Richard J. Sexton, *Concentration and Consolidation in the U.S. Food Supply Chain: The Latest Evidence and Implications for Consumers, Farmers, and Policymakers*, Federal Reserve Bank of Kansas City (2017), https://www.kansascityfed.org/documents/764/Concentration_and_Consolidation_in_the_U.S._Food_Supply_Chain_The_Latest_Evidence_and_.pdf.

⁹⁹ Food and Water Watch, *The Economic Cost of Food Monopolies: The Grocery Cartels* (Nov. 2021), https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf



The consolidation of the retail grocery industry has a number of negative impacts on California consumers. First, consolidation in highly concentrated areas leads to higher prices. The FTC, researching the impact of this consolidation over a decade ago, found that horizontal mergers in the retail grocery sector in highly concentrated markets are associated with price increases.¹⁰⁰

Second, consolidation leads to greater food insecurity in certain populations through the closures of independent grocers. The advent of large nationwide big box grocery retailers has had an impact on food availability to California consumers. It is estimated that the overall number of U.S. grocery stores has decreased nearly 30 percent by 2019 compared to 1994.¹⁰¹ This exacerbates the “food desert” phenomenon already found in California. A food desert is defined as areas where people have limited access to a variety of healthy and affordable food.¹⁰²

The proposed 2022 merger between giants Kroger and Albertsons threatens to further exacerbate an already challenging industry. Kroger is the nation’s second largest supermarket operator with \$50 billion in assets, \$148 billion in annual revenues, 2,719 supermarkets and 430,000 employees in 35 states.¹⁰³ In California, Kroger employs 26,687 workers and operates some 302 supermarkets

¹⁰⁰ Hosken, Daniel et al., *Do Retail Mergers Affect Competition? Evidence From Grocery Retailing* 29-30, (U.S. Fed. Trade Comm’n Bureau of Econ., Working Paper No. 313, 2012).

¹⁰¹ Food and Water Watch analysis of U.S. Census Bureau, *County Business Patterns*, <https://www.census.gov/programs-surveys/cbp.html>.

¹⁰² Paula Dutko, Michele Ver Ploeg, & Tracey Farrigan, Economic Research Service/USDA, *Characteristics and Influential Factors of Food Deserts* at 5 (Aug. 2012), https://www.ers.usda.gov/webdocs/publications/45014/30940_err140.pdf (“Low access is characterized by at least 500 people and/or 33 percent of the tract population residing more than 1 mile from a supermarket or large grocery in urban areas, and more than 10 miles in rural areas.”).

¹⁰³ Kroger Profit Margin 2010-2024, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/KR/kroger/profit-margins>; see also Tom Ryan, *Can Kroger offset its*

under the banners of Ralphs, Food 4 Less and Foods Co., most of which have pharmacies.¹⁰⁴ The California Attorney General, citing food desserts in urban areas such as Los Angeles,¹⁰⁵ sought to block a dividend proposed to be paid by Albertsons – alleged to be intended to distort the competitive process by artificially hampering Albertson’s ability to compete. The Court of Appeals for the District of Columbia denied the request for an injunction pending appeal.¹⁰⁶ In January 2024, the Washington State Attorney General sued to block the proposed Kroger-Albertsons merger, asserting that the merger would severely limit shopping options for consumers and eliminate vital competition that keeps grocery prices low for Washington consumers.¹⁰⁷ In February 2024, the FTC also acted to block the merger of Kroger and Albertsons, arguing that the merger would raise grocery prices to consumers and reduce incentives to compete on quality. But emphasizing the point of this committee, the FTC also alleged that the merger would result in an “increased leverage over workers and their unions—to the detriment of workers.”¹⁰⁸ A consolidated market has effects on two sides. First, it impacts the buyers of goods who face increased prices and reduced quality, but second, it also impacts the workers who lose the ability to negotiate higher (or even stabilized) wages.

In a similar foreign market, Canada’s Competition Bureau undertook a market study of the retail grocery market and the impacts of consolidation on the Canadian consumer.¹⁰⁹ It made a number of recommendations, including: (i) encouraging new types of grocery businesses; (ii) encouraging growth of independent grocers; (iii) government authorities considering introducing accessible and harmonized unit pricing requirements; and (iv) government authorities taking measures to limit property controls in the grocery industry which were preventing new grocers from opening. In response at least in part to this competition report, the country’s five major grocery chains made a commitment to help stabilize food prices, including discounts on certain products, price freezes, and price-matching campaigns.¹¹⁰ Government authorities have suggested the alternative for grocery store chains might be the imposition of new taxes.¹¹¹

In California, multiple reforms are possible to allow recovery by California consumers. First, allowing consumers greater access to the Courts through reduced pleading standards in antitrust cases to allow a similar standard to other areas of law. Rather than requiring confidential witnesses,

margin headwinds?, RETAILWIRE (Sept. 13, 2021), <https://retailwire.com/discussion/can-kroger-offset-its-margin-headwinds/>.

¹⁰⁴ Kroger, *California State Impact*, <https://www.thekrogerco.com/wp-content/uploads/2022/01/Kroger-FactSheet-California.pdf>.

¹⁰⁵ Emergency Motion of Appellants for an Injunction Pending Appeal & an Immediate Administrative Stay at 3, *District of Columbia v. The Kroger Co.*, No. 22-7168 (D.C. Cir. Dec. 13, 2022) ECF No. 1977455.

¹⁰⁶ Order, *District of Columbia, et al. v. The Kroger Co.*, No. 22-7168 (D.C. Cir. Dec. 20, 2022), ECF No. 1978455.

¹⁰⁷ Washington AG Press Release, *AG Ferguson files lawsuit to block Kroger-Albertsons merger* (Jan. 15, 2024), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-block-kroger-albertsons-merger>.

¹⁰⁸ Federal Trade Commission, *FTC Challenges Kroger’s Acquisition of Albertsons* (Feb. 26, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons>.

¹⁰⁹ Competition Bureau Canada, *Canada Needs More Grocery Competition: Competition Bureau Retail Grocery Market Study Report* (June 27, 2023), <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/canada-needs-more-grocery-competition>.

¹¹⁰ Reuters, *Canada’s grocery chains pledge to help cut food prices, government says* (Oct. 5, 2023), <https://www.reuters.com/world/americas/canadas-grocery-chains-pledge-help-cut-food-prices-govt-says-2023-10-05/>.

¹¹¹ Reuters, *Trudeau summons top Canadian grocers in fight against rising food price* (Sept. 14, 2023), <https://www.reuters.com/markets/canada-remove-consumption-tax-new-apartment-buildings-source-2023-09-14/>.

or direct evidence of a conspiracy, allowing circumstantial evidence of a conspiracy should suffice. Direct evidence of an agreement is near-impossible, given that this evidence is almost entirely in the hands of the defendants. Allowing circumstantial evidence to carry the day would allow consumers greater access to the Courts and the ability to challenge conspiracies and cartels when most of the evidence is in the possession of the cartel members. Second, federal law in large part imposes discovery stays on plaintiffs during the pendency of motion to dismiss motions. This puts any evidence out of reach of consumers while the pleadings are challenged. Allowing plaintiffs access to discovery during the pendency of motions to dismiss would allow the correction to pleadings where certain elements have not been met, but while there is still veracity to the claims. Finally, reducing the need to plead or prove market definition in cases alleging a rule of reason violation as long as there is sufficient evidence of a price or wage effect would again increase access to the courts.

IV. HEALTHCARE AND PHARMACEUTICALS

In 2020, California spent \$405 billion on health care, and spending on a per capita basis (\$10,299) surpassed the U.S. average (\$10,191) for the first time since 1991¹¹² Just ten years earlier, California's \$6,480 health care spending per capita was \$572 (8.1 percent) below the U.S. average.¹¹³ The state's rising household health care spending has grown twice as fast as wages, whereas medical inflation nationwide is only 1.5 times greater than general inflation.¹¹⁴

Prices for specific health care services have been the primary driver of higher health care costs. Hospital prices have increased by 600 percent in 35 years; and in 2024, employers are expecting a 5.4 percent increase in healthcare costs which will likely spur escalating prices for goods and services.¹¹⁵ Prescription prices have escalated even faster; increasing at a rate double that of inflation from 2008 to 2016. Between 2021 and 2022, over 1,200 drug prices increased an average of 31.6 percent. As a result, 20 percent of Californians report not filling a prescription and 16 percent cut pills or skip doses due to costs.¹¹⁶

“For all the talk of inflation in the last year, if gas prices went up the same rate as health care prices over the last couple of decades, we wouldn't be seeing \$5 to \$6 a gallon, we'd be seeing \$30 to \$40 a gallon,” explained Anthony Wright, executive director of Health Access California.¹¹⁷ Higher health care costs also translates into higher insurance costs and, relatedly, decisions to forgo

¹¹² Katherine Wilson, California Health Care Foundation, *2023 Edition-California Health Care Spending* (Mar. 14, 2023), <https://www.chcf.org/publication/2023-edition-california-health-care-spending/> [hereinafter CHCF 23 Report].

¹¹³ *Id.*

¹¹⁴ Kristen Hwang & Ana Ibarra, *Health care costs keep rising. A new California agency aims to fix that*, CalMatters (July 15, 2022), <https://calmatters.org/health/2022/07/rising-health-care-costs/>; see also K. Stremikis, *Ever-Rising Health Costs Worsen California's Coronavirus Threat*, CHCF Blog (Mar. 5, 2020), <https://chcf.org/blog/ever-rising-health-costs-worsen-californias-coronavirus-threat/>.

¹¹⁵ Julian Canete, *What's Driving Up Healthcare Prices in California*, Orange County Register (Dec. 11, 2023), <https://www.ocregister.com/2023/12/11/whats-driving-up-healthcare-prices-in-california/>.

¹¹⁶ Arielle Bosworth, Steven Sheingold, Kenneth Finegold, Nancy De Lew & Benjamin D. Sommers, *Price Increases for Prescription Drugs, 2016-2022*, ASPE (Sept. 30, 2022), <https://aspe.hhs.gov/reports/prescription-drug-price-increases>; Lucy Rabinowitz Bailey, Rebecca Catterson, Emily Alvarez & Sangeetha Noble, California Health Care Foundation, *The 2023 CHCF California Health Policy Survey* (Feb. 16, 2023), <https://www.chcf.org/publication/2023-chcf-california-health-policy-survey/>.

¹¹⁷ Hwang, *supra* note 114.

care. California's spending on Health and Human Services, which encompasses Medi-Cal, now consumes nearly one-third of the state budget. Health insurance premiums and deductibles have steadily increased for Californians in the past decade, equaling 10.5 percent of the median household income in 2020.¹¹⁸ And half of Californians skipped or postponed medical care in 2021, according to a California Health Care Foundation report.

Increasing consolidation in both pharmaceutical and health care markets is a powerful contributor to the rising costs.¹¹⁹ Many sectors of both the pharmaceutical and healthcare industries are controlled by only three or four large companies. These mega-corporations, mostly domiciled in other states or countries, dictate and control prices, wages, and innovation within our state.

Their market power also impacts the healthcare and pharmaceutical industries which help power the state's economy. California's 13,689 drug and life sciences companies, 90 percent of which are comprised of less than 20 employees, directly employ 335,231 Californians and contribute over \$277.6 billion in state economic output, with an additional \$472 in indirect and induced economic impact through supply chains.¹²⁰ California is also the recognized epicenter of innovation in health care, siting 25 percent of all active pharmaceutical trials and leading other states with 1,380 therapies in the FDA pipeline.¹²¹ California's health care industry employed more than 1.7 million people in 2019, of which 50 percent were employed in ambulatory settings, 32 percent in hospitals, and 18 percent in nursing or residential care facilities.¹²² California's hospitals reported \$131 billion in operating revenue in 2022¹²³ and employ over 580,000 people.¹²⁴

A. The Pharmaceutical Supply Chain

Our pharmaceutical markets are complex and are comprised of different successive markets, including pharmaceutical manufacturers, pharmaceutical benefit managers, and pharmacies. All

¹¹⁸ Hwang, *supra* note 114.

¹¹⁹ Nicholas C. Petris Ctr. on Health Care Mkts. & Consumer Welfare Sch. of Pub. Health, *Consolidation in California's Health Care Market 2010-2016: Impact on Prices and ACA Premiums* (Mar. 26, 2018), https://petris.org/wp-content/uploads/2018/03/CA-Consolidation-Full-Report_03.26.18.pdf [hereinafter *Consolidation in California*, Petris Ctr.]; Laurel Lucia, *High Health Care Prices are the Primary Driver of California's Workers' Health Care Cost Problems*, UC Berkeley Labor Center (Feb. 20, 2020), <https://laborcenter.berkeley.edu/high-health-care-prices-are-the-primary-driver-of-california-workers-health-care-cost-problems/>; Diana L. Moss, American Antitrust Institute, *From Competition To Conspiracy: Assessing The Federal Trade Commission's Merger Policy In The Pharmaceutical Sector* (Sept. 3, 2020), at 2-4, https://www.antitrustinstitute.org/wp-content/uploads/2020/09/AAI_PharmaReport2020_9-11-20.pdf [hereinafter *AAI Pharma Report*].

¹²⁰ California Life Sciences Association, *California Life Sciences Sector Report 2023*, at 2, 5, 11, 14, <https://www.califesciences.org/california-life-sciences-sector-report/> (California's life science companies consist of 811 drug and pharmaceutical companies, 191 firms in agricultural feedstock & industrial biosciences, 1,552 medical devices and equipment firms, 5,464 bioscience-related distribution companies, and 5,671 research, testing and medical laboratories).

¹²¹ *Id.* at 2, 6-7.

¹²² California Healthcare Foundation, *2021 Edition — California's Health Care Workforce* (Mar. 4, 2021), <https://www.chcf.org/publication/2021-edition-californias-health-care-workforce/>.

¹²³ Samantha Young & Angela Hart, *California hospitals seek a broad bailout, but they don't all need it*, KFF Health News (May 30, 2023, 10:36 AM), <https://www.fiercehealthcare.com/providers/california-hospitals-seek-broad-bailout-they-dont-all-need-it> (this was more than \$7.3 billion from previous year).

¹²⁴ U.S. Bureau of Labor Statistics, *Number of hospitals and hospital employes in each state in 2019* (Apr. 6, 2020), <https://www.bls.gov/opub/ted/2020/number-of-hospitals-and-hospital-employment-in-each-state-in-2019.htm>.

three market phases are dominated at both the state and national level by a few large companies. In California, three health insurers control 80 percent of the health insurance market and three pharmaceutical benefit managers (PBMs) control 75 percent of the state’s PBM market.¹²⁵ Nationally, three PBMs control over 79 percent of the PBM market, three wholesale drug distributors control over 90 percent of the wholesale drug market, three branded pharmaceutical companies have 40 percent of the branded drug market, and three generic drug companies control 65 percent of the generic market.¹²⁶

These markets also exhibit significant vertical integration. For example, the three largest PBMs—Optum, CVS/Caremark and Express Scripts – are owned by three dominant health insurers—United Health Group, Aetna, and Cigna. Moreover, these entities also own their own retail, specialty, and mail order pharmacies, making each of these three are among the top 15 companies on the Fortune 500 list for 2023.¹²⁷ These vertical linkages create strong incentives to entrench and expand market power and disfavor nonaffiliated entities up and down the supply chain. It also obscures the value chain, leaving prices and actual revenues largely unknowable.¹²⁸

¹²⁵ Kaiser Family Foundation, *Market Share and Enrollment of Largest Three Insurers – Individual Market* (2019), <https://www.kff.org/private-insurance/state-indicator/market-share-and-enrollment-of-largest-three-insurers-individual-market/>; California Department of Managed Health Care, *Task Force on Pharmacy Benefit Management Reporting, Report to the Legislature* (February 2020), at 6, <https://www.dmhc.ca.gov/Portals/0/Docs/DO/PharmacyBenefitManagementLegislativeReportAccessible.pdf> [hereinafter Cal PBM Task Force].

¹²⁶ Becker’s Hospital Review, *Top PBMs by 2022 Market Share*, <https://www.beckershospitalreview.com/pharmacy/top-pbms-by-2022-market-share.html>; AAI Pharma Report, *supra* note 119, at 7-8.

¹²⁷ Fortune 500 Full Listing (Feb. 1, 2024), <https://www.50pros.com/fortune500> (The PBMs and their parents are nos. 5 (Optum/UnitedHealth Care), 6 (CVS/Caremark) and 15 (Express Scripts/Cigna)).

¹²⁸ Letter from Geoffrey Joyce, Darius Lakdawalla, Karen Mulligan, Neeraj Sood, Erin Trish & Karen Van Nuys, USC Schaeffer Center for Health Policy & Economics, to Lina Khan, FTC (May 25, 2022), at 10-11, <https://healthpolicy.usc.edu/wp-content/uploads/2022/06/Van-Nuys-et-al.-Public-Comments-to-FTC-on-PBMs.pdf> [hereinafter USC Report].

A Snapshot of PBM Market Consolidation



graphic showing the increasingly consolidated control large pharmacy benefit managers have over the prescription drug market. Image via Pharmaceutical Research and Manufacturers of America.

The result is endless finger-pointing as to responsibility for rising drug prices. Drug manufacturers blame PBMs and their demands for ever larger rebates, preferences for higher-priced drugs, disfavoring and exclusion of lower-priced drugs, and penalties for lowering drug list prices.¹²⁹ Hospitals are blamed for marking up the drugs that they administer.¹³⁰ PBMs argue that the drug companies remain highly profitable, that they discipline the high drug prices set by the manufacturers alone¹³¹, and that they share much of the rebates they receive with health plan customers. The PBMs in turn invite scrutiny of pharmacy associations.¹³²

1. Pharmaceutical Manufacturers

In the market for drug manufacturing, several waves of mergers have resulted in significant consolidation. The four-firm concentration ratio in the brand drug company sector—the sum of

¹²⁹ Letter from James C. Stansel, EVP, Pharmaceutical Research and Manufacturers of America (PhRMA), et al., to Federal Trade Commission (May 25, 2022), at 7-14, https://phrma.org/-/media/Project/PhRMA/PhRMA-Org/PhRMA-Org/PDF/P-R/PhRMA-FTC-PBM-RFI-response_FINAL.pdf [hereinafter PhRMA letter].

¹³⁰ Mark Howell & Bharath Krishnamurthy, *Finger pointing Flawed Report Aims to Deflect Attention From Role Insurer PBMs Play in High Drug Costs*, American Hospital Association AHA Stat Blog (Apr. 25, 2023, 8:01 AM), <https://www.aha.org/news/blog/2023-04-25-flawed-report-aims-deflect-attention-role-insurer-pbms-play-high-drug-costs> (drug companies set their own prices, insurers control premiums and diversion of drugs to their affiliated specialty pharmacies; and practices of drugmakers and PBMs fuel nearly 20% growth in drug expenses per patient for hospitals in 2022 compared to pre-pandemic levels).

¹³¹ Cal PBM Task Force, *supra* note 125, at 7; Bipartisan Study Group, *High Drug Prices: Are PBMs the Right Target* (Feb. 2, 2023), <https://bipartisanpolicy.org/blog/are-pbms-the-right-target/> (mixed evidence).

¹³² Cal PBM Task Force, *supra* note 125, at 7.

market shares of the four largest firms in the industry—rose from 22 percent in 1987 to 43.9 percent in 2017 while the eight-firm concentration ratio rose from 36 percent to 58.3 percent in the same period.¹³³ The largest drug producers maintained *supra*-normal annual profit margins of 15 to 20 percent between 2006 and 2015.¹³⁴

Although pharmaceutical markets have traditionally been divided by therapeutic class, research now suggests that competition also occurs market-wide, and mounting evidence “connects high market concentration and high drug prices.”¹³⁵ The accretion of market power by large pharmaceutical companies provides significant advantages that can be readily exploited to entrench market dominance or to impede or thwart competition, using for instance, exclusive formulary positioning, volume and bundled rebate contracting, increased bargaining leverage, marketing and financing to acquire competitors.¹³⁶ Nor has the pharmacy industry been shy in using this power. As FTC Commissioner Rebecca Slaughter explained, this industry “has a particularly checkered legacy of anticompetitive conduct” that is so “widespread that [the FTC has] an entire division of [the] agency . . . dedicated to investigating and hawking it.”¹³⁷

There is also mounting evidence that high market concentration has reduced innovation. Several studies found that pharmaceutical consolidation from 1989 through early 2000s consistently reduced innovation, with a pronounced drop off in new drug and approval rates in that period.¹³⁸ Another study found 5.3 percent to 7.4 percent of pharma acquisitions in this period were “killer acquisitions” done to hamper new drug entrants.¹³⁹ While a third wave of consolidations commencing around 2010 showed less innovative drop off, 58 percent of the new drug approvals in this period were for lucrative orphan drugs (which are priced on average 25 times higher than traditional drugs) that address rare diseases of small populations, rather than drugs providing broader social benefits.¹⁴⁰

Despite evidence of the ill effects of consolidation, the FTC has challenged very few pharma mergers. Of all the pharma mergers between 1994 and 2020, the FTC moved to block only one, while challenging 67 mergers worth over \$900 billion but settling virtually all with divestitures of

¹³³ Robin Feldman, Brent Fulton, Jamie Godwin & Richard Scheffler, *Challenges with Defining Pharmaceutical Markets and Potential Remedies to Screen for Industry Consolidation*, 47 J. Health Pol. Pol’y & Law 583, 586-89 (2022) (studies show when top 8 firms hold 60% or more of the industry, that the industry becomes oligopolistic rather than competitive). There has also been major consolidation in the generic drug manufacturers with the four largest generics producing 50% of all generic drugs sold. *Id.* at 586.

¹³⁴ Fred D. Ledley et al., *Profitability of Large Pharmaceutical Companies Compared With Other Large Public Companies*, 323 JAMA 834 (2020), <https://jamanetwork.com/journals/jama/article-abstract/2762308>. Many of these companies pay few U.S. taxes, with the eight largest pharmaceutical companies paying only \$2 billion in taxes on profits of \$110 billion. Annalisa Merelli, *Guess How Much Big Pharma Paid in US Taxes in 2022*, Quartz (May 17, 2023), <https://qz.com/guess-how-much-big-pharma-paid-in-us-taxes-on-110-bill-1850441135>.

¹³⁵ AAI Pharma Report, *supra* note 119, at 2, 4.

¹³⁶ Patricia M. Danzon & Michael A. Carrier, *The Neglected Concern of Firm Size in Pharmaceutical Mergers*, 84 Antitrust L.J. 487, 497-513 (2022).

¹³⁷ Federal Trade Commission, *The Future of Pharmaceuticals: Examining the Analysis of Pharmaceutical Mergers* Virtual Workshop (June 14, 2022) (transcript available at <https://www.ftc.gov/news-events/events/2022/06/future-pharmaceuticals-examining-analysis-pharmaceutical-mergers>, at 9).

¹³⁸ Feldman, *supra* note 133, at 584, 586-87.

¹³⁹ Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. Pol. Econ. 649(2021) (available at <https://doi.org/10.1086/712506>); Feldman, *supra* note 133, at 587.

¹⁴⁰ Feldman, *supra* note 133, at 584, 589-90.

untested and spotty success records.¹⁴¹ This record reflects in part, the difficulty of challenging acquisitions under pre-existing merger guidelines and precedent that tightly focus on horizontal overlaps in individual drug markets.¹⁴²

2. Pharmacy Benefit Managers

While there are 66 active PBMs in California, the nation's top three PBMs represent approximately 75 percent of all covered lives in California.¹⁴³ Originally, PBMs simply processed drug claims of patients at the retail pharmacy level.¹⁴⁴ Over time, however, PBMs assumed expanded functions in the drug supply chain, including creation of formularies which determine drug access and pricing for insureds, negotiation of discounts and rebates from the drug companies for formulary placement, and creation of pharmacy networks and terms of pharmacy participation and reimbursement.¹⁴⁵ Accordingly, PBMs wield enormous influence over California's drug system and have used that power to extract ever increasing payments and claw backs from others in the supply chain, including pharmacies and drug companies. In 2022, the three PBMs posted \$27.6 billion in profits.¹⁴⁶

Concerns about PBMs' outsized impact led California to convene a blue-ribbon task force that found PBM operations were so inscrutable that their value could not be determined without greater data, transparency, and study.¹⁴⁷ The California PBM Task Force identified a number of market concerns that PBMs: (a) have "perverse incentives" to have high drug prices because PBMs' rebates and fees are a percentage of the drug prices,¹⁴⁸ (b) "may negotiate higher rebates only to keep the bulk of them," (c) have "misaligned incentives" to favor integrated or affiliated pharmacies, (d) may improperly use prescription information to steer patients who are prescribed high-cost drugs to the PBM's integrated pharmacies," and (e) receive unknown amounts from manufacturers and health plans.¹⁴⁹ Finally, the California Task Force also criticized the PBMs' secrecy and lack of transparency as to (a) who receives and benefits from the rebates that PBMs negotiates, (b) the existence and amount of "spread pricing" in which the PBM pockets the difference between what it receives from the health plan for a drug and what the PBM pays the pharmacy for that same drug, and (c) the metrics for PBM claw backs of revenue from pharmacies.¹⁵⁰

¹⁴¹ AAI Pharma Report, *supra* note 119, at 2-4.

¹⁴² Feldman, *supra* note 133, at 584-85, 594-98.

¹⁴³ Cal PBM Task Force Report, *supra* note 125, at 6.

¹⁴⁴ House Committee on Oversight and Reform Minority Staff, *A View from Congress: Role of Pharmacy Benefit Managers in Pharmaceutical Markets* (Dec. 10, 2021), at 6, <https://oversight.house.gov/wp-content/uploads/2021/12/PBM-Report-12102021.pdf>.

¹⁴⁵ *Id.*

¹⁴⁶ Wendell Potter, *Nearly half of every dollar spent by Medicare drug plans goes to private health insurers' pharmacy benefit managers and wholesalers*, Health Care (Jan. 5, 2024), <https://hc4us.org/nearly-half-of-every-dollar-spent-by-medicare-drug-plans-goes-to-private-health-insurers-pharmacy-benefit-managers-and-wholesalers-health-care-un-covered/>.

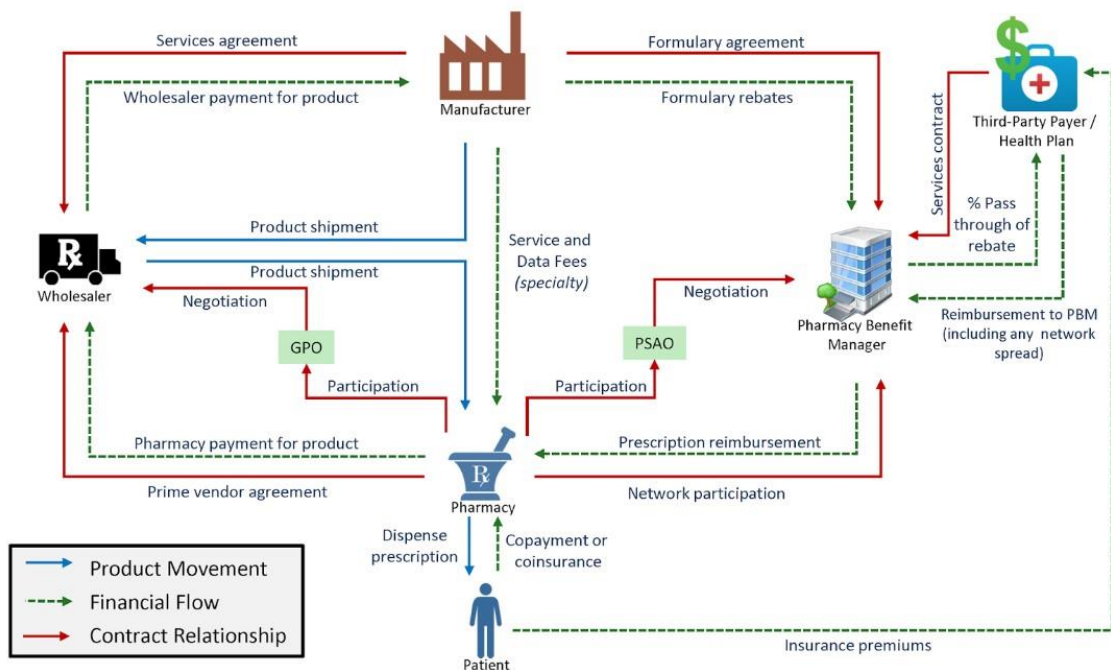
¹⁴⁷ Cal PBM Task Force Report, *supra* note 125, at 5, 8-9.

¹⁴⁸ *Id.* at 6.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 6, 8.

U.S. Distribution and Reimbursement System: Patient-Administered, Outpatient Drugs



Source: Fein, Adam J., *The 2017 Economic Report on U.S. Pharmacies and Pharmacy Benefit Managers*, Drug Channels Institute, 2017. Chart illustrates flows for **Patient-Administered, Outpatient Drugs**. Please note that this chart is illustrative. It not intended to be a complete representation of every type of financial, product flow, or contractual relationship in the marketplace.
GPO = Group Purchasing Organization; PSAO = Pharmacy Services Administrative Organization



USC Schaffer Center for Health Policy & Economics researchers¹⁵¹ were confounded by the lack of public drug pricing data in their efforts to determine the value and profits of PBMs and others in the drug chain.¹⁵² However, they could conclude that every dollar in rebates equated to a \$1.17 increase in the drug list prices.¹⁵³ The “net prices” that the drug manufacturers received—net of rebates and discounts given to the PBMs and insurers—actually decreased on some drugs, while consumers were forced to pay higher amounts out of pocket for these same drugs.¹⁵⁴

Even more recently, a John Hopkins and University of Utah study found that PBMs take more money out of the supply chain than any other entity, including the drug makers with respect to generic drugs.¹⁵⁵ Reviewing 45 highly utilized generic drugs used in Medicare Part D programs,

¹⁵¹ USC Report, *supra* note 128, at 10-11.

¹⁵² *Id.* at 11.

¹⁵³ Neeraj Sood, et al., *The Association Between Drug Rebates and List Prices*, USC Schaeffer Cent. (Feb. 11, 2020), <https://healthpolicy.usc.edu/research/the-association-between-drug-rebates-and-list-prices/>

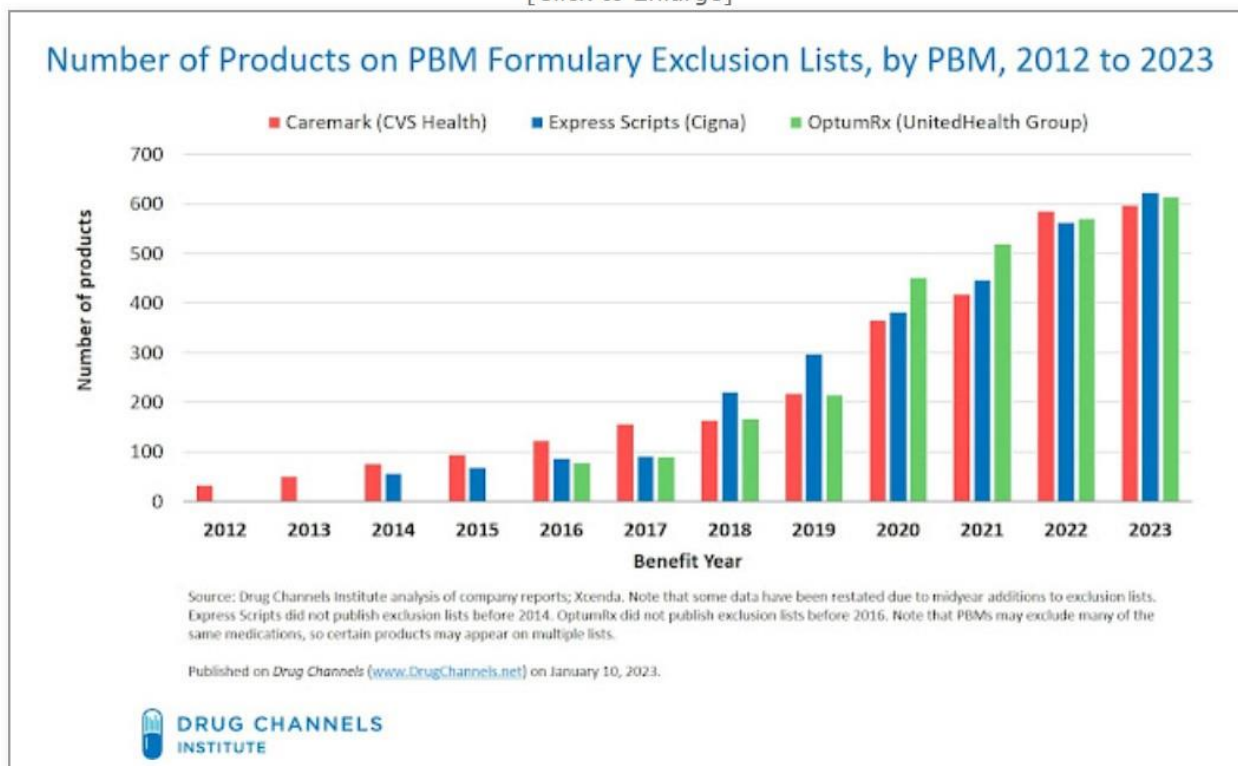
¹⁵⁴ *Id.*; *A View From Congress*, *supra* note 144, at 9-10; Adam Fein, *Four Trends That Will Pop the \$250 Billion Gross-to-Net Bubble—and Transform PBMs, Market Access, and Benefit Design*, Drug Channels (Apr. 4, 2023), <https://www.drugchannels.net/2023/04/four-trends-that-will-pop-250-billion.html> (reporting that as of 2022, the gross to net bubble—the gap between list prices of branded drugs and what the drug makers receive after rebates and discounts for those drugs—had mushroomed to \$256 billion in 2022).

¹⁵⁵ Wendell Potter, *Nearly half of every dollar spent by Medicare drug plans goes to private health insurers’ pharmacy benefit managers and wholesalers*, Health Care (Jan. 5, 2024), <https://wendellpotter.substack.com/p/nearly-half-of-every-dollar-spent>.

researchers found that of every \$100 spent, \$41 went to the PBMs, \$30 to drug makers, \$17 to the pharmacies, and \$12 to the wholesalers. Given that 90 percent of the drugs we take are generic, allowing 70 percent of the expenditures for these drugs to simply profit large intermediaries bespeaks the need to rein in PBM power.

A newer and growing PBM power play is use of formulary exclusions that began in 2012 with a handful of drugs but has escalated in 2024 to some 2,005 drugs being excluded by the three PBMs.¹⁵⁶ As each of the three PBMs national formularies is key to a drug’s access to large markets, the threat of being excluded from a formulary leads drug manufacturers to offer PBMs greater rebates to include the drug. This in turn impacts consumer’s access and costs to use an excluded drug.

[Click to Enlarge]



In July 2023, the FTC withdrew its earlier reports and advocacy letters about PBMs as not reflecting PBMs’ “substantial influence over multiple parts of the pharmaceutical supply chain.”¹⁵⁷

¹⁵⁶ Adam Fein, *The Big Three PBMs 2024 Formulary Exclusions: Biosimilar Humira Battles, CVS Health’s Weird Strategy, and the Insulin Shakeup*, Drug Channels (Jan. 9, 2024), <https://www.drugchannels.net/2024/01/the-big-three-pbms-2024-formulary.html>.

¹⁵⁷ Statement of FTC Chair Lina Khan Regarding the Policy Statement Concerning Reliance on Prior PBM-related Advocacy Statements and Reports (July 20, 2023), at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/StatementofChairLinaMKhanrePBMLetterWithdrawal.pdf; FTC Press Release, *FTC Votes to Issue Statement Withdrawing Prior Pharmacy Benefit Manager Advocacy: Prior advocacy statements and studies no longer reflect current market realities* (July 20, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-votes-issue-statement-withdrawing-prior-pharmacy-benefit-manager-advocacy>.

Broadening an investigation started in June 2022, the FTC is currently examining the PBMs' impact on access and affordability of drugs, independent pharmacies' complaints that PBMs contractual terms are confusing, unfair, arbitrary, and harmful, and several PBM practices, including clawing back monies from unaffiliated pharmacies; steering patients towards PBM-owned pharmacies; unfair auditing of unaffiliated pharmacies; use of complicated, opaque pharmacy reimbursement methods; and negotiating drug rebates that skew formulary incentives and impact drug costs to payers and patients.¹⁵⁸

3. Pharmacies

Pharmacies are center stage for health services and vaccinations in the state, and pharmacists are often the face of the medical professional for many Californians with limited access to healthcare. California has 40,800 licensed pharmacists (as of June 2019), compared with 54,000 primary care physicians.¹⁵⁹ California has nearly 5,600 pharmacies, one third of which are independent community pharmacies.¹⁶⁰

California's pharmacy world is rapidly evolving as the three major PBMs have leveraged their control of 75 percent of the prescription market to divert profitable pharmacy business to their own wholly owned retail, specialty, and mail order pharmacies. Their vertical integration provides the incentive, prescription information and ability to steer the prescription revenue, particularly the most lucrative drugs to their own shops. One study found that the three PBM affiliates filled 76 percent of the prescriptions costing \$2,000 or more but only 16 percent of those costing less than \$2,000.¹⁶¹

Several tactics allow the 3 PBMs to snare a large portion of the "specialty drugs" for themselves. The term "specialty drugs" is a nebulous and evolving term, but in practice, correlates with the best selling drugs by revenue and/or those requiring special handling. The PBM contracts require these drugs be dispensed at "specialty pharmacies" so designated in the PBMs' sole discretion.¹⁶² As a result, the big three PBMs' own specialty pharmacies have captured 65 percent of the rapidly growing \$122 billion dollar specialty market.¹⁶³ Likewise, the mail-order drug market has siphoned significant revenue from brick-and-mortar pharmacies, capturing 37 percent of retail

¹⁵⁸ FTC Press Release, *FTC Deepens Inquiry into Prescription Drug Middlemen* (May 17, 2023),

<https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-deepens-inquiry-prescription-drug-middlemen>.

¹⁵⁹ California Pharmacists Association, *Pharmacist 101: Behind the White Coat*, <https://cpha.com/about/pharmacist-101-behind-the-white-coat/> (last visited Mar. 11, 2024).

¹⁶⁰ *Id.*, National Community Pharmacists Association, *California Fact Sheet*, <https://ncpa.org/state-specific-community-pharmacy-impact-fact-sheets>; Commonwealth Fund, *Competition, Consolidation, and Evolution in the Pharmacy Market* (Aug. 12, 2021), <https://www.commonwealthfund.org/publications/issue-briefs/2021/aug/competition-consolidation-evolution-pharmacy-market>.

¹⁶¹ Letter from Ilisa Bernstein, SVP, American Pharmacists Association, to the FTC (May 25, 2022), at 6, <https://s3.amazonaws.com/cdn.pharmacist.com/CDN/PDFS/> [hereinafter APA letter].

¹⁶² Letter from Douglas Hoey, CEO, National Community Pharmacists Association, to FTC (May 23, 2022), at 1, 7-8, <https://ncpa.org/sites/default/files/2021-09/NCPA%20Comment%20FTC%20RFI%20Contract%20Terms%20vFinal.pdf> [hereinafter NCPA letter];

Commonwealth Fund, *supra* note 160.

¹⁶³ NCPA letter, *supra* note 162, at 1; Paige Twenter, *Top 15 specialty pharmacies by 2022 revenue* (Apr. 12, 2023), <https://www.beckershospitalreview.com/pharmacy/top-15-specialty-pharmacies-by-2022-revenue.html> (payer-and-pharmacy benefit manager-owned specialty pharmacy chains displaced retail chains as the most lucrative specialty pharmacy businesses in 2022).

pharmacy business by 2017.¹⁶⁴ Nearly 60 percent of large commercial plans incentivize the insureds to use a PBM affiliated mail order pharmacy for patients wishing to fill a 90 day supply of medicine.¹⁶⁵ Pharmacists and their associations complain of a host of other steering mechanisms used to divert prescription business to PBM affiliates, including use of aberrant drug lists, brown-bagging, white bagging, refill walk requirements, trolling, switching, diverting, and hijacking.¹⁶⁶

Prescription revenue is also steered away from nonaffiliated pharmacies through use of narrow networks or “preferred networks” which are affiliated or are pharmacies agreeing to accept lower reimbursement. As much as 35 percent of the PBM commercial market and 90 percent of Medicare Part D drug plans have such networks.¹⁶⁷ Patients are restricted from using pharmacies outside these narrow or preferred networks or face stiff financial penalties if they do.

Because the three PBMs control access to 75 percent of California’s covered lives, pharmacies will be foreclosed from servicing those lives unless they contract with each of the 3 PBMs. But pharmacists complain that these PBMs use their market power to impose nonnegotiable, adhesion contracts with “oppressive” “predatory” terms that force them to accept unfairly low reimbursements, endure abusive audits and agree to other onerous terms that increase their costs.¹⁶⁸ The contracts offer unaffiliated pharmacies reimbursement levels often below the pharmacists’ costs, with one pharmacy coalition reporting that new contracts from Express Scripts and CVS reduced pharmacy reimbursement rates by up to 18 percent.¹⁶⁹ In late 2022, Kroger, the nation’s second largest supermarket operator with 2,262 pharmacies, protested Express Scripts contract terms as unfair, stating “it could not profitably operate its pharmacies with the poor reimbursement terms being offered.” Kroger also announced that its decision to not contract with the Express Scripts’ pharmacy networks in 2023 would reduce its 2023 annual revenues by about \$1.2 billion, or 8 percent of its total retail and specialty prescription revenues.¹⁷⁰ Few other pharmacies have the will or resources to absorb the losses from foregoing a market covered by any of the 3 big PBMs.

¹⁶⁴ Commonwealth Fund, *supra* note 160.

¹⁶⁵ PhRMA letter, *supra* note 129, at 20-21.

¹⁶⁶ Letter from Ted Okon, Exec. Dir., Community Oncology Alliance, to the FTC (May 24, 2023), at 17-19, <https://communityoncology.org/category/research-publications/comment-letters/> [hereinafter COA letter]; NCPA letter, *supra* note 162, at 3-4, 7; PhRMA letter, *supra* note 129, at 20-21; Cal PBM Task Force, *supra* note 125, at 6.

¹⁶⁷ PhRMA letter, *supra* note 129, at 16-17, COA letter, *supra* note 166, at 16-17.

¹⁶⁸ NCPA letter, *supra* note 162, at 1-8; Letter from Alan Rosenbloom, President, Senior Care Pharmacy Coalition, to FTC (Dec. 8, 2017), at 5-8 (stating the big 3 PBMs control access to 90% of long term care pharmacies and use “anticompetitive and one-sided contract terms” with Long Term Care pharmacies with payment formulas that allow PBMs to change prices daily, predatory pricing and a growing array of fees without prior notice or explanation, quality metrics inversely related to quality care); Senior Care Pharmacy Coalition, *PBMs and Long Term Care Facilities* (Apr. 2023), <https://seniorcarepharmacies.org/wp-content/uploads/SCPC-PBMs-and-LTC-Pharmacies-FINAL.pdf> (same), COA letter, *supra* note 166, at 8-11, 17-18; Arthur Allen, *PBMs, the Brokers Who Control Drug Prices, Finally Get Washington’s Attention*, Kaiser Family Foundation Health News (May 11, 2023), <https://kffhealthnews.org/news/article/pharmacy-benefit-managers-prescription-drug-prices-congress-legislation/>; APA Letter, *supra* note 161, at 2.

¹⁶⁹ COA letter, *supra* note 166, at 13-14. Some states have enacted legislation to forbid this below-cost reimbursement, but the bills are tied up in legal challenges.

¹⁷⁰ Adam Fein, *CVS, Walgreens, and Walmart Keep Position in 2023 Part D Preferred Networks—While Kroger Bails Over its Express Scripts Blowup (rerun)*, Drug Channels (Mar. 29, 2023), <https://drugchannels.net/2023/03/cvs-walgreens-and-walmart-keep-position.html>.

Another financial challenge to nonaffiliated pharmacists is the practice of the PBMs to “claw back” monies paid to the pharmacies after the prescription is filled. These claw backs are made with a variety of murky explanations about pharmacy performance, periodic reconciliations, quality metrics and newly assessed fees. Between 2015 and 2020, these claw backs increased by 1,600 percent and can reduce the pharmacies’ profit margins on a sale by 40 to 80 percent.¹⁷¹ While profit margins for pharmacists are declining due to these challenges, the profit margins for vertically merged PBMs are increasing.¹⁷² This difference is also exacerbated by a practice known as “spread pricing” by which the PBM retains the difference between what the health plan pays the PBM for a drug prescription and what the PBM pays the pharmacy to fill the prescription. One study found this spread pricing could be 15 percent to 31 percent of what the health plans paid the PBMs.¹⁷³

Due to these dynamics, independent pharmacists who are one third of the state’s pharmacists account for only six percent of the prescription revenue.¹⁷⁴ Many of them operate in minority communities with low-income population, where one third of the pharmacies closed between 2009 and 2015.¹⁷⁵ While California is “pharmacy rich” as the state with the most pharmacies, it is also among the states with the least pharmacies per 10,000 residents. Official “pharmacy deserts” in which patients lack geographic access to pharmacies exist in rural counties but are also prevalent in our urban minority areas. In 2020, of the 130 pharmacy deserts neighborhoods in Los Angeles, 90 percent were in predominantly black or Hispanic neighborhoods. One third of Hispanic neighborhoods in LA were pharmacy deserts both in 2015 and 2020, while the prevalence increased to 50 percent in Black neighborhoods.¹⁷⁶

B. Case Studies

1. Botox: Thwarting Competition

Allergan Inc. bought Botox, a botulinum toxin drug for nine million dollars in 1991¹⁷⁷ and built it into a multibillion-dollar franchise, with annual world-wide sales of \$3.6 billion.¹⁷⁸ Allergan, one of California’s largest pharmaceutical companies¹⁷⁹ turned Botox into a household name for

¹⁷¹ COA letter, *supra* note 166, at 11-12; PhRMA letter, *supra* note 129, at 17 (claw back of DIR fees increased nearly 170 percent on average).

¹⁷² APA letter, *supra* note 161, at 5 (while pharmacy margins are going down (\$6.58 per prescription) the profit margin for vertically merged PBMs was going up (managed care cost per prescription of \$9.98)).

¹⁷³ APA letter, *supra* note 161, at 5-6.

¹⁷⁴ National Community Pharmacists Association, *California Fact Sheet*, *supra* note 162; Commonwealth Fund, *supra* note 160.

¹⁷⁵ PhRMA letter, *supra* note 129, at 18.

¹⁷⁶ Dima Qato, *Pharmacy Access Initiative, Stakeholder Meeting*, USC Schaeffer School (May 25, 2023) (transcript on file with author)

¹⁷⁷ Cynthia Koons, *The Wonder Drug for Aging (Made From One of the Deadliest Toxins on Earth)*, Bloomberg News (Oct. 26, 2017), <https://www.bloomberg.com/news/features/2017-10-26/inside-fort-botox-where-a-deadly-toxin-yields-2-8-billion-drug>.

¹⁷⁸ R. Castellano, *Botox Statistics You Need to Know in 2023*, <https://www.elitetampa.com/blog/botox-statistics-you-need-to-know/> (from 2000 to 2020, the number of annual Botox injections increased by nearly 459%; between 4-5 million people get Botox annually).

¹⁷⁹ Orange County Business Council, *The Economic Impact of Allergan on the California Economy* (Sept. 2016), http://www.allergan.com/assets/pdf/allergan_california_the_economic_impact_report-sep_2016 (Allergan’s California operations generated a combined annual economic activity in the state of approximately \$6.35 billion and

wrinkle treatment by vastly expanding the beauty aesthetics industry as well as the therapeutic uses of Botox which are now half of its sales.¹⁸⁰ But the Botox franchise was also built on a series of acquisitions, licenses, and litigations that insulated and protected Botox in the U.S. from competition from other would-be botulinum toxin (BTX) rivals, keeping U.S. Botox prices *supracompetitive* and multiples of those in other countries.¹⁸¹

One BTX rival, Reloxin had been marketed in Europe for years and according to the FTC, was “positioned to next enter” the US market and likely bring down the price of Botox.¹⁸² In 2002, Inamed Corporation, a Santa Barbara, California company, acquired the U.S. rights to Reloxin. When Allergan sought to buy Inamed in 2005, the FTC objected that Allergan’s purchase of the “first serious competition to Botox” would force consumers to pay higher prices for Botox and required Reloxin be divested.¹⁸³

While use of toxins to treat wrinkles increased 759 percent from 2000 to 2015, Botox kept an 85 percent U.S. market share while facing only minor competition from two BTX products—Dysport (brand name of Reloxin) and Ximeon.¹⁸⁴ However, during the same time period in Korea, a country with the highest number of cosmetic treatments per capita, Botox competed against a number of cheaper Korean rivals, and had only 35 percent of the Korean market. Medytox had 40 percent of the Korean market with its BTX product Meditoxin, which was priced 30 percent to 50 percent lower than Botox.¹⁸⁵ Medytox reformulated its BTX product for approval in the U.S., secured U.S. patents, and planned a new manufacturing plant to be completed in 2013.¹⁸⁶ However, in September 2013, just before Medytox’s planned U.S. entry, Allergan agreed to pay \$300 million to Medytox for the exclusive rights to commercialize Meditoxin in every country but Korea and

net economic impact of \$3.45 billion, generated more than 16,600 direct, indirect, and induced jobs, with annual total statewide labor income of \$1.55 billion).

¹⁸⁰ Alexandra Sifferlin, *Botox: The Drug That’s Treating Everything*, Time (Jan. 5, 2017), <https://time.com/4623409/botox-drug-treating-everything/> (from 2000 to 2015, use of toxins for wrinkles increased 759%; Botox is also used for neck spasms, weak bladders, migraines, atrial fibrillation, and sweaty palms).

¹⁸¹ U.S. Dept of Health and Human Services, ASPE, *Comparison of U.S. and International Prices for Top Medicare Part B Drugs by Total Expenditures* (Oct. 25, 2018), at 19, <https://aspe.hhs.gov/sites/default/files/private/pdf/259996/ComparisonUSInternationalPricesTopSpendingPartBDrugs.pdf> (U.S. prices for Botox are 3.2 times higher than average Botox prices in large-market-based countries—primarily Europe, Canada and Japan).

¹⁸² FTC Press Release, *Preserving Competition, FTC Requires Divestiture Before Allowing Allergans Acquisition of Inamed* (Mar. 8, 2006), <https://www.ftc.gov/news-events/news/press-releases/2006/03/preserving-competition-ftc-requires-divestiture-allowing-allergans-acquisition-inamed>.

¹⁸³ *Id.* In 2009, Reloxin was approved by the FDA and marketed in the U.S. as Dysport. *Dysport Approval History*, Drugs.com, <https://www.drugs.com/history/dysport.html> (last updated Jan. 28, 2021). According to Department of Justice charges, some of Botox’s meteoric growth between 2001 and 2008 was due to Allergan’s promotion off-label uses by providing kickbacks to prescribing physicians and assisting doctors in getting paid for their off-label uses of Botox. Allergan pled guilty to a misdemeanor, paid \$600 million in fines, and executed a corporate integrity agreement, while explaining it did so to avoid litigation and allow it to “focus on developing new treatments.” FTC press release, *Allergan Agrees to Plead Guilty and Pay \$600 Million to Resolve Allegations of Off-Label Promotion of Botox* (September 1, 2010), <https://www.justice.gov/opa/pr/allergan-agrees-plead-guilty-and-pay-600-million-resolve-allegations-label-promotion-botox>; Sifferlin, *supra* note 180.

¹⁸⁴ *Tawfilis v. Allergan, Inc.*, 157 F. Supp. 3d 853, 857 (C.D. Cal. 2015); Sifferlin, *supra* note 180.

¹⁸⁵ *Tawfilis*, 157 F. Supp. at 857.

¹⁸⁶ *Id.*

Japan. After this license agreement was inked, U.S. clinical trials of the Medytox product (Innotox) were delayed as was construction of a new Medytox plant.¹⁸⁷

The Allergan/Medytox license agreement was assailed in class actions as an anticompetitive horizontal market allocation agreement and as a disguised payment to Medytox to not compete with Botox in the U.S. market.¹⁸⁸ However, the challengers were denied summary judgment on the ground that they did not prove Allergan and Medytox were competitors at the same level.¹⁸⁹ Allergan then settled the class action suit with a \$13.45 million payment. The court approved the settlement after describing the plaintiffs' claims as a "relatively novel theory of unlawful market allocation through a pharmaceutical licensing agreement" and questioning whether an agreement could have an anticompetitive effect before the FDA licensed the rival product for sale.¹⁹⁰

Meanwhile, another Korean manufacturer, Daewoong Pharmaceuticals and its US partner Evolus, was on the verge of launching Jeuveau in the U.S.¹⁹¹ Evolus expected Jeuveau's market entry priced 20 percent to 25 percent below Botox would be "very disruptive," and the drug was considered to be the next "strongest competitor" to Botox.¹⁹² But Allergan partnered with Medytox to file an unsuccessful citizen's petition with the FDA questioning the source of Jeuveau.¹⁹³ Then they jointly requested the International Trade Commission (ITC) keep Jeuveau from entering the US market, arguing Jeuveau used Medytox's Korean manufacturing trade secrets.¹⁹⁴ The ITC staff first decided there were no trade secrets and then reversed itself, imposing a 21-month ban on US imports of Jeuveau.¹⁹⁵ After a US appeals court allowed Jeuveau to remain on the market while it reviewed the matter, the parties settled in February 2021, agreeing that royalty payments would be

¹⁸⁷ *Id.* at 858-59; *Medytox CEO to meet Allergan to discuss start of phase 3 trials of Innotox*, Korea Herald (July 11, 2017), <https://www.koreaherald.com/view.php?ud=20170711000741&mod=skb1>; Jung Suk-ye, *AbbVie of U.S. Returns Rights for botulinum toxin candidate to Medytox*, Business Korea (Sept. 9, 2021), <http://www.businesskorea.co.kr/news/articleView.html?idxno=76134> (Medytox reports that PHASE III testing of its drug in the U.S. just "recently" concluded); Lee Dong-gun, *Medytox: Look to Brighter Days Ahead*, Business Korea (Sept. 10, 2021), https://www.businesskorea.co.kr/news/articleView.html?idxno=76187#google_vignette.

¹⁸⁸ *Tawfilis*, 157 F. Supp. at 858-59.

¹⁸⁹ *Tawfilis v. Allergan, Inc.*, No. 8:15-cv-00307-JLS-JCG, 2016 WL 3919488, at *3 (C.D. Cal. May 31, 2016);

Tawfilis v. Allergan, Inc., No. 8:15-cv-00307-JLS-JCG, 2016 WL 6156197, at *2 (C.D. Cal. Aug. 11, 2016).

¹⁹⁰ *Tawfilis v. Allergan, Inc.*, No. 8:15-cv-00307-JLS-JCG, 2018 WL 4849716, at *3-5 (C.D. Cal. Aug. 27, 2018).

¹⁹¹ Kyle Blankenship, *Whoops! Allergan's bid to shield Botox manufacturing secrets from competitors backfires*, Fierce Pharma (Aug. 8, 2019), <https://www.fiercepharma.com/manufacturing/whoops-allergan-s-bid-to-shield-botox-manufacturing-secrets-from-competitors>.

¹⁹² Mana Mishra, *FDA approves cheaper Botox rival to treat frown lines*, Reuters (Feb. 4, 2019), <https://www.reuters.com/article/idUSKCN1PQ5WJ/>.

¹⁹³ *Id.*

¹⁹⁴ *In the Matter of Certain Botulinum Toxin Products, Processes for Manufacturing or Relating To Same and Certain Products Containing Same*, Investigation No. 337-TA-1145 (U.S. I.T.C.), <https://ids.usitc.gov/case/4788/investigation/4788> (last visited Mar. 11, 2024); ITC Press Release, *USITC Institutes Section 337 Investigation of Certain Botulinum Toxin Prods., Process for Mfg. or Relating to Same & Certain Prods. Containing Same* (Mar. 1, 2019), https://www.usitc.gov/press_room/news_release/2019/er030111057.htm. Medytox also filed an action in the California Superior Court alleging theft of trade secrets by Daewoong and its affiliates. Complaint, *Medytox v. Daewoong*, No. 30-2017-00924912 (Orange Cnty. Super. Ct. June 7, 2017).

¹⁹⁵ Blankenship, *supra* note 191; see also Sara Teller, *AbbVie and Evolus Settle Cosmetic Trade Secrets Suit*, Legal Reader (Mar. 4, 2021), <https://www.legalreader.com/abbvie-evolus-settle-cosmetic-trade-secrets-suit/>.

made to Allergan and Medytox.¹⁹⁶ Shortly after this settlement, Allergan, now a part of AbbVie, terminated its 2013 exclusive licensing agreement with Medytox, returning its rights to the Medytox drug which had just “recently” completed Phase III testing in the U.S.; Medytox was not required to return the \$100 million fees it received during the development process.¹⁹⁷

In September 2022, Revance announced the launch in the U.S. of yet another Botox rival, Daxxify, that had FDA approval.¹⁹⁸ Just before Revance got final FDA approval, Allergan sued Revance for infringing six patents in Delaware.¹⁹⁹ In May 2023, Allergan sued Revance again, this time in a Nashville, Tennessee federal court alleging that Revance recruited some of Allergan’s employees who knew about Botox and Allergan’s dermal filler Juvéderm and used Allergan trade secrets.²⁰⁰ Both suits are pending as of this writing.

2. Use of Bundled Discounts to Foreclose Competition: The Voyant and Praluent Examples

Anticompetitive practices that result in higher prices and fewer choices can happen when a dominant supplier of drugs or medical devices imposes bundling contracts and exclusive dealings that effectively shut out rivals.²⁰¹ Two examples involving California-based companies illustrate the point.

California-based Applied Medical Resources Corporation (Applied), alleges a bundled contracting strategy was used against it to foreclose sales of its innovative and less expensive surgical device.²⁰² In 2015, Applied, whose 5,500 employees are centered in Rancho Santa Margarita,

¹⁹⁶ Beth Snyder Bulik, *AbbVie settles trade secrets fight with Evolus, scoring \$35M and royalties on Botox rival Jeuveau*, Fierce Pharma (Feb. 19, 2021), <https://www.fiercepharma.com/marketing/abbvie-settles-for-35-million-and-royalties-from-evolus-botox-aesthetics-legal-battle>.

¹⁹⁷ Jae-young Han, *Medytox’s US business outlook dim as contract with AbbVie ends* (Sept. 9, 2021), <https://www.kedglobal.com/pharmaceuticals/newsView/ked202109090005>; Jung Suk-ye, *AbbVie of U.S. Returns Rights for botulinum toxin candidate to Medytox* (Sept. 9, 2021), <https://www.businesskorea.co.kr/news/articleView.html?idxno=76134> (“Initially, the Korean drugmaker sought to enter the U.S. market through the licensing-out deal, but its dream went down the drain after eight years of waiting.”).

¹⁹⁸ American Board Cosmetic Surgery, ABCS, *DAXXIFY is coming – Here’s What You Need to Know About the Newest Botox Alternative*, ABCS Blog (Dec. 19, 2022), <https://www.americanboardcosmeticsurgery.org/news/daxxify-new-botox-alternative/>.

¹⁹⁹ *Allergan, Inc. v. Revance Therapeutics, Inc.*, No. CV 21-1411-RGA, 2022 WL 2866723, at *2 (D. Del. July 21, 2022) (magistrate judge recommending denial of motion to dismiss First Amended Complaint, recommendation adopted by oral order on Aug. 19, 2022, ECF No. 44).

²⁰⁰ Mike Scarcella, *Allergan accuses Botox rival Revance of employee raiding in US lawsuit*, Reuters (May 2, 2023), <https://www.reuters.com/legal/litigation/allergan-accuses-botox-rival-revance-employee-raiding-us-lawsuit-2023-05-02/>; *Allergan, Inc. v. Revance Therapeutics, Inc.*, No. 3:23-cv-00431, 2024 WL 38289 (M.D. Tenn. Jan. 3, 2024).

Allergan’s bold use of litigation includes an attempt to shield its Restasis patents, which had been declared invalid by a Texas court, from any patent office review by transferring the patents to a Native Indian tribe and asserting the tribe’s sovereign immunity. The U.S. Supreme Court in 2019 left intact a Federal Circuit ruling that Allergan’s rent-a-tribe strategy did not prevent the Patent Office from adjudicating the patents’ validity. Lawrence Hurley, *U.S. Supreme Court rejects Allergan bid to use tribe to shield drug patents*, Reuters (Apr. 15, 2019), <https://www.reuters.com/article/idUSKCN1RR1FC>.

²⁰¹ Amicus Brief on Behalf of the Federal Trade Commission, *Applied Med. Res. Corp. v. Medtronic, Inc.*, No. 8:23-cv-00268 (C.D. Cal. July 3, 2023), ECF No. 27-1.

²⁰² Complaint at ¶¶ 3, 6-11, *Applied Med. Res. Corp. v. Medtronic, Inc.*, No. 8:23-cv-00268 (C.D. Cal. Feb. 14, 2023), ECF No. 1 [hereinafter *Applied Medical Complaint*].

launched Voyant, an advanced bipolar device used by surgeons to operate.²⁰³ These devices are sold to hospitals and hospital buying groups. Voyant’s chief competition came from the Ligasure device made by Medtronic, the world’s largest medical device company with \$30 billion in annual sales and a broad portfolio of medical devices.²⁰⁴

According to Applied’s lawsuit, Medtronic bundles Ligasure with other Medtronic products including its popular monopolar and stapling devices that are sold at a discount if the buyer purchases 80 percent to 100 percent of its advanced polar devices from Medtronic.²⁰⁵ These large bundled exclusionary discounts covering various Medtronic devices far exceeded any possible savings from purchase of the lower-priced Voyant device.²⁰⁶ Multiple hospitals including the University of California and Cleveland Clinic health systems advised Applied that they could not purchase Voyant because of the loss of the entire rebates under Medtronic’s contracts.²⁰⁷ Even if Applied sold Voyant at a loss, Applied could not match the total discount of Medtronic’s bundle.²⁰⁸ Thus, as a result of this contracting strategy, Ligasure controls 78 percent of the advance bipolar market though it sells for 15 percent to 20 percent more and underperforms Voyant on numerous metrics.²⁰⁹ And Voyant has only a 3 percent market share in the U.S., though it has a 40 to 50 percent market share in many European countries where bundled contracting is more strictly regulated.²¹⁰

Another example of exclusionary contracting is that used by Amgen, a California-based pharmaceutical company with 24,000 employees and \$26.3 billion in annual revenues.²¹¹ Amgen sells Repatha, a PCSK9 inhibitor drug for bad cholesterol that faced vigorous competition from Sanofi’s and Regeneron’s Praluent drug.²¹² Soon after getting patents on Repatha, Amgen sued Sanofi for patent infringement and secured an injunction against Praluent sales which the Federal Circuit later stayed.²¹³ Amgen’s Repatha patents were then invalidated (for failure to enable and sufficiently describe the claimed invention) by both the district court in 2019 and the Federal

²⁰³ *Id.* at ¶¶ 3, 13, 29-30.

²⁰⁴ *Id.* at ¶¶ 4, 74 The portfolio included devices received from Medtronic’s \$49 billion purchase of surgical-supply company Covidien; Medtronic allegedly admitted that a main motivating factor for the Covidien purchase was to bundle its products with Covidien’s.

²⁰⁵ *Id.* at ¶¶ 93-97.

²⁰⁶ *Id.* at ¶¶ 24, 96-97 (alleging that Medtronic is “effectively selling its advanced bipolar devices below its average variable costs when allocating the exclusionary discount given by Medtronic on the entire bundle to [Medtronic’s] advanced bipolar devices”); *Applied Med. Res. Corp. v. Medtronic, Inc.*, No. 8:23-cv-00268-WLH-DFM, 2023 WL 5503107, at *1, 3 (C.D. Cal. Aug. 2, 2023).

²⁰⁷ *Applied Medical* Complaint, *supra* note 202, at ¶¶ 120-21, 124.

²⁰⁸ *Id.* at ¶ 99; *Applied Med. Res. Corp. v. Medtronic, Inc.*, No. 8:23-cv-00268-WLH-DFM, 2023 WL 5503107, at *1 (C.D. Cal. Aug. 2, 2023).

²⁰⁹ *Applied Medical* Complaint, *supra* note 202, at ¶¶ 4, 5, 66, 73, 74, 119.

²¹⁰ *Id.* at ¶ 119.

²¹¹ Amgen, *About Amgen*, https://www.amgen.com/-/media/Themes/CorporateAffairs/amgen-com/amgen-com/downloads/fact-sheets/fact_sheet_amgen.pdf.

²¹² Praluent was developed by Sanofi and Regeneron; in 2020, Regeneron was given sole responsibility for Praluent’s marketing in the U.S. Sanofi Press Release, *Sanofi finalizes Praluent® (alirocumab) restructuring with Regeneron* (Apr. 6, 2020), <https://www.sanofi.com/en/media-room/press-releases/2020/2020-04-06-21-00-00-2012457>.

²¹³ *Amgen Inc. v. Sanofi*, 872 F.3d 1367 (Fed. Cir. 2017); *US court suspends permanent injunction for Praluent pending appeal*, THEPHARMALETTER (Sept. 2, 2017), <https://www.thepharmaletter.com/article/us-court-suspends-permanent-injunction-for-praluent-pending-appeal>.

Circuit.²¹⁴ The Supreme Court in 2023 affirmed the Repatha patents’ invalidity, likening them to “little more than two research assignments.”²¹⁵ Despite this patent warfare (and other alleged market misconduct), Repatha and Praluent vigorously competed against one another for shares in the PKSK9 market.

That changed after Amgen acquired the blockbuster psoriasis drug Otezla in early 2020 for \$13.4 billion in an FTC-ordered divestiture in the Bristol Meyers/Celgene merger.²¹⁶ At that time, annual Otezla sales were \$1.6 billion, with double-digit sales projected over the next five years.²¹⁷ Enbrel, an arthritis drug, which Amgen bought earlier in 2002, had 2019 annual sales of \$5 billion.²¹⁸

Shortly after securing Otezla, Amgen began using the combined \$6.64 billion annual sales of Enbrel and Otezla to thwart sales of Praluent.²¹⁹ Amgen bundled rebates on Enbrel and Otezla sales conditioned on exclusive positioning of its Repatha drug (that had 2020 sales of \$459 million) and exclusion of Praluent.²²⁰ Amgen also increased pre-rebate list prices of Otezla and Enbrel, so payors who did not agree to exclude Praluent would not only face the loss of the large Otezla and Enbrel rebates, but would also face paying higher list prices for the two drugs.²²¹ With this bundling, Amgen secured the exclusion of its rival Praluent from formularies covering 50 percent of the PKSK9 market.²²²

²¹⁴ *Amgen Inc. v. Sanofi*, No. CV 14-1317-RGA, 2019 WL 4058927, at *1 (D. Del. Aug. 28, 2019); *Amgen Inc. v. Sanofi*, 987 F.3d 1080 (Fed. Cir. 2021).

²¹⁵ *Amgen Inc. v. Sanofi*, 598 U.S. 594, 614 (2023).

²¹⁶ FTC Press Release, *FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition* (Nov. 15, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation-divest-psoriasis-drug-otezla-condition>.

²¹⁷ Amgen Press Release, *Amgen To Acquire Otezla® For \$13.4 Billion In Cash, Or Approximately \$11.2 Billion Net Of Anticipated Future Cash Tax Benefits* (Aug. 26, 2019), <https://www.amgen.com/newsroom/press-releases/2019/08/amgen-to-acquire-otezla-for-134-billion-in-cash-or-approximately-112-billion-net-of-anticipated-future-cash-tax-benefits>.

²¹⁸ Staff Report, House Committee on Oversight and Reform, *Drug Pricing Investigation: Amgen—Enbrel and Sansipar* (Oct. 2020), at i-ii, <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/Amgen%20Staff%20Report%2010-1-20.pdf>. The report also found that Amgen leveraged the U.S. patent system to limit biosimilar competition for Enbrel by patenting minor changes to Enbrel’s design—including a new version of the injection device called Enbrel Mini with Autotouch—to limit competition.

²¹⁹ Complaint, *Regeneron Pharms., Inc. v. Amgen Inc.*, No. 1:22-cv-00697-UNA, 2022 WL 1718707 (D. Del. May 27, 2022), ECF No. 1 (available at <https://www.bigmoleculewatch.com/wp-content/uploads/sites/2/2022/06/Regeneron-Antritrust-Complaint-vs-Amgen-May-27-2022-3.pdf>).

²²⁰ *Regeneron Pharms., Inc. v. Amgen Inc.*, No. 22-697-RGA-JLH, 2023 WL 1927544, at *2 (D. Del. Feb. 10, 2023).

²²¹ Because rebates are based on list prices, Amgen’s increases in the pre-rebate list prices of Enbrel and Otezla since 2020, increased the penalty to PBMs that did not accept Amgen’s bundled rebates. For a fuller discussion of the incentives and effects of bundled rebates by pharmaceutical companies, see Danzon, *supra* note 136, at 500-03.

²²² Complaint at ¶ 16, *Regeneron Pharms., Inc. v. Amgen Inc.*, No. 1:22-cv-00697-UNA, 2022 WL 1718707 (D. Del. May 27, 2022) (Praluent generated just \$356 million in total U.S. net sales for 2020 and 2021; Otezla and Enbrel generated \$12.8 billion in U.S. net sales in the same period, more than 36 times what Praluent generated. “Praluent’s U.S. net sales amount to only 2.8 percent of what Otezla® and Enbrel generated. Therefore, the threat of paying just 3 percent more for Otezla and Enbrel easily overwhelms the total amount of sales generated by Praluent, leaving Payors . . . with no viable choice but to exclude Praluent from their formularies,” emphasis omitted). If the amount of bundled rebates were all attributed to Repatha sales, Regeneron alleged that Amgen was selling Repatha at less than Amgen’s costs. *Regeneron*, 2023 WL 1927544, at *2-3, 7.

Amgen’s bundling strategy has the potential to expand into new drug classes, as shown by its recent acquisition of Horizon Therapeutics. In December 2022, Amgen announced it would acquire Horizon for \$27.8 billion.²²³ Horizon’s two largest drugs, Tepezza (for thyroid eye disease) and Krystexxa (for chronic refractory gout), accounted for 74 percent of Horizon’s \$3.6 billion in revenue. These two drugs faced no immediate competition but were threatened by potential entry from several developing drugs.²²⁴ In the FTC’s first challenge to a “pharmaceutical merger in recent memory,” the FTC sued to block the merger,²²⁵ noting that Amgen’s core rationale for the merger was its desire to protect and grow these top two Horizon drugs despite their serious potential competitive threats.²²⁶ The FTC cautioned that Amgen might insulate Horizon’s drugs from competitive threats using its “cross-market” or bundling strategy built around Enbrel and Otezla,²²⁷ and that this contracting strategy would likely entrench the high prices of Tepezza (\$350,000 for a six-month course) and Krystexxa (\$650,000 for annual treatment) and deter future rivals. The matter was settled on September 1, 2023, with an order prohibiting Amgen from bundling the sale of any Amgen product with either Tepezza or Krystexxa or from using any Amgen product to secure favorable positioning of them or to disadvantage any rival of the two products. Additionally, the order prohibits Amgen from acquiring any potential or nascent rival to the two Horizon products without FTC consent.²²⁸

C. Concentration in California Health Systems

In 35 years, hospital prices in California have increased by 600 percent.²²⁹ Costs and prices for hospital services have gone up, but so have margins. In 1999, hospitals prices were about 200 percent of costs, and by pre-COVID 2018 they were 417 percent of costs.²³⁰ Covid period subsidies were used by some hospital systems to acquire additional centers and physician affiliates. though on average, a hospital system acquisition of a physician’s office generally raises prices by 14.1 percent.²³¹

²²³ Complaint, *FTC v. Amgen Inc.*, No. 1:23-cv-03053 (N.D. Ill. May 16, 2023), ECF No. 7 (available at https://www.ftc.gov/system/files/ftc_gov/pdf/2310037amgenhorizoncomplainttropi.pdf).

²²⁴ *Id.* at ¶¶ 26, 66-67.

²²⁵ FTC Press Release, *FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses* (May 16, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat>.

²²⁶ Complaint at ¶¶ 66-67, *FTC v. Amgen Inc.*, No. 1:23-cv-03053 (N.D. Ill. May 16, 2023), ECF No. 7 (available at https://www.ftc.gov/system/files/ftc_gov/pdf/2310037amgenhorizoncomplainttropi.pdf).

²²⁷ *Id.* at ¶¶ 59-60, 66-69.

²²⁸ FTC Press Release, *Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition* (Sept. 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition>. Additionally, a monitor was appointed to review Amgen’s contracting for Krystexxa and Tepezza for fifteen years. *Id.*

²²⁹ Julian Canete, *What’s Driving Up Healthcare Prices in California*, Orange County Register (Dec. 11, 2023), <https://www.ocregister.com/2023/12/11/whats-driving-up-healthcare-prices-in-california/>.

²³⁰ *Id.*

²³¹ *Id.*; see also Glenn Melnick & Susan Maerki, *Post-COVID trends in hospital financial performance: updated data from California paint an improved but challenging picture for hospitals and commercially insured patients*, Health Affairs Scholar Volume 1, Issue 3 (September 2023), <https://academic.oup.com/healthaffairsscholar/article/1/3/qxad039/7250185> (Covid however, has challenged many hospitals’ bottom lines, with an increase in labor and other inputs and a new case-mix complexity, but net income margins for larger hospitals are higher than for smaller hospitals.).

Over the years, California’s hospital systems also have been growing. In 2007, California’s seven largest hospital systems accounted for more than 33 percent of hospital beds.²³² In 2013, the state’s eight largest hospital systems accounted for 40 percent of California’s hospital beds. The three largest systems—Kaiser, Dignity Health and Sutter accounted for 25 percent of the state’s beds.²³³

In 2018, the Petris Center at the University of California, Berkeley published *Consolidation in California’s Health Care Market 2010-2016: Impact on Prices and ACA Premiums*, which reported concentration trends in the state’s hospital, physician, and insurance markets from 2010 to 2016.²³⁴ The Petris study issued two major findings. The first was that, as of 2016, both insurer and provider markets across California exhibited substantial concentration. For example, 44 of the state’s 58 counties had what FTC-DOJ metrics deemed as “highly concentrated” hospital markets,²³⁵ and 42 counties had highly concentrated commercial insurance markets.²³⁶

Physician markets exhibited similar consolidation: 12 counties had highly concentrated primary care markets, 20 counties had highly concentrated orthopedic markets, 22 counties had highly concentrated cardiology markets, 24 counties had highly concentrated hematology/oncology markets, and 26 counties had highly concentrated radiology markets.²³⁷ Much of the consolidation in physician markets was driven by acquisitions of physician practices by corporate entities, as the percent of physicians working for hospital-owned foundations grew from 24 percent to 39 percent.²³⁸

The report’s second major finding was that highly concentrated healthcare markets are associated with higher prices. Average prices for inpatient procedures in moderately or highly concentrated markets were 79 percent higher than in markets with less concentration, and outpatient prices were 35 percent to 63 percent higher in moderately or highly concentrated markets than in less concentrated markets.²³⁹ In sum, the researchers concluded that “[c]onsumers are paying prices for health care that are considerably above what a more competitive market would produce” and that “regulatory and legislative solutions need to be implemented.”²⁴⁰

A revisitation of these metrics as of January 1, 2022, reveals that healthcare markets across California have continued to consolidate since the Petris Report’s findings in 2016. According to new data,²⁴¹ 46 out of California’s 58 counties have hospital markets that are highly concentrated, and 44 counties have insurance markets that are highly concentrated. Additionally, several

²³² California Healthcare Foundation, *California Health Care Almanac* (Apr. 2010), <https://issuelab.org/resources/8547/8547.pdf>.

²³³ California Healthcare Foundation, *2015 Edition-California Hospitals* (Aug. 4, 2015), <https://www.chcf.org/wp-content/uploads/2017/12/PDF-CaliforniaHospitals2015.pdf>

²³⁴ *Consolidation in California*, Petris Ctr., *supra* note 119.

²³⁵ *Id.* at 12. The report uses the FTC threshold of an HHI greater than 2,500 to deem a market “highly concentrated.”

²³⁶ *Id.* at 14.

²³⁷ *Id.* at 9.

²³⁸ *Id.* at 24.

²³⁹ *Id.* at 36.

²⁴⁰ *Id.* at 44.

²⁴¹ New data and analysis from the Petris Center’s Managed Market Surveyor provided by Decision Resources Group (now Clarivate) (insurers), American Hospital Association Annual Survey Database (hospitals), and OneKey Database provided by IQVIA (physicians).

counties with hospital and insurance markets below the “highly concentrated” threshold do so only barely, with four additional counties home to hospital markets with HHIs between 1,800 and 2,500 and all but two counties home to insurance markets with HHIs less than 2,000.

Perhaps more significant, recent data reveals that corporate entities have dramatically increased their control over the physician market.²⁴² In 42 counties, over 75 percent of the county’s physicians worked for a hospital or health system. In 39 counties, over 75 percent of the county’s specialists worked for a hospital or health system, and of the remaining 19 counties, only nine had any specialists at all. This is alarming on at least two fronts. First, it reveals that concentrated hospital markets are driving consolidation into physician markets. Second, since hospitals and physician practices offer many overlapping services, hospitals’ vertical acquisitions of physician practices eliminates competition. Moreover, to the degree that outpatient care represents higher value, more preventative care, this more affordable alternative to hospital care is becoming increasingly unavailable.

D. Case Studies of Health Systems

1. Sutter Health: Dominance Through Serial Acquisitions

On December 20, 2019, Sutter Health agreed to pay \$575 million to settle antitrust claims jointly brought by the California state attorney general and classes of unions, employers, and consumers. The historic settlement also included a 10-year prohibition from engaging in several practices that Sutter used to ensure its dominance.²⁴³ The settlement followed a series of studies showing that Sutter’s dominance in northern California contributed to significantly higher prices.²⁴⁴ In a 2021 statement, the Attorney General noted that the litigation meant that “Sutter will no longer have free rein to engage in anticompetitive practices that force patients to pay more for health services.”²⁴⁵

The antitrust settlement marked a watershed for Sutter Health, which transformed itself from a regional Sacramento-based two-hospital system into a giant network with 24 hospitals, 36 ambulatory surgery centers, over 53,000 employees across and \$14.7 billion in operating revenue.²⁴⁶ Sutter Health’s dominance in multiple hospital markets is a product of a series of

²⁴² *Id.*

²⁴³ Press Release, Attorney General’s Office, State of California Department of Justice, *Attorney General Bonta Announces Final Approval of \$575 Million Settlement with Sutter Health Resolving Allegations of Anti-Competitive Practices* (Aug. 27, 2021), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-final-approval-575-million-settlement-sutter> [hereinafter AG Bonta Press Release].

²⁴⁴ See Robert King, *Sutter Health agrees to \$575M settlement over allegation it drove up California healthcare prices*, Fierce Healthcare (Dec. 20, 2019), <https://www.fiercehealthcare.com/hospitals-health-systems/sutter-health-agrees-to-575m-settlement-over-allegation-it-drove-up>.

²⁴⁵ AG Bonta Press Release, *supra* note 243. The challenges of antitrust litigation are highlighted by the *Sidibe v. Sutter Health* class action filed in 2012. After years of wrangling in a federal district court about market definitions, discovery, standing and other issues, the case was tried in 2022 with the nine-person jury finding no tying or coercion in some of Sutter’s contract practices. An unsuccessful appeal was filed as to confusing jury instructions, discovery rulings, and market analysis. See, e.g., Jaime S. King, Alexandra D. Montague, Daniel R. Arnold & Thomas L. Greaney, *Antitrust’s Healthcare Conundrum: Cross-Market Mergers and the Rise of System Power*, 74 *Hastings L.J.* 1057, 1066-67 (Apr. 2023).

²⁴⁶ See AG Bonta Press Release, *supra* note 242; *Sutter Health Financial Performance*, Sutter Health (last visited June 26, 2023), <https://www.sutterhealth.org/about/financials>. For comparison, Los Angeles-based Cedars-Sinai has

strategic acquisitions of hospitals and physician practices it initiated in the 1980s.²⁴⁷ Sutter Health sought to align “aggressively with large physician practices” and by 1993 it had acquired 14 facilities and Omni Health, a physician-created HMO.²⁴⁸ In 1996, Sutter Health acquired San Francisco-based California Health System, then-owner of the four largest private hospitals in the Bay Area, and became the second largest health system in Northern California behind Kaiser Permanente.²⁴⁹

Sutter Health persisted in major hospital acquisitions despite legal challenges. Sutter’s 1998 purchase of Summit Medical Center in Oakland, which gave them nearly complete control of the Alameda County market,²⁵⁰ was challenged by then-California State Attorney General Bill Lockyer.²⁵¹ Lockyer explained that the suit aimed to prevent the creation of a “hegemony” over hospital services in Oakland and Berkeley,²⁵² and his investigation revealed internal memos indicating that Sutter Health pursued acquisitions to leverage prices over health plans.²⁵³ Ultimately, a federal judge, relying in part on Sutter’s pledge that merging the two nonprofit hospitals would benefit the Berkeley and Oakland communities,²⁵⁴ allowed the merger to proceed.²⁵⁵

Sutter Health continues pursuing acquisitions, even after the historic antitrust settlement. In 2023, Sutter Health announced plans to merge with Sansum Clinic in Santa Barbara,²⁵⁶ which would escalate Sutter Health’s presence along the Southern California Coast.²⁵⁷ The Sansum Clinic is comprised of roughly 200 physicians practicing in 30-plus specialties and operating throughout Santa Barbara, with facilities in Carpinteria, Santa Barbara, Goleta, Solvang, Lompoc and Santa

a total revenue of \$8.7 billion. *Cedars-Sinai Health System*, Forbes (last visited Mar. 11, 2024), <https://www.forbes.com/companies/cedars-sinai-health-system/?sh=152863bd7489>.

²⁴⁷ Robert Waters, *California’s Sutter Health Settlement: What States Can Learn About Protecting Residents from the Effects of Health Care Provider Consolidation* at 6 (2020), https://www.milbank.org/wp-content/uploads/2020/09/Sutter-History-Report_v3.pdf; Anthem, Attestation requirement, <https://californiahealthline.org/wp-content/uploads/sites/3/2016/04/anthem-sutter-documents.pdf> (Sutter Health holds more than 45% of the healthcare market share in six Northern California counties); Les Masterson, *Sutter Health Destroyed 192 Boxes of Evidence in Antitrust Case, Judge Says*, HealthCareDive (Nov. 20, 2017), <https://www.healthcaredive.com/news/sutter-health-destroyed-192-boxes-of-evidence-in-antitrust-case-judge-says/511300>.

²⁴⁸ *Sutter Health: The Quest for Growth, Efficiency*, CaliforniaHealthline (June 24, 1999), <https://californiahealthline.org/morning-breakout/sutter-health-the-quest-for-growth-efficiency>. In the 1970s, Sutter Health consisted of two hospitals. *Id.*

²⁴⁹ Sabin Russell, *California Healthcare System and Sutter Health To Merge*, SFGate (Aug. 29, 1995), <https://www.sfgate.com/news/article/PAGE-ONE-California-Healthcare-System-and-3025498.php>.

²⁵⁰ Waters, *California’s Sutter Health Settlement*, *supra* note 247, at 6.

²⁵¹ Tom Abate, *Proposed Hospital Merger Goes on Trial/Summit, Alta Bates Opposed by State*, SFGate (Oct. 26, 1999), <https://www.sfgate.com/business/article/Proposed-Hospital-Merger-Goes-on-Trial-Summit-2899742.php>.

²⁵² *Id.*

²⁵³ Waters, *California’s Sutter Health Settlement*, *supra* note 247, at 6.

²⁵⁴ Abate, *Proposed Hospital Merger Goes on Trial*, *supra* note 251.

²⁵⁵ Waters, *California’s Sutter Health Settlement*, *supra* note 247, at 6.

²⁵⁶ Annika Bahnsen, *New Era for Sansum Clinic*, Santa Barbara News-Press, May 12, 2023.

²⁵⁷ Cathie Anderson, *Partnership for Sacramento’s Sutter Health Will Help It Expand Reach on California Coast*, The Sacramento Bee (May 10, 2023), <https://news.yahoo.com/partnership-sacramento-sutter-health-help-145154336.html>; *Locations*, Sansum Clinic (last visited June 26, 2023), <https://www.sansumclinic.org/locations>.

Maria.²⁵⁸ Despite the two entities describing the plan as entering into a “strategic partnership,” Sutter on September 23, 2023 announced that Sansum had become a part of Sutter’s “integrated healthcare system” and that Sutter planned to fund several projects in the Santa Barbara region.²⁵⁹

2. Cedars-Sinai Health and Huntington Memorial: A “Must Have” Hospital Expands

In March 2020, Los Angeles-based Cedars-Sinai Health System, one of the largest nonprofit academic medical centers in the U.S., announced plans to merge with Pasadena-based Huntington Hospital. The union of the Cedars-Sinai Health system, a multi-hospital system with 2,124 hospital beds throughout Southern California,²⁶⁰ with the 619-bed Huntington promptly raised concerns from the California Attorney General’s Office.²⁶¹

The California Attorney General examined the potential competitive impact of the merger and estimated a potential 32 percent price increase for consumers in relevant Huntington service areas.²⁶² The office commissioned an expert analysis that predicted the merger would lead to a proliferation of “all-or-nothing” and tying arrangements – similar to those that precipitated the Sutter Health antitrust action – that would leverage “must have” Cedars-Sinai facilities and force the acceptance of expensive and expansive provider networks.²⁶³

Despite predictions that the transaction would significantly increase prices, the Attorney General nonetheless offered its conditional approval provided the parties agreed to a set of “competitive impact conditions.” These terms included price caps on Huntington’s rates and requirements that the two systems utilize separate teams for negotiations with commercial insurers.²⁶⁴

The parties objected to even the conditional approval, and in March 2020, Cedars-Sinai and Huntington jointly filed suit against the Attorney General’s Office alleging the AG was subjecting them to “burdensome and unprecedented conditions.”²⁶⁵ Prior to trial, the parties reached a settlement with revised conditions, including “ten-year prohibitions on tying and all-or-nothing contracts, punitive pricing practices, and any contracting practices preventing the promotion of narrow networks, as well as a less-stringent five-year price cap, among other conditions.”²⁶⁶

²⁵⁸ Anderson, *supra* note 257; Partnership Press Release, *Sutter Health Welcomes Sansum Clinic into its Integrated Health System, Enhancing Access to High -Quality Care on California’s Central Coast* (Sept. 29, 2023), <https://www.sansumclinic.org/sutter-health-partnership-press-release>.

²⁵⁹ Nick Welsh, *Sansum to Be Acquired by Sutter Health*, Santa Barbara Independent (May 5, 2023), <https://www.independent.com/2023/05/05/sansum-to-be-acquired-by-sutter-health>.

²⁶⁰ *Huntington Hospital Affiliation with Cedars-Sinai Becomes Official*, Huntington Health (last visited June 26, 2023), <https://www.huntingtonhealth.org/in-the-news/huntington-hospital-affiliation-with-cedars-sinai-becomes-official>.

²⁶¹ John Commins, *Cedars-Sinai, Huntington Hospital, Finalize Affiliation*, HealthLeaders (Aug. 24, 2021), <https://www.healthleadersmedia.com/strategy/cedars-sinai-huntington-hospital-finalize-affiliation>.

²⁶² *Id.*; Amy Y. Gu, *Cedars-Sinai/Huntington Cross-Market Affiliation Settle with Revised Competitive Impact Conditions*, The Source (Aug. 16, 2021), <https://sourceonhealthcare.org/cedars-sinai-huntington-cross-market-affiliation-settle-with-revised-competitive-impact-conditions>.

²⁶³ Gu, *Cedars-Sinai/Huntington Cross-Market Affiliation*, *supra* note 262.

²⁶⁴ *Id.*

²⁶⁵ Commins, *Cedars-Sinai, Huntington Hospital, Finalize Affiliation*, *supra* note 261.

²⁶⁶ Jaime S. King et. al., *Antitrust’s Healthcare Conundrum: Cross-Market Mergers and the Rise of System Power*, 74 *Hastings L.J.* 1057, 1068 (2023).

The lesson from the Cedars-Sinai and Huntington union reflects the challenges of effective antitrust enforcement. Even in a transaction that is likely to increase healthcare prices significantly, regulators' conditional approval accompanied by efforts to limit those price increases, are nevertheless challenged by the hospitals. The road to consolidated hospital markets is paved with stymied antitrust enforcement.

V. THE ENTERTAINMENT INDUSTRY

Entertainment, the glitzy and highly recognizable face of California, draws heavily on Californians' pocketbooks, with the average Californian household in 2021 spending \$3,322.72 on entertainment.²⁶⁷ The entertainment industry is also a significant engine of California's revenue and employment. The California film and television production industry produces over 700,000 jobs in California with nearly \$70 billion in wages and brings in some \$100 billion in tourism.²⁶⁸ From 2015 to 2020, the movie and television sectors generated almost \$22 billion for the state's economy according to a 2022 study by the Los Angeles Economic Development Corporation.²⁶⁹ An industry survey reported that the movie/film sector alone generated \$226 billion in annual sales in 2020, and provided 186,720 jobs in California with over \$30 billion in wages.²⁷⁰ The 2023 strike

²⁶⁷ Alicia Wallace, *Consumers spent big on having fun in 2021* (Sept. 9, 2022), <https://www.cbsnews.com/sacramento/news/consumers-spent-big-on-having-fun-in-2021/> (Bureau of Labor Statistics Consumer Expenditure Surveys review of American expenditures from 2017 to 2021 on entertainment, [defined to include fees and admissions (such as those to sports events or concerts), even memberships or recreation expenses on trips; audio and entertainment equipment (like TVs and video games); pets and hobbies; and purchases of campers and recreational vehicles, but not including internet and utilities] show entertainment spending in 2021 was up 22.7% from 2020, and surpassed 2019 levels by over 15%); U.S. Bureau of Labor Statistics Economic News Release, *Consumer Expenditures--2022*, <https://www.bls.gov/news.release/cesan.nr0.htm> (in 2022, entertainment expenditures decreased 3.1 % from 2022 though fees and admissions increased 27.4 percent). Within California, there were sizeable geographical disparities in 2021 entertainment spending, with households in Los Angeles spending \$3,199, San Francisco spending \$3,590 and San Diego spending \$4,793. U.S. Bureau of Labor Statistics, *Consumer Expenditure Survey, Selected Western Metropolitan Statistics* (September 2023), <https://www.bls.gov/cex/tables/geographic/mean/cu-state-ca-income-quintiles-before-taxes-2-year-average-2021.htm>.

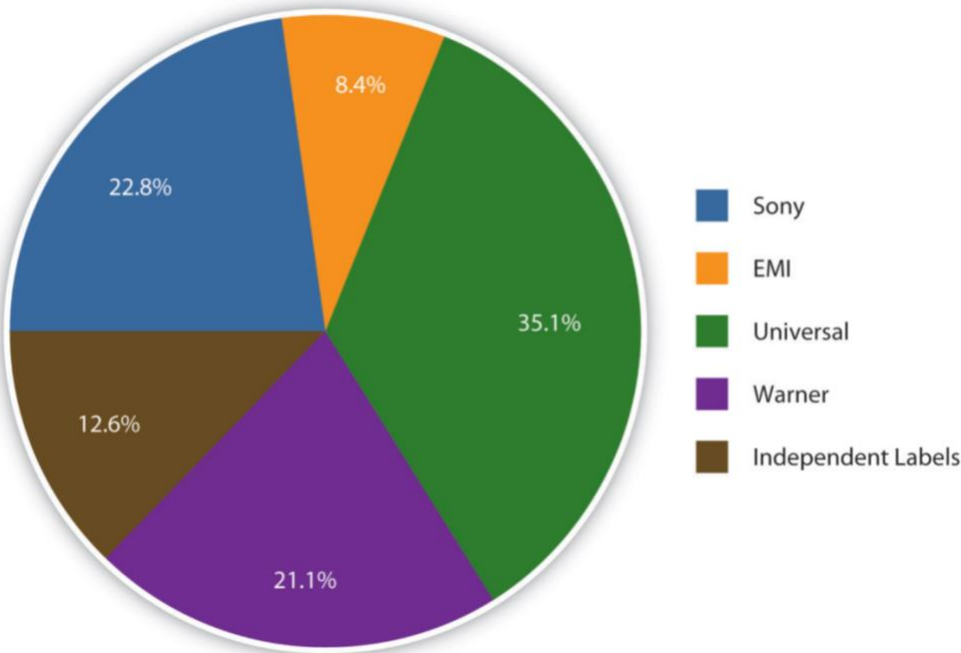
²⁶⁸ California Film Commission, *Message from the Executive Director*, <https://film.ca.gov/> (last visited Mar. 12, 2024) (California's Governor in July 2023 expanded California's Film and TV Tax Credit Program for five years, to "create an estimated 60,000 production jobs and \$10 billion in related investment across the state"); Los Angeles Economic Workforce and Dev. Dept., *Entertainment Industry Incentives and Resources*, <https://ewddlacity.com/index.php/entertainment-incentives>.

²⁶⁹ Jonathan Vankin, *Hooray For Hollywood: California's Most Glamorous Industry, Where It Comes From, How it Shapes the World*, California Local (Dec. 19, 2022), <https://californialocal.com/localnews/statewide/ca/article/show/20616-hollywood-california-movie-business-industry/>; Richard Verrier, *Entertainment industry pours \$47 billion into L.A., economist says*, Los Angeles Times (Nov. 20, 2012), <https://www.latimes.com/entertainment/envelope/la-xpm-2012-nov-20-la-et-ct-onlocation-20121120-story.html> (The 2012 report of the LA Economic Development Corporation survey, which defines "entertainment" to include motion picture and video related industries, sound industry, radio, television and cable sectors, live entertainment as well as agents, managers and independent artists, found entertainment accounted for 162,000 salaried jobs, 85,000 independent jobs and an annual output of \$47 billion in Los Angeles County, or about 8.4% of the county's annual economic output).

²⁷⁰ Motion Picture Association, *Motion Picture Association Statement on the California Film and Television Tax Credit Program Extension* (June 27, 2023), <https://www.motionpictures.org/press/motion-picture-association-statement-on-the-california-film-and-television-tax-credit-program-extension>.

by the industry’s writers and actors that shuttered productions, studios and shows, is estimated to have cost California’s economy over five billion dollars.²⁷¹

California is home to the largest music industry of all the states which adds \$39.5 billion to the state’s economy and accounts for nearly 431,000 jobs.²⁷² Before 1980, a large number of major record labels and independent labels vied for a share of the musical pie. But by the late 1990s, after a wave of mergers between the larger labels and independent labels, only six major labels remained: By 2004, the music industry was dominated by the so-called Big Four: Sony Music Entertainment, EMI, Universal Music Group, and Warner Music Group, that together control over 85 percent of the music industry’s production and distribution:²⁷³



Control of US recording music industry; data from Nielson Company.²⁷⁴

²⁷¹ Olivia Knapp, *A Deep Dive into the Economic Ripples of the Hollywood Strike*, Michigan Journal of Economics (Dec. 6, 2023) (before they ended, strikes estimated to cost industry nationwide some \$5 billion), <https://sites.lsa.umich.edu/mje/2023/12/06/a-deep-dive-into-the-economic-ripples-of-the-hollywood-strike/>; Dominic Patten & Anthony D’Alessandro, *SAG-AFTRA & Studios Set More Contract Talks For Friday; “Cautious Optimism” Motto Of The Day*, Deadline (Oct. 26, 2023), <https://deadline.com/2023/10/actors-strike-talks-friday-optimism-1235584425/> (Hollywood strikes cost the Southern California economy an estimated \$6.5 billion and loss of 45,000 jobs); Wendy Lee & Meg James, *WGA, studios reach tentative deal*, Los Angeles Times, at A12 (Sept. 25, 2023) (the 2023 strike as of September 2023 estimated to have already cost California some \$5 billion).

²⁷² 50 States of Music Website, <https://50statesofmusic.com/state/california> (California music industry also includes 71,905 music establishments and 233,975 songwriters); *50 States Of Music Website Shows Music Industry’s Impact On Each State*, InsideRadio (Mar. 9, 2021), https://www.insideradio.com/free/50-states-of-music-website-shows-music-industry-s-impact-on-each-state/article_44aa75b6-80ac-11eb-8077-4325bee03d39.html.

²⁷³ *Current Popular Trends in the Music Industry*, Understanding Media and Culture (Saylor Academy 2012), https://saylordotorg.github.io/text_understanding-media-and-culture-an-introduction-to-mass-communication/s09-03-current-popular-trends-in-the-.html.

²⁷⁴ *Id.*

While the pandemic challenged many sectors of the entertainment world, it accelerated the rapidly expanding video gaming sector. In fact, the gaming market whose epicenter is firmly planted in California²⁷⁵, has grown 19 times its size in 2006, and is worth up to \$160 billion²⁷⁶. According to the Entertainment Software Association (ESA) study, the video game industry in California annually generates \$51.8 billion, either through direct industry output (\$22.5 billion) or indirectly via suppliers and other supported output (\$29.3 billion).²⁷⁷ It accounts for some 218,100 jobs in California, either directly through industry jobs (about 57,400) or through supplier and other supported jobs (about 167,700).²⁷⁸ The video gaming market has over 55,442 businesses in California²⁷⁹ and is home to many of the leading game publishers and developers, including Activision Blizzard, MobilityWare, Games, Versus Systems, Riot Games, Electronic Arts, Mythical Games, Versus Systems, Play Q and Naughty Dog.²⁸⁰

A. Mergers and Acquisitions in the Entertainment Industry

Over the last decades, entertainment has undergone seismic changes. Television which reigned as everyone's favorite entertainment mode for decades, is being increasingly abandoned by those in the under-sixty cohort.²⁸¹ Films in red envelopes no longer arrive in the mail.²⁸² Largely gone (except in Goodwill bins) are the music vinyl records, cassettes and CDs that jammed home drawers, shelves and closets. Gone are the joysticks, primitive animation and clunky game consoles of the gaming world twenty years ago, replaced with splashy sophisticated multiplayer games on a variety of platforms.²⁸³

Entertainment is also making a major transition from traditional movie and television revenue streams to streaming and digital and to a more immersive and gaming entertainment.²⁸⁴ These and

²⁷⁵ *Report: California Ranks #1 in Nation for Economic Impact from Video Game Industry With \$51.8 Billion Annual Output*, PRNewswire (Dec. 3, 2020), <https://www.prnewswire.com/news-releases/report-california-ranks-1-in-nation-for-economic-impact-from-video-game-industry-with-51-8-billion-annual-output-301186182.html>; Sarah Parvini, *3 takeaways on the state of the global games market (hint: it's growing)*, Los Angeles Times (Aug. 23, 2023), <https://www.latimes.com/entertainment-arts/business/story/2023-08-21/global-gaming-industry-report-2023-league-of-legends-activision-electronic-arts-nintendo-mobile-gaming-mario-bros>; Jack Flynn, *20 Trending U.S. Media and Entertainment Industry Statistics [2023]*, Zippia (July 4, 2023), <https://www.zippia.com/advice/media-and-entertainment-industry-statistics/> (The giant media and entertainment industry, worth some \$717 billion, also fuels 6.9% of the entire U.S. GDP. Of this total, the music industry is worth \$43 billion, the movie industry \$91 billion, the gaming industry \$160 billion and television broadcasting \$63 billion.).

²⁷⁶ Flynn, *supra* note 275.

²⁷⁷ PRNewswire, *supra* note 275.

²⁷⁸ *Id.*

²⁷⁹ IBIS, *Video Games in California - Market Research Report* (Oct. 11, 2023), <https://www.ibisworld.com/us/industry/california/video-games/14990/>.

²⁸⁰ Built In Staff, *26 Video Game Companies Who Call LA Home*, Built In LA (last updated Feb. 27, 2024), <https://www.builtinla.com/gaming/video-game-studios-know>.

²⁸¹ John Koblin, *As Young People Stream Away, Networks Bet on Boomer Taste*, New York Times, Sept. 24, 2023, at 1.

²⁸² Netflix, *Netflix DVD Business Closing*, <https://help.netflix.com/en/node/130637>; Nicole Sperling, *Shipping the Last Red Envelope; Netflix closes its DVD distribution unit for good this week*, New York Times, Sept. 27, 2023, at B1.

²⁸³ Parvini, *supra* note 275.

²⁸⁴ Deloitte, *Deloitte 2023 media and entertainment industry outlook*, <https://www2.deloitte.com/us/en/pages/technology-media-and-telecommunications/articles/media-and-entertainment-industry-outlook-trends.html> (last visited Mar. 12, 2024); Jon Wakelin, *Top 5 developments driving*

other transformative changes are occurring and being facilitated by waves of mergers and acquisitions, big and small, that have joined companies in many differing entertainment sectors including those bridging content creation, film studio production, streaming platforms, television networks, music production and distribution, and technology companies.

These newly big companies top the revenue charts and some dominate many different entertainment markets. The three largest mega-entertainment companies, Comcast, Disney and Netflix who each provide a broad array of content, streaming, television, gaming, communications, and music, generate \$235 billion in annual revenue and have a combined market cap of \$437 billion.²⁸⁵ Six corporations control the majority of all media consumed in the U.S., including broadcast and basic cable television, newspapers, publishing houses, Internet utilities, and even video game developers.²⁸⁶ If these Big 6 media companies- Disney, National Amusements, News Corp, Sony, Comcast, and Time Warner- were a country, they would be the 26th largest country in the world, and could give every American \$1,348.39.²⁸⁷ While the entire U.S. movie industry is worth an estimated \$91.83 billion, a handful of major American studios control 63.7 percent of total film industry revenue- Disney (18.2 percent), NBC Universal (16.4 percent), Time Warner (16.2 percent) and 21st Century Fox (12.9).²⁸⁸

B. Case Studies:

1. Microsoft/Activision: Challenging the Future of the Gaming Industry?

Activision Blizzard, Inc. is a Santa Monica, California based independent gaming developer with annual revenues of \$8.8 billion.²⁸⁹ According to the FTC, it is also one “of only a very small number of top video game developers in the world that create and publish high-quality video games for multiple devices, including video game consoles, PCs, and mobile devices” and has “millions of monthly active users around the world.”²⁹⁰ Activision produces some of the most iconic and

growth for video games, PriceWaterhouseCoopers (Jan. 16, 2024), <https://www.pwc.com/us/en/tech-effect/emerging-tech/emerging-technology-trends-in-the-gaming-industry.html>; PriceWaterhouseCoopers, *US Edition: Global Entertainment & Media Outlook 2023-2027*, <https://www.pwc.com/us/en/industries/tmt/library/global-entertainment-media-outlook.html> (forecasting that streaming or over-the-top (OTT) video revenue will increase by 60% from 2020 to 2025).

²⁸⁵ Nathan Reiff, *10 Biggest Entertainment Companies, CMCSA, DIS, and NFLX top the 10 biggest entertainment companies list*, Investopedia (last updated Apr. 20, 2023),

<https://www.investopedia.com/articles/investing/020316/worlds-top-10-entertainment-companies-cmcsa-cbs.asp>.

²⁸⁶ *The 6 Companies that Own (Almost) All Media*, <https://www.webfx.com/blog/internet/the-6-companies-that-own-almost-all-media-infographic/> (last visited Mar. 12, 2024).

²⁸⁷ *Id.*

²⁸⁸ Flynn, *supra* note 275.

²⁸⁹ Activision became a leading game developer through a series of acquisitions that included Raven Software, Infinity Ward, Treyarch, Blizzard and Key Digital. Nathan Reiff, *5 Companies Owned by Activision Blizzard*, Investopedia (last updated Dec. 9, 2022), <https://www.investopedia.com/5-companies-owned-by-atvi-5093046>. In 2016, Activision acquired King Digital, which owned the Candy Crush franchise and provided Activision with \$2.79 billion in revenue in 2022. Jordan Novet, *Microsoft projects two new areas of growth for gaming, leaked document says: Mobile and ads*, CNBC (last updated Sept. 20, 2023), <https://www.cnbc.com/2023/09/19/microsoft-projected-fast-gaming-growth-from-ads-mobile-transactions.html>.

²⁹⁰ FTC Press Release, *FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.* (Dec. 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc>.

popular video game titles, including Call of Duty, World of Warcraft, Diablo, Candy Crush and Overwatch.

Microsoft's announcement in January 2022 that it would purchase Activision for \$69 billion made it the largest merger in the gaming industry and in Microsoft's history.²⁹¹ It also precipitated regulatory challenges both in Europe and the U.S., which as described by the FTC, were:

. . . about the future of the gaming industry. At stake is how future gamers will play and whether the emerging subscription and cloud markets will calcify into concentrated gardens or evolve into open, competitive landscapes—where games are platform-agnostic, new platforms can emerge to challenge the established incumbent, and consumers are free to choose where and how to access their favorite games.²⁹²

Microsoft's \$198 billion plus annual revenues derive from a wide variety of sources such as its legacy software and computing products. But it also includes \$16.2 billion from its Gaming Division²⁹³ that taps into the rapidly growing gaming industry whose \$200 billion annual revenues exceed those of the combined film, music, and print entertainment industries.²⁹⁴ Microsoft sells the popular Xbox high performance gaming console that competes with industry leader Sony's PlayStation and with Nintendo's Switch. These three companies have dominated the high performance console market for decades with little competition according to the FTC.²⁹⁵ Additionally, Microsoft offers a popular video game subscription service, Xbox Game Pass which provides access to a large library of games for a monthly fee and which has "cloud gaming" functionality that allows games to be streamed and played across a variety of devices.²⁹⁶

Particularly powerful in shaping gamers selections of gaming consoles and cloud gaming subscriptions is the draw of the blockbusters of the gaming industry known as "AAA" games. These are highly anticipated and expensively produced games, made by Activision and three or four other independent game producers that own a significant portion of the most valuable gaming franchises.²⁹⁷ Activision's portfolio of AAA games includes its best-known game Call of Duty which is described as "one of the most successful entertainment franchises of all time, with a massive following and over \$27 billion in revenues."²⁹⁸ Given that access to AAA content on a regular basis is crucial for those in the console or cloud based gaming business, the FTC alleged control of Activision would provide Microsoft with significant and valuable market advantages. However, the defendants counter that Activision like some other game publishers, has not included

²⁹¹ Motion for Injunction Pending Appeal of the Federal Trade Commission, at 2 (July 13, 2023), *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir.).

²⁹² *Id.* at 1-2.

²⁹³ Novet, *supra* note 289.

²⁹⁴ *FTC v. Microsoft Corp.*, No. 23-cv-02880-JSC, 2023 WL 4443412, at *1 (N.D. Cal. July 10, 2023).

²⁹⁵ FTC Complaint, *In the Matter of Microsoft Corp. and Activision Blizzard, Inc.*, FTC Docket No. 9412, ¶ 26 (F.T.C. Dec. 8, 2022),

https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf [hereinafter FTC Complaint] (However, the FTC contends that the Nintendo Switch is not a high performance console that competes with the current Sony and Microsoft products.).

²⁹⁶ *Id.* at ¶ 2.

²⁹⁷ *Id.* at ¶¶ 46-51, 99-101.

²⁹⁸ *Id.* at ¶¶ 6, 7, 51, 59, 78.

its newest titles in subscription services—either close to their release date, or in many circumstances at all—because they are concerned about “significant cannibalization of buy-to-play revenues.”²⁹⁹

With cloud gaming which allows streaming similar to Netflix’ show video streaming services, games may be played on a variety of devices, including non-mobile devices, with Microsoft estimating it could reach 3 billion users.³⁰⁰ Despite this, Microsoft asserts that its Xbox cloud gaming feature has not been perfected or profitable, and that other companies have also had only moderate success in launching cloud gaming services due to “technical difficulties” and “very tricky” economics.³⁰¹

The FTC’s December 2022 administrative complaint asserted that if Microsoft controlled Activision’s valuable and “cherished” game content, especially Call of Duty, Diablo and Overwatch, it would give Microsoft “the ability and increased incentive to withhold or degrade Activision’s content in ways that substantially lessen competition.”³⁰² Specifically, the FTC alleged that the merged firm would have the incentive to withhold Call of Duty and other Activision content from Microsoft’s rivals in the console, library subscription and cloud streaming business, citing Microsoft’s past acquisitions of content that were withheld from rivals.³⁰³ Microsoft has countered with proposals to its rivals to ensure access to Activision content for a period of time, cited past Microsoft acquisitions where content remained available to rivals, and argued that cloud gaming is “entirely unproven” and not a separate market.³⁰⁴

On July 11, 2023, the District Court in San Francisco denied the FTC’s request for a preliminary injunction to prohibit the merger’s closure pending an FTC administrative proceeding outcome.³⁰⁵ The Ninth Circuit denied the FTC’s request for emergency relief to prevent the deal from closing.

On April 26, 2023, the U.K. Competition & Markets Authority (CMA) blocked the Microsoft/Activision deal concluding that it would lessen competition in the cloud gaming market. Microsoft’s President Brad Smith denounced the decision as “bad for Britain” and the “darkest day in our four decades in Britain.”³⁰⁶ A few weeks later, the European Commission on May 15 approved the acquisition.³⁰⁷ After the parties spend months discussing possible compromises, August 2023, Microsoft submitted a new deal to the CMA in August 2023 in which it divested

²⁹⁹ Opposition to FTC’s Motion for an Injunction Pending Appeal at 16, *FTC v. Microsoft Corp.*, No. 23-15992, No. 23-15992 (9th Cir. July 14, 2023), ECF No. 23.

³⁰⁰ FTC Complaint, *supra* note 295, at ¶ 83-90.

³⁰¹ Defendants Memorandum of Law in Opposition to Motion for Preliminary Injunction at 7-9, *FTC v. Microsoft Corp.*, No. 23-cv-02880-JSC (N.D. Cal. June 17, 2023) [hereinafter Defs. PI Opp’n].

³⁰² FTC Complaint, *supra* note 295, at ¶ 17.

³⁰³ *Id.* at ¶ 114-15.

³⁰⁴ Defs. PI Opp’n, *supra* note 301, at 7-9, *passim*.

³⁰⁵ Motion For an Injunction Pending Appeal of the Federal Trade Commission at iii, *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir.) July 13, 2023, ECF No. 21.

³⁰⁶ Oli Welsh, *Everything that happened with Microsoft’s acquisition of Activision Blizzard*, Polygon (Oct. 13, 2023), <https://www.polygon.com/23546288/microsoft-activision-blizzard-acquisition-deal-merger-ftc-latest-news>.

³⁰⁷ Mark Williamson, *Stormy weather delays Microsoft’s acquisition of Activision Blizzard*, Maddocks (Nov. 14, 2023), <https://www.maddocks.com.au/insights/stormy-weather-delays-microsofts-acquisition-of-activision-blizzard> (regulators in U.K. and U.S. opposed the deal while the E.U., Japan, China, South Korea and Brazil approved it and discussion of their differing focus on the cloud gaming market and the console market).

Activision’s cloud gaming rights to Ubisoft³⁰⁸; the CMA then approved this merger on September 22, 2023.

Before the parties consummated their merger in October 2023, the FTC reactivated its administrative proceeding challenging the merger’s “likely anticompetitive effect with a series of hastily assembled side deals” that the FTC never examined or believed would ameliorate the competitive concerns. The FTC suit is pending as of January 2024.

2. Live Nation and Ticketmaster- A failure of merger enforcement and remedies

The live events ticketing market in the U.S. is expected to reach about \$40 billion in 2027, up almost 60% from 2022.³⁰⁹ Live events is an important market, both for eventgoers and fans, for artists and teams, and for the smaller businesses that compete in concert promotion and venue management. In the wake of the pandemic, the return to public events and the benefits of connecting fans and artists and teams, provide an important outlet for a beleaguered public. But the live events markets are dominated by a monopoly – Live Nation-Ticketmaster, where its market shares in tickets and exclusive contracts exceed 70%. This story of market power began even before the merger in 2010 and continues today.

The merger of Live Nation and Ticketmaster melded together artist management, concert promotion, venue operation, and ticketing in a monolithic, multi-level supply chain in the live music business. The \$2.5 billion transaction combined Ticketmaster, the market leader in artist management and dominant seller of tickets to live music events across the country, with Live Nation, the leading concert promoter. In 2008, Ticketmaster held contracts for more than 80% of large venues and Live Nation handled one-third of major concert events, was the second leading owner-operator of concert venues in the country, and also provided ticketing services.³¹⁰

The DOJ’s investigation of the proposed merger was joined by seventeen states, including California. In challenging the deal, the government raised significant vertical and horizontal competitive issues related how the proposed merger would lessen competition substantially for primary ticketing services to major concert venues located in the United States.³¹¹ Vertical concerns centered on enhanced post-merger incentives for Live Nation-Ticketmaster to exclude rivals by “explicitly or practically” requiring venues to take: (1) their primary ticketing services if the venues only wanted concerts promoted by, or concerts by artists managed by, the merged company; or (2) concerts they promoted, or concerts by artists they

³⁰⁸ Brad Smith, *Microsoft and Activision Blizzard restructure proposed acquisition and notify restructured transaction to the UK’s Competition and Markets Authority*, Microsoft blog (Aug. 21, 2023), <https://blogs.microsoft.com/on-the-issues/2023/08/21/microsoft-activision-restructure-acquisition/>.

³⁰⁹ Nadine Koutsou-Wehling, *Online Ticketing Market: Revenues, Pricing, Super Bowl & Other Trends*, ECDB (Feb. 08, 2024), <https://ecommercedb.com/insights/online-ticketing-global-market-rises-u-s-revenues-on-top/4637>.

³¹⁰ John E. Kwoka and Diana L. Moss, *Behavioral merger remedies: Evaluation and implications for antitrust enforcement*, 57 ANTITRUST BULL. 979 (2012), at 990-992.

³¹¹ *United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc.*, Amended Complaint, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 28, 2010) (“Amended Complaint”), at p. 6.

managed, if those venues only wanted to obtain the merged company's primary ticketing services.³¹²

Moreover, the horizontal combination of Ticketmaster's dominant position in primary ticketing services with Live Nation's upstart self-ticketing service eliminated an important rival that could have—but for the merger—grown to challenge Ticketmaster's dominance in primary ticketing.³¹³ Nonetheless, DOJ approved the merger, subject to conditions contained in the 2010 Decree.³¹⁴ The 2010 Decree set forth conduct remedies to address vertical concerns, including prohibitions on anticompetitive conduct and retaliation against venue owners.³¹⁵ The 2010 Decree also required the merged company to license its ticketing platform (Host) to AEG, the second leading concert promoter and an operator of a number of major venues, and to divest Paciolan, the venue-based ticketing division, to Comcast-Spectacor, a small and primarily regional ticketing service.

The DOJ did not need a crystal ball in 2010 to have predicted the imminent failure of the remedies contained in the 2010 Decree. Ticketmaster's monopoly in ticketing was a fact, as acknowledged by the government at the time: "Ticketmaster has dominated primary ticketing, including primary ticketing for major concert venues, for over two decades."³¹⁶ The merger "supercharged" the firm's incentives to foreclose competing venue operators, or raise their costs, by cutting them off from access to critical inputs (i.e., concerts), unless they contracted with Ticketmaster for ticketing services. The harmful effects of the Live Nation-Ticketmaster merger were therefore virtually *guaranteed* by pairing up Live Nation's concert promotion services with Ticketmaster's entrenched monopoly in ticketing.

The conduct remedies in the 2010 Decree did nothing to prevent Live Nation-Ticketmaster from engaging in the exclusionary conduct that animated the government's Motion to Amend the Decree in 2020. The remedies did not restore, much less spur, competition in the primary ticketing market. This outcome came as no surprise. Behavioral remedies do nothing to change the merged firm's incentive to exercise market power.³¹⁷ They create a system of quasi-regulation under which conduct must be continually monitored – a task for which the agencies and courts are ill-suited.

In addition to foreclosing rival venue operators and blocking entry into the primary ticketing market, Live Nation-Ticketmaster has leveraged its market power throughout both primary and resale ticketing.³¹⁸ Resale markets can enhance efficiency by providing a venue for fans to sell and buy tickets, balance supply and demand, and even expand demand for live music, to the

³¹² *United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc.*, Competitive Impact Statement, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 25, 2010), at 17. *See also*, Kwoka and Moss, *supra* note 310.

³¹³ Amended Complaint, *supra* note 311.

³¹⁴ *United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc.*, Proposed Final Judgment, Case No. 1:10-cv-00139-RMC (D.D.C. Jul. 30, 2010) ("2010 Decree").

³¹⁵ *Id.*, at 17.

³¹⁶ Amended Complaint, *supra* note 311, at 10.

³¹⁷ Kwoka and Moss, *supra* note 310.

³¹⁸ *See, e.g., StubHub, Inc. v. Golden State Warriors, LLC*, No. C 15-1436 MMC (N.D. Cal. Nov. 5, 2015).

benefit of artists and concertgoers alike. But there is evidence that Live Nation-Ticketmaster has acted to impede the development of resale ticketing through actions designed to disadvantage resellers. These include restrictions on the transferability of tickets, holding back ticket inventory, and releasing tickets only 48 hours before show times.³¹⁹

Live Nation-Ticketmaster is a textbook example of the perils of lax merger enforcement in a highly concentrated market. With evidence of harmful conduct from an illegal merger and a failed remedy, the DOJ is now contemplating bringing a monopolization case against the ticketing behemoth. A successful case, should it be brought, could lead to a structural breakup remedy to separate Ticketmaster from Live Nation and to further break up Ticketmaster into smaller pieces.³²⁰ In the meantime, a campaign to denigrate the resale market has led to legislative proposals to regulate resale, jeopardizing the very existence of the resale market and harming consumers and artists alike.³²¹

Live Nation-Ticketmaster is an important example of how failed merger enforcement has led to the leveraging of pre-existing market power and harm to consumers and labor. Since revisiting the 2010 Decree is no longer an option, DOJ must turn to other tools of enforcement to address these concerns. Needless to say, stronger merger enforcement in 2010 would have produced a very different outcome.

VI. SUMMARY

Healthcare, pharmaceuticals, entertainment and food and agriculture are important consumer- and worker-facing sectors in California. The competitiveness of markets in these sectors has effects both on the California economy and how the state's economic resources and output factor into national and global markets for important commodities and services. The state of competition in these sectors also has an impact on attracting business and labor to California, in terms of opportunity, equity, quality of life, and the cost of living.

As the CLRC reviews the detailed analysis of top-line competition issues in major sectors contained in this chapter, the working group encourages the Commission to identify policies and legislation best suited to addressing these concerns. These include, among others, antitrust enforcement and regulatory, labor, and intellectual property law and policy. In identifying the tools

³¹⁹ See, e.g., Alejandra Reyes-Velarde, *Why the Black Keys shut out hundreds of fans, causing chaos at the Wiltern*, latimes.com, Sep. 20, 2019, <https://www.latimes.com/california/story/2019-09-20/black-keys-wiltern-tickets-ticketmaster>.

³²⁰ Diana L. Moss, *Busting the Live Nation-Ticketmaster Monopoly: What Would a Break-Up Remedy Look Like?* Am. Antitrust Inst. (Jul. 11, 2023), https://www.antitrustinstitute.org/wp-content/uploads/2023/07/AAI_LN-TM-on-Breakup-Remedy_7.11.23.pdf.

³²¹ Diana L. Moss, *Fans Last? How the Fans First Act Hands Live Nation-Ticketmaster More Market Power*, ProMarket (Feb. 14, 2024), <https://www.promarket.org/2024/02/14/fans-last-how-the-fans-first-act-hands-live-nation-ticketmaster-more-market-power/>.

in the “toolkit,” it will be important that policy be designed to work together, versus at odds with each other, to promote the benefits of competition in California, and in other markets influenced by the Golden State.