

United States

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1. Introduction and Executive Summary¹

The United States has a federalist system in which the powers of our federal or national government, though quite broad, are enumerated, defined, and in important ways limited. The powers of the governments of the American States, which have a residual sovereign status,² are numerous and indefinite, a point that shows up most strongly in the fact that they, unlike the federal government, possess a so-called general police power to legislate on any subject.³ Accordingly, not only can the federal government enforce federal antitrust law, but the American States can and do enforce both federal antitrust law as well their own state antitrust law.⁴

Insofar as Question A asks about the practices regarding, and rights concerning, antitrust settlements in the United States, any discussion of such settlements must occur against this federalist backdrop. Moreover, insofar as enforcement of federal antitrust law is concerned, there are two federal agencies charged with enforcing it: the United States Department of Justice and the Federal Trade Commission. The U.S. Group of the LIDC hopes that the multi-jurisdictional and multi-actor nature of antitrust enforcement in the United States makes our answer to the question before the LIDC Congress on settlements both interesting and informative for our colleagues.

In sum, antitrust settlements in the United States by government enforcers fall into one of the following categories:

1. Criminal plea agreements involving the United States Department of Justice;⁵
2. Civil conduct and merger settlements involving the United States Department of Justice;
3. Civil conduct and merger settlements involving the Federal Trade Commission;
4. *Non-parens patriae* settlements involving the American States; and

¹ The expression of views by the national reporter herein, while they have been endorsed by the U.S. Group of the LIDC, do not reflect the views of his office or any other body in which he holds a position.

² See e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999).

³ See, e.g., *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

⁴ *California v. American Stores*, 495 U.S. 271, 283-84 (1990); *California v. ARC America*, 490 U.S. 93, 101-02 (1989).

⁵ This national reporter will not discuss state criminal plea agreements involving state antitrust statutes. A number of States either do not have criminal antitrust statutes or, like California, do have such statutes but often defer to federal criminal prosecutions of defendants for violation of federal antitrust law as a matter of law, see Cal. Pen. Code § 656, or as a matter of policy. In any event, the national reporter believes that the standards and processes for state criminal plea agreements are almost the same as their federal counterparts.

5. *Parens patriae* settlements involving the American States.⁶

Regarding both state and federal law, substantial deference is given by the courts to the Executive Power, i.e., federal agencies and state attorneys general enforcing antitrust law on the presumption that executive agencies are acting in the public interest. This Executive Power is embedded in the United States Constitution and in cases interpreting that Constitution but it does, as in the case of the American States, precede the Constitution and dates back to the time when the American States were colonies of the United Kingdom. Giving the Executive substantial deference in its investigatory and enforcement functions has flowed from the constitutional structure involving the balance of executive, legislative, and judicial powers in our Federal and in our State Constitutions. It also flows from the practical considerations involved in entering into antitrust settlements in trying to serve the public interest through balancing multiple policy objectives.

But deference is not abdication. There is the due process interest in ensuring that hearings on antitrust settlements are public; comments may be offered; and ultimately in some form the courts have to approve of entry of the settlement, no matter how deferential their review may be. Generally speaking, American process on the review of antitrust settlements falling into one of the above enumerated categories comports with due process though it is not always a perfect fit. Though those interests are most acute where criminal antitrust settlements and state *parens* settlements may be concerned, here, too, American process on the review of such settlements generally comports with due process.

That due process interest must be tempered to a very limited extent when a settlement is reached while an antitrust matter is still under investigation, i.e., before an actual case has been initiated. Executive agencies in the United States have investigatory powers—either using American grand juries or, in the civil context, wielding powers equivalent to the powers possessed by American grand juries—that are quite broad but require confidentiality in the gathering of information. In turn, that confidentiality requirement, for example, precludes defendants’ access to the investigatory files of government enforcers, let alone third parties. Though this need for confidentiality lessens once litigation begins, such that defendants can use various discovery and motion devices to determine the Government’s case against them, such concerns can continue to exist (but only as to certain very limited categories of information) vis-à-vis third parties.

The national reporter for the United States will discuss how these Executive discretion and due process interests are balanced in the five enumerated types of antitrust

⁶ There are isolated instances in which American States have brought class actions that they themselves have settled or have participated in joint *parens patriae*-class settlements. This report will not discuss class action settlements, or private settlements between companies, as being outside the scope of Question A.

settlements. In doing so, the national reporter will discuss due process concerns, either procedural or substantive, that have been raised as to one or more of these types of antitrust settlements. Generally speaking, the national reporter finds that none of these concerns are sufficient to trump the deference accorded on practical and constitutional grounds to executive agencies in bringing and settling antitrust cases. But there are a couple of categories of these antitrust settlements in which some limited tinkering with existing processes may be desirable on policy grounds.

Question A does not mention, nor does the international reporter, the issue of the extraterritorial effect of American antitrust settlements. The U.S. Group believes such an issue not only to be premature at this point but also to be tied into non-settlement related issues; as such it would warrant closer attention at a future Congress. However, the U.S. Group offers by way of background the current state of the law on this subject in the United States as due process concerns have been raised in this area.

The national reporter and the U.S. Group applaud the forthcoming LIDC Congress in Turin for tackling the complex and intricate issues represented by antitrust settlements. Though the U.S. Group is not recommending, as a general matter, changes to the process and standards for U.S. antitrust settlements, its survey of U.S. practices on antitrust settlements leads it to offering suggestions to the LIDC Congress for its resolution on this question.

2. The Constitutional Role and Powers of the Executive Branches in the United States And its American States as They Pertain to Antitrust Settlements

In the American republican system, there is a separation of powers among the Executive, Legislative, and Judicial Branches (e.g., the President, Congress, and the federal courts at the federal government level) embedded in our Constitution in which each branch enjoys a certain role and can wield certain powers.⁷ All executive powers in the federal government are vested in the Executive Department, including for purposes of this report, the federal antitrust authorities, who are required “to take care that the Laws be faithfully executed.”⁸ As witnessed by the full investment of the Pardon Power in the Executive Department,⁹ the Framers envisioned the Executive Branch having broad discretion on the disposal of cases.

⁷ General principles regarding the need for separation of powers between the Executive, Legislative, and Judicial Branches of Government as being essential to a free Constitution are discussed in such cases as *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-43 (1977). A separation of powers also aids in securing liberty. See, e.g., *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Similar separation of powers occurs under our state constitutions for similar reasons. See, e.g., *Southern California Edison Co. v. Public Utilities Comm’n*, 173 Cal.Rptr.3d 120, 143-44 (Cal. App. 2 Dist. 2014) (discussing California constitutional provisions and cases).

⁸ See U.S. Const., Art. II, §§ 1, 3.

⁹ See U.S. Const., Art. II, § 2, cl. 1.

Though the American States often have a divided Executive Branch in the sense that multiple executive officers will be elected directly by the People,¹⁰ the power to act as chief law enforcement officer most often resides in a state's Attorney General.¹¹ Insofar as a state's executive officer acts as the chief law enforcement officer, his or her role is in a state's system comparable to that enjoyed by the President, and the executive agencies through which he acts, in the federal system.¹² And similar points can be made as to whether drafters of state constitutions envisioned broad discretion being vested in the Executive in disposing cases based on the conferral of the state pardon power.¹³

In such a system, or any comparable system, the judiciary cannot dictate policy to federal executive or state prosecutorial agencies but rather are required to respect the policy choices between potentially competing views of the public interest engaged in by those agencies.¹⁴ As our Supreme Court stated in the famous case of *Marbury v. Madison* establishing judicial review for compliance with constitutional mandates: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform a duty in which they have a discretion."¹⁵ Indeed, the Executive, unlike the judiciary, is directly accountable to the electorate, thus reinforcing the need for judicial deference.¹⁶

Our federal and state antitrust laws reflect this notion that state and federal executive agencies, charged with prosecuting antitrust violations, act in the public interest. For example, under federal antitrust laws, the federal government is deemed to be acting in the public interest when it seeks injunctive relief; accordingly, it need only show a violation of those laws for it to be entitled to injunctive relief.¹⁷ In contrast, private litigants must show a threatened loss or damage, in addition to a violation of antitrust law, in order to seek injunctive relief.¹⁸ Because the standards for seeking injunctive relief differ between the federal government on the one hand, and private plaintiffs on the

¹⁰ *E.g.*, *Brown v. Chiang*, 132 Cal.Rptr.3d 48, 63-64, 69 (Cal. App. 3 Dist. 2011). Even when multiple executive officers may share executive powers under a state's law, "supreme" executive power may still be vested in the Governor, a State's equivalent of our federal government's President. *See, e.g., id.* at 69-70; *see also, e.g., Professional Engineers in Cal. Government v. Schwarzenegger*, 239 P.3d 1186, 1201 (Cal. 2010).

¹¹ *E.g.*, Cal. Const. art. V, § 13 (California Attorney General represents the People of the State of California as the chief law enforcement officer). In contrast to the United States Attorney General, for example, who is appointed by the President and confirmed by Congress, the California Attorney General is directly elected by the People of the State of California.

¹² *See, e.g., Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666-67 (2013).

¹³ *Cf. Brown*, 132 Cal.Rptr.3d at 70 (discussing and quoting *McCauley v. Brooks*, 16 Cal. 11 (1860)).

¹⁴ *U.S. SEC v. Citigroup Global Markets, Inc. (Citigroup Global Markets I)*, 673 F.3d 158, 163-64 (2nd Cir. 2012).

¹⁵ *Marbury v. Madison*, 1 Cranch 137, 170 (1803).

¹⁶ *See U.S. (SEC) v. Citigroup Global Markets (Citigroup Global Markets II)*, 752 F.3d 285, 296-97 (2nd Cir. 2014) (citing and discussing non-Security Exchange Commission cases).

¹⁷ *United States v. Borden Co.*, 347 U.S. 514, 519 (1954) (citing 15 U.S.C. § 25).

¹⁸ *Id.* (citing 15 U.S.C. § 16).

other, the ability of one of these plaintiffs to obtain injunctive relief does not bar the other from attempting to seek injunctive relief.¹⁹ State antitrust laws can reflect this distinction as well.²⁰

It is important in our system (and in other systems where a comparable choice has been made) that, as here, our federal and state legislative branches have ratified the wide scope of, and deference of the judicial branch to, the Executive's power to settle cases.²¹ The power of any Executive branch is at its acme when it acts in explicit or implicit agreement with the Legislative branch.²² As the national reporter explains, such legislative ratification of executive discretion—insofar as antitrust settlements are concerned—has often occurred in our state and federal systems.

But practical reasons also rightly play a role in the deferential position taken by state and federal courts vis-à-vis settlements by the Executive. The courts are reluctant to second-guess the Executive in its setting of its cases because to do so puts the Executive in a very difficult situation: it must expend resources in litigating or continuing to litigate a case it believes should have been settled; or it must drop its case entirely, leaving antitrust defendants to continue anti-competitive practices unhindered.²³ The more second-guessing of settlements that the courts indulge themselves in, the more it disserves the ability of the Executive to settle future cases, with all of the burdens on the limited resources of our judicial system and our prosecutors that such a trend would carry.²⁴ In fact, so many factors can go into a decision to settle, such as the value of the proposed compromise, the likelihood of obtaining a better settlement, the prospects of doing better or faring worse after a trial, and the need for resources to continue litigation, that the *decision to settle*—as opposed to the settlement so achieved—is viewed as being immune from judicial review.²⁵ And the Executive remains politically accountable to the People

¹⁹ *Id.* at 518-20 (private plaintiffs' success in obtaining an injunction cannot bar federal government from requesting an injunction); *Howard Hess Dental Laboratories, Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 248-50 (3rd Cir. 2010) (federal government's success in obtaining injunction cannot bar private plaintiffs from requesting one but the required evidentiary showing from those plaintiffs must factor in the existence of the government injunction).

²⁰ *See, e.g.* Cal. Bus. & Prof. Code § 16754.5 (affording the California Attorney General a wider scope in the remedial court orders she may seek for violations of state antitrust law than private plaintiffs enjoy); *People v. Pacific Land Research Co.*, 569 P.2d 125, 129-31 (Cal. 1977) (distinguishing the California Attorney General from private plaintiffs by noting that, when the California Attorney General seeks civil penalties, injunctive relief, and restitution, she is acting in a law enforcement capacity and in the public interest).

²¹ *United States v. Microsoft (Microsoft I)*, 56 F.3d 1448, 1456 (D.C. Cir. 1995).

²² *See, e.g., Youngstown Steel*, 343 U.S. at 635.

²³ *Microsoft I*, 56 F.3d at 1456.

²⁴ *See Microsoft I*, 56 F.3d at 1456, 1459.

²⁵ *See Citigroup Global Markets I*, 673 F.3d at 164; *cf. Action on Safety and Health, et al. v. FTC*, 498 F.2d 757, 759, 761-63 (D.C. Cir. 1974) (court cannot order Federal Trade Commission to allow third party to intervene in their consent decree negotiations). The United States Supreme Court has found the analogous decision to refuse to bring an action based on a violation of law to present similar considerations and hence

of the United States for its exercise of discretion in a way that courts are not should the courts unreasonably second-guess that discretion on a settlement.²⁶ Insofar as the courts recognize these considerations, and others mentioned in the preceding paragraphs, they can ensure that the separation of powers among different branches still leads to a workable government.²⁷

In the end, these considerations are not different insofar as a state executive, such as a state's attorney general, may be concerned.²⁸ Nor are these considerations any difference insofar as criminal settlements are concerned. The unreviewable discretion of government prosecutors to bring a case²⁹ would logically support the *decision to settle a criminal antitrust case*, as opposed to the settlement itself, to be judicially unreviewable.

Though, as explained in more detail below, giving the Executive wide deference on antitrust civil and criminal settlements fits our system, such wide deference should not involve complete deference.³⁰ Avoiding complete deference is important in avoiding arbitrary (i.e. flipping a coin) or inherently unreasonable actions (i.e., actions that are unreasonable after according every presumption and making every assumption in favor of the government, including the need for forward-looking relief) when reviewed against the record provided.³¹ It is important in ensuring public access to a hearing on entry of a settlement agreement and an opportunity for public comment. And it forces the government to be sufficiently clear in its goals, in the measures it proposes, and in the legal basis for its settlements,³² all important goals as a matter of law and a matter of competition policy.³³

to be unreviewable by the courts as a presumptive matter. *See Heckler v. Chaney*, 470 U.S. 831, 831-32 (1985).

²⁶ *See Citigroup Global Markets II*, 752 F.3d at 296-97.

²⁷ *See, e.g., Youngstown Steel*, 343 U.S. at 635 (Jackson, J., concurring).

²⁸ *See Hollingsworth*, 133 S. Ct. at 2666-67 (set in the context of a refusal by the California Attorney General to pursue litigation defending the constitutionality of a state initiative barring same-sex marriage).

²⁹ *See Heckler*, 470 U.S. at 831 (citing and discussing cases going back to 1869).

³⁰ *See, e.g., Citigroup Global Markets I*, 673 F.3d at 168; *see also, e.g., Nixon*, 433 U.S. at 443 (noting that a separation of powers does not mean a complete division of authority between the branches and that each branch does not operate with complete independence); *Southern California Edison*, 173 Cal. Rptr. 3d at 144 (same).

³¹ *See generally, e.g., Massachusetts et al. v. Microsoft (Microsoft II)*, 373 F.3d 1199, 1237-46 (D.C. Cir. 2004) (noting that the remedies contained in the consent decree between the federal government and the States had a number of innovative features designed to restore competition in the affected market, or even ensure competition in certain closely-related markets going forward, but did not go too far in favoring the defendant's competitors over the defendant); Daniel Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 608, 648-51 (2004) (discussing how the FTC's enforcement of Section 5 in the area of privacy via the use of Federal Trade Commission consent decrees is not inherently arbitrary but rather has grown "incrementally" and "predictably"). The paradigm for an unreasonable antitrust settlement would be one in which a court was "exceptionally confident" that adverse antitrust consequences would result. *Microsoft I*, 56 F.3d at 1460.

³² *Cf. e.g., Microsoft II*, 373 F.3d at 1242 (reviewing whether certain terms in the federal and certain States' consent decree with Microsoft were sufficiently clear, including one left purposefully undefined so that it

3. Civil and Criminal Settlements Not Only Allow the Executive in the United States to Achieve Important Goals But Also Play a Key Contributing Role in the Development of Antitrust Law

Antitrust settlements in the American system are very common and, in the experience of the national reporter, can be initiated at any time in an investigative, trial, or appellate process by different actors such as federal or state government agencies, defendants, a court (once a case is filed), or by a special master or mediator appointed for the purpose of facilitating a settlement. Such settlements by federal and state antitrust enforcers, no matter how they were initiated and at what time they are executed, can have many benefits.

They can secure cooperation from key defendants, or individuals, without the help of which antitrust cases cannot be investigated or prosecuted.³⁴ They can allow the fine balancing of pro- and anti- competitive effects that can be involved with the conduct of enterprises that have, or threaten to acquire, market power even while ameliorating the worst of those anti-competitive effects. They can allow for the imposition of innovative or flexible antitrust remedies that can act to restore competition going forward³⁵ without the need for the kind of precedential finding of liability by a court or a jury that would expose companies to trebled damages.³⁶

could be forward-looking); Justin Whitesides, *The FTC's Competition Policy after the Intel Settlement*, 9 DePaul Bus. & Com. L.J. 555, 579-87 (2011) (making similar points in arguing for certain limits as to the Federal Trade Commission's use of Section 5).

³³ Cf. e.g., William Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 Geo. Mason L. Rev. 903, 923-24 (2009) (discussing the process for assessing agency performance as a matter of competition policy).

³⁴ See, e.g., Molly Kelley, *Settling for Settlement: The European Commission's New Cartel Settlement Procedure*, Wash. Univ. Global Studies L. Rev. 699, 700-02 (2010) (discussing amnesty or leniency programs for corporations that report to the government as to conduct violating antitrust laws); see also, e.g., U.S. Department of Justice, Antitrust Division, Antitrust Division Manual, § III(F)(9) at III-95 - 103 (5th ed. last updated Mar. 2004) (describing the amnesty program of the United States Department of Justice).

³⁵ Cf. e.g., *Microsoft II*, 373 F.3d at 1242 (reviewing whether certain terms in the federal and certain States' post-trial consent decree with Microsoft were sufficiently clear, including one left purposefully undefined so that it could be forward-looking).

³⁶ See, e.g., Whitesides, *The FTC's Competition Policy after the Intel Settlement*, *supra*, 9 DePaul Bus. & Com. L.J. at 586-87 (making that point as to the FTC's general use of Section 5); Thomas Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 1, 3-4, 24 (2011) (same regarding unfair competition); see also, e.g., Margaret Zwisler & Amanda Reeves, *Antitrust Judgments in Bench Trials as Evidence: The Unintended Consequences of Section 5(a)*, Sedona Conf. J. 113, 113-14, 120 (Fall. 2013) (discussing the difference between a trial judgment obtained by the United States Department of Justice on the one hand, and a settlement on the other hand, as admissible prima facie evidence in follow-on class actions).

In this respect, these settlements can allow for *soft* lawmaking, the use of consent decrees to set government expectations *over time* as to the legality of business conduct³⁷ as more experience is acquired as to the pro- and anti- competitive aspects of that conduct *without* the need for courts to determine—at what may be a premature stage—the legality of that conduct in what would constitute binding precedent.³⁸ As one example, the Federal Trade Commission adjudication of competition issues involving standard essential patents through a series of settlements—while controversial—have begun to set expectations as to the proper parameters of conduct involving standard essential patents while avoiding premature judicial findings that would constitute binding precedent as to that conduct.³⁹ As another example, the adjudication of vertical mergers in the telecommunications arena through a series of settlements have allowed the federal government to set expectations as to the parameters both of where it will have concerns over potential anti-competitive effects of those mergers and of what remedies it will expect to be imposed.⁴⁰ This latter use of settlements to address vertical merger concerns is important: requiring judicial decisions on this type of mergers risks, in the absence of an economic consensus or sufficient experience with these mergers, either unduly chilling what are generally pro-competitive mergers or unduly limiting any recognition of circumstances in which anti-competitive effects may be present.⁴¹ It also risks judicial decisions, following a rapid trial, involving an all-or-nothing approach, i.e., asset divestiture or approval of the mergers, when conduct-based remedies—that are potentially complex and may require extensive negotiation—may strike a more appropriate balance.⁴²

Finally, settlements allow for the economical and efficient management of government and judicial resources alike. This is an important goal given the length and complexity of antitrust cases as well as the burdens imposed by discovery in the American system.⁴³

³⁷ Cf. Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Colum. L. Rev. at 585-90, 599-600 (noting that a robust “common law” of privacy that gives a wealth of guidance to businesses on the application of Section 5 to privacy issues has now developed through FTC settlements but also noting that, initially, the Federal Trade Commission preferred self-regulation by online companies because of a legitimate fear that regulation would stifle online activity).

³⁸ Cf., e.g., Whitesides, *The FTC’s Competition Policy after the Intel Settlement*, *supra*, 9 DePaul Bus. & Com. L.J. at 586-87 (2011) (making similar, though not identical, general points as to the Federal Trade Commission’s use of Section 5); Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra*, 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 14-23 (same regarding unfair competition).

³⁹ See, e.g., Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, *supra*, 16 Geo. Mason L. Rev. at 909-11.

⁴⁰ See American Bar Association, *Telecom Antitrust Handbook*, Ch. 2 Mergers, at 63-64, 136-37, 140-43 (2d ed. 2013).

⁴¹ See *id.* at 136-37, 140-43.

⁴² See *id.* at 136-37, 144, 145, 146-47, 149-50, 154-56, 156-60.

⁴³ See, e.g., Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Colum. L. Rev. at 611-13 (discussing why companies enter into Federal Trade Commission settlements); cf. *In re Processed Egg*

The pervasive use of settlements in antitrust cases by federal and state government enforcers has not gone unchallenged by commentators though those commentators seem to focus almost exclusively on the pervasive use of consent decrees by the Federal Trade Commission. However, when parsed more closely, the views of these commentators revolve more around their dissatisfaction with the perceived vagueness of Section 5 of the Federal Trade Commission Act (hereinafter “Section 5”), and Section 5’s supposed failure to provide *fair notice* of what conduct is prohibited within its ambit.⁴⁴ Set against that backdrop, these commentators evince a preference that the Federal Trade Commission engage in straightforward rule-making under appropriate administrative processes in lieu of using *only* settlements and more informal statements to provide such notice. Though the national reporter has doubts that such a preference is constitutionally required or necessarily wise,⁴⁵ the national reporter observes that this debate is rooted in the particularities of certain uses of Section 5, which is an unfair competition statute; it does not pertain to the fundamental underlying question here about when, under what circumstances, and affording what type of processes, antitrust settlements should be reviewed. Thus, this *de facto* debate over the parameters of Section 5 does not, in the view of the national reporter, impact directly the issues regarding antitrust settlements raised by Question A.

It may, however, suggest that some sort of judicial review of the entry of Federal Trade Commission antitrust settlements may be warranted. On the one hand, any judicial review of a Section 5 settlement must account for the fact that Section 5 was expressly designed to be flexible to be able to address business conduct that the government should find, with time and experience, could have market-wide anti-competitive effects or that the

Prods. Antitrust Litig., 284 F.R.D. 278, 297-301 (E.D. Pa. 2012) (discussing these points as supporting an early antitrust settlement in class case).

⁴⁴ Compare, e.g., Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Colum. L. Rev. at 599-600, 604-05, 606-07, 608, 621-23, 625-26, 627-49, 651 (noting that a robust “common law” of privacy that gives a wealth of guidance to businesses on the application of Section 5 to privacy issues has developed through Federal Trade Commission settlements and as such provides such fair notice); Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra*, 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 4-23 (same regarding unfair competition based on text, legislative history, and case law) with e.g. Gregory Stegmaier & Wendell Bartnick, *Another Round in the Chamber: FTC Data Security Requirements and the Fair Use Doctrine*, J. Internet L., 1, 17-19, 23-25, 28-29 (Nov. 2013) (reaching opposite conclusion on application of Section 5 to data security and calling for rulemaking).

⁴⁵ The Federal Trade Commission’s Section 5 is no less precise than federal antitrust law with its general standard of reasonableness. The development of the common law, prosecutorial guidelines, and informal statements by government officials have all been thought to be sufficient to flesh out the parameters of this reasonableness standard under federal antitrust law in supplying fair notice to enterprises without the need for formal rulemaking. Accordingly, the same could apply for Section 5. Cf. e.g., Whitesides, *The FTC’s Competition Policy after the Intel Settlement*, *supra*, 9 DePaul Bus. & Com. L.J. at 555-57, 559-60, 561-63, 574-89, 621-23, 625-26, 627-49 (discussing the parameters of Section 5 pertaining to privacy based on its text, legislative history, case law, and scope of Federal Trade Commission settlements in suggesting how Section 5 should be applied going forward); Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra*, 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 4-23 (same regarding unfair competition based on text, legislative history, and case law).

government views as being incipient, i.e., that, if completed, would have anti-competitive effects. In this respect, it would need to take fair account of the fact that Section 5 can reach conduct that does not violate federal antitrust law.⁴⁶ On the other hand, some sort of judicial review of the entry of Federal Trade Commission settlements that imposed ongoing obligations or conditions on defendants would require the Federal Trade Commission to delineate more formally its view of the parameters of Section 5 over time without suffering through a rulemaking process that is more formal and protracted than that faced by other executive agencies.⁴⁷ If there were to be some sort of judicial review, it would, of necessity, need to be quite deferential given the constitutional and policy interests at stake.⁴⁸

A second set of concerns has recently emerged, arising out of the 2008 Great Recession, around the thesis that continued prosecutions should be preferred to settlements where those settlements do not include admissions of fact. The idea is a simple one: corporations escape their just desserts in terms of government action, and any follow-on private action seeking damages, when they are allowed to settle cases against them without ever having admitted wrong-doing.

However, as a matter of law, in contrast to entry of criminal antitrust settlements, entry of civil settlements does not require civil defendants to admit to the truth of a government agency's allegations.⁴⁹ The reasons for that, pertaining not only to the legality of not requiring admissions of fact but also to the wisdom of that rule, are simple:

Trials are primarily about the truth. Consent decrees [settlements with court orders] are primarily about pragmatism.⁵⁰ "Consent decrees are compromises in which the parties give up something they might have won in litigation and waive their rights to litigation."⁵¹ . . . Consent decrees

⁴⁶ See Whitesides, *The FTC's Competition Policy after the Intel Settlement*, *supra*, 9 DePaul Bus. & Com. L.J. at 555-57, 559-60 (discussing the Federal Trade Commission settlement with Intel as an expansion of the Federal Trade Commission's Section 5 authority beyond the scope of federal antitrust law); , *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra*, 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 16-23 (describing FTC cases regarding unfair competition); Kovacic, *Rating the Competition Authorities*, *supra*, 16 Geo. Mason L. Rev. at 911-12, 913-14 (describing Federal Trade Commission cases brought under the Bush Administration).

⁴⁷ See, e.g., Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Colum. L. Rev. at 620-21 (noting that the protracted nature of the Federal Trade Commission's own rulemaking processes do not make rulemaking an option for the Federal Trade Commission).

⁴⁸ Cf. *id.* at 613 (when the Federal Trade Commission conducts an administrative adjudication under its processes, the courts must give substantial deference to its interpretation of Section 5).

⁴⁹ See *U.S. (SEC) v. Citigroup Global Markets (Citigroup Global Markets II)*, 752 F.3d 285, 295 (2nd Cir. 2014).

⁵⁰ *Id.* at 295.

⁵¹ *Id.* (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975) [antitrust settlement]); *FTC v. Circa Direct LLC*, 2012 WL 3987610, *3-7, No. 11-2172 RMB/AMD (D.N.J. Sept. 11, 2012).

provide the parties with a means to manage risk.⁵² “The numerous factors that affect a litigant’s decision whether to compromise or litigate it to the end include the value of the particular compromise, the perceived likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt.”⁵³ These assessments are uniquely for the litigant to make.⁵⁴

The decision of the government not to require admissions from settling defendants in civil cases is similar to the decision of the government not to bring a case for a violation of law. In that regard, the United States Supreme Court has found the decision not to bring a case to be presumptively unreviewable because it often involves a balancing of a number of factors within an executive agency’s expertise such as allocating priorities, determining the chances of success, and expending limited resources.⁵⁵ Consequently, absent facts that suggest fraud or collusion, a simple review of a government agency’s allegations in its complaint, as supported by factual submissions of the government, suffices for judicial review of the proposed settlement even if a defendant has not admitted those allegations.⁵⁶ But, as a practical matter, federal and state government enforcers have, in the experience of the national reporter, begun to contemplate extracting admissions of liability from defendants as a condition to entering into certain civil settlements.

4. Criminal and Civil Investigatory and Trial Processes in the United States, Including the Right of Access of Defendants and Third Parties

Federal prosecutors of criminal antitrust violations most often use grand juries, comprised of panels of ordinary citizens, which have the power to investigate cases by issuing subpoenas for evidence and hearing testimony.⁵⁷ They have wide scope in conducting their investigations.⁵⁸ The proceedings of grand juries are secret, and disclosure by grand

⁵² *Citigroup Global Markets II*, 752 F.3d at 295.

⁵³ *Id.* (quoting *Citigroup Global Markets I*, 673 F.3d at 164).

⁵⁴ *Ibid.* The Federal Trade Commission, for example, typically does not require admissions from a defendant that a law has been violated. *See* 1 Fed. Trade Comm. § 12:6 (2013).

⁵⁵ *Heckler*, 470 U.S. at 831-32.

⁵⁶ *See Citigroup Global Markets I*, 673 F.3d at 295-96.

⁵⁷ *See, e.g.*, U.S. Department of Justice, Antitrust Division, Antitrust Division Manual, §§ III(E)(1)(b), (F)(1), (F)(4) at III-46, III-82, III-85 - 88 (5th ed. last updated Mar. 2004).

⁵⁸ *See, e.g., United States v. R. Enters., Inc.*, 498 U.S. 292, 300-01 (1991). It is important to note that, as part of the wide scope that federal and state prosecutors enjoy at this stage, corporations (as opposed to individuals as long as those individuals are not in a corporate capacity) cannot assert the Fifth Amendment as a basis for refusing to testify or provide information. *Wilson v. United States*, 221 U.S. 361, 374-75 (1911); *United States v. Richardson*, 469 F.2d 349, 350 (10th Cir. 1972) (“privilege against self-incrimination cannot be invoked by a [Subchapter S] corporate officer to prevent disclosure of corporate records which might incriminate him even though the corporation is a mere alter ego of its owner.”); *United States v. Mid-West Business Forms, Inc.*, 474 F.2d 722, 723 (8th Cir. 1973) (privilege

jurors or prosecutors of evidence, deliberation, or voting may be punished by contempt of court.⁵⁹ When criminal charges are brought, the transcript of the entire proceeding is available to defendants in any ensuing criminal proceedings but not to others, including plaintiffs in any follow-on civil proceedings for federal or state antitrust violations.⁶⁰ However, based on the national reporter's own experience, plaintiffs in civil proceedings are often able to secure access to the documents and other evidence, though not the witness testimony, provided to the grand jury through the consent of defendants provided the confidentiality of those materials is guaranteed via a protective order. The reason why confidentiality is important to grand jury proceedings is that they protect members of the grand jury from outside defendants, protect against perjury and subordination of perjury of government witnesses, protect the reputation of innocent defendants, and assure the confidentiality of witnesses.⁶¹

Federal and state enforcers conduct *civil* investigations of potential antitrust violations that can involve the service of investigative subpoenas and interrogatories as well as compelling the testimony of witnesses.⁶² The conduct of civil investigations using these tools has been analogized to grand jury proceedings in the American system.⁶³ Non-public information provided in these investigations is considered confidential and

against self-incrimination not available to officer of Subchapter S corporation to prevent disclosure of corporate records); *United States v. Silverman*, 359 F.Supp. 1113, 1114 (N.D. Ill. 1973) (officer-shareholder of subchapter S corporation could not invoke constitutional privilege against self-incrimination as bar to compliance with IRS subpoena directing him to appear before special agent and produce corporate records and documents); *Naporano v. United States*, 834 F.Supp. 694, 701 n.12 (D.N.J. 1993) ("S Corporations are prohibited from invoking the Fifth Amendment privilege against self-incrimination to prevent the disclosure of corporate records which might incriminate a shareholder"). However, an individual who is a corporate officer cannot be compelled to produce his or her private papers. *See, e.g., Wilson*, 221 U.S. at 377. In contrast to such incorporated entities, an individual, or an unincorporated solo proprietorship run by that individual, does have such rights. *Braswell v. United States*, 487 U.S. 99, 104-05 (1988). Partnerships fall into the category of corporations, however, and not sole proprietorships. *Id.* at 107-08 (explaining "The test ... is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." (internal citations and quotation marks omitted).)

⁵⁹ *See, e.g., Fed. R. Crim. P. 6(e)*.

⁶⁰ *See Fed. R. Crim. P. 6(e); see also In the Matter of the Application of the United States for an Order*, 936 F.Supp. 357, 359 (E.D. La. 1996) (citing cases).

⁶¹ *See, e.g., Application of the United States for an Order*, 936 F.Supp. at 358 (citing authorities).

⁶² *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 635-36, 641-43, 652 (1950); *FTC v. Turner*, 609 F.2d 743, 744 (5th Cir. 1980); 15 U.S.C. §§ 1311-1314; Cal. Gov. Code § 11180 et seq. The associated government investigative files are also secret unless documents in those file end up being somehow lodged with the court. *See, e.g., United States v. Loughner*, 807 F.Supp.2d 828, 831, 833-36 (D. Az. 2011) (citing cases). Such a rule comports with due process (and does not violate the First Amendment to the U.S. Constitution) because it protects a defendant's constitutional right to a fair trial by avoiding a trial of the defendant in the press rather than in court. *Id.*

⁶³ *See, e.g., Morton Salt Co.*, 338 U.S. at 641-43, 652; *Associated Container Transp. (Australia) Ltd. v. United States*, 705 F.2d 53, 58 (2d Cir. 1983); *Turner*, 609 F.2d at 744; *Brovelli v. Sup. Ct.*, 15 Cal. Rptr. 630 (Cal. 1961).

generally exempt from disclosure to defendants or third parties.⁶⁴ In fact, guaranteeing confidentiality is considered to be of such importance that, under the laws of some states, violations of confidentiality by prosecutors can be punished as a misdemeanor and disqualify them from acting in any official capacity.⁶⁵

Accordinging confidentiality to civil investigatory proceedings in the United States does not mean that defendants have no access whatsoever. It has been the experience of the national reporter in working on state and federal antitrust investigations that there is an exchange of information on a general level between defendants and government officials in discussing the government's theories of, and evidence concerning, a case.⁶⁶

However, if a settlement is reached between the government and a defendant while a case is in the investigative stage, the experience of the national reporter has been that the access of a defendant, and any third party objectors or interveners represented by counsel, to information developed in the investigation will be limited to that information presented to a court in order to justify a settlement.⁶⁷ Access by outside parties to that information may be limited to the extent that this information is confidential.⁶⁸

Information developed in the course of these civil investigations can be used by the United States Department of Justice or state prosecutors in bringing civil cases⁶⁹ or by the Federal Trade Commission in bringing cases of its own. This means that, absent a settlement during the investigation itself, a civil investigation is not the "main" event in American processes; rather the trial is.⁷⁰

Accordingly, based on the national reporter's experience, once a civil case is filed, defendants can and do obtain information developed in the investigation to the extent that it has been used (e.g., in drafting the civil complaint setting out the government's case) or will be used in the proceedings leading up to and including trial. And defendants, of course, do have access to the information developed by the federal and state antitrust

⁶⁴ See, e.g., *FTC v. Texaco, Inc.*, 555 F.2d 862, 884-85 & n.62 (D.C. Cir. 1977); *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 969-70, 974 (D.C. Cir. 1980); 15 U.S.C. § 1313; 1 Fed. Trade Comm. § 12:6 (2013); Cal. Gov. Code §§ 6254(f), 11183.

⁶⁵ Cal. Gov. Code § 11183.

⁶⁶ Accord U.S. Department of Justice, Antitrust Division, Antitrust Division Manual, § III(G)(1)(b) at III – 111 (5th ed. last updated Mar. 2004); see also *id.* § III(G)(2)(c) at III-118 (discussing criminal investigations).

⁶⁷ This observation does not apply to the Federal Trade Commission consent decree process since information, as such, does not have to be presented to the court although there is a public comment process as discussed *infra*.

⁶⁸ See *NBC Subsidiary v. Sup. Ct.*, 998 P.2d 337, 363 n.34 (Cal. 1999); *County of Orange v. Sup. Ct.*, 94 Cal.Rptr.2d 261, 264-65 (Cal. App. 4 Dist. 2000); 1 Fed. Trade Comm. § 12:6 (2013); cf. *Loughner*, 807 F.Supp.2d at 831, 833-36 (discussing criminal trials in noting that there was a strong interest in keeping government investigative files confidential to ensure that there was a fair trial).

⁶⁹ See, e.g., 15 U.S.C. 1313(d)(1); Cal. Gov. Code § 11181(h).

⁷⁰ See *O'Sullivan v. Boerckel*, 526 U.S. 838, 854 (1999); *McFarland v. Scott*, 514 U.S. 849, 859 (1994); *Highlands Ins. Co. v. Nat'l Fire Ins. Co. of Pittsburgh*, 27 F.3d 1027, 1032 (5th Cir. 1994).

agencies in preparing their cases through trial through the discovery processes.⁷¹ Insofar as third parties are concerned, pretrial and trial proceedings are presumptively open to them but certain information may be kept confidential such as trade secrets.⁷² This means that, insofar as government settlements are concerned, the longer in time it takes in pre-trial proceedings until a settlement is reached, the more case information is available to defendants and third parties. But this fact does not mean that the American system discourages, let alone bars, early settlements. Quite to the contrary.⁷³

5. Criminal Settlements

Criminal antitrust settlements can involve so-called amnesty applicants, who, by definition, must approach the federal government first, against whom a decision is made by the government not to prosecute them in exchange for the cooperation that they offer and deliver to the government.⁷⁴ Criminal antitrust settlements can also involve those defendants other than amnesty applicants who may receive a benefit, such as a fine reduction, in exchange for pleading guilty to criminal antitrust charges and offering cooperation.⁷⁵

Insofar as amnesty applicants are concerned, the decision to confer such a status on a defendant does not involve a settlement against that defendant in the sense that an action

⁷¹ Even after a case is filed, federal and state government entities will continue to use discovery to develop that case. Their power to use such civil discovery tools as subpoenas for the production of documents or for the taking of testimony are nearly as broad as their investigatory powers. *See, e.g., In re Urethane Antitrust Litig.*, 261 F.R.D. 570, 572-75 (D. Kan. 2009) (discussing breadth of discovery in civil antitrust proceedings as being even broader than in other civil proceedings and as including the ability to request information from defendants on foreign sales, foreign commerce, and foreign price-fixing meetings). As is the case during investigations, corporations (or individuals acting on behalf of the corporation in a corporate capacity) cannot assert a Fifth Amendment right against self-incrimination. However, if an individual (e.g., an ex-employee of a defendant) should assert his or her Fifth Amendment right to refuse to provide information, federal courts may allow in *civil* proceeding for an adverse inference to be drawn against a defendant from that individual's assertion of that right. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F.Supp.2d 141, 153 (D. Conn. 2009) (citing and discussing cases); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F.Supp.2d 890, 907 (N.D. Cal. 2009) (same). Insofar as state civil proceedings are concerned, an adverse inference may not be drawn against a defendant from an invocation of a Fifth Amendment right by an individual such as an ex-employee in certain States such as California. *See, e.g., People v. Holloway*, 91 P.3d 164, 240 (Cal. 2004). But, in California, the California Attorney General can grant immunity to such a witness under state antitrust law, *see* Cal. Bus. & Prof. Code § 16758, thereby requiring the witness to testify notwithstanding such an invocation.

⁷² *See, e.g., Foltz v. State Farm Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003); *NBC Subsidiary*, 998 P.2d at 359-61, 363 n.34, 365; *see also, e.g.*, 28 C.F.R. § 50.9; H.R. Rep. No. 94-1343 at 2610 (1976).

⁷³ *See, e.g., In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 297-301 (E.D. Pa. 2012); *see also In re Linerboard Antitrust Litig.*, 292 F.Supp.2d 631, 643 (E.D. Pa. 2003) (an early settlement with one of many defendants can “break the ice” and bring other defendants to the point of serious negotiations.).

⁷⁴ *See, e.g.*, Antitrust Division Manual, *supra*, § III(F)(9) at III-95 - 103.

⁷⁵ *See, e.g., id.* § III(G)(1)(c)(ii) at III-123 – 124.

has been initiated, even if for purposes of settlement, and then concluded.⁷⁶ Rather, if an amnesty applicant follows through on the promised and required cooperation, an action will never be initiated. Amnesty applicant processes represent the kind of no-action decisions on which executive decisions are unreviewable by the courts under our federal and state constitutions; they reside within that sphere of executive grace and discretion that should be accountable only to the public and not to those aggrieved third parties wishing to challenge a defendant's amnesty status.⁷⁷

Insofar as other defendants are concerned, criminal antitrust settlements involve so-called "plea bargains," that is "negotiated agreement[s] between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or a dismissal of other charges."⁷⁸ Courts interpret their terms like any contract or settlement agreement,⁷⁹ though there must be a valid factual basis for the plea⁸⁰—i.e., through the statements of the defendant acknowledging guilt.⁸¹ Moreover, plea agreements that involve the dismissal of any charges or a specific sentence may be rejected by the courts; plea agreements that involve only a promised sentencing recommendation to a court may not be rejected by a court on that ground, but the court can decline to follow that recommendation.⁸² And hearings on plea agreements are typically open to the public,⁸³ specifically allowing victims a reasonable opportunity to be heard by the court.⁸⁴ Accordingly, plea agreements do not raise constitutional concerns of any kind, including due process.⁸⁵

⁷⁶ See, e.g., Plotkin, *Agent Settlement Reviewability*, *supra*, 82 Ford. L. Rev. at 1402 (citing *New York State Department of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) in noting the distinction on this basis between settlements and no-action decisions).

⁷⁷ Congress has implicitly recognized and endorsed the Executive's use of an amnesty program by passing legislation that limits damages in civil proceedings to single (non-trebled) damages if certain preconditions are met. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 STAT 661 (2004), amended by Pub. L. No. 111-90, 124 STAT 1275 (2010). This congressional recognition of executive discretion means, from a constitutional perspective, executive powers are at their acme in this area. See *Youngstown Steel*, 343 U.S. at 635 (Jackson, J., concurring).

⁷⁸ Dustin Plotnick, *Agency Settlement Reviewability*, 82 Ford. L. Rev. 1367, 1378 (2013) (citing and quoting Black's Law Dictionary 1270 (9th ed. 2009) (internal quotation marks omitted)); *cf.*, e.g., *United States v. Robinson*, 924 F.2d 612, 613 (6th Cir. 1991) ("Plea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law.").

⁷⁹ E.g., *Robinson*, 924 F.2d at 613.

⁸⁰ *Libretti v. United States*, 516 U.S. 29, 28 (1995); Fed. R. Crim. P. 11(b)(3).

⁸¹ See, e.g., Stephen Freccero, *The Use and Effect of an Antitrust Guilty Plea in Subsequent Civil Litigation*, 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 136, 141 (2013)

⁸² See Plotnick, *Agency Settlement Reviewability*, 82 Ford. L. Rev. at 1378 (internal citations omitted).

⁸³ See, e.g., *Oregonian Pub. Co. v. U.S. Dist. Court for the Dist. of Oregon*, 920 F.2d 1462, 1465-66 (9th Cir. 1990) (citing cases).

⁸⁴ 18 U.S.C. § 3771(a)(4).

⁸⁵ See, e.g., *Ashe v. Styles*, 67 F.3d 46, 51-52 (4th Cir. 1995) (citing cases for the proposition that, so long as government fulfills express or implied terms or promises, a plea agreement does not violate due process).

Typically, criminal settlements do not involve the recovery of damages for third parties. Rather the recovery of those damages are left up to parallel civil proceedings that can involve private class actions, state attorney general *parens patriae* actions, or both.⁸⁶

However, insofar as the amnesty applicant is concerned, it has a duty to cooperate with the prosecution of such parallel civil proceedings if it wishes for its civil exposure to be limited to single damages.⁸⁷ Further, it is the experience of the national reporter that an amnesty applicant will often settle early in a case with plaintiffs, for what can be enormous reductions in the damages owed in exchange for providing cooperation, for the simple reason that plaintiffs know its cooperation is usually essential to the prosecution of their parallel civil actions. Moreover, insofar as other defendants may be concerned, if they have pled guilty to criminal antitrust violations, those plea agreements may be used not only as evidence of guilt but also may, in many circumstances depending upon the scope of the agreement and the factual statements made by a defendant in support, be used to estop or bar those defendants from contesting key issues relating to liability.⁸⁸

6. Civil Conduct Settlements Involving the United States Department of Justice

Civil antitrust settlements by the United States Department of Justice are reviewed under the Tunney Act. Under that Act, the federal courts have to review those settlements to determine if they are in the public interest.⁸⁹ But this public interest review is a narrow one: the settlement is reviewed to determine if (1) any of the terms of the proposed court order are ambiguous; (2) if the method of enforcing the terms of the proposed court order are inadequate; (3) if third parties will be positively injured; or (4) if the settlement will make a “mockery” of the judiciary.⁹⁰ This review is limited in recognition that the government has broad discretion to bring cases in the first instance, let alone settle them,⁹¹ and that it is the duty of the government to reconcile competing social and policy interests.⁹² The proposed settlement need not be the best one possible, and the court must presume the terms to be reasonable though the court is not supposed to be a rubber stamp.⁹³ Moreover, the Tunney Act has never been interpreted as requiring a judicial admission of liability from a defendant as a precursor to judicial approval of a federal

⁸⁶ See, e.g., Amended Plea Agreement at ¶ 11, *United States v. Samsung SDI. Co., Ltd.*, No. CR 11-0162 (WHA) (N.D. Cal. May 17, 2011).

⁸⁷ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 STAT 661 (2004), amended by Pub. L. No. 111-90, 124 STAT 1275 (2010).

⁸⁸ Freccero, *The Use and Effect of an Antitrust Guilty Plea in Subsequent Civil Litigation*, *supra*, 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 136-37, 141, 148-55 (discussing, among other things, Section 5(a) of the Clayton Act and case law interpreting that section).

⁸⁹ See, e.g., John Bourdeau, William Danne, Eleanor Grossman, et al., *Monopolies et al.*, Am. Jur. 2d § 552 (May 2014).

⁹⁰ See, e.g., *Microsoft II*, 373 F.3d at 1234-36; *Monopolies*, *supra*, Am. Jur. 2d, § 552.

⁹¹ See, e.g., *Microsoft II*, 373 F.3d at 1236-37.

⁹² See, e.g., *Monopolies*, *supra*, Am. Jur. 2d § 552.

⁹³ See, e.g., *id.*

antitrust settlement. In fact, the Tunney Act does not allow courts to speculate as to the claims that the government could have brought, let alone why the government did not bring those claims,⁹⁴ nor does it allow the court to reject remedies set out in a proposed settlement merely because it believes other remedies may be preferable.⁹⁵ Rather, a court can reject a proposed settlement only if it has “exceptional confidence” that the proposed remedies will result in adverse antitrust consequences.⁹⁶

That being said, the courts do set hearings, do entertain public comments on the settlements (to which the United States Department of Justice must respond), can take testimony from witnesses, and can provide an opportunity for third parties, including associations, either to appear as *amicus curiae* or to intervene formally and present their perspective at the hearing.⁹⁷ However, a request to intervene formally does have to satisfy certain requirements, including most notably whether they have a case that involves a question of law or fact in common with the action being settled.⁹⁸ And there is a requirement for settling defendants to disclose to the court their oral or written communication, in connection with the proposed consent decree, with the United States Department of Justice.⁹⁹

The Tunney Act thus fairly balances competing needs. On the one hand, there is the need, rooted in constitutional law and sound policy, to require the courts to give substantial deference to the Executive in confirming civil antitrust settlements. On the other hand, there is the need to meet due process-type of concerns as a competition policy matter, requiring the submission of justifications for the settlement, an opportunity for public comment, and some sort of non-rubber stamp form of judicial review.¹⁰⁰

There is one final issue here: the interplay between civil antitrust settlements of the United States Department of Justice and any follow-on private rights of action.¹⁰¹ Generally speaking, the terms of such a consent decree, as well as even evidence that such a decree exists, cannot be introduced into any follow-on private right of action if the

⁹⁴ See, e.g., *Microsoft I*, 56 F.3d at 1459.

⁹⁵ *Id.* at 1460.

⁹⁶ *Id.*

⁹⁷ See, e.g., *Microsoft II*, 373 F.3d at 1236 (citing cases), 1238.

⁹⁸ See, e.g., *Microsoft II*, 373 F.3d at 1234; *Monopolies*, *supra*, Am. Jur. 2d § 552. There is also a requirement that intervention not delay or prejudice the action being settled. See *Microsoft II*, 373 F.3d at 1235-36.

⁹⁹ See *id.* at 1249. An example of the application of these principles can be found in *Microsoft II*, 373 F.3d at 1237-50.

¹⁰⁰ *Post*-entry, third parties cannot, as a constitutional matter, go to court to challenge enforcement decisions, or the lack thereof, under those consent decrees made by the United States Department of Justice before it actually files an enforcement action. See *Epic*, 844 F.Supp.2d at 103-06; *Alpine Inds.*, 40 F.Supp.2d at 942-43.

¹⁰¹ As with its criminal antitrust plea agreements, the United States Department of Justice generally does not pursue damages in its civil antitrust settlements but rather leaves that up to any follow-on private actions.

government's case settles before trial.¹⁰² This rule is designed to facilitate the government's ability to settle its cases, using its executive discretion, without being hemmed in by collateral consequences in follow-on private actions for damages, if it should so choose.¹⁰³

7. Civil Conduct Settlements Involving the United States Federal Trade Commission

Civil antitrust settlements involving the Federal Trade Commission follow a different path from civil antitrust settlements involving the United States Department of Justice. The Federal Trade Commission will negotiate a settlement that in nearly every case includes a consent decree, i.e., obligations and conditions imposed on a defendant for a period of time.¹⁰⁴ It will then submit a proposed settlement for public comment and, following submission of any comments within a 30 day period, will address those comments as part of its final approval, modification, or rejection of that consent decree.¹⁰⁵ Each of the individual five Commissioners may also write their own concurring or dissenting opinions as part of this process.¹⁰⁶

Though the consent decree is a non-judicial one that flows from executive discretion such that it does not require approval from a court,¹⁰⁷ the Federal Trade Commission has a range of remedies that it can resort to if there is a violation, including assessing civil penalties in the amount of \$16,000 per violation and filing a lawsuit in court asking for injunctive relief and other equitable relief.¹⁰⁸ This latter provision does give the courts a role in Federal Trade Commission consent decrees though it is not the same role that they play in Tunney Act proceedings involving settlements by the United States Department of Justice or in most, if not all, state antitrust settlements. In fact, the Federal Trade

¹⁰² See, e.g., Freccero, *The Use and Effect of an Antitrust Guilty Plea in Subsequent Civil Litigation*, *supra*, 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 136 (discussing section 5(a) of the Clayton Act); see also, e.g., *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 555 F.Supp. 824, 826 (D. Md. 1983) (citing cases).

¹⁰³ See *Metrix Warehouse, Inc.*, 555 F.Supp. at 826 (citing legislative history behind section 5(a) of the Clayton Act).

¹⁰⁴ See, e.g., Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Colum. L. Rev. at 610.

¹⁰⁵ See, e.g., 1 Fed. Trade Comm., *supra*, § 12:6; Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Colum. L. Rev. at 610, 623.

¹⁰⁶ See, e.g., Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Colum. L. Rev. at 623.

¹⁰⁷ See *Action for Safety and Health*, 498 F.2d at 762-63; see also *Epic v. FTC*, 844 F.Supp.2d 98, 103-06 (D.D.C. 2012), *sum. aff'd* 2012 WL 1155661 (D.C. Cir. 2012) (Federal Trade Commission cannot be compelled to bring court action to enforce Federal Trade Commission consent decree); *Alpine Inds. v. FTC*, 40 F.Supp.2d 938, 942-43 (E.D. Tenn. 1998) (court refused to construe Federal Trade Commission consent decree provisions, and thereby bar FTC from bringing an enforcement action, as the Federal Trade Commission has complete discretion over the initiation of enforcement proceedings). Put another way, settlement agreements are construed as contracts rather than as binding judicial precedent. 1 Fed. Trade Comm., *supra*, § 12:6.

¹⁰⁸ See, e.g., Solove, *The FTC and the New Common Law of Privacy*, *supra*, 114 Colum. L. Rev. at 599-600, 604-05, 606-07, 608.

Commission has almost completely unfettered discretion in fashioning the scope of its consent decree with common provisions including penalties, conduct bans, requirements for corrective action, reporting, and audit provisions.¹⁰⁹

If, however, the Federal Trade Commission should file a case in court against a defendant, it is a different story. In settling a filed case in court, the Federal Trade Commission will seek court approval of any settlement and consent decree under a standard analogous to that involving civil settlement by other federal prosecutorial agencies, including the lack of any need for a judicial admission of liability from a defendant.¹¹⁰

It appears to be settled that pre-filing Federal Trade Commission consent decrees under Section 5 are thus insulated from court review.¹¹¹ Given the opportunity for public comment prior to the Federal Trade Commission's final promulgation of a consent decree that accounts for those comments, the close tie of such a consent decree with a no-action decision of the kind that should be left to the Executive Branch, and the extremely limited effectiveness of such a consent decree in the absence of a Federal Trade Commission decision to go to court, such consent decrees do not present due process concerns.

But it is not free from all doubt as a matter of sound policy (if not constitutional law) that the *entry* of such consent decrees should not be subject even to that highly deferential review (e.g., for arbitrariness) applied by the courts to other forms of administrative agency actions.¹¹² For example, such review, even if highly deferential, could require additional, clearer, explanations by the Federal Trade Commission as to the fit between these consent decrees and its views of Section 5. This could help defuse criticism that the development of Section 5 law is being accomplished in a vague or unreviewable manner without the drawbacks of imposing an inherently rigid straightjacket, such as would

¹⁰⁹ *E.g., id.* at 613-19.

¹¹⁰ *See, e.g., Circa Direct LLC*, 2012 WL 3987610 at *3-7.

¹¹¹ *See Action for Safety and Health*, 498 F.2d at 762-63; *see also Epic*, 844 F.Supp.2d at 103-06; *Alpine Inds.*, 40 F.Supp.2d at 942-43.

¹¹² *See generally* Plotkin, *Agent Settlement Reviewability*, *supra*, 82 Ford. L. Rev. at 1370-71, 1394-1404 (federal agency settlements that do not involve court orders should not be regarded as being unreviewable but rather should be reviewed in the highly deferential manner applicable to other agency actions). The national reporter does not necessarily agree that arguments contained in this article should, or do, trump any countervailing arguments as a *constitutional matter* insofar as the review of any federal agency settlement are concerned, let alone Federal Trade Commission consent decrees. *See Epic*, 844 F.Supp.2d at 103-06; *Alpine Inds.*, 40 F.Supp.2d at 942-43. Nor can or should third parties be able to obtain an order requiring the Federal Trade Commission to enforce a consent decree, *Epic*, 844 F.Supp.2d at 103-06, or construing a Federal Trade Commission consent decree so that the Federal Trade Commission cannot initiate an enforcement action, *Alpine Inds.*, 40 F.Supp.2d at 942-43. The national reporter merely cites this article as a starting point for considering whether Federal Trade Commission consent decrees should, as a matter of sound policy, be subject to some form of highly deferential review by the courts before they take effect.

occur where the Federal Trade Commission to use its existing rulemaking powers, that would betray the congressional intent behind Section 5.¹¹³

There is one final issue: the interplay of Section 5 determinations, i.e., in the context of a Federal Trade Commission consent decree, with private rights of action. First, Congress refused to create a private right of action under Section 5 because Section 5 was designed to address conduct that a business may not have known beforehand would end up being prohibited under that section.¹¹⁴ Second, Section 5 consent decrees have no preclusive effect even in parallel antitrust actions, i.e., they cannot be used to estop or bar defendants from contesting key liability issues in parallel antitrust actions under state or federal antitrust law that may be based on the same theories as those underlying the consent decrees in question.¹¹⁵ Third, Section 5 consent decrees cannot be introduced into evidence.¹¹⁶ By allowing the Federal Trade Commission to avoid being hemmed in by collateral consequences of its consent decrees in any parallel private antitrust actions, this set of rules not only facilitates the ability of the Federal Trade Commission to settle its cases using its executive discretion,¹¹⁷ but also helps the Federal Trade Commission to meet its forward-looking mission of remedying business conduct that could have market-wide anti-competitive effects or that may otherwise constitute incipient conduct that, if completed, would violate antitrust laws.¹¹⁸

8. Non-Parens Patriae Civil Antitrust Settlements Involving the American States

Though American States may have a split executive under which the Executive Power is split among multiple elected state offices with their Attorneys General serving as the chief law enforcement officer for these States, they act in a manner similar to the federal executive and enjoy a similar measure of discretion. However, these state attorneys general can act either in a non-*parens patriae* capacity or in a *parens patriae* capacity, the latter of which is explained in the next section.

¹¹³ The Federal Trade Commission has, on at least one occasion, agreed to a settlement agreement that, in one aspect, did not involve entry of a consent decree. Fed. Trade Commission Stmt. at 3 n.2, FTC File No. 111-0163, *In the Matter of Google, Inc.* (Jan. 3, 2013). The difference between such a settlement provision, which the Federal Trade Commission still views as being binding, *see id.*, and a consent decree appears to be that the Federal Trade Commission cannot impose civil penalties for violations of such a settlement provision. Insofar as this report is concerned, that distinction makes no difference to the report's findings or conclusions, regardless of the wisdom of entering into such settlements.

¹¹⁴ Dahdouh, *Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra*, 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 8-9. Whether, and under what circumstances, the Federal Trade Commission can or should be able to seek restitution is beyond the scope of this report.

¹¹⁵ 15 U.S.C. §16.

¹¹⁶ *See Metrix Warehouse, Inc.*, 555 F.Supp. at 826 (discussing consent decrees generally); *Damon Corp. v. Geheb*, 1982 WL 1927, *2, No. 80 C 1500 (N.D. Ill. Nov. 23, 1982) (discussing FTC consent decree).

¹¹⁷ *See Metrix Warehouse, Inc.*, 555 F.Supp. at 826.

¹¹⁸ *See Dahdouh, Section 5 and its Critics: Just Who Are the Radicals Here?*, *supra*, 20 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. at 3-4, 15-23.

Acting in a *non-parens patriae* capacity involves either bringing a law enforcement action for a court order, civil fines, and restitution,¹¹⁹ or in a proprietary capacity on behalf of government agencies for a court order and damages.¹²⁰ Thus, *non-parens patriae* civil settlements of the American States can fall into two categories. They can involve only a payment of money to individual state agencies (though a monetary-only antitrust settlement of claims of state government agencies is unheard of in the national reporter's experience) or they can involve in some fashion a requested entry of a court order.¹²¹

At the onset, such settlements, like federal civil settlements, do not bind individuals or businesses such that the rights of those individuals or businesses are foreclosed. Thus, there should be no need for a review for adequacy of the settlement in addressing the interests of those parties.¹²²

But the standard of review appears to be an open one. On the one hand, the standard of review of comparable federal civil settlements *outside of the antitrust context* appears to be a deferential one to determine if a settlement is fair and reasonable and, if, insofar as a request for a court order is concerned, entry of that order would not disserve (or, to put it another way, injure) the public interest.¹²³ The assessment of fairness and reasonableness requires, at a minimum, that the courts examine the following criteria: (1) the basic legality of the settlement and court order; (2) whether the terms of the settlement and court order are clear; (3) whether the settlement and court order resolve the allegations of the complaint; and (4) whether the settlement is tainted by allegations, backed by evidence, of collusion or corruption.¹²⁴ Mere policy disagreement as to the policy interests involved may not suffice for a court to reject the proposed settlement and court

¹¹⁹ See, e.g., Cal. Bus. & Prof. Code § 17200 et seq.

¹²⁰ See, e.g., Cal. Bus. & Prof. Code § 16750(b) & (c).

¹²¹ There is the possibility that, though it tends to be strongly discouraged as a bipartisan policy matter in most American States, a State may enter into a settlement agreement that imposes duties or conditions on parties beyond the payment of funds with no consent decree or court order required or with such a decree or order being imposed *after* breach of the agreement is found. Assuming that the resulting dismissal of any such action does not require judicial approval (*but see* Cal Bus. & Prof. Code §16760 [judicial approval required before dismissing state antitrust action]), such an action does not defeat judicial review as breach of any such agreement can only be remedied via the bringing of an action in court for breach of contract. See *Walton v. Mueller*, 102 Cal. Rptr. 3d 605, 609-10 (Cal. App. 6 Dist. 2009). Whether such a policy choice otherwise serves the goals of public accountability and the proper use of public funds is beyond the scope of this report though the national reporter notes that such settlements are often disclosed to the public such that enforcers may be held to political account for them.

¹²² *Citigroup Global Markets II*, 752 F.3d at 293-94. Insofar as proprietary claims are made under a state's antitrust law to recover damages for state or local government entities, a settlement of those claims may be binding such that a review for adequacy may be appropriate though with an extra measure of deference given that a state executive must be almost conclusively presumed to be acting in the best interests of fellow state agencies and local government entities.

¹²³ *Id.* at 292-95.

¹²⁴ See, e.g., *Citigroup Global Markets II*, 752 F.3d at 294-95 (citing and discussing *non-SEC* cases).

order.¹²⁵ As discussed above, federal civil antitrust settlements by the United States Department of Justice are reviewed under similarly deferential processes and standards.

On the one hand, based on the experience of the national reporter, this deferential standard of non-antitrust federal civil settlements most closely encapsulates the review that many state courts do give for state civil *non-parens* settlements that involve a court order though some States may choose to follow Tunney Act processes and standards. On the other hand, for those States that do not follow Tunney Act processes and standards, that review can be quite abbreviated. Entry of the proposed order may occur the same day that it is presented to the court without any sort of hearing being held; this abbreviated review can insulate these proposed orders from *any* meaningful scrutiny via the input of interested parties, which is a meaningful contrast even with the Federal Trade Commission's consent decree process discussed above. An overly abbreviated settlement process may create a problem for alleged controversial settlements in hindering a fully reasoned exposition as to how such settlements fit within the wide parameters of the law and the authority that government enforcers have to enter into such settlements in order to restore competition.¹²⁶

9. *Parens Patriae* Settlements Involving the American States

In the American federalist system, the American States have “quasi-sovereign” powers, having surrendered only certain sovereign powers when they joined the Union.¹²⁷ The exercise of those quasi-sovereign powers can involve the American States representing their natural persons (and in a few States businesses) in what is called a *parens patriae* capacity.¹²⁸ The history and nature of the States' *parens* power is explained best in the following passage from a United States Supreme Court case:

Parens patriae means literally “parent of the country.” The *parens patriae* action has its roots in the common law concept of the “royal prerogative.” The royal prerogative included the right or responsibility to take care of persons who are “legally unable, on account of mental incapacity, whether it proceed from 1st nonage; 2 idiocy; or 3 lunacy to take proper care of themselves and their property.” At a fair early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative. “This prerogative of legislative power is inherent in the Supreme Power of every State, whether that power is lodged in a royal

¹²⁵ See *id.* at 297.

¹²⁶ Cf. *Circa Direct LLC*, *supra*, 2012 WL 3987610, *3-7, No. 11-2172 RMB/AMD (D.N.J. Sept. 11, 2012).

¹²⁷ See *Massachusetts v. EPA*, 549 U.S. 497, 518-21 (2007); *State of Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907).

¹²⁸ See, e.g., Cal. Bus. & Prof. Code § 16760; see also, e.g., 15 U.S.C. § 15c (State attorneys general have the power to file *parens patriae* actions under federal law).

person or in the legislature [and] is often a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.”¹²⁹

In the American States, this *parens* capacity has morphed into the capacity to act when the State has a quasi-sovereign interest in the well-being of its population.¹³⁰ For example, if the health, safety, or economic interest of a State’s citizens is threatened, the State can represent its citizens in a *parens* capacity.¹³¹ This forms the basis for a State being able to sue on behalf of its citizens for a violation of antitrust law.¹³² And, insofar as an American State brings a *parens patriae* claim on behalf of its residents for damages either under state antitrust law (if it has a state *parens* statute) or under federal antitrust law, the resolution of such a claim as part of an antitrust settlement may operate to preclude any such individuals from bringing their own claims under, respectively, state or federal antitrust law.¹³³

Judicial review of *parens* settlements, in hearings generally open to the public, is typically required.¹³⁴ The standard of judicial review of such settlements involves the same type of determination as with private class action antitrust settlements: Is the proposed settlement fair, reasonable, and adequate?¹³⁵

Adding adequacy as part of the inquiry (as fairness and reasonableness can be part of the inquiry into non-*parens* civil antitrust settlements) makes sense given that *parens* settlements can bar the claims of individuals covered by the *parens* claim.¹³⁶ Addressing adequacy involves such considerations as the strength and weaknesses of the State’s *parens* claim as well as the total monetary and non-monetary consideration obtained by the State in its *parens* settlement of that claim, though the courts are not, in reviewing the settlement, to retry the case in effect to see if the settlement was the best result possible.¹³⁷

¹²⁹ *Alfred L. Snapp et al. v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 601-02 (1982).

¹³⁰ *Id.* at 603.

¹³¹ *Id.* at 602-08.

¹³² H.R. Rep. No. 499, 94th Cong., 2d Sess. 6-7 (1975) (legislative history of 15 U.S.C. § 15c).

¹³³ *E.g.*, Cal. Bus. & Prof. Code § 16760 (b)(3); *see also* Order, *State of California et al. v. Philips Electronics Co. et al.*, A140908 (July 9, 2014) (order in possession of author) (requiring briefing on the merits of a *parens patriae* settlement by the California Attorney General because of the concern that such a settlement *could* operate to bar federal class action litigation involving alleged price-fixing).

¹³⁴ *See, e.g.*, 15 U.S.C. § 15c; Cal. Bus. & Prof. Code § 16760(c).

¹³⁵ *See, e.g.*, *In re Compact Disc Minimum Advertised Price Litigation*, 216 F.R.D. 197, 204, 206 (D. Me. 2003); *see also In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1374, 1384-1385 (D. Md. 1983).

¹³⁶ *See* Cal. Bus. & Prof. Code § 16760(b)(3).

¹³⁷ *See, e.g.*, *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1384-86; *see also, e.g.*, *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007). Significantly, “the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disproved.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974). Conversely, non-monetary relief such as cooperation and

But, substantively, the judicial review of *parens* settlement involves a great deal of deference to the State.¹³⁸ This substantial deference is because of the following twin presumptions: the State is in the best position to judge when a settlement is in the public interest¹³⁹ in weighing all of the policy considerations and that the State performs its duties in a regular manner.¹⁴⁰ And, as noted, judicial approval of *parens* settlements may be based on the value of non-monetary considerations such as the strength of injunctive relief and cooperation that may be important to a state attorney general acting in the public interest.

Procedurally, the judicial review of *parens* settlements also involves an assessment of the sufficiency of the notice given by the State to its citizens so that its citizens, who would otherwise be bound to those settlements, could object or opt-out.¹⁴¹ While the assessment of the sufficiency of notice turns on whether that notice was reasonable under the circumstances, that standard is not a strict one under the due process clause.¹⁴²

In the final analysis, this process for approving antitrust *parens* settlements fairly balances competing needs much as does the Tunney Act. And, like the Tunney Act, this process fairly and comprehensively addresses due process concerns.

10. Extraterritorial Reach of American Antitrust Settlements

The Foreign Trade Antitrust Improvements Act of 1982¹⁴³ (“FTAIA”) governs the foreign reach of federal antitrust law,¹⁴⁴ though whether it applies to state antitrust law as well is still an open question.¹⁴⁵ It applies equally to civil and criminal antitrust law¹⁴⁶ though, as a non-jurisdictional statute that does not restrict the courts’ power to hear a

injunctive relief can be very important. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1384-86; *Rebney v. Wells Fargo Bank*, 269 Cal.Rptr. 844, 857 (Cal. App. 1 Dist. 1990).

¹³⁸ *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002).

¹³⁹ *See New York v. Reebok Int’l Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (Attorneys General in *parens* actions are motivated by concern for the public interest); *In re Lorazepam*, 205 F.R.D. at 380 (“the Court may place greater weight on such opinion in addressing a settlement negotiated by government attorneys committed to protecting the public interest.”); *In re Toys ‘R’ Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) (“The participation of the State Attorneys General furnishes extra assurance that consumers’ interests are protected.”).

¹⁴⁰ *See, e.g.,* Cal. Evid. Code § 664.

¹⁴¹ *See, e.g., Mullhane v. Central Hanover Bank & Trust Co.*, 339 U.S. 309, 314 (1950); *Grunin v. International House of Pancakes*, 513 F.3d 114, 120-121 (8th Cir. 1975); Cal. Bus. & Prof. Code § 16760(b)(1).

¹⁴² *See, e.g., Mullhane*, 339 U.S. at 317-18 (1950) (under due process clause, notice by publication is sufficient where it is not reasonably possible or practical to give more adequate warning to absent beneficiaries); Cal. Bus. & Prof. Code § 16760(b)(1) (notice by publication is default form of notice). The national reporter is aware that, for *parens* settlements, notice can include publication on a government web site, Internet ads, a press release, and use of e-mail lists.

¹⁴³ 15 U.S.C. § 6a.

¹⁴⁴ *See, e.g., United States v. Hsiung et al.*, slip. op. at 3-4, No. 12-10514 (9th Cir. July 10, 2014).

¹⁴⁵ *See Amarel v. Connell*, 248 Cal. Rptr. 276, 283 (Cal. App. 3 Dist. 1988).

¹⁴⁶ *Hsiung*, slip op. at 3-4.

case,¹⁴⁷ whether it could be asserted by a third party or an objector to bar an antitrust settlement is quite doubtful.¹⁴⁸

FTAIA bars the application of federal antitrust law to restraints involving trade or commerce with foreign nations unless those restraints involve import commerce into the United States or the restraint has a direct, substantial, and foreseeable effect on American commerce.¹⁴⁹ FTAIA was designed to carve out the actions of American exporters and foreign companies so long as those activities only affected foreign (non-American) commerce.¹⁵⁰

Import commerce includes transactions in which foreign companies target and sell price-fixed products to U.S. companies that import those products into the U.S. directly.¹⁵¹ Thus, at the very least, a civil or criminal antitrust settlement that involves such import commerce is proper.

Furthermore, a civil or criminal antitrust settlement is proper even if it involves anti-competitive conduct overseas regarding foreign commerce where that conduct has a direct, substantial, and reasonably foreseeable effect on American commerce.¹⁵² And, given that Congress enacted FTAIA, a civil or criminal antitrust settlement that comports with it, even if it affects foreign commerce, would be supported with “the strongest of presumptions” with “the burden of persuasion [resting] heavily upon any who would attack it.”¹⁵³ In fact, such a settlement would not violate due process at least as long as there is more than a “slight and casual” connection between the United States and the anti-competitive activity in question.¹⁵⁴

It has been the experience of the national reporter that antitrust settlements need to be able to reach foreign commerce where the underlying anti-competitive activity has a sufficient connection to a host country. “Domestic and foreign markets are interrelated and influence each other.”¹⁵⁵ That the overcharges from anti-competitive acts on common products may go through several steps a global supply-chain before those

¹⁴⁷ *Hsiung*, slip op. at 25-28.

¹⁴⁸ *See Matsushita Elec. Inds. Co. Ltd. v. Epstein*, 516 U.S. 367, 374-79 (1996) (court can give preclusive effect to settlement even if settlement resolved claims over which court entering settlement had no jurisdiction).

¹⁴⁹ *Id.* slip op. at 24.

¹⁵⁰ *Id.* slip op. at 25.

¹⁵¹ *Id.* slip op. at 33-35, 41-42.

¹⁵² *Id.* slip op. at 39-41. Whether this exception covers overseas anti-competitive activity, such as price-fixing, involving product components that are incorporated into products sold to U.S. citizens or U.S. corporations is open to dispute. *See, e.g., id.* at 41 & n.9.

¹⁵³ *Youngstown Steel*, 343 U.S. at 636 (discussing the seizure of steel mills by the President).

¹⁵⁴ *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir. 2013).

¹⁵⁵ *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 826, 842 (7th Cir. 2003).

overcharges are paid by U.S. citizens does not render those acts too indirect or remote.¹⁵⁶ And the extraterritorial application of antitrust laws based on such effects is widely accepted.¹⁵⁷

11. Recommendations of U.S. Group On Question A Regarding Antitrust Settlements

The U.S. Group is composed of current and former government enforcers, plaintiff and defense counsel, and legal commentators and scholars. After discussion and consideration of this Report and its findings, the U.S. Group recommends the following general suggestions for the LIDC Congress' Resolution on Question A:

1. Civil and criminal settlements, like civil and criminal prosecutions, are important tools in antitrust enforcement and should remain so;
2. Government antitrust agencies should continue to be given substantial deference in settling their criminal and civil antitrust cases;
3. The settlement of antitrust cases in the civil and criminal context performs valuable services in the public interest, including securing important cooperation and access to otherwise unobtainable information; obtaining monies for victims and/or fines without litigation (or continued litigation); addressing difficult questions involving the balancing of anti- and pro-competitive effects; and exploring the frontiers of legal precedents and remedies in innovative ways. In this respect, it is important that, although these settlements can serve as a body of law for judicial reference in contested cases, they do not bind the courts in the same manner as would case precedent, thus avoiding the need to make premature all-or-nothing choices that can hinder development of the law;
4. Insofar as the goal of more seeking civil admissions of liability, or more civil prosecutions, may be concerned, this is a goal that should be endorsed provided that it is made clear that this goal can be obtained through the public feedback process without the need for legal constraints;
5. Moreover, civil settlements are and remain valuable even without securing a civil admission of liability as a formal matter;
6. Settlements by government enforcers should involve a measure of formal judicial review, albeit a highly deferential one, with a publicly available

¹⁵⁶ See *Loeb Inds. v. Sumitomo Corp.*, 306 F.3d 469, 486-89 (7th Cir. 2002) (discussing the injury of copper wire producers from unlawful activity in the copper futures market); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F.Supp.2d 953, 964 (N.D. Cal. 2011) (discussing overcharges on LCD panels making their way from LCD manufacturers to American retail stores). However, this issue is now being litigated, albeit in the non-settlement context, in front of the United States Court of Appeals for the Seventh Circuit in *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir.).

¹⁵⁷ Floridan Wagner-von Papp, *Competition Law and Extraterritoriality*, in *Research Handbook on International Competition Law* 21, 57 (Ariel Ezrachi ed. 2012).

government explanation of the settlement and its rationale (subject to protecting the confidentiality of certain information), a reasonable opportunity for public comment, and a generally public hearing;

7. A process of formal judicial review of settlements while a case is still in the investigative stage should not require affording a formal right to defendants or third parties to access investigative files, at least for jurisdictions with an American-style system. Informal, but meaningful, sharing of theories, or decisions to prosecute, with defendants, consistent with the need to guarantee confidentiality, are a different matter;
8. The U.S. Group applauds the European Union for affording a right of access for defendants to the antitrust investigatory files of the European Commission in civil proceedings once a statement of objections has issued. A comparable right for defendants in the United States should exist only at a comparable stage in American civil and criminal proceedings, namely the actual commencement of civil or criminal litigation; and
9. The existing state of affairs for third parties should be maintained; third parties should not have access to investigative files. But, they should have access to records filed in court proceedings, e.g., once a case commences or a pre-complaint settlement is filed, subject only to the need to protect the confidentiality of certain information such as trade secrets, a need that should be narrowly interpreted and applied.