Exhibit A

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

HONORABLE ROSLYNN R. MAUSKOPF
Director

WASHINGTON, D.C. 20544

July 19, 2021

Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
Washington, DC 20515

Dear Mr. Leader:

I write regarding H.R. 3460, the "State Antitrust Enforcement Venue Act of 2021," which was ordered reported as amended by the Committee on the Judiciary on June 24, 2021. Neither the Judicial Panel on Multidistrict Litigation ("Panel") nor any of the relevant committees of the Judicial Conference of the United States ("Conference") have had the opportunity to analyze this bill thoroughly. Considering its potential impact on the federal Judiciary and the efficient administration of justice, I offer for your consideration the following initial observations. These comments are neither expressions of support for, nor opposition to the bill. Nevertheless, I hope they are helpful and note that pending a more in-depth analysis, by both the Panel and the relevant Conference committees, additional comments may be submitted.

Background

Section 1407 was enacted in 1968, in the wake of a large multidistrict antitrust litigation involving alleged conspiracies to divide businesses and fix prices in multiple product lines of electrical equipment. That litigation encompassed more than a thousand actions in numerous federal judicial districts brought, in large part, by public utilities against virtually every manufacturer of electrical equipment. The sudden influx of civil antitrust actions led to the creation of ad hoc procedures to coordinate the litigation before a smaller number of judges to eliminate duplicative discovery and pretrial proceedings.

Section 1407 was intended to serve as a permanent solution to the problem that large multidistrict litigations pose to the federal Judiciary's ability to administer its civil docket efficiently and justly. The statute created a panel of seven circuit and district judges, no two of whom shall be from the same circuit, which is authorized to transfer

civil actions involving one or more common questions of fact and pending in different districts to a single district for coordinated or consolidated pretrial proceedings. *See* 28 U.S.C. § 1407(a). To distinguish from other forms of transfer and consolidation, transfer for coordinated or consolidated pretrial proceedings under Section 1407 is referred to as "centralization." The Panel may transfer actions for centralized pretrial proceedings only if it determines that transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions. *Id.* Civil actions transferred to multidistrict litigation (MDL) proceedings are remanded by the Panel at the conclusion of pretrial proceedings to their transferor districts (*i.e.*, trial is conducted in the district of original filing), unless the actions were terminated during the course of pretrial proceedings. *Id.*

Over the past fifty years, MDLs have encompassed a wide variety of civil litigation in the federal courts, but antitrust litigations have always constituted a core category of cases subject to centralization. Section 1407 contains one exception with respect to antitrust MDLs – enforcement actions by the United States arising under the federal antitrust laws are not subject to transfer under Section 1407. *See* 28 U.S.C. § 1407(g). Congress has amended Section 1407 only once. As part of the Hart Scott Rodino Antitrust Improvements Act of 1976, Congress added subsection (h), which authorizes the Panel to consolidate and transfer any action brought under 15 U.S.C. § 15c (*i.e.*, State *parens patriae* actions) for both pretrial purposes and trial. *See* 28 U.S.C. § 1407(h).

Concerns

H.R. 3460 would amend 28 U.S.C. § 1407 to limit the Panel's ability to centralize civil actions brought by States under the antitrust laws of the United States and delete the subsection added by the Hart Scott Rodino Antitrust Improvements Act of 1976. Congress to date has never amended Section 1407 to restrict the Panel's ability to centralize civil actions. Doing so in this instance raises several concerns that merit Congress's consideration.

H.R. 3460 May Negatively Impact the Efficiency and Conduct of Antitrust MDLs

Restricting the Panel's ability to centralize State antitrust actions could negatively impact the efficiency and conduct of antitrust MDLs. When the Panel centralizes actions under Section 1407, it considers whether centralization will enhance convenience and efficiency with respect to the parties, witnesses, and the federal Judiciary as a whole — the Panel does not limit its consideration to the impact on any one party in isolation. In general, MDL litigation is most efficient when all related actions are centralized before a single judge. Doing so minimizes the potential for duplicative discovery and motion practice, eliminates the potential for inconsistent pretrial schedules or rulings, and

conserves the resources of the parties, counsel, and the Judiciary. To the extent there are actions with different legal issues or concerns, the MDL judge can formulate a pretrial program that allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues (for example, by creating a separate discovery or motion track for certain actions). This ensures that pretrial proceedings will be conducted in a streamlined manner leading to a just and expeditious resolution of all actions to the overall benefit of the parties.

Excepting State antitrust actions from centralization can only increase the number of actions (and, hence, the number of independent parties and courts) outside the ambit of the MDL. Related actions that cannot be centralized can introduce case management difficulties into the MDL. Parties and courts in actions pending outside the MDL may (either actively or inadvertently) undermine attempts to coordinate and streamline discovery and pretrial practice in the litigation. For instance, such actions may be subject to different pretrial schedules, parties and witnesses might by subject to duplicative discovery, and the courts might issue inconsistent pretrial rulings pertaining to the same parties. It also is possible that substantively inconsistent rulings could issue — such as with respect to market definition or which standard of review (*per se* or rule of reason) applies to a given case. Given the nationwide scope of these antitrust litigations, such inconsistent rulings may complicate proceedings and sow confusion not only among the courts and parties, but also in the marketplace.

H.R. 3460 May Result in Inefficient Judicial Administration of Antitrust Litigation

Apart from the general impact on efficiency caused by increasing the number of actions that cannot be centralized, there could be particular inefficiencies created by excepting State antitrust actions from centralization. States are, in many ways, similar to private antitrust plaintiffs. For instance, States may sue because they have suffered a direct antitrust injury (e.g., if the State directly purchased a product subject to an alleged price fixing conspiracy). Along with their claims under the federal antitrust laws, States may also include claims brought under state antitrust law for "indirect" antitrust damages not permitted under federal antitrust law.[1] Both types of claims are substantially similar to those presented by private plaintiffs asserting antitrust injury as direct or indirect purchasers. As such, these type of State antitrust claims will present factual and legal issues that are similar or identical to those presented by the claims of the private plaintiffs. These common claims generally will be most efficiently litigated in a centralized proceeding. Notably, similar claims by the United States for civil damages due to injury to the government itself are not excluded from centralization under Section

[1] In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court established a bright-line rule that plaintiffs who are two or more steps removed from the antitrust violator in a distribution chain (*i.e.*, indirect purchasers) do not have statutory standing to bring a federal antitrust action.

1407. *See* 28 U.S.C. § 1407(g) (stating that the exemption for claims brought by the United States as a complainant under the antitrust laws "shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a)").

In addition, States may bring federal antitrust claims on behalf of their citizens who have suffered harm due to the alleged anticompetitive conduct (*parens patriae* actions). Those citizens may be class members in private antitrust actions. Indeed, Section 4C of the Clayton Act, 15 U.S.C. § 15c, imposes on State *parens patriae* actions notice and opt out requirements akin to those for private class actions under Federal Rule of Civil Procedure 23. Courts also are statutorily obligated to exclude from any award in a *parens patriae* action any amounts that duplicate awards in private actions. *See* 15 U.S.C. § 15c(a)(1). A single MDL judge usually will be best positioned to coordinate state and private litigations.

H.R. 3460 Could Adversely Affect the Interest of States

Excluding State antitrust actions from MDL proceedings could adversely affect the interests of the States. While States might gain greater autonomy with respect to their individual actions, they would lose much of their ability to participate in and influence the centralized proceedings. Collaboration between private plaintiffs and State Attorneys General also may be reduced, particularly if the States retain outside counsel to prosecute their antitrust claims. Such counsel may have attorneys' fees or other incentives inconsistent with close coordination with the MDL. This could result (absent coordination between the different courts) in competing pretrial schedules and inconsistent orders that complicate the management and adjudication of both the State antitrust action and the MDL.

H.R. 3460 Could Undermine the Panel's Efforts to Enhance Coordination with Federal Antitrust Litigation

Excluding State antitrust actions from centralization could undermine the Panel's efforts to facilitate coordination and cooperation between private antitrust litigation and antitrust actions brought by the United States. Where there is a federal enforcement action or investigation that cannot be included in a given antitrust MDL, the Panel often will centralize the MDL in the court where the federal antitrust action or grand jury proceedings are pending to facilitate any appropriate and necessary coordination with the private actions. By multiplying the number of actions excluded from centralization under Section 1407, the proposed legislation might eliminate this alternative means of

facilitating coordination with respect to litigations involving both federal and state antitrust actions.[2]

Conclusion

Thank you for considering these comments. We request that the Committees of the Judicial Conference and the Panel have the opportunity to conduct more in-depth analysis of the legislation before any further consideration by Congress.

If we can be of further assistance to you, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,

Roslynn R. Mauskopf

Roslynn R. Mauskopf
Director

cc: Honorable Jim Jordan
Honorable Chuck Grassley

Identical letter sent to: Honorable Steny Hoyer

[2] It also should be noted that the Panel, when considering where to centralize an antitrust MDL, may opt to centralize the litigation in a forum selected by a State Attorney General. *See, e.g., In re Med. Waste Servs. Antitrust Litig.*, 277 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (transferring case to the District of Utah in part because the Utah Attorney General had investigated the alleged antitrust conduct).