

The Colorado State Antitrust Act of 2023

Key Provisions and Implications

BY MATT SCHOCK

This article explains key provisions of the Colorado State Antitrust Act of 2023, highlights changes from the previous law, and discusses some practical implications of the new law.

On June 7, 2023, Governor Jared Polis signed into law the Colorado State Antitrust Act of 2023 (2023 Antitrust Act), marking one of the most significant updates to Colorado antitrust law since the state revamped its competition statute more than 30 years ago.

The new law creates additional legal claims, expands the Colorado attorney general's enforcement authority, increases criminal and civil penalties, and gives courts additional discretion to fashion remedies. Each of these changes could usher in substantial shifts in Colorado state antitrust enforcement, both private and public. This article highlights those potential shifts and offers some key takeaways for those operating within Colorado's evolving competitive landscape.

Changes to the Colorado Antitrust Act

The 2023 Antitrust Act repeals and reenacts its predecessor statute, the Colorado Antitrust Act of 1992 (1992 Antitrust Act), and makes six significant updates, all of which expand the scope of Colorado antitrust law.

Aiding and Abetting Liability

It is now "unlawful to facilitate or aid and abet another person in violating" the 2023 Antitrust Act, and each instance of facilitation or aiding and abetting is an independent violation.¹

The new aiding and abetting provision enlarges the scope of liability for concerted conduct in Colorado. Under the 1992 Antitrust Act, concerted conduct liability was limited to those who participated in contracts, combinations, or conspiracies that restrained trade—that is, the *parties* to anticompetitive agreements. Now the law may reach *nonparties* that assist in creating or maintaining those agreements, whether by facilitating competitor communications, punishing cartel deviations, cutting off crucial

commercial channels, or engaging in other conduct commonly thought to restrain trade. These nonparties could include advisory firms, investors, research analysts, or, in some cases, market participants at different supply-chain levels (e.g., suppliers to conspiring distributors, distributors to conspiring retailers, etc.).

The 2023 Antitrust Act does not prescribe legal standards for aiding and abetting, but existing Colorado law may point the way. In civil cases, Colorado recognizes liability for aiding and abetting a tortious act when "the party whom the defendant aids performs a wrongful act that causes an injury, the defendant is generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance, and the defendant knowingly and substantially assists the principal violation."² For criminal offenses, Colorado makes an accomplice liable as a principal "if, with the intent to promote or facilitate the commission of the offense," the accomplice "aids, abets, advises, or encourages the other person in planning or committing the offense."³ Notably, neither of Colorado's aiding and abetting standards requires the actor to be a member of, party to, or direct participant in a concerted activity or in other activity that forms the basis of the violation; assisting is enough.

Expanded Attorney General Investigative Authority

The 2023 Antitrust Act also expands the Colorado attorney general's investigative authority by permitting the attorney general to request information from "any person" who may have information relating to potential antitrust violation.⁴ Previously, the attorney general could issue requests to investigation targets, but the law was not clear on the power to do so for witnesses or third parties. The 2023 Antitrust Act clarifies and enlarges the scope of the attorney

general's authority, aligning it more closely with that of federal antitrust enforcers.

Additional Remedial Tools for Courts

The 1992 Antitrust Act permitted recovery of actual damages but did not address restitution or unjust enrichment. The 2023 Antitrust Act changes that. Courts can now order remedies to make successful plaintiffs "whole" or to disgorge purportedly ill-gotten gains from unsuccessful defendants.⁵ These changes add to an already formidable remedy structure that, like the federal antitrust laws, affords treble damages to prevailing plaintiffs. Additionally, in actions brought by the Colorado attorney general, the changes permit the type of recovery that the Federal Trade Commission (FTC) was barred from obtaining in *AMG Capital Management, LLC v. FTC*,⁶ making Colorado an attractive ally to the FTC in joint state-federal antitrust matters where potential remedies include restitution and disgorgement.

Illinois Brick Repealer

One of the more significant additions to the 2023 Antitrust Act allows indirect purchasers to sue and recover for antitrust violations. Indirect purchasers are those who buy products indirectly from the firm purportedly responsible for the anticompetitive conduct. For example, if a group of widget manufacturers fixed supra-competitive prices on widgets and sold them to widget retail stores, which in turn sold them to widget consumers, the consumers would be considered indirect purchasers of the price-fixed widgets.

Under the US Supreme Court's opinion in *Illinois Brick Co. v. Illinois*,⁷ indirect purchasers generally do not have rights of action under federal antitrust laws. In the example above, although the widget retail stores might be able to sue the widget manufacturers under the Sherman Act, the widget consumers could

not. But because federal antitrust laws do not preempt state antitrust laws, states can “repeal” *Illinois Brick* to allow indirect purchasers to sue under state law.⁸

Colorado has done just that. The 2023 Antitrust Act now permits private indirect purchaser actions, whereas the 1992 Antitrust Act did not.⁹ It also expands the Colorado attorney general’s authority to bring such actions on behalf of private actors; under the 1992 Antitrust Act, the attorney general could bring indirect purchaser claims only on behalf of government or public entities.

Increased Per-Violation Penalties

Penalties for violations under the 2023 Antitrust Act are significantly higher than they were under the 1992 Antitrust Act. In civil actions brought by the Colorado attorney general, maximum per-violation civil penalties increased from \$250,000 to \$1 million.¹⁰ And in criminal actions, the maximum per-violation penalty rose from \$1 million to \$5 million.¹¹ These are the largest penalty increases ever instituted under Colorado’s antitrust laws.

Statute of Limitations Changes

The 2023 Antitrust Act makes two updates to the statute of limitations. First, it clarifies that for a series of acts or practices (including mergers or acquisitions) that purportedly violate the 2023 Antitrust Act, the statute of limitations accrues on the date that the *last* event in that series occurs.¹² Second, it tolls the statute of limitations for any matter subject to the 2023 Antitrust Act that is being addressed in a federal proceeding until one year after that federal proceeding concludes.¹³

Key Takeaways and Implications

Given the scope of the changes, including expanded public and private antitrust enforcement capabilities, the 2023 Antitrust Act could alter the antitrust law landscape in Colorado in several important ways.

Increased Plaintiff Power

Each of the 2023 Antitrust Act’s new provisions enhances potential plaintiffs’ ability to bring—and perhaps win—competition cases in

“
In civil actions brought by the Colorado attorney general, maximum per-violation civil penalties increased from \$250,000 to \$1 million. And in criminal actions, the maximum per-violation penalty rose from \$1 million to \$5 million.”

Colorado. New legal claims, improved recovery options, and a relaxed statute of limitations will make antitrust claims easier to maintain and will likely increase plaintiffs’ leverage in seeking recovery.

By exclusively reinforcing plaintiff power, the Colorado General Assembly may be suggesting that part of the new statute’s intent is to adjust a perceived imbalance in Colorado’s competitive landscape. The 2023 Antitrust Act lacks any new restrictions on government regulation

and enforcement or private rights of action; the assembly presumably could have included such restrictions if it had concerns about potentially unwarranted claims or recoveries. But it did not, and its lack of action suggests that if the assembly did perceive a competitive imbalance, that imbalance favored the targets of Colorado competition law—not its enforcers.

Same Cases, Additional Liability

The additions of aiding and abetting and indirect purchaser claims could lead to new types of lawsuits under the 2023 Antitrust Act. But it is more likely they will instead expand the scope of cases that could have been brought under the 1992 Antitrust Act. Aiding and abetting claims are, by their nature, secondary violations; even if they independently violate Colorado’s antitrust laws, they must be connected to another party’s primary violation or attempted violation of those laws. This means that to bring aiding and abetting claims, a plaintiff will most likely need a conventional antitrust claim as well—one that would have been permitted under the 1992 Antitrust Act.

Similarly, indirect purchaser cases rarely stand alone; they often involve direct purchasers, who likewise tend to allege harm where sellers charge purportedly supra-competitive prices. Under the 1992 Antitrust Act, direct purchaser claims were always permitted; under the 2023 Antitrust Act, indirect purchaser claims are more likely to tag along with direct purchaser cases than arise independently.

Although *new* case types are unlikely, new parties to *existing* case types are almost certain. In price-fixing cases, for example, direct purchasers can expect to be joined by indirect purchasers, particularly if claimed overcharges are alleged to have filtered through to downstream consumers. In conspiracy cases, those who were previously third parties could become defendants if there is evidence that they took action to further an allegedly anticompetitive enterprise. And in investigations by the Colorado attorney general, parties who may have been witnesses under the 1992 Antitrust Act could become subjects or targets if they are suspected of helping a target gain or maintain an anticompetitive advantage.

Greater Exposure for Roll-Up Transactions

The changes to the 1992 Antitrust Act's statute of limitations could significantly affect challenges to so-called "roll-up" transactions that combine several entities into one. Roll-ups typically take place over the course of months or years, and the individual combinations of which they are composed tend to be small and potentially insignificant on their own. But if the sum total of a roll-up's component transactions presents competitive concerns after an extended period of consolidation, the 2023 Antitrust Act could allow a challenge to that consolidation that brings in every transaction it incorporates—even transactions that would otherwise fall outside the statute of limitations.

Though the 2023 Antitrust Act does not name specific types of seriatim transactions it would encompass, some potential candidates include physician group and medical provider combinations as well as consolidations of traditionally dispersed specialized services like court reporting and personal accounting practices. Post-consummation challenges to these types of transactions could create a host of potential business risks, including defense costs, possible divestiture or disgorgement of combined entities, and future restrictions on similar deals.

Expanded Attorney General Powers

In recent years, the Colorado attorney general's office has taken a prominent role in antitrust enforcement, and the 2023 Antitrust Act reflects the General Assembly's continued confidence in the attorney general's office to police potential antitrust violations. Expanding the attorney general's investigative authority provides a broader tool set for reviewing competitive concerns, and increasing the 2023 Antitrust Act's per-violation penalties strengthens the attorney general's hand in seeking relief for alleged violations.

Conclusion

The 2023 Antitrust Act expands the scope of key aspects of Colorado antitrust law. In addition to opening the door to new potential plaintiffs and broader claims, the law increases penalties for violations and broadens the attorney general's investigative authority. 



Matt Schock is an antitrust litigator in BakerHostetler's Denver and Washington, D.C. offices and a former assistant attorney general for antitrust in the Colorado Attorney General's Office. His practice focuses on antitrust and competition and spans complex litigation, criminal and civil investigations, and regulatory matters—mschock@bakerlaw.com.

Coordinating Editor: Todd R. Seelman, Todd.Seelman@lewisbrisbois.com

NOTES

1. CRS § 6-4-108.
2. *Holmes v. Young*, 885 P.2d 305, 308 (Colo. App. 1994).
3. CRS § 8-1-603.
4. CRS § 6-4-111.
5. CRS § 6-4-112(4)(b).
6. *AMG Capital Mgmt., LLC v. FTC*, 141 S.Ct. 1341 (2021).
7. *Ill. Brick Co. v. Ill.*, 431 U.S. 720 (1977).
8. *See Cal. v. ARC Am., Corp.*, 490 U.S. 93, 102 (1989) ("Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.").
9. Permitting indirect purchasers to sue and recover damages under the 2023 Antitrust Act is also consistent with the elimination of the former § 6-4-119 in the 1992 Antitrust Act, which stated: "It is the intent of the general assembly that, in construing this article, the courts shall use as a guide interpretations given by federal courts to comparable federal antitrust laws."
10. CRS § 6-4-113.
11. CRS § 6-4-118.
12. CRS § 6-4-119(1)(b).
13. CRS § 6-4-119(4).



We're in this together.

CBA members can now take advantage of **flat discounts of up to 50%** on UPS® small package shipping services.

To learn more and start saving:

Visit: savewithups.com/cba

Call: 1-800-MEMBERS (636-2377)

© 2023 United Parcel Service of America, Inc. UPS, the UPS logo and the color brown are trademarks of the United Parcel Service of America, Inc. All rights reserved. 1045582593



CBA
Est. in 1897
Colorado Bar Association™