



AMERICAN ANTITRUST INSTITUTE

# 2022 IMPACT REPORT



# WELCOME



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# FIGHTING FOR COMPETITION TO PROTECT CONSUMERS, WORKERS, AND SMALL BUSINESSES

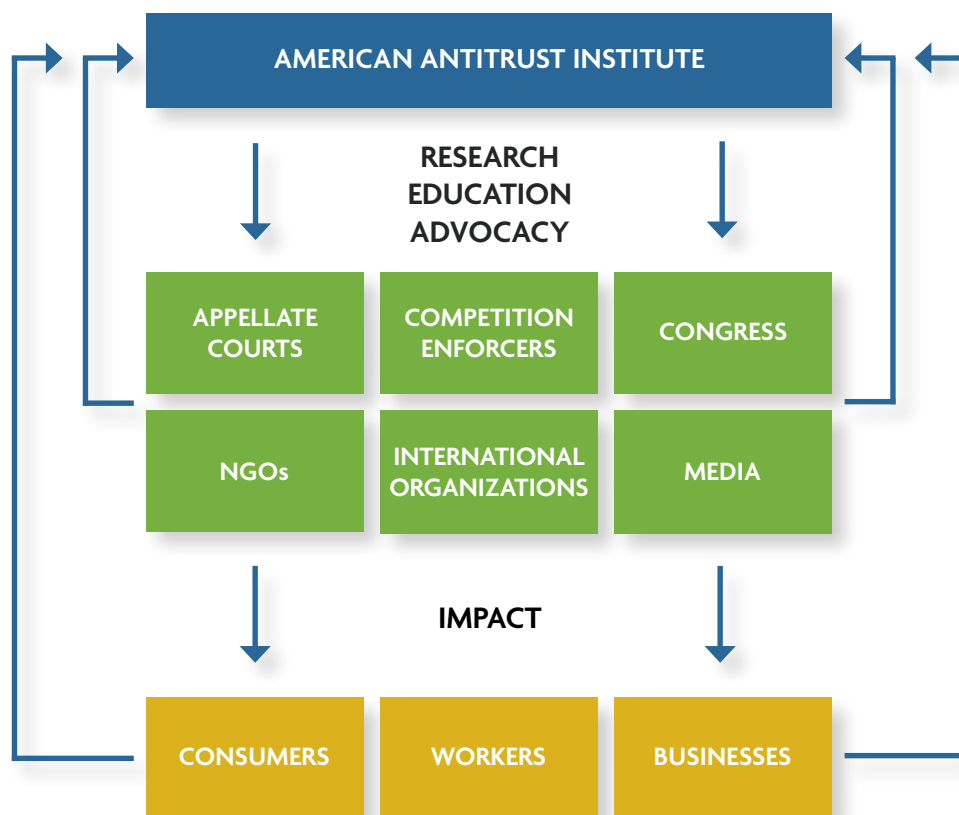
In 2022, the American Antitrust Institute continued to lead with expert legal, economic, and policy analysis that promotes competition for the benefit of consumers, workers, and businesses. The snapshots in this 2022 Impact Report show that AAI's respected and impactful work supports the vital role of antitrust enforcement and competition policy in protecting our markets and the democratic principles that support them. We look forward to serving the public interest again in 2023 as the leading non-profit, progressive competition research, education, and advocacy organization. We can do this only with the help of existing and new sponsors, donors, and grantors. Please help us continue to grow our unique organization and to carry forward AAI's successful 25-year legacy.

Sincerely,

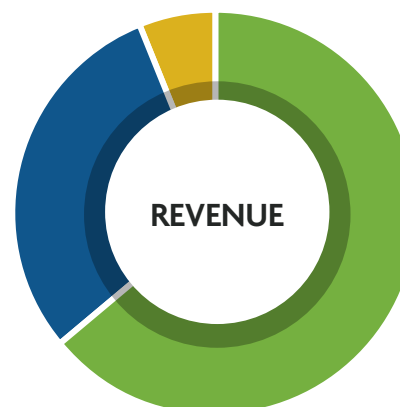
**Diana Moss**  
President, American Antitrust Institute

## EFFECTIVE, EFFICIENT, AND IMPACTFUL

### HOW AAI WORKS



### FISCAL YEAR 2022 FINANCIALS



#### EXPENSES

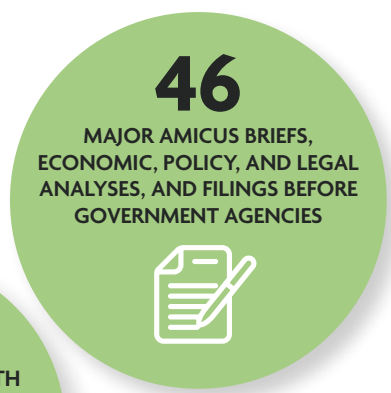
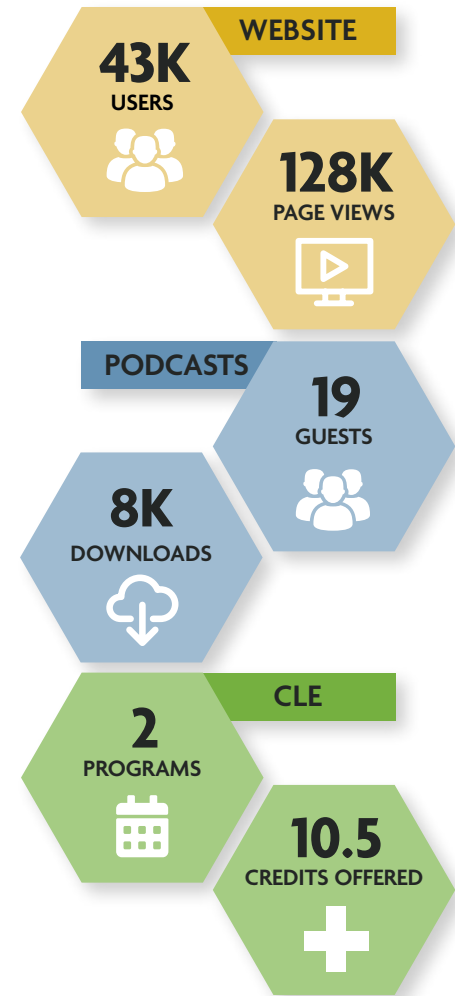
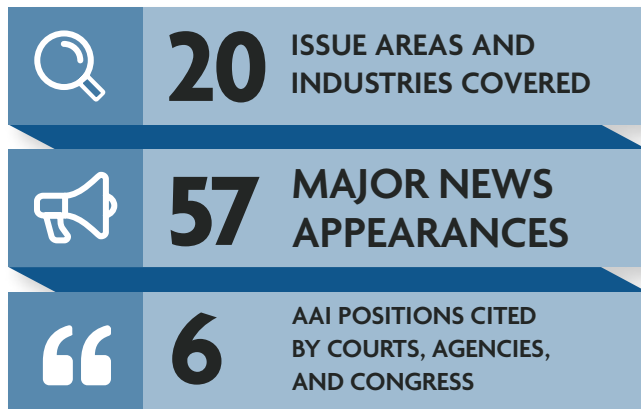
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- Amicus Briefs — 18%
- Legal Analysis — 14%
- Economic and Policy Analysis — 21%
- Comments and Filings — 12%
- Podcasts — 25%
- Events — 10%





## THE NATION'S LEADING PROGRESSIVE COMPETITION RESEARCH, EDUCATION, AND ADVOCACY ORGANIZATION







## AAI'S CUTTING-EDGE ANALYSIS AND REPORTS

### **From Competition to Conspiracy: Assessing the Federal Trade Commission's Merger Policy in the Pharmaceutical Sector**

AAI's analysis of pharmaceutical mergers reveals an FTC policy that is based on approving virtually all transactions subject to divestitures, versus blocking them. The report argues that the FTC's policy requires an overhaul, as it has likely resulted in higher concentration, leading to higher drug prices, price-fixing conspiracies, and exclusionary schemes to keep out generic rivals.

### **Anticipating the Next Generation of Powerful Digital Players: Implications for Competition Policy**

This landmark AAI report examines the unique digital business ecosystem model and its propensity for "growth by acquisition." The report compares key features of digital and non-digital players. Empirical analysis identifies up-and-coming digital players, likely further expansion of the digital sector, and the need for a sector-wide competition policy.

### **What Billion-Dollar Deals Mean for Stronger Merger Enforcement**

This AAI white paper makes a strong case for why billion-dollar mergers should be a major factor in the agencies' calculus for managing risk and allocating scarce resources. It explains the out-sized role of the billion-dollar merger in early- and late-stage enforcement, why they generally pose more significant competitive concerns, and the implications of the findings.

### **Protection or Pretext? Structuring an Appropriate Antitrust Analysis of Apple's Security Justifications for App Store Restrictions**

AAI's commentary frames an antitrust analysis of Apple's security-related justifications for its App Store restrictions. It sets forth the proper allocation of evidentiary burdens and the role of less restrictive alternatives to assist Congress, the Biden Administration, and the federal courts, all of which are currently grappling with Apple's restrictions and justifications in proposed legislation, investigations, or pending cases.

### **Airline Joint Venture Agreements: Assessing Impact on Consumers and Labor**

AAI's analysis is the first to evaluate airline JVs as a "workaround" to further mergers and a creative means of enhancing horizontal control in order to maintain or strengthen the market positions of major carriers. The analysis makes the case for why it is vital to evaluate the competition issues JV's raise, including the impact of higher fares and fees, lower quality, and less choice on consumers, and the prospect of lower wages and reduced bargaining power for workforces such as pilots.

## [A] TITAN IN THE ANTITRUST ARENA.

– Chief Judge Rosenstengel, U.S. District Court  
for the Southern District of Illinois



## MAKING INROADS IN THE COURTS: AAI'S AMICUS BRIEFS

### **AAI Asks En Banc Ninth Circuit to Consider Both Core Antitrust Policies and Practical Realities in Enumerating Rule 23 Standards for Antitrust Class Actions (Olean v. Bumble Bee)**

The Ninth Circuit, sitting *en banc*, agreed with AAI in rejecting a "de minimis rule" for classes that may include some uninjured class members and in holding that regression models that rely on averaging techniques are not inherently unreliable. The court embraced numerous arguments made in the AAI brief and cited sources referenced in the AAI brief.

### **AAI Urges Ninth Circuit to Reinstate Conspiracy Case Against the National Association of Realtors (The PLS.com v. NAR, et al.)**

A unanimous Ninth Circuit panel ruled in favor of the plaintiffs in holding that a direct purchaser in the middle of a supply chain does not have to account for effects on "ultimate consumers," and it is no defense that network effects can make such consumers better off with a single real-estate listing platform than multiple competing platforms. The opinion mirrored AAI's argument that such a defense is directly contrary to the purpose of the antitrust laws and that consumers, not NAR, should be able to choose the products they prefer.

### **AAI Offers Guidance to 11th Circuit on Franchise Employee No-Poaching Agreements (Arrington v. Burger King Worldwide)**

An Eleventh Circuit panel sided with AAI in overturning the dismissal of a class complaint challenging a franchise no-poach agreement covering Burger King employees. Among other things, the court held that Burger King and its franchisees do not constitute a single economic enterprise incapable of engaging in the concerted action required to establish a Section 1 violation.



## SHAPING ENFORCEMENT AND POLICY: AAI'S FILINGS BEFORE CONGRESS AND GOVERNMENT AGENCIES

### Comments to DOJ, USPTO, and NIST to Restore Bipartisan Consensus on Remedies for Infringement of Standard-Essential Patents

In comments, AAI asked the DOJ, USPTO & NIST to restore bipartisan consensus on remedies for infringement of standard-essential patents. The comments applaud the agencies for setting aside their joint 2019 policy statement and restoring two-decades of bipartisan consensus supporting a balanced approach to evaluating remedies.

### Comments to Surface Transportation Board to Update Reciprocal Switching Rules for Freight Rail

AAI's comments to the STB encourage the agency to update reciprocal switching regulations in light of ongoing consolidation and lack of competition in freight rail. AAI supported the STB's proposal to eliminate the need to show anticompetitive conduct and encouraged rejection of arguments that the proposed regulations are unduly costly and interfere with investment incentives.

### Testimony before House Committee on Small Business Hearing on Fair Competition and a Level Playing Field

AAI President Diana Moss testified that small business is an integral part of the U.S. economy but highlighted troubling indications that its role is declining. AAI testimony explains that integration that reinforces high concentration can disrupt the role of small business, and discusses how the goals of antitrust align with the interests of small business versus when other competition policy tools are needed.

### Letter to DOJ on Proposed Merger of Ultra-Low-Cost Carriers Spirit and Frontier

AAI's letter to DOJ provides cutting-edge analysis of why the loss of competition from the proposed merger of ultra-low-cost carriers Spirit and Frontier would likely be felt by consumers in the form of higher airfares, higher ancillary fees, and lower quality service. The analysis also casts serious doubt on the carriers' efficiency claims based on AAI analysis of past airlines mergers.

DESCRIBING AAI'S TESTIMONY ON WEAK ANTITRUST ENFORCEMENT AT THE SENATE JUDICIARY ANTITRUST SUBCOMMITTEE HEARING ON BIG TECH:

“MOSS CAME TO THE HEARING WITH HARD DATA, TESTIFYING THAT [AAI] HAD LOOKED AT OVER 700 ACQUISITIONS.....”

—Senator Amy Klobuchar

### Comments to FTC and DOJ on Merger Policy to Assist Federal Agencies in Updating Guidelines

AAI submitted a comprehensive response to a request for information from the FTC and DOJ to assist the agencies in updating their merger guidelines. AAI's comments take up a number of key issues, ranging from the role of evidence, to buyer power, labor markets, two-side markets, nascent competitor acquisitions, efficiencies, and remedies.

### Comments to FERC on Updating Natural Gas Facilities Certification Policy

AAI filed comments encouraging FERC to update its 20-year-old policy regarding certification of new interstate natural gas facilities. The comments call into question the agency's policy of relying on so-called Affiliate Precedent Agreements as evidence of “need,” explaining why it raises potentially serious competition and consumers concerns around regulatory evasion.

### Commentary on the Huntington National Bank and UC Hastings 2021 Antitrust Annual Report: Class Action Filings in Federal Court

AAI issued its annual commentary on the Huntington/UC Hastings annual antitrust class action report. In the analysis, AAI reviewed new data, the role of COVID-19, and key, emerging statistical trends. The analysis provided in the commentary highlights the importance of private antitrust enforcement in the U.S. system and the particularly important role played by the antitrust class action.

# OUR WORK



## HIGHLIGHTS OF AAI'S 2022 EVENTS

### **23rd Annual Policy Conference – Bringing and Litigating Antitrust Cases in an Era of Change**

AAI's annual conference gathered competition experts to identify challenges to more vigorous enforcement. Public and private enforcers came away with strategies for bringing and litigating antitrust cases, taking on key questions around non-competition goals, mitigating bad legal precedent, and antitrust enforcement as part of the policy toolkit.

### **Virtual Competition Roundtable – Harnessing State Antitrust Enforcement in Food & Agriculture**

AAI's Competition Roundtable addressed state antitrust enforcers as uniquely suited to aggressively addressing violations in food and agriculture markets. The focus was on identifying and bringing cases resulting from problematic horizontal and vertical ownership patterns, market power "bottlenecks" and reactive consolidation, and incentives to collude.

### **Competition Roundtable – Breaking the Monopoly in Ticketing: Policies for Restoring Competition and Protecting Consumers**

This Competition Roundtable unpacked ongoing, systemic competition problems in live event ticketing and proposals to restore competition. Panelists discussed how market conditions and practices have facilitated Live Nation-Ticketmaster's dominance, characteristics of the markets that invite monopolization, and the role of break-ups in reviving competition.

### **16th Annual Private Antitrust Enforcement Conference**

This flagship forum gathered leading private enforcers and experts to explore frontier issues in private antitrust enforcement. Cutting-edge topics in 2022 included class action ethics, collaboration between public and private enforcers, taking antitrust class actions to trial, and best practices for plaintiffs in appeals. The event also featured the Young Lawyers Breakfast and AAI's Awards Night.



**LET'S NOT DENY THAT ANTITRUST IS HOT RIGHT NOW...BUT I HAVE TO GIVE AAI CREDIT BECAUSE AAI STARTED EARLY... AAI LIVED THROUGH THE ANTITRUST WINTER. YOU KEPT THE FLAME ALIVE.**



– Tim Wu, Special Assistant to the President, National Economic Council



## AAI'S TOP-RANKED COMPETITION PODCAST SERIES "RULED BY REASON"

**Efficiencies in Horizontal Mergers – 2020 Jerry S. Cohen Award Winners for Antitrust Scholarship Nancy Rose and Jonathan Sallet, with Guest Host Roger Noll**

**Competition in Freight Rail – Unpacking Consolidation, Concentration, and Remedies in a Critical Part of the U.S. Transportation System**

**How Should Antitrust Tackle Acquisitions of Nascent Competitors? A Conversation With Scott Hemphill, 2020 Jerry S. Cohen Award Winner for Antitrust Scholarship**

**The "State" of State Antitrust Enforcement with Wisconsin Assistant AG for Antitrust Gwendolyn Cooley**

**Invigorating Antitrust Enforcement – A Conversation with Carl Shapiro**

**Litigation Funding is Changing the Contours of Antitrust Class Actions in the U.S. and Abroad**

**The High Costs of Growing Corn – How Growers are Squeezed by High Input Prices That are Set by the Fertilizer Oligopoly**

**From Medical Licensing to Health Insurance – Major Policy Issues That Will Shape the Future of Telehealth**

**Toxic Cocktail or Essential Device for Protecting Competition – Recent Developments in the Empirical Study of Antitrust Class Actions**

**Countervailing Power – Why It Cannot Save Local Newspapers or Competition**

**Is Antitrust Agnostic? Enforcement in Markets with Outsized Implications for Society, Health, and Vulnerable Groups**

**Government Institutions and Antitrust Reform – Wielding the Federal Agencies to Implement Constructive Change**

# CONNECT & SUPPORT



## THE ONLY WAY AAI CAN FULFILL ITS MISSION IS WITH YOUR SUPPORT.

Promoting competition that protects consumers, businesses, and society is more important than ever. AAI is the leading progressive competition research, education, and advocacy organization in the United States. Our independent, expert, and highly respected work has significant impact on advancing the case for strong enforcement and progressive competition policy. Please connect with AAI and give your support.

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