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2012 Antitrust Law Section Symposium

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Section Chair
JAY L. HIMES
Labaton Sucharow LLP
New York City

Program Chair
WILLIAM H. ROONEY
Willkie Farr & Gallagher LLP
New York City

TABLE OF CONTENTS

Introduction and Welcome

MR. HIMES: Good morning. This is the Antitrust Law Section program for the entire day. If this is not the program that you intended to come to, that's fine, just take up a chair. The speakers would prefer full chairs to an empty one, and you may even get a chance to vote on officers who will lead a Section that you didn't intend to come to anyway.

For those of you who did intend to be here, you probably know what's going to happen for the day. We will do a morning program, which Bill is in charge of as Program Chair and the incoming Section Chair. He'll tell you more about it. We have a couple of nice panels for the morning and the first one is up here.

At some point in the morning we will have a break for the New York Bar Foundation folks to come in. There is the business part of the meeting near the end of the morning where we will transact the weighty business of the Section in short order. There is a break for lunch for about an hour from roughly 12:00 to 1:15.

The afternoon section has three panels. As you all know, the evening events, we will have our reception over at the University Club and dinner there. Our keynote speaker at the dinner is Bill Kovacic, former FTC Chair. And we will confer the Lifland Award on my good friend Steve Houck.

And that is the day. Bill, as I said, will give you the gory details.

If I might ask everybody to turn off their cell phones or silence them, same with tablet computers or netbooks or whatever you may have. I guess you don't have to really turn them off. I'm like the airlines, where it never happens anyway, just make them quiet.

Bill, it's all yours.

Preliminary Injunction Standards for the FTC and DOJ in Merger Cases—Do They Really Make a Difference?

MR. WILLIAM H. ROONEY: Thank you, Jay.

My name is Bill Rooney, and I have had the privilege and the pleasure of working with a number of panelists to put together what we hope will be a terrifically fun and informative day. We have a series of panels that span the spectrum of antitrust law, and importantly, three of the panels have been conceived and organized by our newly formed and vibrant subcommittees. This is the manifestation of the first year's work on the subcommittees, as we have been giving them the opportunity to express their particular mission in the form of what we think will be very interesting panels.

A few logistics. You have two sheets in the big book that you have, and if you didn't pick up a book, there are CDs that are available for you as well. But for a CLE credit you need to have that gray and yellow sheet. Both the gray and yellow sheet say the morning session, but in the block below that phrase there is one for the morning session and one for the afternoon session. So before you leave for lunch, be sure to put the morning session in the bin. When you come back in the afternoon, you can put the afternoon session in. I just don't want anybody not to get the credit they deserve for having been here.

The morning sessions will be twofold. One is going to be Preliminary Injunction Standards For the FTC and DOJ in Merger Cases, Are They Different? And if so, does the difference make a difference? And Lisl Dunlop is going to moderate that panel, which she will introduce momentarily.

We will then have a short break, during which we hope the Bar Foundation will make its presentation to you. And then for our showcase presentation for the day, our Annual Review of Antitrust Developments, we have a whole new format that Elai Katz will moderate and has conceived and worked with Dick Rapp and Scott Hemphill. I'm sure that will be engaging.

Throughout the day we would very much like questions. The moderator will let you know the time and place they would prefer the questions. As the Chair I don't really mind when they are as long as we have them, because I think what really invigorates a CLE program is interaction with the audience as well as among the panel.

With that I would like to turn this over to Lisl and get rolling.

MS. LISL J. DUNLOP: Thank you, Bill.

Happy Australia Day everybody!

We have a very American topic before us today: the preliminary injunction standards that apply to merger standards brought either by the Federal Trade Commission or the Department of Justice. For those of us that practice in this area, we know they certainly look different on paper. The question is, do they really make a difference? Do they make a difference in how you proceed with your merger review? Do they make a difference in how you actually proceed with the litigation of a PI and seeing a matter through to the conclusion on the merits? Do they make a difference to what evidence you use, or how you use your economist, or what your economist is going to do? At the end of the day, do they really make a difference in the outcome?

We have got a great panel for you this morning. To my left, Janusz Ordover, who I think is well known to all of you. Janusz is a Professor of Economics and a former Director of the Masters in Economics Program at New York University. He has experience at the DOJ—he served as Deputy Assistant Attorney General for Economics in the Antitrust Division under President George W. Bush. And he's also well-known to many of us as a consultant economist in merger cases and many other cases. Thank you, Janusz, for participating.

Next we have Len Gordon. Len Gordon currently serves as Director of the Northeast Regional Office of the Federal Trade Commission, where he supervises the investigation and litigation of consumer protection and antitrust matters. Len joined the FTC in 2005 from the firm that's now DLA Piper, and he has been the Director since March 2008. I personally encountered Len on the other side of the courtroom in administrative litigation, and I know that he has appeared in PI cases and consumer protection litigation.

Next on our panel we have MJ Moltenbrey. MJ is a partner at Dewey & LeBoeuf, (currently a partner at Paul Hastings) where she is in the antitrust practice. She represents clients before the FTC, DOJ, state attorneys general, a very deep practice in merger and other antitrust litigation and counseling. MJ is also here to represent the DOJ side of the coin. She was formerly Director of civil non-merger enforcement in the Antitrust Division, and she also served as Chief of the Civil Task Force and trial attorney in the Transportation Section during her tenure at the DOJ.

Finally, we have Stacey Mahoney, who is partner at Gibson, Dunn & Crutcher. Stacey also has extensive experience in counseling and litigating on behalf of clients on merger and other antitrust cases. And most particularly related to our panel today, Stacey was part of the team in the *CCC/Mitchell* case, which was an FTC preliminary injunction challenge, and I'm sure we'll hear a bit more about that today.

A couple of housekeeping matters. We'd like this panel to be as interactive as possible. We'll be going around to get people's reactions to different aspects of the different standards. I'd encourage people to ask questions as they occur to you; don't hold them until the end. So just raise your hand, and we'll call upon you.

MR. ROONEY: We have a mobile mic, so it will be easy to have the dialogue.

MS. DUNLOP: For those of you who may be unfamiliar with the different standards, Stacey is going to cover the history and background of what the standards actually are and why we have them. Then we'll move into the impacts of the different standards, starting from the very beginning of a merger case, during a merger review, clearance to one or the other agency and how the different standards might impact the calculus of the parties and agencies through the merger review process into a challenge situation, and ultimately to the resolution of a case.

Finally, we'll throw up some thoughts on the actual impact the standards have on the ultimate outcome and some ideas about how you might take this forward in the future. Stacey.

MS. MAHONEY: Good morning. I appreciate you all being here for the first panel of the day.

So I think it's relevant for our consideration of what will be clear in my opinion today is a divergent standard between the Federal Trade Commission and the Department of Justice for preliminary injunction by looking at the statutory authority pursuant to which the FTC goes into a federal District Court to get a preliminary injunction.

The statute was actually introduced in 1973, before we even had the HSR Act. So Section 13(b) was not drafted or passed with mergers in mind. In fact, the purpose of the Act—and I'm going to quote a few things from the various Congressional record authorities—it was not subject to a lot of lights in the terms of the passage of it or records supporting it. But the purpose of the Act was to grant the FTC the requisite authority to ensure prompt enforcement of the law the Commission administers by granting statutory authority to seek preliminary injunctive relief to avoid unfair competitive practices.

What was happening was the FTC was pursuing various antitrust conduct issues and wasn't able to get any injunctive relief to stop them; that, they felt, was seriously hindering their prosecutorial abilities.

So the question turns to what is really relevant for us today. What is actually the thought process in terms of the standard for the preliminary injunction for the FTC going into a federal District Court? The idea was to maintain the statutory public interest standard, which is now applicable, and it was referring to the federal case law that was extant for the Department of Justice primarily, and not to impose the traditional equity standard of irreparable damage. That, of course, is the standard that is imposed on private parties back then and to this day.

They went on further to say that that standard is not appropriate for the implementation of a federal statute by an independent regulatory agency, the FTC, where the standards of public interest measure the propriety and need for injunctive relief.

So that was really the point. What they were really passing this for and language in Section 13(b) was to allow the FTC to get an injunction without establishing the irreparable damage requirement in the traditional PI paradigm.

So what happened? Then subsequently we have the HSR Act passed, and initially, of course, mergers were being challenged not pre-consummation but post-consummation, so we weren't really having the problem of this preliminary injunction issue because that wasn't the way that it worked.

The injunction cases in the beginning were really kind of all over the place. We had a 1977 *FTC v. Lancaster Colony Corp.* case that said the courts were akin to a rubber stamp, requiring no evidentiary hearing and little analysis when the FTC came in for a preliminary injunction. And then contrast that with a case the *FTC v. Great Lakes Chemical Corp.* in 1981, in which the Court said the analysis of the preliminary injunction is considered—the preliminary injunction—an extraordinary and drastic remedy whose severe adverse consequences could lead to the deal dying. So there was a recognition from early on that in fact the granting of a preliminary injunction in the merger context could result in the deal being killed altogether.

And of course this is not just a historical debate. As recently as 2003 in the *Inova* case the Court rejected the Defendant's request for an evidentiary hearing with witnesses, saying the issue before it was a very narrow one.

Now if any of you are doing any merger practice, you have read the lengthy decisions in the most recent cases, the 2008 and 2009 cases, the *Whole Foods* and *CCC/Mitchell* cases respectively. Both of those adopt a kind of different standard. And Judge Collyer in the *CCC/Mitchell* case relied quite heavily on the *Whole Foods* decision. If you remember, there is a non-precedential plurality; Judge Brown and Judge Tatel granted the preliminary injunction, and Judge Kavanaugh denied it. But Brown and Tatel had separate opinions.

Nevertheless, Judge Collyer in the *CCC Holding* case cited the *Whole Foods* decision in excess of 20-some-odd times in order to support her finding that the standard for the FTC in a preliminary injunction case is that they were entitled to injunction if the FTC raised questions going to the merits so "serious, substantial, difficult and doubtful" as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals. And that standard seems to be the one that the FTC is going to be propounding on an ongoing basis.

The DOJ has the historical standard: The government must prove a likelihood of success on the merits; irreparable harm if the injunction does not issue; less harm will result if the preliminary injunction issues, and public interest. Now, courts normally presume the irreparable harm issue, so that doesn't seem to be subject to an evidentiary requirement. But those are very significantly different standards.

So what we are going to discuss today, and I hope I've given you a little bit of background for how the discussion is going to be framed, is some of the opinions on this. Commissioner Rosch has voiced some recommendations of how things might be changed. The ABA submitted some proposals to the Antitrust Modernization Commission, and the AMC actually came out with some recommendations about how to standardize these PI standards between the Department of Justice and the Federal Trade Commission. We'll talk more about those later, but I wanted to give you a framework with which we'll analyze these issues on a going-forward basis this morning.

MS. DUNLOP: Thanks, Stacey.

So where we are left is that, even within the FTC cases, there is a real divergence in how courts have interpreted the standard. In the modern cases, you're left with the FTC's highwater mark for a PI being heard just on the papers, no hearing. And what I think is more usual in the cases we're seeing, *CCC* and *Whole Foods* certainly, and some of the other recent cases, a fuller evidentiary hearing that looks a little more like a DOJ PI proceeding or DOJ final injunction proceeding. Still, maybe there's a different standard applying when it comes to actually making the decision.

Are we all agreed that the standards are actually different?

MR. GORDON: For a preliminary injunction I'm not sure that there is that much difference in the standard. If you look at the Justice Department's papers in the *H&R Block* case, they use the term reasonable probability. They cite a bunch of FTC cases as to what the standard ought to be. What happens, though, almost uniformly, is when the Justice Department brings a challenge, the preliminary injunction is collapsed with a final adjudication on the merits and there they have the full burden of proof. So I can't think of an example where it was just a preliminary injunction hearing on a Justice Department merger challenge and a subsequent trial on the merits. If you look at the Justice Department's papers, they maintain you need to meet a standard very similar to that which the FTC has to meet. It just never comes to be that you have to meet it because the two proceedings end up getting collapsed.

MS. MOLTENBREY: I think there's clearly a technical difference in the standards. I think I agree with Len, that whether it actually plays out and has a practical impact when you're looking at the different preliminary injunction standards is really hard to measure, because DOJ cases are almost always trials on the merits, where the full burden of proof of the violation is on the government.

In the *H&R Block* case, there's an interesting footnote in the Court's opinion; I think footnote 6, where the Defendants were arguing about the fact that the DOJ was citing these FTC decisions saying, well, it is a different standard, they don't apply. Actually the Court said yes, it is a different standard for preliminary injunction, but they are citing the cases for the ultimate standard of Section 7, and for that purpose and the framework of analysis it doesn't really matter, so I'm going to rely on those decisions for that framework. But even there, the Court seemed to sense if it wasn't a preliminary injunction hearing, which it had been frankly up until the date the trial was starting when the parties agreed to combine the trial on merits with the preliminary injunction hearing, perhaps the standards would have been a little different.

MS. DUNLOP: Does anyone in the audience have any comments?

MR. ROONEY: Just before we go by this slide, in private litigation it would be a substantial likelihood of success on the merits, not just a likelihood. Did we consciously omit the word substantial here for a governmental standard?

MS. MAHONEY: Yes. With a governmental analysis it is typically a sliding scale, yes. So the real issue is they don't necessarily have a substantial likelihood of success. If they have a substantial likelihood of success, then the defendants have to put in more evidence in order to contrast that. But they can get by with a showing of a likelihood of success. Again, that's the DOJ standard.

What's happened with the FTC is that likelihood of success has been converted, and this was clearly done in the *Whole Foods* case and has been a adopted now by Judge Collyer in the *CCC/Mitchell* case. The likelihood of success requirement has been converted to this requirement that the FTC raise questions "so serious, substantial and difficult."

MR. ROONEY: To me there is a chasm between the two; not a technical difference but a substantive chasm. That is, all the FTC has to do is show a hard market definition question, as was the case in *Whole Foods*. And the Court says, how can I decide this; this is really a serious question on which the whole case may turn, and it warrants serious study in an administrative law context.

In an ordinary PI context the burden is on the plaintiff. And the DOJ has lost a lot of cases by not having sufficient evidence to demonstrate that its market definition not just is plausible but is right. That is the difference between winning and losing the case, and it may turn on where your merger finally happens to be cleared if indeed those standards are different. If I've got that right.

MS. DUNLOP: John?

MR. JOHN HERFORT: Judge Collyer in her opinion says at footnote 11 that the "likelihood of success on the merits" standard in an FTC context, in her phrase, has a less substantial meaning than in other preliminary injunction cases.

I was one of the lawyers in the case, and we read that as a clear statement that non-FTC cases, including DOJ, were they tried for preliminary injunction would be tougher on the government than for the FTC.

Now as MJ points out, few DOJ cases get tried on a preliminary injunction as opposed to a full hearing on the facts; *Siemens* is the classic, and it's 30 years old. *Siemens* makes it pretty clear that it is a tougher burden on DOJ than in the FTC cases in the most recent years. The reason for that is the Department of Justice likes to go to a full hearing on the merits as it gets more discovery.

I think that there is a clear difference. Whether it is a chasm or not, that's a linguistic issue. As a practical matter, what happened in *CCC* was that the judge said the government wins on market definition, it wins on concentration, but I've got to decide and focus on effects. Unilateral effects, she says, the defendants are clear winners. Coordinated effects, she basically says, I can't make up my mind. She cites Judge Tatel and says serious questions, therefore the tie goes to the government. That's what happened.

Now what that case shows is that there are cases that get tried on a PI basis with the FTC where market definition is inevitable. Market definition is sometimes inevitable. In *Whole Foods*, the government's market definition was right; the numbers were off the charts and the defendants didn't have good arguments.

In some cases where the market definition is bad for the defendants and the numbers are high, judges in the DC courthouse are going to look at effects. So to me a real question in many cases is: How do they apply the likelihood of success / substantial questions standard to the effects? It is pretty clear to me, I was one of the lawyers in this and that was part of the outcome. As Judge Collyer says in the footnote, you've got a much easier standard if you're the FTC. It is that simple.

MS. MAHONEY: I think all that is right. If we put it back in the framework of why Section 13(b) was passed, that is the correct state of play. But I think it is the incorrect question. What was 13(b) meant to give a benefit for? It was not on the likelihood of success, but on harm issue. So our whole dialogue has been shifted to a different one of the criteria, and arguably the most important of the criteria, why else do you get a preliminary injunction? The whole idea is, of course, to keep the status quo, but as the courts have consistently recognized, it doesn't keep the status quo. In fact, very frequently, if not most of the time, a preliminary injunction kills the deal, and it changes the framework of the parties' reality.

MS. MOLTENBREY: I wanted to say I agree with Bill in practice there is a chasm, but I think what is hard to tell here is how much of that is due to the different preliminary injunction standards and how much is due to the fact that DOJ rarely gets to try or represent its case on a preliminary injunction standard at all.

Certainly I'm going to put my DOJ hat on. I think the DOJ would argue in a case, and has argued that the standard for it to get an injunction isn't really that different from what the FTC standard is; that they should benefit from the presumptions of the public interest standard; that they should benefit from presumptions on market concentration and other factors. The reality is we never see that played out, and never get a court decision on that, because ultimately the courts are deciding DOJ merger cases on the Section 7 merits. And that's where you really know there is no question there is a chasm between the FTC preliminary injunction standard and the DOJ standard.

MR. HERFORT: The only thing I would add to that, Bob Kramer gave a speech a couple of years ago just after *CCC* was decided in which he totally unsurprisingly said the standards are the same. But Bob Kramer works for Department of Justice and he is one of the guys that manage the program.

As to what Stacey said, the whole issue of the equities is to some extent the Part 3 experience cuts against the defendants. Because the FTC's position is look, if you let this merger close and you wait for the Part 3 process to play itself out, you're hurting the public interest. That's a big deal. Let it close; in their view, it immediately starts causing consequences that the FTC thinks are bad news. And that's an argument that many of us in the bar think unfortunately has some resonance with the judges in the D.C. courthouse who hear most of these cases.

MR. MARK BOTTI: Could I offer a comment and talk a little bit about how DOJ collapses the PI and the trial on the merits, so you have one trial on the merits? In an FTC preliminary injunction hearing, the court can't have a trial on the merits, so you can't divorce the discussion of the different standards from the question of when is the Part 3 trial and where it is going to occur.

So who is going to really adjudicate this? Is it the court or is it the FTC? In a DOJ case it is always going to be the court. In an FTC case one of the questions is are you going to have two people have a full trial on the merits, which lends itself to an argument that a more truncated standard for the court to decide whether the FTC gets to have that trial on the merits may be appropriate if you can have this interesting two-system approach to antitrust enforcement.

MR. GORDON: I think that's right. If the Commission is actually going to adjudicate Section 7 cases, the only way that works is if it has the opportunity to quickly stop the merger and adjudicate the case on the merits. Otherwise it doesn't work. That's why the Commission changed the process a couple years ago to try and give itself more of an opportunity to actually read cases on the merits.

MS. DUNLOP: That's a really helpful segue. Let's move to the impact on the process.

MJ, why don't I start with you: Please run us through the typical merger review process.

MS. MOLTENBREY: Sure. I can tell from looking around that most of the people in the audience probably know this stuff pretty well, but for those of you who don't, we'll kind of walk through what the process is.

One of the things that I think has been somewhat alluded to or foreshadowed by Mark's comments is that timing in these questions is important. That's part of the reason why I have some timelines on this slide.

I don't think there is really a significant difference between DOJ and FTC practice during the investigation stage of a matter. Once you have a merger agreement and a letter of intent or a signed agreement to present, you make your HSR filing. Obviously, the timing of that is at the parties' discretion, but very typically that would be five or ten days after the signing, which starts your first 30-day waiting period.

I'm assuming here that we are dealing with a transaction that everyone knows from the get-go is going to raise significant antitrust issues, so your first step is likely to get an access letter from the agency requesting some predictable sets of information, customer names, sales information, business plans, documents, etcetera. That will be provided, and the agency will be conducting interviews, and you'll be beginning your advocacy work with the agency.

By the 30th day you will get your second request letter, which will trigger your second waiting period. During which time you'll be preparing to comply with the second requests. It may well be the agency is going forward with a more formal discovery process, possibly depositions, or hearings in the case of the FTC. Parties need to get their white papers. How long that takes varies between transaction to transaction, but those are some fairly typical ranges up there. Either moving very quickly, meaning maybe you will get into compliance in two months to two-and-a-half months. It wouldn't be unusual for that to be quite a bit longer than that in a large case. So you've got a range of a couple of months there.

You will certify substantial compliance, which then triggers the last 30-day waiting period. Although as a practical matter, more often than not the parties will enter into some sort of a timing agreement with the agency that will give them a little bit more time. The agency will say you've raised some issues that we want to consider, but if you want us to really look into those issues, you are going to have to give us some additional time, otherwise we are just going to have to get ready for litigation, and we are not going to give you the hearing that you want to have on these issues. So there will be some sort of timing agreement.

So the ultimate consequence of that is that the investigation leading up to a filing of a complaint typically, even on a fairly quick investigation, is going to take about six months and may well take longer than that. It is pretty hard to get it done in less than six months, although occasionally it will be a little shorter than that.

Also going forward, we started here at the letter of intent contract, but as we get into the discussion one of the things I want to talk about is the impact of these decisions and of these differences between the agencies may actually start even before then, because it comes down to when you're negotiating your merger agreement and what it says and what is required. So this is the first step, where no matter where you think you're going to end up, you're looking at about six months or so, give or take, before you're even going to be in court.

MS. DUNLOP: To continue with the overview of process so we can put the comments into context, Len, would you give us an overview of what's going on at the FTC?

MR. GORDON: Sure. The time frame that MJ laid out is equally applicable to either agency. What has changed in the last couple of years is sort of the sequence of events in an FTC challenge. For a long time the agency would seek a preliminary injunction and sometimes not even issue an administrative complaint until the preliminary injunction had been resolved and then would decide. I mean it would not necessarily be determinative of the outcome of the injunction as to whether an administrative complaint would issue.

I forgot something really, really important. If you don't remember anything else I said today, please remember this. Anything that I say today represents my views and not necessarily those of the Commission or any of the Commissioners.

MS. MAHONEY: Applicable retroactively.

MR. GORDON: Nunc pro tunc that is effective.

So I think the Commission felt—again, I thought the Commission felt that doing it that way diminished its role and wasn't really fulfilling the role that Congress had created for this to be an expert agency and to push the law forward. So there had to be a fast-track procedure in the rules as amended 1996, and I think it was never, maybe almost never used. So the idea was to change the paradigm. *Inova* was really the first case we did that. The idea was to issue an administrative complaint either before or at the same time as the preliminary injunction or the District Court complaint and to have those two actions proceed at least initially on parallel tracks and have the judge maintain the status quo and then let the Commission adjudicate the matter.

The Commission realized if it was going to ask the parties to hold things separate, it needed to resolve these things quicker than it had up until now, and they amended the Part 3 litigation rules. I'll go over them very quickly. Compared to prior rules, it is much, much quicker. To the extent there are multiple matters in Part 3 adjudication, 13(b) preliminary injunction matters take precedence. The hearing commences five months after the filing of the administrative complaint, which is roughly, if you average it out, when a Justice Department trial on the merits would begin. You have 14 days to respond to the complaint. Your initial disclosures are due within five days of the answer. The hearing is limited to 210 hours; that's about 30 trial days. Post findings and conclusion 21 days after closing of the record, which is usually pretty close to when the actual evidentiary hearing ends, and replies ten days later. The ALJ has to issue his initial decision 70 days after the last filing, post-findings. And the Commission, in a 13(b) appeal, you only have to file the appeal; the review is automatic. Briefs are due 20 days after the initial decision; 20 days for reply, I mean for answer, and five days later for reply. So it is a very expedited briefing schedule. Oral argument within ten days of the reply. And the Commission has held itself to issue a decision, final decision 45 days after oral argument. So that's a pretty aggressive schedule. The commission takes those deadlines very seriously.

This is an order from a case that I actually tried in the consumer protection area, and I asked the Commission to move the oral argument two days, because I would be arriving from ten days away only the day before the oral argument, and the Commission said no, they are holding me to it. This wasn't even under the new rules. So the Commission does take these rules seriously.

ProMedica is a hospital merger that is apparently in administrative litigation; it is a hospital in Toledo, Ohio. This gives you an idea of the new rules in action. Administrative complaint filed in January last year; TRO filed the next day. Preliminary injunction entered by the District Court applying what we had probably called the triple C standard. The judge said he's going to hold the FTC to its deadlines. Part 3 hearing started within five months of the complaint. There were some scheduling issues, experts and things like that, so it took a little bit longer. Initial decision from the judge came in December. Oral argument is held early next month, and the deadline for the Commission decision is in March. And the Commission, if you look at their opinion in *North Carolina Dental*, they took less time than they were allotted to issue their decision, and I will expect they will try to do the same in ProMedica.

The discovery schedule in *Graco* is pretty aggressive; as of this morning still pending in the District of Columbia and also in administrative litigation, but you will notice it is a very compressed discovery schedule. You've got to be ready to go; both complaint counsel and counsel for respondents need to be ready to go. The experts need to be all lined up, because expert reports are due two months after the filing of the complaint, and all the expert discovery takes place essentially within a month. It is a very compressed schedule, and everybody has to be ready to go. You may also be doing simultaneously some District Court discovery.

I think that gives you a quick overview of the FTC process.

MS. DUNLOP: MJ, can you take us through DOJ?

MS. MOLTENBREY: So once you've gone through the investigative stage and a decision is made to file a complaint, as we have talked about already, DOJ is going to go to District Court and file their complaint there. Typically—I'm actually not sure there is a typical answer to this. It is not always the DOJ that wants a consolidated trial on the merits with PI hearings. It is usually the judge. It is very, very hard at this stage of the game to convince the judge not—that this judge needs to sit in here, have a serious evidentiary substantive hearing on the same matter twice. And the DOJ does want the PI hearing obviously, because they are going to have the burden even in the PI hearing to be a serious evidentiary hearing that they'll have some discovery in advance before they even go in.

It varies by the court in terms of how quickly you're going to move, but the Court is going to set the hearing anywhere from three to five months after the complaint is filed. Sometimes even a little bit less than that. So here we have the *H&R Block* case. DOJ filed on May 23rd, and the hearing was conducted in early September, after substantial discovery. So you're talking about roughly three-and-a-half months to get to the hearing.

The hearing lasted several weeks and the judge ruled fairly quickly. So on October 31 the court ruled and granted DOJ a permanent injunction. Actually as I mentioned at the beginning of that trial, a decision was made that the preliminary injunction hearing and trial on the merits would be combined. So you've gone roughly five months from filing of the complaint to a final decision on the merits of the case.

There's a couple other examples that give you a sense of the range. In the *Oracle* case the complaint was filed in late February of 2004, and the trial on the merits was in the beginning of June. A permanent injunction was denied by the District Court in early September. So there you have again a little over six months from the filing of the complaint to the final decision on the case.

Now in the *U.S. v. AT&T* case we never got to a final decision on that. But at least as initially planned, the DOJ complaint was filed at end of August and trial was set for February.

So it is a relatively quick schedule. I think it is useful to point out that notwithstanding the FTC's legitimate and sincere efforts to make this a very quick and efficient process—and I am very sympathetic to Len, because you're under a lot of pressure—it is extremely difficult to make those deadlines. You're constantly under the gun. Nevertheless, if you lay out how those two schedules compare, the FTC process takes twice as long at a minimum from the filing of the complaint to a decision, a final decision by the Commission, compared to the DOJ going in and getting a decision from a court. That makes a big, big difference to companies who are contemplating a merger.

If you are looking at a transaction that you know raises very significant issues, and you're deciding that part of your going forward will be what will we do if the agency challenges this, is this something that we want to litigate, and will we be prepared to litigate it, and will we have the option of litigating it, you're going to lay out your timeline. So I'll give you an example where this was crucial to the deal being done.

Monsanto, back in 2000 or '98 I think it was when they started it, and they tried to buy a company called Delta & Pine Land. They were in front of DOJ—probably Mark in that case—and after a very, very long and difficult investigation, they ultimately abandoned that transaction based on objections from the DOJ. That original deal required that Monsanto make reasonable best efforts to consummate the transaction, so when the deal was abandoned it immediately led to litigation between Delta & Pine Land and Monsanto as to whether or not Monsanto had met its burden and done what it needed to do. And I think Delta & Pine land filed a $2 billion breach of contract case in Mississippi state court. It was very, very hard fought. It led to very protracted and hard-fought contracted litigation between the parties, and it was getting ready to finally go to trial after a very complicated procedural history in 2006. In a mediation the mediator suggested that one possible way to resolve this problem would be for Monsanto to buy Delta & Pine Land.

A lot had changed in terms of the market structure, so there were some very legitimate reasons to think that possibly you would get a different outcome if you were to present this case to the DOJ. But it also was clearly a high-risk transaction; some of the concerns they raised before might still be there. The parties did not trust each other at this point at all, so it was a very difficult merger to negotiate.

One of the clear things that happened was the parties were insisting on an absolute drop-dead date, where the deal had to be consummated, with a very, very sizable breakup fee. It was the highest that I have ever seen; it was about 42 percent transaction value.

So in deciding whether to go forward on this a very key point was whether or not in the course of that, from signing to having to pay that sizable breakup fee, would Monsanto be in a position, if it needed to, to litigate this case. Fortunately, in that case we were quite confident we were going to be in front of the Department of Justice.

I will tell you, going from filing to merger to going to second request process, filing of a complaint if need be and litigating to a judgment in a year is an extraordinarily difficult thing. But it was just barely possible if you planned far enough in advance for that, if you were ready and get second request compliance ready, and if you weren't going to argue too much about the scope of the document production, just do it, you could be done in a year. If we had been in front of the FTC, this deal could not have happened.

So that's an example of how these things can impact deals going forward, not just after you have landed at one agency or another, but even as you're thinking about the deal and whether it can be structured in a way that allocates antitrust rules the way the parties want it to be allocated.

MR. GORDON: One thing I would note is that deals have lots of markers along the road where they are abandoned or unable to move forward. So deals are abandoned before the second request issues; deals are abandoned during the second request process; deals are abandoned during the complaint issue.

One thing that does favor the FTC process is that preliminary injunction hearings usually happen more quickly, usually in a month to two months after the filing of the complaint. So the parties on both sides get a read on how a judge perceives their arguments relatively quickly. Either if the injunction is denied or granted, that again gives the parties additional information upon which both sides can make a decision in a quicker framework than that would happen if everything had collapsed three to eight months later.

MS. DUNLOP: Although it does depend on whether you're in an *Inova* situation, where you don't necessarily get such a read because you're not having a full evidentiary hearing. Or some of the District Court of D.C. processes where you might get more of a read of what the judges think.

MS. MAHONEY: I think also we cannot put aside the idea of the preliminary injunction hearing is more often than not outcome determinative. So when you are looking at applying a standard that is less than a full merit analysis, but it has the impact on the deal of what the full merits analysis would have been, that to me is significantly conceptually problematic.

As a practical matter, when you're going into it, one thing if you're in an industry where it is clear which agency will be reviewing your deal, DOJ or FTC, you can structure the deal, think about the deal, you can go through the whole process knowing that. But structuring the deal in one of these online industries where you're not sure who you're going to be in front of makes counseling an interesting prospect, because you have to say if this, then this, if that, then that. As a practical matter it really has a difference.

Putting aside the timeline thing, which is a real thing and I don't discount that the FTC has done a lot with the Part 3 rules to try to get this process as streamlined as possible. But if on the PI hearing on the standard that is, as even Judge Collyer recognized, reduced from the typical PI standard, if that is going to be the outcome determinative analysis, I think from a policy and enforcement perspective we have got an issue that needs to be addressed.

MR. GORDON: Clearly, from a policy point of view if we had a blank sheet of paper and could govern by fiat, we would probably not have two antitrust agencies and clearance fights, and one antitrust agency having a different decision-making model than the other. But we do. That's the way Congress up to now has conceived it. If the FTC is going to fulfill its mission to adjudicate merger cases on the merits, this is about as good as we can do.

I'm sure most people in this room have felt at one time or another they ended up with a second request because of a clearance fight. That's obviously not ideal, but it is a fact, and it is the way the system is currently construed. And efforts to try and streamline that clearance process have been met with tremendous resistance on Capitol Hill.

MS. DUNLOP: Quick question from John.

MR. HERFORT: There are some ironies here. First, it depends on which side of the Potomac River you go. If the FTC moves in Alexandria, a judge is likely to say, as in the hospital case, no hearing, and I am going to basically grant the PI. If you move in the District of Columbia, Judge Collyer says we are going to be at trial, preliminary injunction trial in six weeks, and I'm going to give you six days of full hearings with the Rules of Evidence plus two days of oral argument. Now frankly, the FTC may think it needs 210 hours to try a merger case in Part 3, but six days of evidentiary hearings and two days of oral argument really ought to be enough to do a merger case with all the justice that our system requires, whatever standard you have.

So you have judges in the District of Columbia courthouse, Collyer in particular, saying I'm going to treat this like it is a real merits case, but I'm stuck with this standard which basically says I throw up my hands if it looks like a close case, and I'm not going to decide, likely go to the merits in the way it is traditionally decided. I think the answer for this, frankly, is for the District of Columbia Circuit to come down with some really hard and fast rules. Because we are now playing with, as I say, it is different justice even within the FTC whether you're in Virginia or the District. I think the D.C. Circuit is not clear as a whole court whether the approach of Judge Collyer and the *Whole Foods* panel is the right approach.

I think there is the issue that Bob Kramer and MJ talk about, does DOJ, if it is going to be a PI, have a harder time than FTC or not? When you have a courthouse that has nine judges that can resolve a lot of this in a heartbeat. But a lot of what you're talking about really has lots of ironies in it, and really is a reflection of the fact that the D.C. Circuit really has to do its job.

MS. MAHONEY: I think, John, this is going to get resolved on appeal. This is tough on the parties, as you know; the idea that a merger is going to be pending. Yes, maybe you can get an expedited review in the D.C. Circuit, but it is going to hang on until the Supreme Court decides that they are interested in taking this. I think that's really a decision of the parties, whether to appeal.

MR. HERFORT: Well, the case goes the other way. If the government loses in the District Court, it will get resolved. Which is almost what happened in *Whole Foods*. We had a lot of people in what we do for a living thinking it was a great mistake in *Whole Foods* for the en banc court not to have taken the case.

MR. BOTTI: A real quick question: Do you think the DOJ is being rushed too quickly by the courts, their cases are going too fast or that the FTC is taking too long in terms of what it should take to adjudicate merger cases on an appeal system? It may be outcome determinative.

MS. MOLTENBREY: I think that's hard to say. I think given some of the recent success that the DOJ has had it is hard to say they are being rushed too fast. They do spend a year, if you start from the beginning in terms of gathering evidence and in preparing to go to court. So I don't think so.

I think the problem with the Commission is really the Part 3 proceedings leading up to the hearing from the DOJ could be shorter. The District Courts show it can be done much faster than that if you set some tight deadlines. But you're never going to get over the fact there is a two-part process there. A lot of the extra time there is time the Commission gives itself for briefings and argument and then months to write a decision. Most District Courts after the hearing issue their decision within either a couple of days or at most a couple of weeks, while the Commission gives itself several months to write a decision on these cases. So I think it is the administrative process that really adds to the time.

MS. DUNLOP: I would like to move onto a different perspective on some of this, and talk a bit about the role of economists in the processes at each of the agencies and at various stages of the proceedings. I will ask the question whether the different standards are impacting how that works. Janusz?

DR. ORDOVER: I want to thank you for inviting me to this panel. I sort of feel like a fish out of water, which is not often, listening to distinguished litigators talking about strategizing and venue shopping and whatnot.

From an economist's perspective those issues are, if not secondary, they are tertiary. The good thing about being an economist, besides having complete control over the antitrust laws of this country at this point—

(Laughter.)—the benefit I think is that our work is not really driven by whether or not we are going to go to DOJ or FTC. I spent three hours yesterday at DOJ, and other than meeting my friends, I could have spent exactly the same three hours at the Federal Trade Commission. The economic theories are pretty much the same. Everybody pursues the same baseline of economic work. The issue may be that of timing or how much discovery has happened before you have to start dealing with the prospect of litigation. But again, these are matters for lawyers to try to slow them down or speed them up. From my perspective it is really not an issue.

What really is an issue is what we have talked about already, which is the extent to which information, the key data become available to economists on both sides to do their work properly. There is a lot of work that has to be done, and there is a formula I stuck in my slides there just to see whether you are awake or not. In fact, I put in an error, hoping that somebody will jump up and say, hey, your formula is wrong. So I won't tell you what it is.

The key thing for us, the issue really becomes when do you employ the economists; when do you hire the economists to do your work with you when you are in the private sector and whether or not when you are—of course, if you are an agency economist you get involved pretty quickly. My experience at DOJ, when I was there, I always insisted on my economists getting in there as quickly as possible, often equally at the same speed as the legal teams.

So the interesting question to me is one I highlighted on the prior slide, which is: Do you have two economists? It is expensive as it is to hire one; they don't come cheap by any stretch of the imagination. But the question is do you want to have two teams on the private side, and in particular a team that is going to be testifying, an expert that is going to be the testifying expert and the expert who is advising the parties on the potential problems with the particular transaction.

I don't like doing that. I think that it is a very dangerous strategy, because if you think there is something to hide or something that has to be papered over, this is bound to come up sooner or later, and then you are in trouble. But, of course, when it comes to the agencies, the economists may—outside economists may come into play rather late because of the budgetary constraints that exist, and those are often extremely tight.

I know when I had to go out and look for someone from the outside to be out there to testify, we had very little time to accomplish that, because our budgetary constraints would not allow somebody to hang around for three months and debate the issues. So from that perspective I think the agencies are somewhat disadvantaged, to the extent you need outside economists, or are in some way superior, which I don't believe for one second.

But it is the case that you have to make sure that your economist gets involved in your deal; on the private sector side the economist gets involved with the agency economist as quickly as possible so that the scope of this agreement, if there is any, as there often is, can be narrowed very quickly. So to sum up on this thing, there is a huge role for economists in both agencies as well as on the private side of any particular merger to do a lot of economic work.

The current Guidelines and the practice require a deep immersion by both sides into often the most arcane aspects of economic theory. And that depends often on the industry. If you're doing merger in the airlines, you are talking really about econometric work that is state-of-the-art econometric work. If you are doing work in the high-tech industry, it is a different kind of economics. If you're doing a traditional supermarket merger, that's yet another kind of work you're doing as well. And the problem is in the supermarket world we have the *Whole Foods* decision, which is the most misguided decision on economics you can imagine. But forgetting about that, you cannot avoid dealing with folks like me when you are in the private sector and you cannot avoid using folks like me when you go and talk to the agencies. Your hope is the economists can talk to each other in a professional manner, by which I mean not through invective but rather being committed to seeking the truth. And that process does not depend on whether you are at FTC or DOJ.

MS. DUNLOP: So why don't we talk a little about some of the impact of the different standards or the different agency practices on some of the conduct of litigation issues.

Just briefly, we've talked a little bit about choice of forum and the impact that a forum can have on your PI hearing. Len, would you like to comment on that?

MR. GORDON: Sure. In a merger case that has a national market, for resource reasons, we are probably going to file that case in the District of Columbia. And obviously the standard is best developed there that we think is the appropriate one for mergers. But also hospital mergers we have filed—the *ProMedica* case in Toledo where they were located. Of course the judge happened to be in West Palm Beach in the winter, so we ended up having a preliminary injunction hearing there. But no one objected. The *Rockford Hospital* merger we filed in Rockford, Illinois, where they were located. So markets that are localized you're going to hopefully find us where the hospitals, where the retail outlets, wherever it is the localized effect of the merger is felt, that's where we will be.

In *Lab Corp.*, we filed that in D.C. and ultimately it got moved to L.A. There was bankruptcy proceeding in the courts in L.A. that I think helped draw it there, and I think the effect was relatively localized. So balancing that, the judge kicked it to L.A.

In *Graco* we are awaiting decision on a transfer motion there. The Justice Department faced a transfer motion in *H&R Block*; ultimately it was denied. So my sense is that there is not a great deal of difference. Both agencies would prefer to be in D.C., the law, along with judges know antitrust cases better than Federal District Court judges elsewhere. D.C. Circuit has a pretty well developed body of law. And resources are a big deal, we have restricted travel budgets. So other things being equal, we will prefer being in D.C.

MS. DUNLOP: So it is not forum shopping, looking for a judge, like filing everything in Virginia.

MR. GORDON: No, we would put everything before Judge Bryant based on the *Inova* decision, but we can't do that.

MS. DUNLOP: Let's talk a little about post-complaint discovery, and obviously the two proceedings are quite different. The Part 3 and the PI in the FTC case have a big impact on how discovery is conducted in the FTC cases.

Len, do you want to comment on that?

MR. GORDON: There is going to be—I mean there are two pieces of litigation, and there is going to be some duplicative litigation. In *ProMedica* some of the key people were deposed in the preliminary injunction proceeding and also deposed in the Part 3 proceeding, and that is going to be the case. We are not going to require you to produce documents four different times, but key witnesses are probably going to get deposed more than once.

MS. DUNLOP: What about economists?

MR. GORDON: Definitely. We are going to depose them as many times as possible. They ask us to do that so they can incur additional fees.

Yes, we are probably going to depose economists more than once.

MS. DUNLOP: Janusz, does this pose any particular issues for you, being deposed on basically the same expert reports multiple times?

DR. ORDOVER: Only when it screws up my teaching schedule. But other than that I think the answer is no. Obviously, if you get to file more than one report, then you have to worry about maintaining consistency. The real challenge is between the first report and second report new evidence may have come in and new theories may have been developed by your opposing economists and, therefore, you may have to potentially modify the first report to reflect this.

But from the standpoint of doing, the actual work is exactly the same as you would do in any case. And the real question is whether or not you can withstand your deposition the first time around. If you can withstand your deposition the first time around, the fact that you get whacked a second time around really doesn't make any difference.

MS. MOLTENBREY: It is probably harder on the litigator who has to defend his deposition twice than it is on Janusz.

MS. DUNLOP: Stacey, any other comments on the practicalities of dealing with the deal, coming out of the *CCC* experience?

MS. MAHONEY: Well, a couple of things strike me. One of which, of course, is the Federal Trade Commission practice if not policy is to go into a PI hearing and try to convince a judge to do it on the papers, no further discovery is necessary, etcetera, etcetera. If in fact it loses that though, it wants to go ahead and do the discovery for the PI and then get additional discovery for the permanent injunction hearing in front of the ALJ. Again, that strikes me as wanting to have your cake and eat it too. Especially when, at least in the *CCC* case, my experience was that the folks at FTC—and I understand scarce resources and human beings can only accomplish so much—but the teams at the FTC that were working on the Part 3 proceeding, at least at the level of the people who were negotiating and reviewing the documents etcetera, were different than the teams that were involved in the PI. And that really made it quite challenging, because they did not necessarily know what the history was and what had been done and who had been deposed and where the documents were and what had already been turned over and what wasn't. So you wind up having discussions that you really shouldn't be having. It is one thing if, for example, you got the preliminary injunction decision, and it raised some issues that one side or the other wanted to explore further, perhaps that is a justification for additional discovery from the Federal Trade Commission perspective. But having already lost the argument that they'd like to proceed on the record without any discovery, to try to get more again before the Part 3 proceeding just seems to me to be a little bit difficult from a private litigant's perspective.

MS. DUNLOP: Then moving into the actual litigation process, Janusz, talk a little bit about what your role is given the litigation itself.

DR. ORDOVER: Well, I think pretty much all of you are familiar with what economists do. But the process starts much earlier; it starts where we get retained, either internally, which is always the best case, or externally, to get ready for something that is going to be potentially a very confrontational process during which your assumptions or models of how markets behave, your knowledge of these markets gets tested in a very potentially effective way.

The lawyers are trying to make the economists look like incompetent, paid-for testifiers who do not adhere to the process of truth or sound economics. It's not a pleasant place to be in, I must tell you, especially if you don't feel comfortable about what you have done. So my advice is whenever you start work or as soon as you get to the point that you realize this is not going very well and either the deal is going to cave before you end your litigation or when you're heading for potential litigation, that you be prepared for it, that you tell your economists that you have to be at the level of work, both externally and internally, that can actually withstand a fairly hostile process during which the economist gets cross-examined on facts, on theories, on knowledge of the industry, inner workings and documents. And it's not much fun to be confronted with a document that says XY and Z, where you said it is impossible for XY and Z to be true.

So again, the thing is that one has to try to come down pretty quickly on what it is that you're going to try to establish in economic theory.

I listed on the slide a few cases that I was involved with as an economist in matters that actually were almost going to court. *CCC/Mitchell*. I am the capitalist economist that actually lost the case. John and Stacey were actually out there fighting for me, but I couldn't deliver the goods. So the fact of the matter is that we had a lot of interesting theories in that case alone. There was the bidding model to analyze the effects on the beta side. There were plain vanilla, what I call unilateral effects models, to deal with the repair shops. We had a complicated aspect which had to do with a two sided-model market aspect of the case, in which there were insurers on one side and there were the repair shops on the other. This is very novel, very complicated economics, and to try to explain that in a relatively straightforward manner is not an easy task.

In the *Google/ITA* case, when I was getting ready to actually testify, for the DOJ this time around, the questions centered around the vertical foreclosure problems created by the merger. So you have to be again tailoring your work and data to how it fits into these types of theories, both from the short term perspective of the market development and also from the dynamic perspective.

In the *First Data/Concord* case, in which I was going to be testifying for DOJ again, the case ended after a hearing in front of Judge Collyer. I can't figure out what the hearing was, because my good friend Jerry Hausman actually testified by telephone from Egypt. It seemed to be some sort of *Daubert* hearing or something. I think it was designed to teach the judge about the market facts. Again the economics were really very difficult. This is the beginnings of what economists understand about network markets, about two-sided markets. I think it was about 1993.

Then, of course, the *3 Tenors* case, which again didn't go my way. But again, I think it is an abomination what the FTC did in the case, and I'm happy to say that many lawyers agree with me.

So you can see you have a lot of things that you can work with. There is a huge amount of economics out there that bears on how the mergers get analyzed, and you really have to come down quickly to the couple of things that you hope will make sense.

Of course I am not spending time on market definition, because that is obvious, and we always assume that we have to say something about that in the hearing. But as Judge Collyer pointed out, it is really effects that we are after. And that's where familiarity with industrial literature, with the cases, with the regulators' thinking comes into play in terms of helping the lawyers to get out of the thicket of what's out there, to my work as a convincing economist.

MS. DUNLOP: In the last few minutes of our panel we come back to the question: Do the standards really have an impact on the ultimate outcome, whether that be the ultimate outcome of a complete hearing and trial on the merits or on the calculus of parties and at what point they might move forward on their deal? Do the different standards mean that what agency you end up at really makes a difference to the outcome of your transaction?

Stacey, do you want to start?

MS. MAHONEY: I think it is clear what my response is going to be. It does, and I do think that's because of the reduced Section 13(b) standard, which I just think is not really correct. I mean, clearly, the cases in the D.C. Circuit, D.C. District Court have established this substantial question issue. But that's really not the general gist of 13(b), and I think that's wrongheaded.

But if you are looking at going into court on a merger facing a PI in a Federal District Court, if you're in front of the DOJ, you are going to likely get an outcome determinative hearing with all of the requisite discovery, and it will be a full resolution on the merits of the deal.

With a PI against the FTC, first you're going to argue about whether in fact there is going to be discovery, and then if there is, then you'll have the PI hearing, and you've got to face the prospect of having a Part 3 proceeding. The FTC can choose to consolidate the PI and a permanent injunction in the District Court, but it likes to go through the ALJ process. Either way the judge rules on the PI, you can still be facing a Part 3 process.

The timing that you need to discuss with your client is very significant in that regard. You need to let them know what the issues are, what the risks are. This reduced standard, I think, changes the outcome to something less than a resolution on the issues. For example, Judge Collyer did not find effects; she found a question about the effects. And that decision became determinative of merger, and the parties had to abandon the deal at that point. So I think it is a real question, and I hope we get a chance to discuss some of the proposals on how to address this, because I think some of those are very interesting.

MS. DUNLOP: Before we go there, Len, from your perspective do the different standards have an impact on how aggressive the FTC is, for example?

MR. GORDON: I think how aggressive the FTC is at any point in time is much more a function of the personality of the Chairman and the Commissioners than of the standard. It is really a question of risk tolerance. And in large part it is probably true at DOJ as well. People make these decisions as to which cases are going forward. Some people are more risk averse than others, and that influences how the agencies operate to a large extent.

Clearly, the DOJ process is shorter, and for deals where financing or other reasons create time pressures the parties react differently to the process.

I think as to what cases get brought and if they are actually tried at the end of the day, I really don't think there is much difference. I think a case with a strong market definition, with clear structural stories, both agencies are going to win. In cases where that's not case, the agencies are going to have a hard time.

MS. MOLTENBREY: I generally agree there is an impact. It is hard to bring a merger to litigation. Most companies don't want to go there, and in that respect, to the extent either agency suggests they are going to challenge, that often is going to be the end of that, determinative. But I don't think it's possible to quarrel that at the margin the standards make a difference, and they make a difference between how willing you are to push the agency to go to litigation, how long you can stick it out. The burden the agency has to meet is much lighter in a preliminary injunction than a full trial on the merits, whatever you think about the different PI standards. DOJ is going to be doing trial on the merits; FTC is not. The outcome of either of those proceedings is likely to determine—if you do get to litigation—is likely to determine whether the merger goes through.

So I think there is no question that at least on the margin it will have an impact on either whether parties go ahead with the deal or pursue litigation in the deal and what the outcome of that deal would be. It also has an impact on, frankly, people's perceptions of the fairness of the process, and I think that's an important factor to take into account as well.

MS. DUNLOP: Stacey alluded at the beginning to some of the policy proposals or changes to the system that have come up over the years, and in the materials we included a report—I think it was the ABA's recommendations to the AMC on this issue—and also a paper by Commissioner Rosch who has some interesting ideas about the DOJ taking advantage of the FTC administrative process.

MJ, do you want to take us through some of these ideas?

MS. MOLTENBREY: Sure. I think the one thing that everybody agrees on here, if you were starting out from scratch with a clean slate, nobody would structure this the way it is structured. It doesn't make sense to have two different agencies with two different processes and two different ways of doing this. But that's where it stops, which is why it is probably not ever going to get fixed, or at least anytime soon, because people have very strong feelings about the different ways to go about addressing it.

So one approach that's been put out there is the idea that perhaps the FTC should in merger cases follow the same process that the DOJ does. That they would file a complaint; that the case would not be litigated before the Commission, but would be litigated in court. Presumably they would end up being subject to the same processes that the DOJ is, which is almost without exception the PI hearing and the trial on the merits would be consolidated in front of a federal court judge who would make a determination on the merits. So that proposition has been thrown out there. Strongly resisted by people who both think that might lessen the strength of the agencies resisting anti-competitive deals and who really value the FTC process and the notion that the whole idea of the Federal Trade Commission is you should have experts who are making decisions about difficult economic issues.

So Commissioner Rosch has proposed the exact opposite, which is that when the DOJ wants to bring a merger case, it can go to court under a similar PI standard, take advantage of the same PI standard that the FTC has, get a preliminary injunction, and then go try its case in front of the Commission. And the Commission would basically go through a Part 3 type process and get a result that way.

With both of those there are a lot of politics involved, a lot of people with a vested interest in a particular process and in a particular camp. The even bolder solutions have been, gee, let's get rid of the overlapping jurisdiction. I think Christine Varney has suggested at one point, and it was very much a passing kind of comment, but, gee, perhaps the FTC should do consumer protection analysis and the DOJ should do the Section 7 and the rest of the antitrust enforcement. And we certainly heard similar proposals on the other side saying, well, gee, maybe the DOJ should do criminal cartel enforcement and leave the other stuff to the FTC. The reality is I don't think any one of those proposals is likely to get traction anywhere, other than in seminars like this.

MS. DUNLOP: Yes, John.

MR. HERFORT: The only thing I would add is I think there are two audiences that you have to always worry about as you go through this process. And you can't be too categorical about this stuff for this reason. One is boards of directors. On deals that the FTC and the Justice Department gets interested in, High HH1 deals, with clearly high entry barriers. They tend to be deals that are very important to the companies; they are strategic deals, and any lawyer is going to have to deal quite carefully and repeatedly with boards of directors.

The other audience, the investment bankers and the financiers, you've got to deal with them and keep them informed. And they are also, particularly the good investment banking houses, which you see in repeated instances, they are pretty well informed. They have their own briefing books on all the topics that we are talking about today, and some of them are occasionally misguided and over-categorical.

When you talk about how the FTC, as some of us who want to, has an easier deal than Department of Justice, the FTC loses cases, so the notion if you get into the D.C. courthouse you're dead meat with an FTC case, well, the record isn't great in recent years, but you have guys like Judge Friedman, and they can be difficult for the government. So you have to avoid, I think, categorical discussions. I think this area is somewhat in flux, and obviously my feelings are pretty much like people on the panels. The FTC in general has a better deal, particularly in the D.C. courthouse, but you cannot be too categorical about it. The FTC can be forced to a fairly lengthy trial in a PI, and that can be difficult for it. And the facts do make a great deal of difference. And as I say, you do have these other audiences which are going to be calling you up all the time, so you have got to deal with them. Those are the decisions that really determine the deal.

MR. GORDON: I think one of the things that I think makes that hard is the sample size is relatively small. So if you are trying to project what's going to happen in the future, you are basing that on one or two deals a year, maybe. So that makes it very hard to advise clients.

MS. MAHONEY: It is not clear to me that we need to talk about this in a way that it's such a sea change. I am actually a proponent of the FTC and DOJ keeping concurrent jurisdiction over mergers. I like the two enforcement processes in that you have the Commissioners for seven years and independence from the Executive and all that kind of stuff. So I'm not talking about eliminating one of the agencies or even separating what their jurisdiction should be. But I just think the courts have misinterpreted the Congressional language for what 13(b) was intended to do. That's really all that needs to change. They can go in and get the PI. If we actually got a PI analysis based on what the proper standard is, then I think that can be useful.

The idea that a Part 3 Administrative Law Judge is an expert in areas that are antitrust—there's been this debate for years. Should we have a separate antitrust court? Should we not have antitrust cases go to a jury? There is some foundation for that. But the idea to be able to go in and get a PI with this very reduced standard I think is, as I said, a policy issue.

It is an international problem, because to the extent that we are considered to be some of the strongest thinkers in the antitrust area, we have got a mess in our house, and I think it is a little bit of an international embarrassment.

MS. DUNLOP: Jay.

MR. HIMES: I'm going to date myself with an example. Once a upon a time there was no Hart-Scott-Rodino Act, and major antitrust cases got tried in a matter of weeks.

Stacey mentioned that 13(b) was enacted in 1973. At the very end of 1973, very early January 1974, a company named British Oxygen made a public tender offer for a company called Airco, and the two companies were in the industrial gas business. They produced various kinds of gases that are used in major industrial facilities. British Oxygen was number two in the world, and Airco was number two or three in the United States. British Oxygen had no presence in the United States, so it was a potential competition sort of merger.

The FTC promptly brought an administrative proceeding around February of that year and applied for an injunction in the District of Delaware. It was the first 13(b) injunction that they had ever sought. The District Court granted it under the then new statute. The case went to the Third Circuit, which largely sustained the injunction, and you heard about how deals go away after things like this happen.

British Oxygen did not go away. They went into the Part 3 proceeding, and the case was tried for a number of weeks before the Administrative Law Judge, who of course ruled in favor of the FTC, found a Section 7 violation on a potential competition theory. British Oxygen would have entered the U.S. market but for this tender offer for Airco.

British Oxygen did not go away. They took the case to the Commissioners, which sustained. It took them a year to do that, all the while Airco is being held separate by this injunction. Which, by the way, was the leverage to get a prompt trial before the Part 3 judge. If they couldn't get a trial quickly, we were going to go back to the District of Delaware and move to have the injunction vacated.

Be that as it may, the FTC enjoined the merger; the case went then to the Second Circuit, because you could appeal wherever you wanted basically. In 1977 the Second Circuit overturned the FTC, found that the Commission had not proven a substantial likelihood of entry by BOC, and British Oxygen acquired Airco. So that was five years in the making. You've heard about how deals go away. Now you see why the British were able to defeat the Germans in World War II.

MR. BOTTI: Jay actually made reference to something in his question that I wanted to ask. I saw the *Inova* PI decision which was the District Court limiting the duration of the preliminary injunction; the proposition in the Part 3 proceeding was expedited. One, was that part of the *ProMedica* PI decision? Two, would the Commission be willing to negotiate over the length of a Part B proceeding and forgo the PI proceeding, or is that written in stone and the regulations? I'm curious as to people's thoughts on that.

MR. GORDON: At the end of the *ProMedica* memorandum / opinion there is a reference that the Judge is basing his decision in part upon counsel's representation that the agency is going to start its hearing in five months. And if that's not the case, then it can come back, and we'll talk about whether the preliminary injunction should continue.

The way the rules are written, only the Commission, not the ALJ—I guess the ALJ probably—can lengthen the schedule. So given the appropriate signal by a District Court Judge, I'm sure counsel would ask the ALJ, and if necessary the Commission, to alter the schedule, and I would think that the Commission would listen to that. I can't predict how they would react.

MS. DUNLOP: I think we're running out of time. Bill, I hope we answered the question. I just want to thank all of the panelists very much for their participation.

Annual Review of Antitrust Developments

MR. ROONEY: We are now moving onto our second panel of the day, which is the Annual Review of Antitrust Developments.

Just a little personal anecdote here. Elai and I were wrestling with how we might modify the ordinary format, and we had a lot of different ideas and proposals. Where I left off in the conversation, probably in mid-to-late December, is that we were going to settle upon the panel that we have here, and then we were also wondering how we should organize this panel. As it happened, my January was such that Elai and I did not have a chance to speak very much, so I personally am waiting with bated breath to see how this next panel comes off, since I sort of knew what the conception was, but I certainly don't know what the implementation will be. It will be exciting to hear our Annual Developments from a slightly different perspective than what we had in the past. I'm going to stop here and let Elai introduce and describe it and see what happens.

MR. KATZ: Thank you very much, Bill. Yes, we do have a surprise for you. Instead of antitrust we thought we would just talk about the Republican debates. So it is good that we hadn't spoken. No, indeed we will talk about antitrust, and I see very many friendly faces here who I know have been here for many years at this Annual Meeting. For years we have done a Review of Antitrust Developments program, and many years ago it was usually given as a lecture by one person, including my mentor, Bill Lifland, and it was really a very good review of what happened. We decided over the last year to change it up.

As you might remember, last year we had two senior federal enforcement officials. We had Molly Boast and Julie Brill, and this year we decided to change it up and have a leading academic in the antitrust field, who in the meantime became the leading enforcer in this state, and a leading economist, to talk about antitrust developments not only in the sense of what were the cases that came down and the mergers that were challenged, but also to expand it a little further and talk about what is the direction of the most exciting and latest thinking, both in terms of economics and law in important areas.

So we have a lot to cover. We won't be able to cover every development that is important, of course, but I think there are a lot of very interesting things for us to discuss.

Now we certainly are interested in the audience's questions, but because we have such a full plate we are going to defer those until the very end. So I would appreciate if you hold off on those until the end. We will leave time for questions at the end.

Let me start by introducing our panelists, who we are very pleased to have with us today. First, on the end, we have Dick Rapp. Dick Rapp is one of the leading economists in our country, especially in antitrust and intellectual property. He had been for many years the president and then chairman of NERA, the economic consulting group. Previous to that he had been an Associate Professor at SUNY Stony Brook, and he has asked me not to provide all of his very many accomplishments. I think many of you here in the room are very familiar with Dick and his work and his accomplishments.

Next I have Scott Hemphill, who is now the Chief of the Antitrust Bureau of the New York Attorney General's Office. This is a new position, I think maybe several weeks, a month. He's on leave from Columbia Law School where he's a Professor of Law. He has clerked for Judge Posner and Justice Scalia. In addition to a J.D., he also holds a Ph.D. in economics from Stanford. And I'll do the same with Scott; I could go on quite at length about many of his accomplishments, both in writing and speaking, but I think he's quite familiar to many of you, and we'll move right to the program.

There are several major areas that we wanted to focus on in terms of developments in this past year, in 2011, and the first one of them is mergers. There were a lot of important developments in the merger area in cases brought, but also this is really the first year that the new Merger Guidelines, which came out in 2010, are now in 2011 getting implemented, at least out in the field.

So we wanted to first talk about the mergers and the Guidelines. I would introduce it by just saying this: The Merger Guidelines seem to deemphasize some of the old order of things, the notion of defining a relevant market first, and then there are other kinds of analyses that come in. I think with that basic introduction we will talk about the Merger Guidelines themselves and how we have seen them implemented.

Scott.

DR. HEMPHILL: Thanks for the invitation; I should start by saying that I speak only for myself, not for the Office of the Attorney General or the Antitrust Bureau. In addition, to the extent that we discuss pharmaceutical issues, I've served in the past as a consultant for the Federal Trade Commission, and on these issues again these views are my own.

I want to kick things off by thinking a little bit about the AT&T / T-Mobile transaction. As everyone in this room knows, the Antitrust Bureau is a small shop, and so we need to choose our matters carefully. National mergers are not our bread and butter. And pretty clearly, when DOJ or FTC is already on the case, often—not always—

there is less incremental need for state involvement, given the limited resources and our need to choose carefully. That said, this was an extremely important merger with direct effects for New York consumers.

The substantive analysis that I want to focus on is the F.C.C. staff report about the transaction. Since the deal was abandoned, the F.C.C. report is our fullest account, at least so far, of how to think about the transaction. I thought the analysis was quite interesting, both in its assessment of unilateral effects and its analysis of coordinated effects.

The unilateral effects analysis made significant use of concepts from the "New" Guidelines—I use the term advisedly, since in an important sense they are not really new. The ideas have been used by the agencies for quite some time and have appeared in a lot of academic analyses.

I think the very emphasis on unilateral effects before getting to coordinated effects, in what might have seemed to some to be an ordinary four-to-three transaction, was telling.

The F.C.C. analysis spent a fair amount of time noting head-to-head competition between AT&T and T-Mobile where one was number one and the other was number two. There was significant discussion of upward price pressure. These references, which included explicit references to the Guidelines, are all the more remarkable because the F.C.C. isn't obliged to follow the Guidelines and has a different standard.

With respect to coordinated effects, what really interested me was that the F.C.C. went well beyond the usual analysis of oligopolistic price elevation. It noted, as one kind of parallel effect that we ought to care about, the risk of what I will call "parallel exclusion." What the staff had in mind here is analogous to conscious parallelism as to price. But instead, the concern was that each firm (here, principally AT&T and Verizon) would be engaged in exclusion of outsiders, each of them acting in parallel. This might happen, for example, in making a roaming deal or selling at wholesale or excluding rivals from handsets. The F.C.C. gave attention to all these issues. This is important because it implicates not only price elevation but also entry and hence innovation. So in some sense innovation was at the core of the F.C.C.'s thinking—an idea that has a much stronger place in the New Guidelines than it did in the Old.

Finally, before moving on, since this is a case that was joint between state and federal enforcers, I just wanted to say a word about that. I've only been here for a month, but I've been quite encouraged so far at the level of interest and commitment I've seen from both state and federal agencies in working together on these common issues. I see Geralyn Trujillo and Eleanor Hoffmann are both here. In *AT&T* Geralyn and others in our Bureau really cooperated closely with DOJ staff to develop evidence and witnesses on a compressed time scale.

The other quite striking example of this in the last year that comes to mind—this is a non-merger case, but I'm going to sneak it in here—is the municipal bonds investigation, which featured a variety of anticompetitive behavior. Eleanor and others in our Bureau coordinated with the New York Field Office of DOJ and also with main Justice in Washington to secure a quite substantial recovery for New York entities that were the victims of this illegal activity.

Both of these examples bear the hallmarks of effective state involvement: able staff, local knowledge, quick and effective cooperation. I'm very much looking forward to continued cooperation along these lines.

MR. KATZ: I'm glad that Scott was talking about how the F.C.C. really applied some of the new thinking. When I read the Department of Justice's complaint in the AT&T matter, what struck me was how structural and old-fashioned the complaint was. They talked about how they defined the market, what the market shares were; they counted the HHIs.

I wonder, Dick, if I may turn to you and ask about your views just about how new thinking in Guidelines, talking about these Guidelines or prior ones makes its way into the courts. Can you tell us about your experience over the years?

DR. RAPP: Sure, I'd be glad to. When I got an email invitation from Bill to join this panel, it spoke in very kind terms in a complimentary way about me, including my great experience, which I interpreted to mean: We need an old guy who might remember some of the history. So my brief contribution to this part of the discussion is a recollection of schizophrenia that the 1982 Guidelines, the first set of Guidelines, created for the agencies and practitioners.

The Guidelines, unlike the previous Guidelines, were well founded in theory. The use of Herfindahl index, later HHIs, had their grounding in Cournot and Stigler's theory of oligopoly, and they made sense to an economist in the way the preceding Guidelines and procedures did not. But what that meant in dealing with the agencies and in agencies dealing with applicants for mergers, on one hand they had to have a split personality that wanted to think about those things. The economists particularly wanted to engage in Merger Guidelines activities, but there was a lengthy period when people said yes, that's the way we are pursuing that. But when we think about our prospects in court we have to exclude this; the courts have no reason at this stage of the game to want to adapt to their purposes what is essentially a mental road map of the way the agencies are going to do mergers. And it took a long while for the Guidelines—it took a long while—I stick by that, it took a long while for the Guideline procedures to gain traction with *Brown Shoe* sitting out there since the early 1960s.

I think we are going to have a repeat experience with the 2010 Guidelines. I think the emphasis that Scott mentions of the unilateral effects, the substitution—and that may be an overstatement, but it is for you lawyers to decide better than me—the substitution in unilateral effects analysis of UPP and its variations over market definition. I'll put that stronger than you might. It is something that is going to persist early as schizophrenia when the agency economists and perhaps lawyers and their counterparts in the private sector say well, we want to talk to one another in these terms because they make theoretical sense for unilateral effects, but at the same time when we go to court we are going to define a market, we are going to make reference to *Brown Shoe*, nothing has changed there. Whether you see it as a problem or not, I don't know, but that's my view of reality.

There's another side to that that has to do with the innovation part, and we can turn to that when we get to it.

DR. HEMPHILL: Can I pick up on the first part of that?

I think *H&R Block* is really a nice example of the schizophrenia you're talking about. Here, of course, was a big win for DOJ, and an opinion that seems in a lot of ways to "get" the economic analysis, and is fluent about unilateral effects. The court understands diversion ratios. It is cognizant of the idea that analytically you don't need a market definition in order to show market power, particularly in unilateral effects. But then it refers to *Brown Shoe*, and an interpretation of the Clayton Act that relies on market definition. And so we have these innovative parts of the opinion clad in a larger structure that is still quite traditional. You can almost sense the district judge planning for an appeal, asking, how am I going to manage this newer learning, given *Brown Shoe*.

MR. KATZ: If I could be just a little bit cynical, in a case like that, like *H&R Block*—and I know there are some people in the audience who know a lot more about it than me, who litigated it. But there the government got to define the market the way they liked; they had a relatively straightforward structural case based on the case law, without making reference to the Merger Guidelines, which aren't law. So why not, if you're the government and want to win the case because you think this merger is anticompetitive, why not, when you can, use those old rules? There are only three players, which I think is what the government claimed in the *H&R Block* case. As many of you know this has to do with electronically prepared tax forms, and there was a debate as to whether those compete with more traditional use of accountants or even pen and paper kinds of calculations of taxes. And I think the government, I would suspect—sure there was a lot of very interesting kind of more cutting edge analysis, and I'm confident the government did that during the second request process—but when push came to shove and they were going to try to win a case, why not fall back on what seems a pretty straightforward case where you have presumptions well enshrined in the law? At least that's how I see that. In a way maybe they are having it both ways. Do you have any comments on that?

DR. RAPP: Is *Ovation* a counter example of that, in that it was litigated in a conventional way with market definition alluding to the more important underlying question, which is the behavior of doctors in the face of a price increase and the idiosyncratic relationship between those two drugs? Actually I say a counter example, because the government came out and lost in that circumstance. And market definition there seemed so profoundly inadequate to answer the questions posed by that acquisition.

MR. KATZ: Maybe we'll step back. Would you like to tell just a little bit about the facts of *Ovation*; are you comfortable doing so?

DR. HEMPHILL: Usually I try to make other people state the facts, but I'll do my best. Ovation—later acquired by Lundbeck, but I'll ignore that detail—bought the rights to NeoProfen, which is one of two different drugs that treat premature babies with a rare heart condition called patent ductus arteriosus, or PDA. At the time Ovation already had a PDA drug, Indocin IV. NeoProfen was not yet approved. Ovation, shortly after the transaction closed, raised the price of Indocin IV by something like 1,300 percent. A challenge was duly brought, arguing that these two drugs that treat PDA constitute a market. The district court rejected that, and the Eighth Circuit recently affirmed.

Now I recognize that there's a certain sense, probably shared by some in the room, that the FTC, having advocated a very narrow product definition in the past on pharmaceutical products, is in some sense hoisted by its own petard here. Although both drugs treat the same condition, they are not bioequivalent. These are not perfectly interchangeable; one is not a generic to the other.

One key here is that the traditional attention to price competition is not the best way to think about the conduct. What Ovation was trying to execute here is a product switching strategy. Indocin IV was about to go generic; NeoProfen as the next best alternative—perhaps better for some patients—was coming online, and it did not face generic competition. So once the two products were under common ownership, it became possible to blunt non-price competition between the two.

Ultimately, doctors are not going to care that much about price. Suppose you poll them and ask if the price of NeoProfen was 20 percent less, would you treat your preemie baby patient with a different drug? They will say no. That's not how they are going to think about it. This game is going to be won or lost in *non-price* competition, where reps come in and talk about the advantage of one drug relative to another. Now for that to work, well, you need contending information. You need independent organizations sending their reps out into the world and advertising for independent drugs. Once they are under common ownership, that disappears—or worse, it becomes one- sided.

So the Ovation sales force went out and argued, oh, Indocin IV, that's the old thing. You should use NeoProfen, the new drug, which has these advantages. So you had one-sided pressure in execution of this product switch.

One more point. The Section 2 allegation that was also part of this case might be a better frame for understanding the conduct. What was really happening was that Indocin IV was heading off the competition from its next best alternative. Normally, when we think somebody has market power and they acquire their next closest alternative, that's something we should be troubled by.

MR. KATZ: Dick, this is a good time to go back to what you were going to talk about, the interesting discussion of interrelationship between UPP, the upward pricing pressure analysis, and Ovation. And I have two distinguished economists next to me and some in the audience, so I wouldn't even try to explain what UPP is. But I would want to hear about how an analysis that thinks mostly about price, how does that play into the importance of innovation? Which I think in a case, such as the one Scott was just describing, I would think that part of the story that is in the drug area isn't just the price but also continued competition over innovation.

DR. RAPP: It's a point that is made very clearly in the Guidelines, which combines innovation with product development. I can be brief about this I think and also give you a little history, as I seem to have taken on that role.

In the early 1990s, Richard Gilbert, a Berkeley economist, and Steven Sunshine, I think they were the two who were responsible for introducing innovation into antitrust enforcement and consideration of antitrust. They first did it in the well-known GM / ZF merger that had to do with truck or bus transmissions, I forget which. But since then it has been largely—not exclusively, but largely—about pharmaceutical and medical problems. They wrote that approach into not only their enforcement activities when they were both in the Justice Department at that time, but into the 1995 IP Guidelines and into an important article they wrote in the *Antitrust Law Journal*, and the concept they used was innovation markets. There is no reason for anybody to remember this, but I was one of the primary objectors to the concept of innovation markets, while admiring the introduction of innovation, which is, after all, as or more important than price competition or product in the American economy.

My objections and the objections of others to innovation markets was they were atheoretical, and that they attended to the subject of R&D capacity, as if anybody knew anything about the relationship between the combining of R&D capacity and innovation and the prospects for merger.

Remember, at this time and for the next 20 years a very, very important development to the industrial organization of R&D was taking place in the United States and worldwide, and that was the de-integration—if that's the right word—of big pharma. What they used to call the research-based companies diminished in number, acquired one another, partly because of dry pipelines. And the R in R&D to a considerable, certainly not total degree, but to a considerable degree, lived off smaller firms. What was once a vertical relationship became contractual relationships between small VC funded startups, not only in biotechnology but in conventional medicine drug development with big pharma, which now number ten or twelve multinationals worldwide instead of 30. That's an interesting background to what's going on here.

To the present. The 2010 Guidelines, Section 6.4 are very clear in that they have abandoned the structural presumption approach that was inherent in the innovation market concept and followed the lead of unilateral effects in the New Guidelines. So what we have now is an attention on the same UPP type concepts.

All I will say by way of explanation for that, because I think there's been years of discussion about the contents of the 2010 Guidelines, what we are talking about are the incentive properties of firms engaged in an acquisition with competing profits and whether the acquisition, whether the combination of those two products under one roof, as in Ovation, would create a reduced incentive for output expansion. The opposite of output expansion is the adverse welfare consequence of monopolization, and merger is the most efficient way of creating dominance in a firm.

So the idea was if you look at the margin of the acquirer's drug and you look at the diversion ratio, the cannibalization of that drug by the drug that was being acquired and which formerly competed with it, the combination reduces the incentive to sell both drugs the way they were before, and the consequence is upward price pressure.

What we have in the Guidelines has never been named DIPs, that is downward innovation pressure. But the temptation was very strong in Howard Shelanski when he was at the Agency, and he has described for us, and the outlines describe for us, the concern of this shift that produces a very similar thinking about innovation, brings innovation much further into line with conventional Merger Guidelines practice. And the last word, from my standpoint, resolves the key problem with the old innovation markets concept, which was as interested or had the potential for being as interested in future goods, in research projects that represented nothing more than the gleam in the eye of the chemists and pharmacologists who were involved in it. Now the Guidelines are going to deal predominantly with drugs that are in the here and now, like NeoProfen and Indocin IV.

DR. HEMPHILL: There is an ambiguity in the Guidelines' treatment of innovation that bears on the *Ovation* case.

The New Guidelines say more about innovation than the old ones did. Some of that language shows up in the efficiencies section. There is a sentence that puzzles me: "The agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations." I think that this language picks up on some of the ideas that Rich Gilbert and others were talking about in the 1990s. As I read it, it says, if I would otherwise have trouble receiving an adequate return for my innovation, maybe it is okay for me to merge with another firm, where it lets me bring something to market or otherwise improve my appropriability as to a product.

Now this interests me because it offers a potentially rather powerful source of efficiencies arguments, in a case like Ovation. I can think of two. One would be that I'll have higher ex ante incentives and come up with more new drugs if you let me buy my rival. This is one way to increase my appropriability. My guess is that this tack won't work.

But on the particular facts of Ovation, where we are talking about executing a product switch, you might be able to argue that there's complementarity between the Indocin IV sales force and the not-yet-developed sales force for the new drug, and for Ovation to continue client care in an optimal way, they need to join forces. This would be a second way of increasing appropriability.

DR. RAPP: And I would say that that parallels very closely the rest of the Guidelines and has the potential, either for being ignored if the arguments don't make sense or otherwise.

Just a quick analogy, there was a real estate merger in which I participated, in commercial retail real estate. A lot of argle bargle about whether discount shopping centers are in the same market as other shopping centers and so forth, a fruitless exercise if ever there was one. But part of the story is the proposition that a really effective developer could benefit from the conditions of those markets. The relationship between rent and sales is such that if you have somebody who is really a powerhouse developer taking on an ostensible competitor, with all the different dimensions not being considered, what may happen is that tenants get better off as a result of that, because the losses to tenants from increased rent can be shown with authority to be swamped by the gains, partly because of the externalities of shopping centers and so forth. I see that as the same thing, just parallel thinking, and it is a reflection of the strength in the New Guidelines.

MR. KATZ: I would like to move on. This is a great discussion, but I want to make sure we cover more things. One of the topics we'll talk about briefly, because it has been discussed a lot, in fact indeed here in prior years, the most recent developments in pay-for-delay or reverse payments, whichever side of the debate you're on you might use a different term.

So Scott, if you can tell us a little about some recent cases. I know there is a little bit that has gone forward, and also if there is some new thinking that you'd like to introduce to us.

DR. HEMPHILL: Sure. These pay-for-delay cases are still alive and well. The basic issue arises when a brand-name drug maker faces a generic would-be competitor, typically one that doesn't yet have product approval. They are engaged in patent litigation, and the brand provides compensation of some sort as part of an overall deal in which the patent litigation is abandoned, and there is some delay in generic entry.

A number of cases are pending. One involves a drug called Cipro. Cipro has already seen antitrust rulings in both the Second Circuit and Federal Circuit, and now there is a third case in California state court. The Supreme Court of California is taking a look at that case.

Second, litigation over Provigil is still quite active. The latest there was a judgment by the district court in the underlying patent case, holding that the patent is invalid. This could matter in the antitrust case because the rule that the district judge applied, in denying dismissal, focused in part on actual invalidity as a basis for antitrust liability. A third case involving yet another drug, AndroGel, is pending in the Eleventh Circuit. [Update: In April 2012, the Eleventh Circuit ruled in favor of defendants.]

I think we may begin to see a shift to a different kind of case, focused less on a cash payment, and more on a bottleneck that sometimes arises. Let me explain. A generic that challenges a patent sometimes gets 180 days as the first filer; 180 days of exclusivity in conjunction with the brand as a duopoly. Now, the 180 days goes not only to a generic firm that *wins* litigation; it also may be given to a generic firm that merely *settles* the litigation with the brand. So if you lose the litigation as a generic, your 180 days goes away. If you win, you get to keep it, and if you settle, you also get to keep it. And in the meantime, other generics are blocked from FDA approval.

That's the source of the bottleneck, and we are starting to see cases pressing on that point. And understandably so, since the courts, though they have come out different ways about pay-for-delay settlements, have consistently said the bottleneck is actually quite troubling. And whatever else you think about cash payments in the course of settling litigation, one ought to be worried about the bottleneck.

So wearing my academic hat for just a minute, Mark Lemley and I have a piece that just came out in the *Antitrust Law Journal* trying to pivot the discussion a little bit, to think about solutions to this problem that aren't purely or traditionally antitrust litigation. We are focusing attention on the bottleneck itself, which may be the more important part of the puzzle, even more than the cash payments. We consider various regulatory and legislative solutions, for example, interpretation of the so-called "forfeiture" provisions that exist for drugs that were first challenged after December 2003. This regulatory regime is amenable to an interpretation that would lead to forfeiture of exclusivity upon settlement. We also discuss legislative change and FTC competition rule-making as other ways to get at the problem.

MR. KATZ: I think in order to move on, because there is so much more that we would like to discuss, I would like to, though we have discussed it much, but I do think the new paper that you're describing that is in the most recent *Antitrust Law Journal* does in an interesting way try to come out—I think we are at a bit of an impasse between what most of the circuit courts have said and what the FTC and others believe. There needs to be a way out, and that's one interesting suggestion.

To move onto different kinds of problems that the antitrust laws try to deal with, I want to focus a little bit about different kinds of exclusivity. Mostly we see it come out in a variety of types of vertical arrangements or types of payments, discounts, exclusivities. There has recently been some discussion of grouping a bunch of these types of things, including most-favored-nation clauses, contracts, references and rivals; it is a big basket where a lot of different things may not all belong there, but it is helpful to us today to discuss some of these together.

I want to kind of kick this off by talking just a bit about the *Intel* case and focusing especially on the FTC and the complaint they brought against Intel, and that was settled. This is a 2010 case, but it was late in 2010, and I think there is still impact from it in 2011, so it is fair game for our panel.

As many of you know, the FTC had alleged that Intel used a whole variety of practices to keep its rivals, especially AMD, from getting their chips on the manufacturers of computers that the manufacturers sell. This included, among other things, especially attractive discounts if the manufacturer was very loyal, meaning if they used Intel chips for a greater percentage of their own use. That, among other things, was challenged.

So without getting too much into all the very detailed allegations and also the relief that the FTC fashioned there, I want to sort of step back a little bit and just have Dick tell us about what kinds of economic analyses, especially in terms of more recently favored kinds of thinking out there, that we can use and look at to help us think about these types of cases, and not necessarily just Intel but the questions that case raises.

DR. RAPP: I can start that conversation and others can pick it up. I can give you three good reasons for having this conversation, and that's a way to start it off.

One is that Joe Farrell at FTC and Fiona Scott Morton at DOJ are both thinking about this subject and talking about it. I don't want to say unexpectedly, but it sort of came out of the blue. It didn't come out of Guidelines thinking or anything like that particularly. And what I'm going to be doing is orally plagiarizing Joe Farrell on the subject. And the reason that I've chosen him is because I think he has addressed an underlying principle that seems to be very much at odds with Section 2 practice since *Brooke Group*. But let's put it this way: it has great analytical traction, and certainly the members of the plaintiffs' bar in the room will applaud after I finish describing it.

Another way to come at this, though, is just refer—just refer and not delve into behavioral economics, which is a very interesting subject and has made some real headroads into antitrust since Tom Rosch's speech encouraging that fact.

Early in the history of behavorial economics, when two psychologists—Kahneman won the Nobel Prize in economics, and Tversky—were exemplifying their thinking about how you and I, when we're not wearing our economist and antitrust lawyer hats, how we abandon the rationality assumption upon which much of neoclassical economics relies and how we are victims to various heuristics and biases. One of those is called framing. And the example they gave is when you go into a car dealership, imagine yourself in an auto showroom and imagine that the car that you covet has a sticker price of $20,000, but you won't see one in the showroom because they are in such hot demand they have sold even the demo. And the salesman comes up to you, you know the sticker price, the salesman says, look, it is a $20,000 sticker price car, but we're on allocation in these, so we have the right, since the sticker price is only an MSRP, we have the right to charge a surcharge. This is going to cost you $24,000. And if you're like many people, you say price gouging, I don't like that. Let me see if I can find somebody who will do otherwise. If all of the numbers were the same, except the $24,000 were on the sticker and the salesman said to you I know you're in the habit of receiving discounts off sticker price and normally this car sells for $20,000, but because they are in short supply we can't give you that discount, the car is going to cost you $24,000. The transactions that I've just described are identical; your reactions, my reactions, some people's reactions are these are two different things and one is fair and one is unfair. Economics is interested in that subject but the mechanisms for dealing with it are limited.

Why did I introduce this and give this lengthy introduction and use this as the means of an introduction? Because language is deceptive, and people are imperfect in their interpretation. When we talk about loyalty discounts, Farrell's point is we ought to be talking about disloyalty premiums. All you have to do is change the language, and you stop thinking about it as if in the "lower prices are good for consumers" mode, because what's going on is a tax that you pay, not in the car case but in the case of the typical loyalty discount that gets litigated. Think of *Concord Boat*, the Eighth Circuit case about marine engines. Those loyalty discounts are often structured in a way so that the buyer is saying to himself, if I don't keep buying Brunswick engines and start to buy Mercury engines, it is like there's a tax on every one of those purchases that I have to pay. Tax was the language that Robert Hall used in that *Concord Boat* case. His testimony was thrown out by the Eighth Circuit for reasons unrelated to this point. I was the witness on the other side of that.

Now here is how this relates to the thinking in the agencies, among the agencies' economists, at least Joe, about the subject. What this should sound to you like is nothing like Section 2 as it's now practiced. It sounds like Section 2, but it doesn't sound like Section 2 case law somehow. We are okay with monopoly that is lawfully gained, and we are okay with monopoly pricing too. Dominant firms have a right to do that, unlike in some jurisdictions. The reason for that is there is the dominant firm trade-off, Farrell says. The dominant trade-off is charge your monopoly price, and what happens, you are encouraging rivals to cause you to lose market share, to gain share at your expense and you're inducing entry by doing that, and competition is not harmed by that in the long term, or the second order effects ought to be improved consumer welfare.

What Farrell's version of discount pricing is, as I've heard it, and I think Fiona Martin, when thinking about CRR, contracts referencing rivals, has the same thing in mind. When you have these discounts structured in the way that you do—all of them above cost, so you can put that consideration out of your mind, what's happening is that you are interfering with that dominant firm trade-off. It is a mechanism for structuring prices in such a way that when you charge buyers a dominant firm price, you have arranged by dint of your market to be able to impose a tax on the attempts of rivals to increase their market share. We think in the big picture about the welfare consequences of the Sherman Act—think about how closely that fits inside Sherman Act Section 2 patience with monopoly but not monopolization; it sounds like the makings of an affront to Section 2, notwithstanding the case law built up so powerfully to encourage above-cost pricing, the discounting, the reduction of prices, as long as they don't go below cost. This new concept and the old one are at odds. So again, let me suggest that if this idea gains traction, we will have a certain amount of schizophrenia. It won't be in the courts for a long while, and some people will say never, but it represents a nice tension between the way that Section 2 has developed and its intention to predation and exclusion by pricing below cost and this rather newer concept of a tax.

DR. HEMPHILL: I think that discussion was really helpful. I think both Fiona's "contracts referencing rivals" and Joe's ideas about a tax on innovation are useful in trying to understand Section 2 policy more broadly. It is a nice set of examples—to which we can add work on the Guidelines themselves—of academics intersecting with real-world antitrust to produce fruitful results.

I want to offer a word here about legal policy, and the idea that *Brooke Group* controls these cases. That idea is incorrect and indeed pernicious. After all, *Brooke Group* is not premised on the idea that above-cost prices are never anticompetitive. Rather, the idea is that price cuts are, in the words of the court, often "beyond the practical ability of a judicial tribunal to control." That language from *Brooke Group* was later picked up by the Supreme Court in *Trinko*.

That conclusion, in turn, is premised on a judgment that predatory pricing is (in the Court's words) "rarely tried and even more rarely successful" and hard to distinguish from ordinary, procompetitive price cuts. Finally, the predatory pricing rule was originally based on what was described as a "consensus among commentators" as to these features.

Yet none of those things are true of loyalty discounts, of market share discounts, of any of this range of bundling activity that we are talking about now. The inability to distinguish procompetitive and anticompetitive conduct is not present. And the consensus very surely does not exist at this point. So the notion that *Brooke Group* would be the last word here is quite surprising.

MR. KATZ: This is a topic we could spend quite a lot of time discussing, and I think there are Section 2 developments, there are really a lot of issues that we could discuss.

But what I want to shift to here is other areas where some of these same concerns arise, these are exclusionary concerns. (Like many of us, I like to think of antitrust problems being either price increasing or output reducing, on the one hand, or on the other hand exclusionary.) I think these are concerns that you are excluding a competitor or potential competitor.

How do those interplay with parallel conduct? The way I would like to approach this is first maybe talk just a tiny little bit about the e-Books case. This is a recent case, complaints filed, there are investigations pending, according to press reports.

Dick, do you want to very briefly chat about that?

DR. RAPP: I'll just set it up for questions and see if people want to talk about it. We are coming into the question period. But this is something for which every electronic reader who knows antitrust should be interested in. A class action complaint in e-Books says there was a conspiracy of some kind, and we don't know whether it is really conscious parallelism or conspiracy like you never do at the outset of these cases. But the idea is that we used to be buying our Kindle books at $9.99. That was seen, interestingly, by the publishers as something of a threat to their traditional print and ink business. The complaint alleges that the conspiracy with Apple, beginning on the day that Apple launched the iPad, was to change from a wholesale relationship. Macmillan wholesales the electronics for the Steve Jobs book to Amazon and Amazon retails them to you for $9.99. No longer. It is now an agency relationship. Amazon and Apple will show you, if you look closely at their web page, a)—what you already know, the price has gone up to $12.99, and b) something that says the publisher set this price.

This bears a resemblance to—and it is a question of agency, but it bears a resemblance to Most-Favored Nation; resale price maintenance is invoked, although the mechanism is different. The historian in me wants to point to the newspaper distribution cases of long ago, the transfers to agency, the air ticket commission litigation where the technology of Ark coupons gave way to e-tickets and so forth. So we could talk about that. It is interesting stuff; it is new high-technology antitrust.

MR. KATZ: But aren't all of these things that really we worry about between the supplier and the distributor, these are vertical questions and we know how to answer them. They are hard to challenge.

Scott, do you want to take us to where you are?

DR. HEMPHILL: With respect to exclusion, I am doing some work with Tim Wu to make sense of a class of cases that are important and neglected, and that existing doctrine doesn't really have a full handle on.

The class of cases is at the intersection of two lines of thinking. On the one hand, we talk about collusion by oligopolies, the old fight between Turner and Posner about what constitutes an actionable horizontal agreement to fix prices. On the other hand, when we talk about exclusion, we are normally thinking about a dominant firm.

We are interested in the intersection, namely parallel exclusion, where exclusion is being conducted by multiple firms acting in parallel. This is the conduct considered in the coordinated effects analysis of AT&T / T-Mobile that I talked about earlier. It also appears in the "honor all cards" litigation against MasterCard and Visa.

Parallel exclusion could have some of the same effects as exclusion by a dominant firm. At the same time, its success or failure might depend on how those excluders interact. And as a matter of doctrine, in some cases the presence or absence of horizontal agreement gets taken extremely seriously, even though analytically the horizontal aspect may be quite unimportant. The mismatch between doctrine and the underlying economics is something at the heart of our project.

MR. KATZ: We are near the end of our session, at least the original timing, but with your permission since we started a bit late, I'm trying to steal a little bit of time from the next session. We are going to conclude with kind of what's really the end of an era. Many of you may have noticed, and I know right up front one of you spent a lot of years of your life working on this case, the end of the *Microsoft* consent decree, took place on May of 2011. We will keep it short because it is getting towards the end of our time.

So if you could each tell us just about a sentence or two, if you would like, on what you take away from the end of what a bunch of years ago would have been the biggest story in antitrust and now for the most part we are turning the page.

DR. HEMPHILL: Liability is pretty hard to establish; remedies are a lot harder.

DR. RAPP: Looking forward to Google; fit problems with search preferences into the bigger and more familiar category of paying for prominence, such as Coca-Cola buying endcaps at the supermarket, etcetera.

DR. HEMPHILL: That ends our antitrust haiku.

MR. KATZ: I was very impressed. You took the challenge on, and I think most other panelists would have decided to talk as much as they could, but you guys did just great.

With that I would like to open it up to the audience. I notice some people had questions before. Does anybody have any questions about any of the topics that we have covered?

MS. BARBARA HART: Is there data to support the preference discount that would suggest that that helps that the offeror of the loyalty discount entrenched the monopoly. Is there some kind of database that supports this? The idea would be that they lengthen their monopoly power by stopping migration to the lower priced competitor because they are entrenching their loyal customer?

DR. RAPP: I don't know of any data or database that supports that. But let's put it this way: The algebra of price structures can give you a hint or tell you in any particular fact situation about the impact of the discount on rivals in the terms that Robert Hall first used in *Concord Boat* and that I think Joe uses. You know, tell me the price structure and the economics of that market, and I'll tell you something about the degree to which rivals can be disadvantaged by a price structure.

MS. MAHONEY: To follow up on Barbara, because it is very interesting, but how do we measure? You don't want to discourage someone who might make a better mousetrap to get a greater market share, even if that at some point is going to translate to some degree of market power, by virtue of creating a better mousetrap. And why can't they in fact price at a competitively aggressive level? And I think that's why we have—not so easy really to measure, but the below-cost pricing concept.

But what you're talking about is something very theoretically interesting, but how does it reduce itself into something that we could draw a meaningful and predictive distinction between that which is competitive and that which—

DR. RAPP: I think the work is left to be done.

Scott, you may have some further thoughts about that, but if the gist of that is, of your two questions is this sounds very impractical compared to a hard and fast cost test, I think the answer is that it's not. It is the same. First of all, pick your model, are we talking about quantity setting or are we talking about price setting? Do we know something about the elasticity of the demand and the cross price elasticity between those products? Tell me that and the price structure, and I think that we can derive information, maybe a forecast of share changes. Remember, the Learner relationship between shares elasticity and demand and margins.

If you're asking me whether I have done it—and you didn't, but I'll confess, the answer is no. If you ask me whether I think this is as doable as the kind of price / cost comparison test that invariably uses a controversial sometimes mushy, often wrong definition of what the right cost is to compare, I think it is very doable. If you ask me whether I think the law is going to change in the direction that would permit above-cost discounting to being subject to sharp antitrust scrutiny by the courts, that's a prediction I'd be scared to make.

MR. KATZ: Bill.

MR. ROONEY: So from a development standpoint I think one of the statements that was made today that has the most resonance for me is that innovation has become just as an empirical fact, as important if not more important than price competition in today's economy. If that is true, if we take that as a starting point, what are the antitrust implications for that? It seems to me that there are implications both for the plaintiff's side, the defendant's side. On a market definition standpoint one might take as an implication of the importance of innovation competition that product differentiation is a means of competition and not a means of market definition. So that would mean a stricter scrutiny on the supply side of the market to see the supply dynamics, to see the breadth of products that should be included in what has traditionally been known as the relevant market in the venue for competitive analysis.

On the Section 2 side it also may call for broadening the concept of exclusionary conduct and recognizing that a large entrenched firm may be undertaking measures that will make displacement of its dominance more difficult and that those measures could be viewed as legitimate and actionable exclusionary conduct.

So with that sort of overview on a developmental standpoint and a forward-looking standpoint, maybe you could make a comment.

DR. HEMPHILL: I would just add firm *or firms*: multiple excluders should always be part of how we think about this problem and that hasn't been the way we think about it.

DR. RAPP: I don't have a real answer to your question. I have a preface to the real answer and I hope Elai has the real answer, but the statement that you heard me make, the mental reference that all the economists in the room will recognize is to a 1950 article by Robert Solow called "Technical Change and the Aggregate Production Function," for which Solow won the Nobel Prize. It was the basis for the emphasis on innovation, which came late. And I hope I gave due credit to Gilbert and Sunshine and didn't leave out others for introducing it into antitrust. That finding, which has been supported from that day to this, is that when you think about the sources of an economic productivity growth in a modern economy, including ours, you can add labor, you can engage in capital deepening, but those are two relatively minor contributors to growth in productivity. The major contributor, the thing that causes the aggregate production function to shift, is new technology.

The question that that raises in response to your question is although antitrust practitioners and the Merger Guidelines group product differentiation along with innovation, and undoubtedly those sets interact and overlap importantly, it's not always the case that tweaking a product is the sort of innovation that matters in the way that the Solow article describes. To the extent that we measure innovation by patenting, which many economists do all the time, bear in mind that most patents are worthless, which is interesting in its own right.

So that's, sorry, not an answer, but a riff on the question.

DR. HEMPHILL: Can I do one other riff?

Bill's comment makes me think about a key distinction that deserves a lot of attention going forward, between entrenchment on the one hand and exploitation on the other. So when firms are acting in a way to prevent entry, that's the kind of thing we should really be focused on. When firms are basically just making a monopoly profit, that may be a kind of exploitation we are less worried about. I mentioned *Trinko* before. That opinion contains language that some people think of as almost a celebration of monopoly. In that context, the Court is talking about exploitation and not about entrenchment. So taking that as an invitation to engage in conduct that would otherwise violate Section 2 would be a misunderstanding.

MS. ELEANOR FOX: I want to ask a question about equally efficient rivals; that is, we shouldn't worry about exclusionary conduct or call it anticompetitive exclusionary unless it would exclude an equally efficient rival.

I wonder what implication your whole discussion has for that test. One point is easily efficient rival is virtually always thought of in terms of price cost, not innovation. So if you look at Intel or Microsoft as rivals and AT&T/T-Mobile, the rivals were—I'm sorry I realize AT&T/T-Mobile is different, but at least the rivals were innovative, putting out something that was very innovative. If it is the case that these various strategies we have talked about are geared to and do make it more difficult for the monopoly power to be displaced, does that have implication for the equally efficient rival test, which not only ignores the fact that rivals might not yet be as efficient and might never get there and ignores the innovation aspects of the challengers?

DR. RAPP: Innovation, as you and others know, is so idiosyncratic. We use proxies for it. We use R&D activity, R&D investment or expense, patenting and so forth. But the distribution of innovations that are actually, let me say economically, impotent is very highly skewed, as is the distribution of patent values, forgetting about other forms of IP protection. So I find it hard to connect the question to a practical application.

We know there are innovative companies. IBM runs the commercials during football games; when other people are selling Doritos, they are telling you about their innovations. But how we can sort of actualize as analysis and enforcement practice how we can bring innovation into the analysis of whether these strategies could exclude, let us say, equally efficient rivals in production but unequal in innovation and therefore be problematic, where we just assume that equally efficient rivals ought to be able to match one another's prices and there is not likely to be a problem there. That's the premise. But innovation is deeper and more difficult to read. I think it's so difficult to read that I'm pessimistic about its inclusion in this sort of thinking and analysis. That's the best I can do, Eleanor.

MR. KATZ: I'd love to talk a lot more, but Scott, you have the last word, and we will let you go on to lunch or the meeting before lunch.

DR. HEMPHILL: Equally efficient rivals is a superficially attractive standard. It looks simple, it looks clean. But in practice, it can be extremely demanding in its requirements. The rival has to emerge fully grown, ready to be in all the necessary markets to pull together a competing bundle. That's a lot to ask, and it is going to sweep under the rug a lot of conduct that we might think of, particularly in a dynamic perspective, as being anticompetitive.

DR. RAPP: Which is her point.

MR. KATZ: Thank you very much, everyone. I appreciate the attention and questions. And I want to really thank our panelists for what I thought was a really engaging discussion which made us think about not only what happened but about how the thinking is developing, and I certainly found it was very helpful. Thank you very much.

Section Business Meeting, Election of Officers and Members of the Executive Committee

MR. ROONEY: Before we all break for lunch, there is a very brief business meeting of the section. Jay will preside over this very short business meeting of the section.

MR. HIMES: This is the last thing that I get to do. I promise to be brief. The first item is to approve the minutes from the last Annual Meeting a year ago, and the second is to receive the report of the Nominating Committee on new Executive Committee members and the slate of officers for next year and who vote on them.

The first order of business is to approve the minutes of last year's meeting in this location.

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MR. HIMES: So moved and a second. All in favor of the minutes? (Members vote aye).

Anyone opposed? (None).

I have Meg now to do a second piece of business.

MS. GIFFORD: If you will all please at least let me read the names before you move their election, I'd appreciate that.

I have my usual report of the Nominations Committee. I had understood that our friends from Albany were going to have copies of this out at the table, and I did not see them, so I apologize for that. Not that it is actually my fault, but I apologize anyway.

So if you'll allow me, I will dispense with the reading of the names of those members of the Executive Committee who are simply continuing in office, in order to save some time.

The Nominating Committee proposes the following current members of the Executive Committee for re-election to two-year terms ending at the Annual Meeting in 2014: James Bailey, Jeffrey Clark, Lisl Dunlop, myself, Martha Gifford, Leonard Gordon, Leslie Harris, Barbara Hart, Kevin Hart, Jay Himes, Elinor Hoffmann, Ethan Litwin, Steve Madsen, Mary Marks, David Marriott, Scott Martin, Terri Mazur, Robert Milne, Eamon O'Kelly, Doug Richards, William Rooney, Fiona Schaeffer, Benjamin Sirota and Eric Stock.

May I have a motion to elect those individuals to the Executive Committee.

AUDIENCE MEMBER: So moved.

MS. GIFFORD: Second?

AUDIENCE MEMBER: Second.

MS. GIFFORD: All in favor? (Audience votes aye.)

MS. GIFFORD: The Nominating Committee proposes the following individuals for election to a two-year term on the Executive Committee ending at the Annual Meeting in 2014:

Rita Sinkfield Belin of Skadden Arps; Adam Hemlock, Weil Gotshal; Michael Jahnke of Loeb & Loeb; and if I mispronounce your name, I apologize, Anne Nardacci of Boies Schiller; Mark Siemens; Geralyn Trujillo of the New York Attorney General's Office; Christine Varney of Cravath, Swaine & Moore and Dale Worral of Harris Beach.

May I have a motion to elect those individuals to the Executive Committee.

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MS. GIFFORD: All in favor say aye. (Audience vote aye.)

MS. GIFFORD: Thank you.

And finally, but not least, the Nominating Committee nominates the following members of the Executive Committee for election to one-year terms to the offices that I will identify:

Bill Rooney as Chair; Eric Stock, currently our Secretary, as Vice Chair, and responsible for next year's program, and Barbara Hart, Secretary.

May I have a motion.

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MS. GIFFORD: All in favor? (Audience vote aye.)

MS. GIFFORD: Thank you, Jay.

MR. HIMES: Thank you. I'm out of here. (Applause.) (Luncheon recess.)

What Hath *Leegin* Wrought? Has State Enforcement Served or Stymied the Public Interest?

MR. ROONEY: We are going to begin with our afternoon session. We've had three subcommittees this year, one is Vertical Restraints, one is Horizontal Restraints, and the other is Class Action. In that order we will have our next three programs. They have actually been conceived, sponsored, populated and run by the energy of each subcommittee.

The Vertical Restraint Subcommittee today is offering the panel they have labeled: What Hath *Leegin* Wrought? Has State Enforcement Served or Stymied the Public Interest?

Of course we know that *Leegin*,[1] at least according to some, is the completion of a cycle that began with *Sylvania*,[2] continued with *Monsanto*,[3] then *Business Electronics* and then finally with *Leegin*, basically to take all vertical restraints outside the per se rule and put it into the rule of reason.

I think our panel is going to explore whether that's been a good thing or bad thing on a federal level and what it means for state law, which may or may not follow the federal course in that regard. Let me turn this over to Dan, who will be the moderator for this hour-long panel.

MR. ANZISKA: Thank you, Bill.

My name is Dan Anziska from the law firm of Troutman Sanders here in New York, and I'm the Chairman of the Subcommittee on Vertical Restraints.

As we all know, the Supreme Court's decision in *Leegin* brought about a dramatic change in the law relating to vertical price agreements, or resale price maintenance as it is commonly known. A venerable precedent was retired and minimum resale price maintenance is no longer a per se violation of the Sherman Act.[4]

Unfortunately, as many of us here know, for many practitioners and inside counsel that decision did not end the difficulty in counseling or litigating issues related to resale price maintenance. In fact, it has made it more difficult in many circumstances. While resale price maintenance remains subject to the rule of reason analysis under federal law, many state laws, including our own here in New York State, still purport that resale price maintenance is to be treated as per se unlawful.

Some cases have been brought around the country, including in this state, and post-*Leegin* many commenters have written extensively about its impacts. The ABA ran a highly attended panel this past spring meeting on this subject.

Our program today will explore current legal and practical issues facing companies which operate here in New York and around the country and the lawyers who have to counsel these companies.

Joining me to my immediate left is Bob Hubbard, who is an Assistant Attorney General in the Antitrust Bureau of the New York State AG's Office, and Dr. Tom Overstreet, a Vice President at the economic consulting firm of Charles River Associates.

Bob is a former Chair of this Section and past recipient of the prestigious Lifland Award. He earned his J.D. from Fordham University—go Rams—and his M.B.A. from NYU.[5] He's been with the Bureau since 1987 and has represented New York and New Yorkers in cases such as *In re Disposable Contact Lens Antitrust Litigation*,[6] *New York v. Tempur-Pedic*,[7] which actually involved a resale price maintenance challenge; *New York v. St. Francis Hospital*[8] and *New York v. Julius Nasso Concrete*.[9] He was also involved in major multi-state antitrust litigation,[10] including the states' amicus in *Leegin* supporting the per se treatment for minimum RPM agreements.[11]

From 2005 to 2009 Bob served as Chair of the Multi-State Antitrust Task Force of NAAG. He has lectured and published extensively, partaken in many panels discussing antitrust issues, including a very popular ABA Mock Trial on Minimum RPM a couple of years ago, where shockingly a mock jury found it should be unlawful to pay more for their products.[12]

Seated next to Bob is Dr. Tom Overstreet, an economist with Charles River Associates, focusing on industrial organization and antitrust economics. Tom obtained his B.A. in Economics from George Mason and Master's and Ph.D. from Vanderbilt. He began his career with the FTC, where he held a number of positions. Since coming over to CRA Tom has appeared on behalf of clients before the FTC and DOJ on many matters. He's extensively published, received numerous honors and, like Bob, Tom also signed an amicus in *Leegin*, though it was the opposite position.

So let me turn it now over to Bob and Tom to discuss resale price maintenance in the world post-*Leegin*.

Go ahead, Bob.

MR. HUBBARD: Hi, good afternoon. It is weird to be talking about a 2007 case here in 2012. Maybe it's time to start thinking about these issues again, and I kind of feel as though states aren't able to do enough, and Tom Overstreet thinks they are doing too much. So we'll see where this all goes.

I hate the term resale price maintenance; it sounds like you're trying to keep everything calm, you don't want anybody to fight. This is price fixing. You're setting the price at which the retailer can sell, and that's what we should be talking about. But the literature talks about maintenance; it talks about vertical price fixing. What's vertical? Any non-antitrust lawyer will not quite know what vertical means. I like to talk about this as resale price fixing.

Now, resale price fixing was illegal per se from 1911 to 2007.[13] Seemed like a good rule that withstood the test of time. Obviously the Supreme Court didn't agree with that, so I have to set context of how I think about this. Like everybody else I only speak for myself. I think the only person I could bind by any comment here is my wife. And anyone who knows my wife knows that I don't speak for her either.

So background and history. AGs have been doing these cases for a long, long time. There's a long history of it. It was one of the few cases that didn't have an *Illinois Brick* problem.[14] It was one of the few cases where you could aggregate a lot of claims by individual consumers, individual voters.

There's like $120 million in cash that has been distributed by states in some of these cases along with other distributions. We have brought claims against restraints on the kind of products that people know of: Japanese consumer electronics,[15] shoes,[16] farm chemicals,[17] CDs,[18] George Foreman grills.[19] We have a whole slew of those. And we participated as amici in the Supreme Court cases that talk about this in *Monsanto*,[20] *State Oil*,[21] and *Leegin*.[22] The amicus in *Leegin* was a 37-state amicus; the New York Solicitor General argued on behalf of the states.[23]

Now resale price fixing, the reason why all this activity is going on is because it is really at the core of what state AGs do. There is statutory parens authority under federal law that gives the right to an Attorney General to represent the individual natural persons within his or her state.[24] It is a clear pocketbook issue; we are talking about an overcharge to those people. And the impact is significant in the aggregate. Although an individual would never have an incentive to bring it, certainly in the aggregate it makes sense to work on these cases.

Nevertheless it wasn't easy for a plaintiff even before *Leegin* came down. There's all sorts of stuff about *Monsanto*, limiting what agreement is, emphasizing importance of suppliers communicating with one another.[25] There is a definition in *Sharp* about what constitutes an agreement on price.[26] Agreeing to terminate a discounter somehow wasn't an agreement on price.[27] The lower courts were applying that pretty broadly. It was pretty hard for a plaintiff the days before *Leegin* came down. But *Leegin* comes down, and it is no longer a per se illegal restraint.[28]

People seem to think everything changed. I continue to point out that it was a 5-4 decision. Maybe we'll have a transformation by a justice on the Supreme Court, but I don't think so. It is an expansive Kennedy decision, talking about how economists theorize that resale price fixing can be beneficial, holds that the rule of reason applies.[29] But I think importantly it instructs courts to find a fair and efficient way to prohibit anti-competitive restraints and promote pro-competitive ones. I'm not quite sure what that means. It hasn't worked out very well for plaintiffs so far. But the Breyer dissent is really interesting.[30] With one more vote it would have been a majority. In talking about the majority accepting stale old arguments, he held up at oral argument, a book that talked about all these free rider arguments from 1966, and said what's new here?[31] Why do we have to be talking in 2007 about things that had been argued extensively long ago, that stare decisis deserves more respect, and that retail prices will go up? Well, we have to deal with this.

So while the dust settled, there were various things that the states did. We had a case against Herman Miller; we ultimately settled that and distributed some money.[32] North Carolina had a case against an oil jobber that was a resale price fixing case.[33]

Also, one of the things that happened was Nine West, who the states had a civil case against.[34] Nine West also was subject to an FTC decree which was longer in duration than our state settlement. Nine West petitioned the FTC to ask that they be relieved of the FTC decree in light of *Leegin*.[35] There were state comments on that.[36] The proposal that the states made was the idea that courts were supposed to make sure that they didn't allow anti-competitive stuff to happen.[37] We argued a much more truncated rule of reason, sort of a la *Polygram*,[38] and talked about that if prices go up the burden should be on the defendant to illustrate that this was better, that somehow consumers were benefiting from paying the higher prices.[39] The FTC sort of came out that way, but not all the way.[40]

One thing I think we have to talk about here is that resale price fixing makes prices go up. There's no dispute about that. The question is whether the higher price comes with value that consumers want and deserve. There are a lot of studies on this. One reason Congress repealed the Fair Trade Laws was a DOJ study, and a lot of FTC work on this. Prices go up. In 1975 when they repealed the Fair Trade Laws they were talking about one and a half to 3 billion dollars a year more paid by consumers.

So state AGs and people like me are in a position of having the rule of reason. There is obviously some concern about that, because it is much harder to win a rule of reason case. So there are varied possible responses, and we have had a few years to try out all of these. The first one is a legislative proposal. The second is to try some of these cases under federal law. And the third is to use state law which can and does differ from federal antitrust law.

Now, I want to stop here to sort of pause. From my perspective this has always been about whether you can get to a jury, and if you can establish to a defendant that you are going to get to a jury, I think you'll get a settlement and you'll win this.

I have talked with many consumers over the years and I think I know what questions to ask. Nonetheless, I find it very difficult to find any consumer who thinks that a manufacturer prohibiting discounting is a good idea. They usually think that discounting is something that benefits them and that ought to be allowed.

I know that when *Leegin* first came down, I don't know whether it was a threat or opportunity, but I got invited to do a mock trial at the ABA Antitrust Section Spring Meeting. We put on the case. I think many thought Andy Rossner and I were going to lose and it wasn't even going to be that close. But I always believed that a jury would rule in favor of plaintiffs, and they did. They didn't buy the idea that paying more was good for them.

Let's go to the three alternatives for getting rid of *Leegin*. First, there was the *Leegin* overrule legislation.[41] There have been state AG letters in support of that. The 2008 letter got 35 states;[42] the 2009 got 41 NAAG signatories, which includes 38 states.[43] It passed out of House and Senate Committees twice. I think Senator Kohl wants it as his swan song, but I don't think that's going to happen. Maybe something will happen after November, I don't know, but nobody is optimistic about that legislation going any further.

There have been various people who have tried to make the argument under a structured rule of reason the plaintiff ought to win some of these resale price fixing cases under federal law. They haven't done very well. The case remanded from the Supreme Court was in the Fifth Circuit.[44] The District Court dismissed the claims based on the Supreme Court decision[45] and the Fifth Circuit affirmed.[46] The Fifth Circuit imposed a market power screen and said that you can't make a rule of reason case without this market power screen.[47] Plaintiffs petitioned for cert, which was denied.[48]

The Eleventh Circuit in a case against Tempur-Pedic had a similar case that was on hold until *Leegin* came down.[49] The District Court dismissed the complaint saying that all mattresses should be in the market and not just the limited market that Plaintiffs were proposing,[50] and the Eleventh Circuit rejected that market definition as implausible.[51] So it looks like two alternatives, legislative overrule and using the federal antitrust law and the structured rule of reason are not working very well. But at the same time states are trying with affirmative state actions.

California has brought two cases, *Dermaquest*[52] and *Bioelements*.[53] These are both cosmetic products and moisteners; they have both those purposes. They have written contracts in which they set the resale price.[54] California argued that its state law specifies various restraints in a list of what is illegal.[55] California has long argued that resale price fixing is included within the price fixing that is illegal under language in the Cartwright Act.[56] They successfully got some settlements on that.[57]

One of the things also that happened in *Leegin*, was a Kansas state court case.[58] Kansas is a populist state, and has a very aggressive state antitrust law.[59] The state AG wrote an amicus that was submitted quite awhile ago.[60] I think it has been pending for about a year, but there's an argument currently pending in front of the Kansas Supreme Court that resale price fixing is per se illegal.[61]

Also shortly after *Leegin* came down, the Maryland AG and others advocated that resale price fixing ought to be illegal under Maryland law. They proposed legislation, and it was passed.[62] So that's currently the law in Maryland.[63]

In the great State of New York, the Empire State, we brought a case against Tempur-Pedic.[64] We argued that there are bans on discounting that are prohibited by state statute.[65] That case is based on General Business Law Section 369-a.[66] I have it quoted in full in my slides. It is not very complicated. Price fixing is prohibited, right there in the heading.[67] And we argued that what Tempur-Pedic was doing violated the statute.[68] The Attorney General has authority under the Executive Law in New York State to prosecute that claim and that Tempur-Pedic should be enjoined from continuing to do that.[69] As I'll get to, we lost that case,[70] but that's the statute. I certainly read it and we will argue on appeal that it says that bans on discounting are illegal.[71]

There were a whole slew of other cases. There is a plumbing supply company called WorldHomeCenter.com, and he actually brought a bunch of cases trying to use section 369-a so that he could continue to discount.[72] I think the count is he lost all four of those—maybe there were five.[73] They successfully got them dismissed because he didn't have a contractual relationship with the supplier, so accordingly he couldn't have a contract provision, which was a necessary prerequisite of section 369-a.[74] And there's also a decision saying that section 369-a doesn't talk about a private right of action.[75] There is a standard you're supposed to apply to see whether you have a right of action, and he lost on those arguments.[76]

But returning now to New York State, the special proceeding that we brought for the *Tempur-Pedic* case is something that I had not done before. I usually practice in federal court, but in state court under the Executive Law we have a special proceeding, it is sort of like filing a motion for summary judgment as your first filing. So if you go to our filing, you will find it is quite a fulsome record; it has an affirmation that has 37 exhibits and includes declarations from Sleepy's and other people who say they know they can't discount; if they discount they are going to lose the account.[77] There are a lot of email exchanges back and forth, and we argued on the basis of that, that Tempur-Pedic had violated section 369-a, and the trial court dismissed our action.[78] The court held that section 369-a provides that bans on discounting are only unenforceable, not illegal.[79] It said that the heading, which used the word prohibited, should not be read into the text.[80] And said that there is no contract provision on resale price, because Tempur-Pedic's written contract said that there wasn't an agreement on price.[81] The court discounted the communications back and forth and our argument that not discounting was a condition for being an account.[82]

Now we filed a notice of appeal. It is currently set for argument in the April 2012 term, and the AG's papers are due only four days from today.[83] So that's sort of where we are.[84]

MR. ANZISKA: So, Tom.

DR. OVERSTREET: I'm Tom Overstreet, and I'm an economist. And after what Bob said you might wonder what's wrong with economists and the Supreme Court to take such a view of this.

There is an economic case for applying rule of reason to analyze resale price maintenance matters. As I understand the question that was asked by the Supreme Court: Was this practice always or almost always harmful to competition and consumers? And if it is, it should be per se illegal.

So economic theory says that it's not likely to be always or almost always harmful to competition. There's a plethora of economic theories. Congress has been studying this practice for a long time. I'm not going to go into a long detail about them, but to summarize them, there are general circumstances under which it can be good and bad, and it depends on the particular fact situation. The reason people think it can be good can be boiled down to a simple intuition. Resale price maintenance is a manufacturer typically telling either a wholesaler or a retailer not to discount, so they are going to end up getting larger margins at a downstream level of distribution. If nothing else happens, the more money the retailer takes out of what the consumer pays, the less there is for the manufacturer. So without something propping up retailer margins or reseller margins just doesn't make profit maximizing sense for a manufacturer, so there must be something else going on. That's the way economists have thought about it. Intuition says what might that something else be, something the dealers do to expand the demand. You give them favored margins and they respond in a positive way to help sell products. Nothing anti-competitive about that if it works out that way. So it can facilitate; the good stuff is that it can do these things in terms of facilitating services.

There are a couple of varieties of that argument. One has to do with special services where the idea is that people spend a lot of time educating you about something, then you don't buy there because they have to charge you for the service, so you go to a discounter, and eventually that won't be sustainable and services won't be provided. There aren't a lot of examples of hands-on services when you go through the literature on this stuff, but there are other types of retailer services that economists have talked about that involve things like quality certification, putting it in a fancy showroom that helps establish it as fashionable and so forth.

Practice can facilitate entry. It is risky to take on a new product; people don't know how it is going to do. There's usually competition after it gets started. Someone has to do the missionary work to sell the brand, and a lot of entrants want to protect dealer margins during the entry phase. Facilitating entry is not thought to be a particularly bad thing either.

On the other hand resale price maintenance can facilitate collusion among manufacturers and facilitate collusion among retailers. And some of the things that dealers can do have ambiguous effects, sort of like advertising. Some of these dealer services will bring in marginal consumers that may not purchase at the lower price, only with the higher price, but then there is infra-marginal customers that would purchase the product anyway. So if you have resale price maintenance, the price goes up. Some consumers are worse off, some better off, and the net effect on consumers is a little ambiguous. It depends on a number of things. So that wouldn't be necessarily anti-competitive, but it might not be in the interest of consumers.

There is also the possibility that some of the advertising or promotion that the dealers do people worry that it will be misleading or deceptive, just basically recommending people to certain brands because the margin is higher for them, not because it is actually better, things of that sort.

I'll give an aside. There is also some new economic work that's coming out by one of New York's own, John Asker, who is there in the back, who has a paper[85] now where he developed an interesting model where one of the dealer services—he doesn't say it this way; I'm interpreting it. I think his work could be interpreted as one of the dealer services is basically to provide an access barrier to competitors of manufacturer. So it helps manufacturers maintain market power by keeping competitors off the shelves and they share some of that with the retailer. That's not very pro consumer either. So it goes both ways.

There is a brief that was distributed that the economists put together, and there were about 25 or so economists that spanned a lot of ages and political beliefs and economic approaches to this that all managed to agree on the fact that it shouldn't be per se illegal, according to the economic thinking about it. The basic arguments are set out in an intuitive way in an amicus brief,[86] and the Supreme Court found it at least persuasive. So that's what the theory has to say, it can be good or bad and it depends.

On available evidence, that's a mixed bag. Bob actually had it right about the federal law being consistently anti-competitive, but we did have a period of time in this country where resale price maintenance was legal. It was legal from 1937 to 1975 during the fair trade era. Fair Trade laws—there was a law, Miller-Tydings[87]—passed, and it made an exception to the Sherman Act that states would bless fair trade contracts or basically resale price maintenance contracts, and they were allowed as long as states enacted them. After the passage of that act virtually all the states in the country—there were one or two holdouts and District of Columbia never did it—but most all states allowed resale price maintenance. They had different schemes of enforcement, whether you needed contracts with everybody, whether you needed contracts with one, etcetera, etcetera. It was a cumbersome state-allowed way to go, and we did have that.

There were studies of what happened during the Fair Trade days. Most of the studies focused only on price and didn't explore the services arguments. Most of them found that prices went up, just like Bob said. That tends to be what happens. But at that time interestingly states favored the laws.

Now, over time those laws got repealed in various states; they became unpopular with consumers. There was a lot of pushback and the pattern of state blessing of this thing fell apart. By the time the repeal rolled around in 1975 you had a patchwork of states where some allowed it and some didn't. And it had basically started to crumble under its own weight, because having a patchwork like that is very impractical for manufacturers to enforce a distributional program where it is legal in some places and not in others. They can't control trans-shipping, so it was largely abandoned.

So a lot of studies about what happened right after the change in Fair Trade laws, they talk about it as a fizzle, not much happened. But that was because it had become an environment sort of like today, in which it wasn't all that favorable towards enforcing it because it was impractical.

The FTC has prosecuted these cases over the years. I've studied that and a lot of people have taken a look at these cases and there have been studies of court cases that have involved resale price maintenance, trying to make sense out of it. There are some raw-based studies and some case studies mostly following on litigated matters about what happened in individual cases, and then there are a lot of international studies.

Generally, what these things found is they do raise prices. There have been some retailer cartels. The original Fair Trade laws, when they were passed, the impetus for that at the political level were retail dealers. There's the National Association of Retail Druggists who were the motivators behind this, and they were not interested in efficiency. They were facing chain store and more efficient forms of competitors, and they wanted some relief. So there are some reasons historically to be suspicious about the practice. There were also manufacturers that supported it in those days as well. So they didn't have common interests. There have been some cartels.

It is also true that there is lots of evidence of small firms and entrants. Entrants have used this practice for a while. They use it to facilitate entry, and once they get established a lot of them switch to national manufacturing, and then they don't care about it.

As the Court noted, a lot of the literature is old. The fair trade days are long gone and markets change. So it is hard to study a practice and come up with good examples, since '75 it has been per se illegal. States don't allow it. So it is hard to get into these things when firms don't want to admit they are doing it. So there is not a lot of good evidence for this.

So my take on all this is, especially given the fact of evidence that a lot of small firms that can't possibly have market power, have used this to facilitate entry. I'm pretty comfortable saying that there are instances which have been pro-competitive and it shouldn't be illegal all the time. But if that's true, then it would make sense to go to a rule of reason if it means you will get better results, if you will actually get better results at reasonable cost.

This change at the Supreme Court level kind of harmonizes the law between non-price restraints and price restraints. The Supreme Court has often taken the view that suppressing intra-brand competition, that is competition among dealers to sell the same product, is okay if it encourages them to sell in inter-brand competition against other brands. They have recognized that, territorial restraints and so forth. The intuitive argument is much the same in resale price maintenance, and they have accepted the law, and it brings those two things into harmony, at least from the federal level. As an economic matter, that could eliminate some distortions because people might use non-price restraints when resale price maintenance would be more efficient because of the legal issues.

So if all of that stuff follows, the *Leegin* indecision should lead to better law where you can figure these things out, better consumer welfare and more RPM and higher prices to some extent as well. And if that's all right, interference by the states will slow and stop these benefits from emerging, okay.

So how can the states interfere? We talked about how the maze of laws makes it very risky. Most manufacturers distribute beyond state boundaries, and any that do will have some complications if you have different legal regimes across the state. I talked about the precedent.

States like Maryland that change legislation and Bob and others are enforcing this law so that, at least in some states with very large populations, firms will find it risky. I'm not sure from a legal perspective that you advise your clients that the situation is a whole lot different now that than it was actually for *Leegin* because of the states.

Now, what's wrong with this? What's wrong with that picture, because Bob obviously doesn't agree with it? What does it did depend on? The logic is fine, but it depends on a certain number of things being true. First of all, it depends on whether the economist can actually look into this stuff and figure out the good ones from the bad ones on the basis of theories. It also depends on the courts' ability to implement that stuff in a reasonable way and reach good decisions. And it depends on the relevant costs of these different regimes.

So in terms of the theories of whether economists can really do a good job, where the economic understanding of this stuff stands now, in my view at least, is the clearly anti-competitive things and the ones that are almost certainly not anti-competitive can be sorted out. So I think you can sort the best and worst of them, and then there's a bunch in the middle where it is going to require you to dig a lot into the facts. Whether you can get all the way down so that you're absolutely certain that you're making the right decision, or get as far down where you can eliminate some and get where you can make a reasoned decision, I think that remains to be seen. We need more practice. But I do think that we can do a good enough job to make decent decisions and do better than saying just prohibit it entirely.

The welfare effects of this, though, can be ambiguous. Like I said, new work is emerging that puts a new twist on what some of the dealer services might actually be. Although as an economist, though, I don't find that situation to be a whole lot different than what we find in a lot of areas like merger analysis, for example. There's always a good deal of guesswork going on in these things about what is going to happen. So any economist can do a better job, but it remains to be seen because we don't have a lot of opportunities, given the thing has been per se for so long.

There is a question in the literature about whether rule of reason actually means per se legality. There are studies that show that defendants always win or almost always win, plaintiffs almost always lose, and so they've come up with different suggestions: Rule of reason, a triggered presumption that can be rebutted, presumptions of illegality, you can have escape hatches, safe harbors and other ways to defend.

Most of this really has to do with cost and the unfairness of the cost. Because in resale price maintenance cases, as Bob was saying, a lot of the people that complain about it are dealers; they are not going to be real large. Their interests are not real large, and they are going to be pieces of a broader picture and there will be an asymmetry with respective manufacturers in many cases. So having this thing being real expensive and requiring approval works very much against plaintiffs.

The per se approach is the easiest, the lowest cost in terms of administratability, but it is probably the highest in terms of Type-I and Type-II errors, and you catch everything, and that means you're going to stop good stuff as well as some bad stuff. The rule of reason, if it's implemented, presumably can reduce the error types and stop the bad ones and let the good ones go, but it is going to cost a lot more. So the socially optimal sort of thing would minimize the total cost of that all, but it is a little hard to figure out. Somewhere in the middle, between per se illegal and per se legal, is where I think all of that should shake out.

The question really is does rule of reason really mean per se legality? If it does, there's no good economic case for per se legality. All the stuff I'm talking about says per se legality is no better than per se illegality.

Bob has pointed out something that I agree with. I don't think plaintiffs need necessarily always lose these cases if you can get it to a jury. The arguments in favor of this practice are subtle, and they basically require you to explain to people why they are better off if they pay more for something. There can be instances in which that's true, but it is a hard argument. And a good lawyer can stand up and say look, use your common sense, how can that be good for you? And that's a pretty good argument for a lot of juries, as we saw at this ABA thing.[88] It didn't take the jury long to come back and say this is a bad thing.

We also don't know how the courts are actually going to do this. Is it going to be full blown; is it going to be truncated; how will they do it? That remains to be seen, I think. The Supreme Court in its decision did mention cost; it did mention instability as one of the things they hoped would lead to better decisions.

So to end this thing, what do firms do now? And you guys are all lawyers, by far most of you are. What do you tell your clients? How do you advise? Basically they definitely, if you are thinking about a restricted distribution system, you need to talk to a lawyer. Because there's a minefield out there of per se and not per se state laws and then federal law that's maybe more receptive.

But if you are going to do this thing, I would say you should think it through, have your clients think it through in a very well articulated rationale in terms of a business rationale that's in the consumer's interest before you decide to risk it. I think what a lot of people are doing is moving up just shy of resale price maintenance, and they are doing things like suggesting minimum advertising price restraints, so that you can't advertise below a level, which is not quite the same thing as controlling prices, where it is controlling what you can advertise. Or they do selective distribution, just avoid this area. They do a variety of things that are short of price restraint that probably have an effect on pricing anyway and it is less risky. Whether that's good or bad, it is one of the things we might find out if the legal regime changes.

That's all I have to say about this, and I'm happy to take any questions.

MR. ANZISKA: Well, thanks, Bob and Tom. Maybe let's just jump into a few follow-up questions.

My first question is for you, Bob. Do you agree with Tom that the post-*Leegin* world sounds a lot like the pre-*Leegin* world for all our manufacturer and supplier clients out there? Is there any real difference right now?

MR. HUBBARD: I don't know. I guess you always see the glass half empty or half full. I think prices have gone up on a lot of things; they haven't always gone up.

I do think there is a significant paradigm shift going on, and I think that it's more than the legal regime. I think that Internet commerce has really affected how this plays out. I think that it's not quite clear how discounters operate in Internet commerce.

There are more global fights. Costco is buying stuff in Asia and selling it in the United States. There's all sorts of ways, and there have always been ways for businesses to discount. With the Internet there are more ways than there ever have been before.

It's hard to know whether you can enforce these price restraints. Certainly the more frontal you are about a price restraint, the clearer you are, the more risk there is. I certainly have talked with people who say they counsel their clients to be calm, but I've talked to others who have said that their clients are fixing the resale price. And they won't tell me who that is.

MR. ANZISKA: That sounds wise, Bob.

Well, Tom, I guess, just to follow up on what Bob said, we just had this lovely presentation about minimum RPM and everything else, but is this potentially outdated in light of the Internet? What's the interplay you see between minimum RPM and the explosion of Internet sales?

DR. OVERSTREET: Let me put this in a little bit of an historical perspective. A lot of this stuff has become an area of conflict when you have traditional retailers facing new forms of more efficient distribution. When the Fair Trade laws were passed it was really about chain stores and department stores that were more efficient than the little mom and pop retailing systems that were typical of the day. And the existing incumbents were fearful of lower-cost distribution, and they sought protection in Robinson-Patman Act[89] if you were a wholesaler and Fair Trade laws if you were a retailer.

The Internet raises the same sort of issues. It is a very low-cost, efficient way of distributing, and it is going to create problems for people who want to sell that way and through brick and mortar outlets that have overhead. So there is going to be some conflict between the guys who provide the physical outlet where people can see the stuff, go in and touch the goods and see what they want, size it up, which is important in some cases, and the Internet where they can buy it for cheaper.

So there is an area of conflict, and there's going to be conflict between brick and mortar guys and Internet, and so the resale price maintenance issue is not going to go away. Right now what people are doing is they are requiring Internet sites to also have a brick and mortar outlet. Maybe they are doing their Internet sales on their own web site.

The potential for conflict is there, and I suspect we'll see that.

Another thing people do, it goes back to the old Fair Trade days. They are moving to agency systems, where your resellers will be told the price to sell it at, because there's no resell; you're just a sales agent, we'll give you a commission on it, and then you avoid the resale problem.

I don't think it is going to go away. I think the Internet is actually going to create a whole new wave and new margin where this plays out.

MR. HUBBARD: Yes, and it is interesting too. There are articles about how the free-rider argument that has always been talked about in these cases, how that plays out with Internet distribution. First, most of the literature was talking about how the Internet retailers were free-riding on the brick and mortar stores. There is increasingly literature that rebuts and makes the counter argument that actually retailers provide a lot more customer information on the Internet. They provide ratings, reviews, all sorts of things that, last I checked, you don't really need to get from brick and mortar stores. There are people who argue that the free-rider is actually the other way. You go to the Internet and figure out what it is you want to buy, and then you go to the brick and mortar store so you don't have to wait the three days for shipping.

One thing that *Leegin*, I think, did was actually there hadn't been a lot of in-depth thinking about what this restraint was doing. I think the blossoming of a lot of this literature has been interesting, papers that try to apply behavioral economics to this and whether when Levi's imposed resale price fixing whether they were making a mistake. When they were enjoined from doing that, demand went up quickly, and they became much more profitable. Maybe that was just the owners making a mistake. You know, it is interesting literature out there; it is hard to keep up.

MR. ROONEY: So I have two brief questions, and I wanted to leave others the opportunity to ask some questions as well. But why isn't the issue really controlled by market power? I mean if we get a market definition right, and the one who is imposing resale price maintenance and essentially raising their price is constrained by a lot of different reasonably good substitutes, then they are doing so at their peril. And so they must have a pro-competitive or output enhancing reason to keep the price up, which may be prestige. They don't want their product to look discounted.

The other point is for the mavens here who have really studied this, does it matter whether it is top down or bottom up? That is, the retailers probably cannot get together in a retail association and say: We are all selling Sony electronics, we are cutting each other's legs out, let's go to Sony and say same price for all Sony electronics, you enforce it and eliminate the competition among us retailers. If, however, it comes from the top down, it's got a whole different patina on it. Does that make any economic sense?

MR. HUBBARD: My short answer to your first question is if they can make the higher price stick, then they have enough market power for me to be concerned. If that competition is so robust that there are plenty of alternatives, they can't make that higher resale price stick. So I don't know how you measure that, how you make economists happy about that, but that's my bottom line, number one.

Now, I do agree that there are many instances in which the resale price is set and it's not about price. There are some behavioral economics studies that talk about price. If you put a higher price on a product people will misconstrue the quality. They will think that if you pay more for something, it is higher quality. I don't know whether they talk about that as signaling, whether this is really a new concept. But that brand consciousness, I think ,is part of the price restraint.

From an enforcer perspective it is hard to argue that as a matter of committing resources you ought to invest in cases where the buyers don't care about discounting. So that's my market power response.

Top down or bottom up, I think that the bottom line is that it is all so intertwined. There's the interaction between the manufacturers and the retailers. But what does it matter who first suggested it? I mean the manufacturers know that their retailers would prefer to be without competition. The retailers know that they can't enforce it themselves but the manufacturers could. And I've always thought that discussion in the Supreme Court was kind of silly because it doesn't matter.

If you're talking about a manufacturer shielding the retailers from price competition and other competition, then that purpose is anti-competitive. If you're talking about providing services and other things, that purpose is arguably pro-competitive. We should be talking about the purposes rather than the inferences.

DR. OVERSTREET: Yes, on the latter part I agree with that. It think where it comes from, you know a dealer could be the one to recognize you got a free-rider law and tell the manufacturer, and he might say you're right, and in fact it came from the dealer. Vice versa could be true, too, it could come to a manufacturer. But where it comes from, like I said, there is this new modeling out there now that suggests that the manufacturers might initiate it with the hope that what the retailers do is reciprocate and not take on the manufacturer's competitors. So you have retailers protected from discounting competition, and in return they deny access to the shelves for the manufacturer's competitors, and that would be a bad thing that originated upstream. So that I don't think is necessarily going to take you where you want to go.

For harm there does need to be market power somewhere, either unilateral or collective market power. Ideally what it should be doing is restricting output if it's anti-competitive, and if it's pro-competitive it should be increasing output.

MR. ANZISKA: Are there any questions? We have a couple more minutes for questions if anyone has any.

So I'm going to jump in then. Bob, this one is for you. You spoke before that somehow when people speak to you they don't identify their clients were running RPM programs. My question is: As a New York State enforcer, what type of person would typically raise your antenna if they are running a minimum RPM program?

MR. HUBBARD: We have limited resources, so we try to focus on where we get the best results for the commitment of our resources. I don't think there's been much resonance with AGs on very brand conscious things, prestige items and all those things. I think that that's perfectly understandable. So the more it's a mass product, the more that the manufacturer has what looks like market power, the more those factors come into play, I think that internally within an AG's office the more likely we are to do something. You're trying to protect consumers from higher prices when they would prefer to be paying lower prices, and the wider the spread the more likely you are to commit your resources.

We have heard complaints from very prestige-oriented products, and the people who buy them don't seem to care that they cost more.

MR. ANZISKA: I think we have one question in the back.

SCOTT MARTIN: Bob, correct me if I'm wrong, but at one point did you not want to buy a Tempur-Pedic mattress?

MR. HUBBARD: You know I think Tempur-Pedic has a very good quality mattress. I've certainly heard that from other people. They don't listen to my advice, but I think they'd do a whole lot better without the price restriction in effect. I do not have a Tempur-Pedic mattress. I do have Herman Miller chairs.

AUDIENCE MEMBER: One comment and one question. I think you take too much solace in Justice Breyer's dissent.[90] I think it has a lot more to do with the '73 Blackmun decision[91] than it—

MR. HUBBARD: Oh, I agree with you on that.

AUDIENCE MEMBER: But beyond that, in answering the question what has *Leegin* wrought, have you not brought us to a point where the end result of the enforcement, to the extent it continues by the states, is really just going to be increased transactional costs and Kabuki theater in implementation of *Colgate*[92] policies?

MR. HUBBARD: One of the things going on in *Tempur-Pedic* is we are arguing that section 369-a has statutory language that talks about contract provision.[93] It doesn't talk about the agreement under section 1[94] or under the Donnelly Act.[95] I don't know the extent to which that's different. We certainly talked about contracts being formed in New York State by course of dealing and other things that Tempur-Pedic rolled its eyes about.

I don't know. I think that a lot of these *Colgate* policies are clear nods and winks. Everybody knows what is going on, but if you follow the magic rules, you won't get in trouble. I hope—I know that there have been people who have argued that one of the things that *Leegin* ought to do is focus on the substance of what's going on, instead of that form of the *Colgate* policy. The substance is that the resale price is being restrained by these policies. Just like they haven't accepted in federal court the arguments there shouldn't be a market power screen, they haven't accepted that argument either.

But I would hope and I think that in many instances we are focusing more and more on the merits and the actual anti-competitive effect. I hope that we start doing that more with resale price fixing cases instead of following what I think is a completely illogical discussion about what is unilateral.

MR. ANZISKA: So at this point I want to thank Bob and Tom today. I really appreciate it, and I'm sure they are going to stick around for a few minutes if you really need to ask specific questions.

Endnotes

1. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).
2. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).
3. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).
4. 551 U.S. at 899.
5. *See generally*, Resume of Robert L. Hubbard, *available at* http://www.roberthubbard.net/resume (last accessed Aug. 6, 2012) (listing academic and professional experiences).
6. *In re Disposable Contact Lens Antitrust Litig.*, No. MDL 1030 (complaints filed M.D. Fla. 1994).
7. *New York v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900 (N.Y. App. Div., N.Y. Cty. 2011).
8. *New York v. Saint Francis Hosp.*, 94 F. Supp. 2d 423 (S.D.N.Y. 2000).
9. *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82 (2d Cir. 2000).
10. *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6th Cir. 2004).
11. Brief for New York, et al. as Amici Curiae Supporting Respondents, *Leegin*, 551 U.S. 877; (No. 06-480).
12. *See* Michael A. Lindsay, *Resale Price Maintenance: Real Life Lessons from a Mock Trial*, 7 Antitrust Source 1 (Jun. 2008) (discussing ABA Mock Trial in which Mr. Hubbard represented the states); *see also* Resume, *available at* http://www.roberthubbard.net/ resume.
13. *Cf. Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) (holding that minimum retail price maintenance agreements are *per se* violations of the Sherman Act, 15 U.S.C. § 1), *with Leegin*, 551 U.S. at 899 (holding that minimum retail price maintenance agreements are not *per se* violations of the Sherman Act, but subject to rule of reason analysis).
14. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).
15. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).
16. *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000); *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *New York v. Keds Corp.*, 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. Mar. 21, 1994).
17. *Missouri v. Am. Cyanamid Co.*, No. 97 4024-CV-C-SOW, 1997 WL 129408 (W.D. Mo. Feb. 7, 1997); *Texas v. Zeneca, Inc.*, No. 3-97-CV-1526-D (N.D. Tex. Jun. 26, 1997).
18. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48 (D. Me. 2006).
19. *New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003).
20. Brief for Washington, et al. as Amici Curiae Supporting Respondents, *Monsanto*, 465 U.S. 752 (No.82-914).
21. Brief for New York, et al. as Amici Curiae Supporting Respondents, *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (No. 96-871).
22. 551 U.S. 877.
23. Brief for New York, et al., *Leegin*, 555 U.S. 877 (No. 06-480).
24. 15 U.S.C. § 15c(a)(1).
25. 465 U.S. at 763-64.
26. 485 U.S. at 735-36.
27. 485 U.S. at 726-27.
28. 551 U.S. at 899.
29. *Id.* at 889-99.
30. *Id.* at 908-29.
31. Transcript of Oral Argument at 12, *Leegin*, 551 U.S. 887 (No. 06-480).
32. *New York v. Herman Miller, Inc.*, No. 08 CV 2977 (S.D.N.Y. Mar. 25, 2008), *available at* http://www.ag.ny.gov/sites/default/files/ pdfs/bureaus/antitrust/Signed_FJ.pdf (last accessed Aug. 8, 2012).
33. *North Carolina v. McLeod Oil Co.*, No. 05 CVS 13975 (Wake County Superior Ct. July 30, 2007).
34. *Florida v. Nine West Group Inc.*, No. 00-Civ-1707 (S.D.N.Y. Dec. 14, 2000).
35. Petition to Reopen and Modify Order, *In re Nine West Group Inc.*, No. C-3937, (F.T.C. Oct. 30, 2007), *available at* http:// www.ftc.gov/os/caselist/9810386/071106petition.pdf (last accessed Aug. 6, 2012).
36. Amended States' Comments Urging Denial of Nine West's Petition, *In re Nine West Group, Inc.*, No. C-3937 (F.T.C. Jan. 17, 2008), *available at* http:// www.ftc.gov/os/comments/ninewestgrp/080117statesamendedcomments.pdf (last accessed Aug. 6, 2012).
37. *Id.* at 6.
38. *In re PolyGram Holding, Inc.*, No. 9298, 2003 WL 21770765 (F.T.C.), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).
39. Amended States' Comments Urging Denial of Nine West's Petition at 5, 7-9.
40. Order Granting in Part Nine West's Petition to Reopen and Modify Order Issued Apr. 11, 2000 at 17-18, *In re Nine West Group, Inc.*, No. C-3937 (F.T.C. May 6, 2008), *available at* http://www.ftc.gov/os/caselist/9810386/080506order.pdf (last accessed Aug. 6, 2012).
41. Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. § 3 (2008); Discount Pricing Consumer Protection Act, S. 148, 111th

Cong. § 3 (2009); Discount Pricing Consumer Protection Act of 2009, H.R. 3190, 111th Cong. § 2 (2009).

42. Letter from Thirty-Five State Atty's Gen. to Sen. Patrick Leahy, et al. (May 14, 2008), *available at* http://antitrustcommentary.com/wp-content/uploads/2008/05/ag-letter-supporting-s-2261.pdf (last accessed Aug. 8, 2012).

43. Letter from Thirty-Eight State Att'ys Gen. to Sen. Herb Kohl and Sen. Orrin G. Hatch (Oct. 27, 2009), *available at* http://naag.org/assets/files/pdf/signons/20091027.S_148.pdf (last accessed Aug. 6, 2012); Letter from Thirty-Eight State Att'ys Gen. to Rep. John Conyers and Rep. Lamar Smith (Oct. 27, 2009), *available at* http://naag.org/assets/files/pdf/signons/20091027.HR_3190.pdf (last accessed Aug. 6, 2012).

44. *Leegin*, 551 U.S. 877.

45. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 2009 WL 938561 at *8, 2009-1 Trade Cases P 76,592 (E.D.Tex. Apr. 6, 2009).

46. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 421 (5th Cir. Aug. 17, 2010).

47. *Id.* at 418-19.

48. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 131 S.Ct. 1476 (2011).

49. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 2007 WL 4373980 (N.D. Ga. Dec. 11, 2007).

50. *Id.* at *4.

51. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1337-39 (11th Cir. 2010),

52. Complaint, *California v. DermaQuest, Inc.* (Cal. Super. Ct. Alameda Cty., Feb. 5, 2010) (No. RG10497526).

53. Complaint, *California v. Bioelements, Inc.* (Cal. Super. Ct. Riverside Cty., Dec. 30, 2010) (No. 10011659).

54. Complaint at 2-3, *DermaQuest*; Complaint at 3, *Bioelements*.

55. Complaint at 3, *DermaQuest*; Complaint at 3, *Bioelements*.

56. *Harris* v. *Capitol Records Distrib. Corp.*, 64 Cal. 2d 454,463 (1966); *Mailand v. Burckle,* 20 Cal. 3d 367,377 (1978); *Chavez* v. *Whirlpool Corp.,* 93 Cal. App. 4th 363, 369 (2001); *Kunert* v. *Mission Fin. Servs. Corp.,* 110 Cal. App. 4th 242,263 (2003).

57. *DermaQuest*, No. RG10497526 at 2-6 (Cal. Super. Ct. Feb. 23, 2010); *Bioelements*, No. 10011649 at 2-6 (Cal. Super. Ct. Jan. 11, 2011).

58. *O'Brien v. Leegin Creative Leather Prods., Inc.*, 237 P.3d 1062 (Kan. 2012).

59. Kan. Stat. Ann. § 50-112 (2009).

60. Brief for the State of Kansas as Amicus Curiae, *O'Brien v. Leegin Creative Leather Prods. Inc.* (Kan. Aug. 12, 2010) (No. 08-101000-S).

61. *O'Brien v. Leegin Creative Leather Prods., Inc.*, 237 P.3d 1062, 1078-80 (Kan. 2012). This decision, holding price fixing *per se* illegal under Kansas state law, came down shortly after this panel was convened.

62. Maryland Antitrust Act, S.B. 239 (Md. 2009), *available at* http://mlis.state.md.us/2009rs/bills/sb/sb0239t.pdf (last accessed Aug. 7, 2012); Maryland Antitrust Act, H.B. 657 (Md. 2009), *available at* http://mlis.state.md.us/2009rs/bills/hb/hb0657t.pdf (last accessed Aug. 7, 2012).

63. Md. Code Ann., Com. Law. § 11-204(B) (2009).

64. *New York v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900 (N.Y. Sup. Ct., N.Y. Cty. 2011).

65. Complaint at 1-2, *New York v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900 (N.Y. Sup. Ct., N.Y. Cty. 2011) (No. 400837-10), 2010 WL 4919531.

66. N.Y. Gen. Bus. Law § 369-a (McKinney's 2012).

67. *Id.*

68. Complaint at 1-2, *New York v. Tempur-Pedic Int'l, Inc.*

69. N.Y. Exec. Law § 63(12).

70. *New York v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d at 905, 909.

71. *See New York v. Tempur-Pedic Int'l, Inc.*, 95 A.D.3d 539, 540 (N.Y. App. Div. 2012) (affirming lower court's ruling that resale price fixing is not *per se* illegal under section 369-a).

72. *WorldHomeCenter.com, Inc. v. LD Kichler Co., Inc.*, No. 08-CV-020(DRH)(ETB) (E.D.N.Y. Mar. 31, 2009), *available at* http://law.justia.com/cases/federal/district-courts/new-york/nyedce/2:2008cv00020/276393/33/ (last accessed Aug. 7, 2012); *WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc.*, 2011 WL 2565284 (S.D.N.Y. 2011); *WorldHomeCenter.com v. PLC Lighting, Inc.*, 2011 WL 7416334 (S.D.N.Y. July 5, 2011); *WorldHomeCenter.com, Inc. v. KWC Am., Inc.*, 2011 WL 4352390 (S.D.N.Y. Sept. 15, 2011).

73. *See id.* At present, WorldHomeCenter.com has brought four claims under section 369-a.

74. *LD Kichler*, No. 08-CV-020(DRH)(ETB), at 6-8; *Franke*, 2011 WL 2565284 at *4; *PLC Lighting*, 2011 WL 741633 at *2; *KWC*, 2011 WL 4352390 at 6.

75. *LD Kichler*, No. 08-CV-020(DRH)(ETB) at 6-7; *PLC Lighting*, 2011 WL 741633 at 6; *KWC*, No. 10 Civ. 7781 at 8.

76. *Id.*

77. Affirmation of Linda Gargiulo, Assistant Attorney General of New York State Department of Law, *New York v. Tempur-Pedic*, 95 A.D.3d 539 (No. 400837/10), *available at* http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/antitrust/Gargiulo%20Affirmation%203.24.10.pdf (last accessed Aug. 7, 2012).

78. *New York v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d at 904-09.

79. *Id.* at 905.

80. *Id.*

81. *Id.* at 907-09.

82. *Id.*

83. *See* Brief for Appellant, *New York v. Tempur-Pedic*, 95 A.D.3d 539 (No. 400837/10), *available at* http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/antitrust/NYAG%20AD%20Reply%2012%203%2009.pdf (last accessed Aug. 7, 2012) (arguing that section 369-a prohibits price fixing schemes, and that petition sufficiently alleges a price fixing scheme).

84. *See supra*, note 70.

85. John Asker & Heski Bar-Isaac, *Exclusion Due to RPM, Slotting Fees, Loyalty Rebates and Other Vertical Practices* (NYU Stern & NBER, Working Paper), *available at* http://pages.stern.nyu.edu/~hbar-isa/jahbi_RPM.PDF (last accessed Aug. 7, 2012).

86. Brief for Economists as Amici Curiae Supporting Petitioner at 4-19, *Leegin* (No. 06-480).

87. Miller-Tydings Amendment to the Sherman Act, 15 U.S.C. § 1 (1964).

88. *See* Michael A. Lindsay, *Resale Price Maintenance: Real Life Lessons from a Mock Trial* (discussing ABA Mock Trial in which Mr. Hubbard represented the states).

89. 15 U.S.C. § 13 (2006).

90. *Leegin*, 551 U.S. at 908-29.

91. *See Flood v. Kuhn*, 407 U.S. 258 (1973) (upholding Major League Baseball's exemption from the antitrust laws based upon *stare decisis* and legislative inaction).

92. *See United States v. Colgate & Co.*, 250 U.S. 300 (holding that a manufacturer does not violate the Sherman Act by suggesting retail prices or by refusing to deal with retailers that sell below its suggested prices).

93. *New York v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900.

94. 15 U.S.C. § 1.

95. N.Y. Gen. Bus. Law §§ 340-47.

Accountable Care Organizations and the Influence of Antitrust on Health Care Policy

MR. ROONEY: So to stay on schedule today we are going to run right into our next panel, which will be the horizontal restraints panel, and it is entitled: Accountable Care Organizations and the Influence of Antitrust on Health Care Policy.

Elinor Hoffmann of the State AG's office will be our moderator.

MS. HOFFMANN: I'm going to start. My name is Elinor Hoffmann, I'm with the Antitrust Bureau of the New York State Attorney General's Office, and anything I say here today doesn't bind anyone in my office, any new members of the President's Task Force or anything like that.

Today our discussion is going to be about Accountable Care Organizations, the antitrust issues they raise and the health policy objectives they are supposed to achieve.

Now for those of you who don't know much about Accountable Care Organization or the Medicare Shared Savings Plan, which is part of the Affordable Care Act of 2010, the big health reform act that was passed, you're going to hear about what they are today in some detail. But I just want to point out, these programs encourage provider organizations to become bigger.

This highlights a basic tension with antitrust policy. Bigger can be good if it is integrated and efficient, and in the health care context if it provides better access to higher-quality care at a lower cost, or at least some of those things. But bigger obviously raises antitrust or competition law red flags. So we have a panel here, an expert panel to help us understand all of this, and these are ongoing issues.

We are at a threshold here. We are seeing new developments in health care. Every time you pick up the newspaper something else is going on. My co-planners here today, Lauren Rackow of Cahill and Greg Asciolla of Labaton, and I have planned the discussion not only to include antitrust lawyers but also a health care expert and someone who represents insurance plans and who doesn't do antitrust as a main thing.

Our panelists today are first, Christine White of the Federal Trade Commission, who is intimately familiar with the antitrust guidance that the Federal Trade Commission and the Justice Department have put together regarding Accountable Care Organizations.

Another panelist is Harold Iselin, who is a shareholder at Greenberg Traurig, and Harold represents health plans and is very attuned to new developments in New York, of which there are many.

Our third panelist is Margie Davino. Margie is a health care lawyer who represents all kinds of provider organizations and hospitals. I got to know her when she was in-house at St. Vincent's many years ago. Do you remember that hospital?

MS. DAVINO: I left when it was still doing well.

MS. HOFFMANN: Yes, definitely. And Margie is now a partner at Kaufman, Borgeest & Ryan, and immediate past Chair of the health care section in the New Jersey Bar Association and Vice Chair-Elect of the Health Law Section of New York State Bar Association.

And finally, Mark Botti. Mark is a partner at Akin Gump in Washington. Prior to Akin Gump, Mark headed the Lit I Section at Justice. And Mark, for those of you who don't know, was lead trial lawyer in the *LIJ/North Shore* merger case that DOJ brought. As we all know, that merger went through.

Now our panel format is going to be an interactive discussion. I'm hoping we can get the perspective of all our panelists, and we hope we will have time to take questions from the audience as well.

Chris, let's start with you, what is an Accountable Care Organization?

MS. WHITE: Thanks, Elinor.

Like you, I need to start with a disclaimer that my comments here today are my personal views and they may or may not reflect the views of the Federal Trade Commission or any individual Commissioner.

With that disclaimer, let's talk about what is an Accountable Care Organization. This audience probably is pretty familiar with the concept, and there are any number of words that have a specialized antitrust meaning that may be a little bit different from how business people tend to view them. It looks to me like the Accountable Care Organization term may fall into that category of words. So if you're talking to a health care practitioner or a health care professional, don't be fooled when they talk about the Accountable Care Organization as though it is any other integrated delivery system that brings together hospitals and doctors. If we are talking about antitrust issues it is not.

Accountable Care Organization has a very specialized meaning. What you should know is that that meaning derives from the legislative and regulatory history. The definition of ACO that is provided in the FTC and the Department of Justice recent policy Guidelines on Accountable Care Organizations actually uses a definition that derives heavily from the CMS definition. So I'm going to start with that.

What you should know when you leave today is that an Accountable Care Organization is a construct of this 2010 Affordable Care Act, which is commonly referred to as the health care reform legislation, or ACA. Affordable Care Act is legislation that seeks to achieve health care quality objectives while reducing costs by bringing hospitals and doctors together to literally be accountable for a given Medicare fee-for-service patient population through an integrated delivery system.

Under the ACA, CMS is responsible for implementing and overseeing certain health care programs, including the Shared Savings Program. The Shared Savings Program really promotes the formation of the operation of Accountable Care Organizations as a very specific and defined form of integrated delivery system. It is defined as a vehicle by which physicians and hospitals work together to manage and coordinate care in a collaborative way on behalf of a defined population of Medicare fee-for-service beneficiaries where the providers may be able to share in some portion of the savings that they achieve.

If you are working with clients who are trying to put together an Accountable Care Organization, you obviously need to go to the CMS regulations to get a detailed understanding of what you need to accomplish as an Accountable Care Organization. But I'm going to identify for you five key criteria that you will need to satisfy.

The first is that to be an Accountable Care Organization you need to have a formal legal structure that allows an organization to collect and distribute shared savings amongst its members. You also need to have leadership and management structure that includes clinical and administrative processes, as well as processes that will promote evidence-based medicine and patient engagement in those processes.

The fourth criteria is perhaps one of the most important criteria, at least from my perspective as a health care antitrust lawyer; that is, that you have to have the ability and the processes to collect data on cost and quality measures and to report back to CMS on that data.

Then, finally, one of the most important criteria from CMS's perspective is that the ACO needs to provide coordinated care for its beneficiaries.

Additionally, beyond these specific eligibility criteria, the ACO has to agree to contract with CMS for a minimum of three years and has to have the ability to provide care for 5,000 beneficiaries.

So with that background on CMS's eligibility criteria for ACOs let me give you the definition of an Accountable Care Organization that is included in the FTC / Department of Justice Final ACO statement. That provides that an ACO is a collaboration of otherwise independent providers that are eligible to and have been approved to or are seeking approval to participate in CMS's Shared Savings Program. So you can see it is a derivative and highly defined term of art.

When we think about how Accountable Care Organizations are similar to other integrated delivery systems that those of us in health care antitrust may be a little more familiar with, like PHOs, physician-hospital organizations, or IPAs. There are a number of areas where I think they are quite similar to traditional IPAs, and the first is that both ACOs and more traditional forms of provider network ventures have very common goals in terms of cost containment and quality achievement. They also have very similar means of seeking to achieve those goals; that is, bringing providers together to work in a collaborative fashion.

MS. HOFFMANN: Chris, so an ACO would have many competing providers in it, is that correct?

MS. WHITE: Yes, it can have many otherwise competing providers, yes.

MS. HOFFMANN: And that might be competing physicians and / or competing hospitals?

MS. WHITE: That is contemplated, yes.

MS. HOFFMANN: I want to get back to the guidance in a few minutes, but I thought I'd ask Margie, from a health care lawyer's perspective, how do your clients see ACOs; are they a good thing, bad thing, an improvement on something that existed in the past?

MS. DAVINO: Well, a lot of them really would prefer not to have anything to do with ACOs, but they are afraid if they don't, they are going to be shut out of the market. So they really look at ACOs as something they are not quite sure if it is the fad of the moment or something that we are really going to go towards, because Medicare is pushing it so much. So they feel as though they have to look at this as an option in terms of something they would do. Now, that's a big—a certain percentage.

Then you have your really truly forward-thinking people. Some hospital presidents, some physician groups that really indeed do want to do the right thing, truly have quality and look at this really as an opportunity. But I think that, just as a little bit of background, I would like to give in terms of ACOs and also in terms of health care providers, when you look at why are we going towards ACOs in this country, why is Medicare pushing it? It really is an issue of health care costs. Because right now we as a nation spend 17 percent of our GDP on health care costs. That is projected to go up every year. So if we get to the point which is expected, we are going to spend 20 percent of our GDP on health care cost; how can we be competitive?

From a Medicare standpoint and from a taxpayer standpoint Medicare says what can we do to try to decrease health care costs. So if you look at studies, there is this study out of Dartmouth, the Dartmouth Atlas Study, it looks at what are the health care costs that Medicare spends per Medicare beneficiary in different areas of the country. If you look at what Medicare spends in Miami, it is more than twice what Medicare spends in other areas of the country. And you think okay, well, Miami has bigger costs than, for example, Minneapolis, Minnesota has less than half the health care costs per Medicare beneficiary than Miami. But then you look at well, McAllen, Texas has twice the cost of El Paso; they both are in Texas, both have similar population base, so why is that the case? The issue is really because people in McAllen, Texas use a lot more services than people in El Paso, Texas. People in Minneapolis use a lot fewer services because there is this organization there called Mayo Clinic in Rochester, which is an integrated delivery system which looks at clinical care and doesn't look at driving up a number of services.

So from a Medicare standpoint and from a taxpayer standpoint you think how can you be more like El Paso, Texas, more like Mayo Clinic. And if you look at Mayo Clinic as kind of the end-all and be-all in terms of decreasing health care costs, they are one big, huge clinically integrated organization. So we're going to be like Mayo Clinic, and that's basically what Medicare wants us to be like because not only do they have much lower health care costs but their results are great. They are among the absolute highest on quality level and on the efficiencies level. Then you come up with this organization called an ACO, Accountable Care Organization. So it is intended to put health care providers together, so they can be clinically integrated, so they can talk to each other, so they can be paid on other than a fee-for-service basis where a doctor is paid for every single patient he sees and every single procedure that she does, and instead we are going to be something efficient.

So just to utilize that kind of background in terms of health care providers, there are some health care providers really excited about ACOs, because they look at this as an opportunity to be paid for all of the efforts that they've made. Like Montefiore, Montefiore for the last 20 years has been doing an absolutely amazing job, really putting together a clinically integrated efficient system that takes care of a really high-risk population in the Bronx. And now all of a sudden there's a vehicle that allows it to actually be recognized and compensated for that. Then there are a lot of other health care providers that have absolutely no idea what they are going to do in terms of this but feel they have to look at it because everybody else is looking at it.

MS. HOFFMANN: Mark, let me ask you, as someone who represents providers, how do your clients see this; do any of them just see it as an opportunity to jointly bargain with payers?

MR. BOTTI: Well, my clients are from both sides of that bargaining table. I'd say this to you about this whole thing, though. There is a concern that ACOs will lead to higher reimbursement rates for physicians or perhaps they will be captured by some of the areas, particularly hospitals, where we might see some of the savings realized. Maybe some physicians do see it as a bargaining thing, and maybe some plans fear it.

But to Margie's point, that we are in a different era as to how marketplaces are developing, I think a lot of people in the marketplace see things as perhaps different today than they were at one time in the past. Some of the things that people talk about, like maybe physicians will get higher rates in the bargaining here, do not necessarily equate with an anti-competitive outcome if overall costs are reduced. That's somewhat of an income shift maybe among providers as perhaps we get more efficient.

So I think people are kind of coming to it and trying to figure out what's going to happen and participate in it and hopeful, if you will, that it may be good things.

MS. HOFFMANN: Harold, do you have any perspectives on it from your side of the table?

MR. ISELIN: Sure. I think from the health insurer payer perspective the best word to probably describe the reaction right now is wary. That is because the vision of ACOs is what Mark just described and what Margie described, which is better quality, more efficiencies and hopefully—I don't want to say lower costs but costs that don't go up as much as they have been going up now.

The history, however, is—well, one word about the underlying economics of that. For that to happen, and I think this was Mark's point about the cost shift, what you would actually expect to see would be resources diverted toward certain types of physician services and presumably away from inpatient services. That's sort of, in basic economics health care kind of way, what would happen so that the ACO is delivering the quality and redirecting resources in a way that's more productive for higher quality and more coordinated care.

The problem or maybe the wariness results from a couple of things. First, when you look at entities forming ACOs, more of them are coming out of the hospital world. And that's not necessarily an assumption that hospitals can't reorient themselves to sort of shift resources away from inpatient care to physician-driven care, but I think the track record in this regard is not one that would necessarily make one feel all warm and fuzzy that an institution built around inpatient care can make that paradigm shift.

I think the other issue is that this is sort of the next iteration of some of the hospital mergers. It is very different, but there are some at least similarities, and I think the track record there was less than good where both efficiencies and quality improvements were often promised when hospitals wanted to merge or where you saw horizontal arrangements that would not typically be accepted, and often those quality improvements and cost reductions were not achieved. Even to the point where the FTC moved—and Chris may want to comment—but certainly there are cases where they went back in to try to undo mergers because the promises and commitments made to support the merger weren't delivered.

That said, there are many payers actively working with ACOs now. A successful ACO would be great for payers, because it really would get the providers aligned with the payer on efficiencies and on quality.

So from what I see, there isn't a full-scale resistance to it. There are definitely lots of discussions going on. There are ACO negotiations under way between entities that are well down the ACO track and payers, and that's to cover not just Medicare, which was sort of the driving force behind the ACO and behind the ACO regs, but also for other populations, including commercial insurance populations and any Medicaid populations.

MS. HOFFMANN: Great, and that's actually a great segue.

I wanted to ask Chris to talk a little bit about the guidance that the FTC and DOJ issued this past year, first as the Proposed Guidance, then modified. They issued Final Guidance some months later, and we'll discuss how the guidance relates to Medicare commercial plans and how it deals with different perspectives and interests.

MS. WHITE: Sure. So the final statements that were issued by the agencies apply specifically to Accountable Care Organizations that are participating in insurance savings programs. And going to one of Harold's comments earlier, it would be correct that ACO Guidelines do not apply to mergers or other formations of single-employer integrated entities. Those types of entities would be evaluated under the Horizontal Merger Guidelines and Competitor Collaboration Guidelines. So we're really talking about formation of entities that enter into contractual arrangements with maybe multiple hospitals, multiple physicians, and they bring together otherwise competing physicians and hospitals to work together collaboratively.

The most significant aspect of the final ACO statement is probably that it creates a presumption that the rule of reason will be applied to qualified ACO entities. Most provider groups that have gotten into trouble with the antitrust enforcers or under the antitrust laws in recent years have gotten into trouble because they have been found to not be sufficiently clinically or financially integrated in a way the providers are working together, and it justifies those providers joining in price negotiations with health plans.

What the ACO statement does is it takes that issue completely off the table. It basically says that if you're an ACO that is operating within CMS, we are going to assume that you are sufficiently integrated to engage in price negotiations with private health plans. This is really a huge event for ACOs and for their counselors when working with private networks. I think the bulk of a practitioner's time is spent trying to assess whether there is sufficient financial, clinical integration to get the network out of the risk of per se condemnation for price fixing. And that's exactly what this statement does.

One of the things that Elinor had asked when we were preparing this is that I address differences between the draft statements and final statements. This is one area where there is a significant difference. In the draft statement the agencies originally contemplated that the rule of reason would only be presumptively applied to newly formed ACOs, those that were formed after the date of the passage of the Affordable Care Act. Under the final statement, all ACOs are entitled to that presumption.

I don't know if people want to comment on that position, or I can address the other position in the final statement as well.

MS. HOFFMANN: You can go ahead and talk about it.

MS. WHITE: Okay, sure. Let me make one concluding remark on the rule of reason.

If your provider organization is not eligible to or even if it's eligible to but it is choosing not to participate in a Shared Savings Program or it gets kicked out of a Shared Savings Program, it is no longer entitled to that rule of reason presumption. So that's the real difference between the ACO and the non-ACO, and a distinction that's going to be important.

MS. HOFFMANN: Chris, let me ask you one question about the difference between the proposed and the final Guidance. One thing I thought looking at the Proposed Guidance, and I'm speaking just for myself, is that if I were a provider looking at forming an ACO and entering the Shared Savings Program, there is a lot of stuff I would have to do to apply, to qualify under the Guidelines, and there were thresholds for mandatory approval. There were rules about contiguous areas and noncontiguous areas. And it struck me that the FTC really listened and heard a lot of these comments.

MS. WHITE: Yes, I think that's exactly right. The rule of reason treatment is one area where from the original draft that was issued to the final statement there was this big change I mentioned.

And Elinor brought up another area. In the draft reg, the draft statement on which it would have been required that ACOs with shares exceeding 50 percent in a PSA obtain mandatory antitrust review before they could seek to participate in the CMS Shared Savings Program. These two issues were areas on which the agencies were seeing a significant amount of public commentary during the review and commentary period. Commissioner Rosch has a statement on ACO issues that we included in our written material, and he provides some good background about that commentary.

The other point I think this raises is that it wasn't just the FTC and the DOJ staff and policy leaders who really reflected on the comments received; they were working with CMS very carefully. One of the issues with the mandatory review is that CMS determined that even though it had asked the agencies to conduct this review, it didn't actually have the ability to sub-delegate antitrust review to the agencies before allowing ACOs to participate in the Shared Savings Program. Richard Raskin and others submitted a paper on this, it is cited in Richard Raskin's statement. But yes, I think there was a lot of thought that went into those issues.

Obviously, the comments that were received from the FTC split along sort of a source line. As you can imagine, providers who wrote in generally thought the mandatory review was a really bad idea. Payers and employer coalitions thought that the mandatory review was not only a great idea but it should be expanded to cover additional ACOs.

Another area Elinor referenced is this calculation of the PSA shares. Under the draft ACO policy statement, to determine whether you needed mandatory review you had to go identify all of the overlapped areas where any two individual participants in your ACO provided a common service, whether it was a physician service or an inpatient or outpatient service, and identify each participant's share in their PSA and then the parties' combined share within each participant's PSA.

There were significant concerns, especially from physician groups, who didn't feel like they had the ability to collect the data and figure out what their PSA share was. That was an area where I think the FTC was also very responsive in a reasoned way—the FTC and DOJ were very responsive in a reasoned way to the concerns.

Under the current statement you need to assess your PSA share if you want to qualify for the newly established ACO "safety zone." That "safety zone" is eligible for ACOs or available to ACOs that have a 30 percent or less share in all service lines where they have competitor providers offering overlapped services.

To calculate the PSA shares you have to basically add up all your shares of patients by zip code until you hit 75 percent of your patients. That zip code area that you've created by adding up your patients is your PSA. Nothing in the Guidelines requires anybody to go out and do that calculation today, but if you wanted to determine whether you fall within the "safety zone" you would need to do the calculation.

MR. ISELIN: Chris, could I ask a question? Basically if you get CMS approval, you're pretty much good to go, right?

MS. WHITE: If you get CMS approval, you can pretty much participate in a CMS Shared Savings Program today.

MR. ISELIN: But you'd be under rule of reason, so.

MS. WHITE: You would be under rule of reason as long as you're a network entity, as opposed to a merger.

MR. ISELIN: So since we have a lot of antitrust people, let me ask, isn't then the next challenge for people who are counseling doctors or counseling hospitals to then sort of start monitoring whether the ACO is actually going to satisfy the requirements? Because I think at some point there's another look, right? You mentioned the three years, they have to commit to at least three years.

MS. WHITE: That's a CMS program participation requirement.

MR. ISELIN: Right. Does the FTC—I'm just asking, does the FTC ever plan a built-in review to say did they actually do what they were supposed to do?

MS. WHITE: So the final policy statement notes that CMS is going to provide copies of ACO applications as well as data on cost and quality to the FTC and the DOJ. The statement also says that the agencies are going to vigilantly monitor, taking a look at this data, as well as any complaints that they receive about ACOs.

I think any provider network that you form can run into antitrust issues both at the formation stage and then post-formation during its operations. And the Guidelines do provide some advice to networks; beyond the formation issues, they identify a series of conduct that ACOs outside the "safety zone" generally should avoid, including steering and tying, exclusive conduct—Not prohibited conduct, but conduct to be undertaken with care and in consultation with their antitrust specialist. And it also identifies concerns about sharing competitively sensitive information among competing providers at any point.

MS. HOFFMANN: Let me ask Mark and Margie another question. There are the health care statements that the FTC and DOJ put out in mid-90s dealing with a whole slew of things including provider organizations. Let's say your clients want to integrate but don't really want to do the Shared Savings Program for one reason or another. What Guidelines would you advise them to follow?

MR. BOTTI: So let's put this current statement of the enforcement agencies in context of this particular program in a broader context for a moment. Taking the '96 Clinical Integration Statement as one other statement from the agencies and going back further in time is a pretty consistent position by the antitrust enforcement agencies; if you form an efficiency-enhancing joint venture and you are collectively setting the price and it supports the achievement of those efficiencies, absent market power, hey, that's going to be okay. So in one sense what's stated here is really nothing new.

One thing about it that I think is new is that it reflects quite an evolution in the agencies' view of their role when it comes to joint ventures in the health care space. Go back before the 90s in statements and you look at what they were saying in a series of business review letters, it was essentially: Here's our cookbook for what you can do together, and if you don't do it our way, we're going to sue you. You should either substantially share financial risk, otherwise you should not be setting your price jointly.

That was sort of the regulatory perspective of the antitrust enforcement agencies in that time frame.

When we came to ‘96, and I think it is an important context to keep in mind, there was very threatening Congressional action in the form of the Campbell Bill intended to vest provider groups with bargaining power. So the context in which we see this acknowledgment of the theory of clinical integration in ‘96 was one of a push for bargaining power by the providers. Okay, it articulates again this standard efficiency-enhancing joint venture, that’s going to be okay.

When we get to today and we see what the agencies say, we see them really backing off the regulatory perspective. That is backing off the idea that we know which way the market should go, and we are going to tell you ahead of time what forms are okay. The ACO statements say everything that Chris says. But to answer your question directly, Elinor, that’s a statement for those organizations that participate in the Shared Savings Program. I think it reflects a broader acknowledgment by the agencies that if somebody forms one of these complex organizations, they are not a cartel; they are not a single set of competitors in one market coming together. These are multi-provider organizations for people who provide complementary services as well as competing services. What they are saying is boy, that looks like a rule of reason thing; let’s see what happens in the marketplace, let’s see if you do all of these things, you invest in a way that could achieve these efficiencies. We’ll look at it maybe in three years and we’ll see whether you achieved any savings under the Shared Savings Program. But if unit costs come up with no efficiencies, maybe we’ll challenge it then.

But a final point, just to contrast, and it comes back to something I think Chris said, which goes to confusion in the marketplace as to what an ACO is. There is this technical term ACO under the Shared Savings Program, embodied in these Guidelines. But there is a broader industrial context in which providers are forming organizations that can be considered Accountable Care Organizations unrelated to what government says an Accountable Care Organization is. That was going on before the government announced these things, and you really might ask the question whether ACO is defined in these regulations or simply reflecting something that’s going on elsewhere.

MS. DAVINO: Let me comment from a provider perspective. Late in the 90s, when hospitals formed PHOs, physician-hospital organizations, the whole reason that we did it was for two reasons. One, we wanted to have a closer relationship from a hospital perspective with our doctors so that we could really look at having a loyal medical staff and having people remain in our hospital. And then the second reason was because from a managed care perspective, if we formed a PHO and we had our doctors and hospitals together, then we could go to managed care companies and get better rates for the hospital and better rates for the doctors. From a managed care perspective, when you’re talking about from a hospital or doctor perspective, everything in terms of the rate you get is what kind of leverage you have in the marketplace.

So for example, I represent a lot of doctors, individual doctors, small doctor groups, big doctor groups, small hospitals, big hospitals. If you’re an individual doctor or small doctor group, no managed care company will even return your call. If you’re a medium size doctor group, maybe they will return your call, but unlikely to make any changes to your contracts or rates. If you’re a big doctor group you have some leverage. If you’re a big hospital, one spectrum to the other, then you may not get everything you want in terms of rates and contract changes, but at least you have some ability to negotiate.

So back in the 90s, when the hospitals and doctors came together, it really was looking at how can we increase our market penetration; how can we increase our leverage in terms of negotiation, and what do we need to do to do that. We looked at the FTC and the DOJ Guidelines, and they said we had to clinically integrate. So hospitals and doctors tried to—at least tried to have some kind of clinical integration to try to meet the least minimum requirements in regards to that.

Today it is a little different. It is really building on that, but it is more than just getting together in terms of negotiations. Because now you’re really looking at if you’re a hospital or doctor group or both or either, and you’re looking at coming together in terms of forming an ACO, the reason you do so is because you want to set yourself up for the future in terms of being able to be an organization that’s going to survive into the future. But also you are really looking at it as not just coming up with a better managed care contract and better managed care rates, which was the situation with PHOs in the 90s. Now you are going to be taking complicated contracts, so you are really taking risks. All of a sudden you have to have some kind of integration, because that means you are potentially going to be at risk in terms of losing money. Not necessarily in the Medicare Shared Savings Program, because in the Medicare Shared Savings Program there are two different options. One is a one-sided model where you don’t take risk, and the other is a two-sided model where you do take risk.

But if you as a hospital or doctor group are going to put together an ACO, you’re not going to do it most likely just to have a contract with Medicare and to participate in the Medicare Shared Savings Program, you’re going to want to utilize that organization to negotiate with commercial payers as well. And then you do anticipate that you’ll be taking risks. So you are really going to be in a situation where you are going to have to have more clinical integration, you are going to have to have more efficiency. As Harold said, that is kind of scary from a hospital perspective, because hospitals make money by having people in the hospital. From a quality perspective and a risk perspective you’re going to be making money by keeping people out of the hospital. So the hospitals are really trying to decide, well, so how do they deal with that? How can they really survive in the future and be organizations that are going to be more outpatient-based rather than inpatient-based and put more focus on outpatients? So it really is an issue of integrating with doctor and doctor groups, from a hospital perspective. Doctor groups look at it as hospitals want to control everything, and they don't want to be controlled by hospitals. Doctor groups look at should they do the ACO themselves and should they be the entity. But again, it really is going to have to come down to clinical integration.

MS. HOFFMANN: I want to just mention an interesting piece that Commissioner Rosch put out last November questioning, as he has for a long time, the merits of clinical integration and whether it is meaningful and looking at some of the kind of test programs that have been established under the ACO regime. But apart from mentioning it, because I don't want to run out of time here, I commend it to all of you to read.

I want to move on to what's happening in New York. Because New York has done a lot of things in the health care area that are perhaps almost unique in the nation. Some of you may be familiar with something called the Berger Commission Report. It was a commission appointed in 2006, I believe, to study the health care industry, and I think this comes out of the directive to assess, to rationalize health care in New York State for the 21st Century. The Commission put out a thick book of recommendations that involved consolidation, mergers, allocation for services and closings in New York State of hospitals and nursing homes, some of which, absent a clearly articulated state policy and active supervision of the program by the state, might not pass antitrust muster.

Some of you may have read there's been another Berger Commission, also headed by Stephen Berger, that looked at Brooklyn hospitals recently and recommended a whole series of closings, consolidations, repositioning of services. Going back to something that Harold mentioned at the outset, questioning whether hospitals are really the best vehicle for delivering patient-centered care at the physician level.

Anyway, with that background there have been other more recent events in the last year in New York in the legislature. Harold, I would like you to take a role in describing that.

MR. ISELIN: So it won't surprise anybody that New York State health policy making, like many other things in New York, is a bit schizophrenic. Whereas in other environments, competition seems good and lets the market sort of weed out inefficient entities, in this case we are sort of focused on hospitals. In New York we actually decided through this centralized top-down government-focused effort to try to do that effort, even if it created more powerful, and in some cases, dominant hospital systems. The claimed deficiencies that would result were being used to justify state efforts to reduce Medicaid expenditures.

So this in many ways has always been a lot about Medicaid and not looking at the role that the hospitals play and some of the pro-competition that results from having more hospitals in certain areas. I think one of the outgrowths has been some caution from Medicaid and in some ways Medicare onto the commercial market. And you do see some fairly well documented studies where cost shifting occurs.

I would also just point out that while we are very focused always on New York City, now again, as Margie said, we are going through another mini version of it in Brooklyn. There are places actually out on Long Island, in Nassau County and certainly upstate where we have virtually state-created hospital monopolies. So the market is very skewed in New York between places where we have lots of competition and places where we have no competition, at least at the hospital level.

Not content, though, with sort of managing the shrinkage of the hospital system, last year the state passed legislation—again well intended, I think, but not sure it will play out that way—that authorized the Health Department to issue a Certificate of Public Advantage. It is an effort—outside the ACO effort but with a similar thrust—to allow certain kinds of clinical integration or certain kinds of horizontal arrangements to come together but to justify it by imposing sort of an umbrella of state action unity.

The legislation was passed, and I think you will shortly see some regulations coming out from the Health Department that will allow horizontal collaborations, that wouldn't come anywhere close to meeting an ACO standard I might add, but nonetheless being able to apply for this Department of Health certificate that gives them at least the veneer of state action immunity, not only because of the approval process but because there is sort of built into a little bit of ongoing state supervision gloss to it.

I'll tell you that the payer reaction is again, as you might expect for this, a little bit negative. There are some collaborations, horizontal collaborations that truly are done for clinical integration and not just for the pricing and the negotiation advantage that Margie talked about. But as often as not what we actually see is providers coming together to say we want to negotiate collectively; we don't want to actually integrate in the way an ACO would integrate; we don't want to actually merge because we are a bunch of doctors and we really don't like each other anyway, but we'd like to get higher prices, or some of the other things. So I will say, because I think this is maybe a common view not only to the Certificate of Public Advantage but also maybe to the comment I made on the ACOs, which is the difficulty with these arrangements is once they are constructed, they are very difficult to take apart. Economically there can be degrees of integration. You've got IT systems that may have combined in part, and politically they are enormously difficult to take apart. So we are going into this experiment where we are going to say at the federal level we would have the ACOs; at the state level let's give these doctors who now all want to get together to set prices a Certificate of Public Advantage because they claim some degree of clinical integration. But three or five years later when costs have gone like this, there's no demonstrable quality benefits, again give credit on the ACOs to CMS, and FTC and DOJ actually are sort of trying to build that into the model. New York does no such thing. And then good luck going to the doctors and hospitals or the ACO or whatever it might be and say you didn't achieve the quality indicators that we wanted to see, break it up. Not so easy to do. So I think that's really part of the fear.

I will just add one other New York specific thing. There is legislation that's been proposed every year—it was proposed again last year and actually passed one house—that would allow doctors to collectively bargain but not really to have any integration. Again, they have to go through sort of an Attorney General approval process. Again, kudos to the FTC which, as it has in many states, raised very legitimate antitrust and anti-competitive concerns about allowing physicians to do that.

MS. HOFFMANN: That rule has not passed; it is just pending?

MR. ISELIN: It passed one house.

MS. WHITE: Just two focuses in terms of where we are going. One is consolidation because you see more and more mergers of doctor groups and more doctors going to be employed by hospitals. Last year is the very first time that a majority of residents graduating from residency programs actually went to be employed by hospitals. So you do see a lot more people getting together in terms of forming bigger entities on the doctor side and on the hospital side, both in New York and throughout the country.

The other area in terms of where we're going, and this is going to be a lot slower movement in this focus, is away from fee-for-service system. Because if you think about again what is really CMS's goal with regard to ACOs, is to make everybody look like Mayo Clinic. Well, what makes Mayo Clinic so special? One of the things that makes it so special is doctors are not paid on a collective basis.

I represent a lot of doctors and hospitals. Every single doctor contract I have pretty much rewards doctors based upon their productivity, how many services they provide, how many tests they order—you can't compensate doctors on how many tests they order, but compensate on how many procedures they do, how many people they see. So if you go away from the fee-for-service basis, and if you do what Mayo Clinic has and go towards decreased utilization and put quality measures into that, now that's going to be a lot harder to do because that really is going to mean if you go away from fee-for-service, then that means going towards capitation and you truly do have to have a situation where providers somehow truly not only share risk but agree how they are going to divvy up the dollars that come into the system. And of course everybody wants their piece of the pie to be as large as possible. But I would say it is two focuses really for the health system: One, consolidation, and two, eventually away from fee-for-service or at least mitigating away from that.

MR. ISELIN: Very contrary to New York's physician culture. I will say that. I know we may think doctors all over the country act the same, but they don't. And we don't have a lot of group practices in New York, partly because we have all these kind of rugged individual physicians who want to do their own thing.

MS. WHITE: Totally agree.

MR. BOTTI: On where we are going and can we come back to the question of Harold.

A couple of things, ACOs are probably easier to disassemble than mergers and acquisitions or even employment of physicians. But in health care, even with physician mergers or the employment of physicians, even that type of merger, if you will, it is not that hard to take apart. And if we find three years from today that all these ACOs have been formed and they really invested lightly in all of these things necessary to achieve the efficiencies and that they have achieved no shared savings and they raised prices, we saw when Tim Muris was Chairman of the FTC a rather robust campaign to take apart so-called clinically integrated physicians across the country that was rather successful, I think. I don't see such a major impediment to that happening again.

On the other side of the coin, though, if people do really invest in these systems such that they are hard to take apart, I think you'll probably find some real value being created by them. So the case for taking them apart may not be as great as we fear it might be. You go back and look at hospital mergers retrospectively. An interesting thing where studies looking at hospital mergers that resulted in concentration showed that prices went up. Studies looked at hospital mergers where it did not result in concentration, where I think you'll find a lot of efficiencies flowed from hospitals merging, but even when they resulted in concentration, the much ballyhooed FTC retrospective resulted in only one challenge, I guess you would say. I would debate whether it was successful or not. But really not many challenges. I think one of the reasons for that, which is not talked about that much, is probably a lot of efficiencies were generated. My experience with hospitals that have merged anti-competitively is they also did achieve some significant efficiencies.

MR. ISELIN: Except on Long Island.

MS. WHITE: I just want to pause here for a moment. Because I think that how easy or difficult it is to undo the consolidation that happens is going to be a function of what is put together and how it is put together. Specifically, although I think I was in private practice for a lot of the Muris campaign to take apart provider networks, and I followed that pretty closely. I think it would be hard to argue that the bulk of those entities achieved the kind of clinical integration that CMS is talking about today. Most of those provider networks that were challenged in the past were much more like per se entities that looked at what's the minimum that we can do to try to get into the rule of reason world. Frankly, they didn't do it that well. What they were really about is trying to get prices up against health plans and cobble together some type of reason for doing so, we do group purchasing, we buy our liability together. They weren't doctors coming together and sharing accountability for patient groups.

There is a lot we can learn from history, although we seem to be redoing the same things. We had these situations historically in the 80s and 90s when hospitals were hot to employ physicians. We are seeing some of that again in the ACO world. And it is hard to divorce the integration from the price effects here. There is always the argument that the doctors and hospitals are coming together and they are doing more, so they should be paid more. They are not actually trying to lower costs. Their costs may be going up because they are arguing they are investing more of their time and effort. I'm not issuing an opinion on this, but I'm saying we can't divorce the cost situation.

The other thing is today we are seeing a lot of hospitals buying up the assets of physician groups and employing physicians. There are regulatory reasons that the minute the doctors are employed by the hospitals, their reimbursement goes up. And it's not a direct—the overall reimbursement for the physician services rendered as a hospital-employed physician is higher than the reimbursement for a physician in an individual practice. Even if they don't change their office location or don't change their specialty or their patients or anything else they do.

So just a couple of points I think we should think about as we evaluate whether it is a good thing, whether we have learned from our past, and what we think about the future.

MR. ISELIN: And my comment wasn't that these integrations and particularly ACOs are bad things. I think payers would love to see them be successful. But imposing the metrics, which I think the regs and both CMS and the antitrust agencies are trying to do, and then holding the new entities accountable is really the important part. And what we often see in health care, again we start on these noble experiments and they are always well intended and they are in the right direction, but when it comes time to come back to the accountability and say are you performing, are we getting better quality? Yes, there may be costs, but again if you saw quality improvements or lower overall costs, everybody would stand up and cheer. The reason why the states have to come in and almost forcibly force three hospitals in Brooklyn to merge is because the hospitals fundamentally were never held accountable. And we heard in the Health Law Section, Steve Berger yesterday, and that's basically his point; we never held them accountable for all of the money that they took.

So a lot of the things are important, but I think what all of us should want as patients as well as taxpayers is that at the end of the day there is the accountability built in and not overlooked or minimized, and that there is some real discipline to the process. Because we have all these great health care theories, but I expect all of you have physicians, hopefully primary care physicians, and if you went to your doctor and you said what's bugging you, they hate the payers, they hate the hospitals, and they want more money, okay. So I mean and yes, quality is in there too; you probably won't hear the word efficiencies much. So we have all these great theories, but when you're dealing with it at the microcosmic level, the tree level and not the forest level, you don't hear a lot of the discussion about efficiencies and measurements and quality outcomes, etcetera, etcetera. I'm not saying that to be pejorative, I'm just saying, you know, it is sort of that's the doctor's existence. It does vary, and there are very visionary physician practices, no question.

MS. HOFFMANN: Just a quick poll of the panel. Can I get some insight, if you think you have it, as to whether you think ACOs will accomplish what they are supposed to do?

MS. DAVINO: I think there are some providers that are really, really forward thinking. There is this one group up in Orange County called Crystal Run Healthcare, about 200 docs, and it has the best CEO of a physician group. He's a doc, and his concept is absolute best quality care, reward his docs not for fee-for-service basis but reward them for providing quality. So he's putting together an ACO. So when you look at that or you look at Montefiore and you look at ACOs as being a mechanism that will reward them for spending money on things that do improve quality, because right now the payment system does not reward providers for hiring nurse practitioners, to call people at home to see if they took their medication, to do things to prevent them from going back into the hospital. So you think of those kinds of really forward looking providers and ACOs providing a payment mechanism to reward them, then I think that ACOs can really work. But then that's not everybody.

MS. HOFFMANN: Harold?

MR. ISELIN: I agree with Margie. I think you will see some that are very successful in terms of hitting the economics that I think are built in and from a quality perspective and frankly from the patient satisfaction perspective. And I think there will be many that are not successful. And so maybe the phase two challenge is how do we either not continue the ones that are failing, or get the ones that are failing to look like the ones that are succeeding.

MS. WHITE: I agree with the comments. Mainly I'm experienced in the private sector, and I saw really great integrated entities where physicians and executives come together and they work together really well. When it doesn't work, I don't know how you correct it.

The other thing we haven't discussed all that much today is the success I think is largely a function of how you collect and use your data, and whether your physicians really have that ability. I think at the end of the day the doctors who can use their data well, in terms of identifying what they want to collect and how to collect it and how to use it, have a big advantage over everybody else. Because it is what other physicians listen to, and at the end of the day it is what helps the patients and what convinces the payers.

MR. BOTTI: Picking up on that information revolution in health care and as well as a greater understanding of how we take care of certain populations, I think there is greater knowledge. I think we're going to see improvements in the cost of the delivery of care in health care as a result of those things. I think that ACOs, some of them will get credit for the forces that are playing out in health care, regardless of the formation of ACOs. And typically government programs will tend to impede those types of things. And so ACOs, I don't know that they will be deserving of the credit for the improvements. We'll see.

MS. DAVINO: Just one last comment. In addition to ACOs and providers we all as patients and taxpayers have to be a part of that as well. Because we are in America, you have a headache, you think you should get an MRI, and we all have to get away from that concept in order for this whole concept of ACOs to work.

MS. HOFFMANN: Can we borrow a few minutes for questions?

MR. ROONEY: We want to stay on course for our next one, but please, if there are questions.

MS. SUSAN RAITT: Do you have any idea as to number of applicants, number of ACO applicants right now?

MS. WHITE: Well, I know that if we were going to get any applicants—applications for voluntary review do you mean or CMS themselves?

MS. RAITT: For both.

MS. WHITE: Okay, from the agencies' perspective if we were going to get requests for voluntary review for ACOs that would participate in the next round, they would already have been received. And I don't know that CMS has made its statistics publicly available yet. Margie?

MS. DAVINO: All the applications are due either in two phases this year, people who want to be an ACO. But there was a program that was actually set up in 2011 for people who wanted to participate in the "Pioneer ACO" program because they wanted to be the pioneers in the field. So those Pioneer ACOs have been announced; there's only one in New York, which is Montefiore. Overall in the country maybe 25.

MR. ISELIN: I can get you the answer after. I think I have it in something.

MR. ROONEY: A question back there.

MR. ASCIOLLA: I understand that the policy statement allows for a newly formed ACO to voluntarily seek an expedited antitrust review by the agencies. And I was wondering for Chris, do you expect or have you already seen a newly formed ACO come to you and take advantage of this? And Margie, who represents providers, under what circumstances would you advise a client, if any, to take advantage of any voluntary antitrust review?

MS. WHITE: So far none have been received by the agencies, and we would have expected to have received some before the April 1st application deadline for CMS. They haven't been received yet. I have heard of people who have asked questions that might suggest that they could be looking for it in the future but haven't seen any.

MR. BOTTI: Typically I wouldn't advise someone to seek that type of review.

I suppose, Margie, if you were trying to put one of these together and antitrust was becoming a practical impediment to getting a consensus, you might decide to go that way, if advice of counsel couldn't convince people that they should do it.

MS. DAVINO: From a provider standpoint, if I were putting together an ACO right now, I would say let's look to our antitrust counsel as to whether or not we should get an antitrust review. But I would probably be reluctant to do that. One, I would say well, if I don't have anything to worry about from an antitrust standpoint, why waste my time and money in terms of getting an antitrust review? If I do have something to worry about, do I really want to bring it to the attention of the regulatory agency?

MS. WHITE: And another point in the advisory voluntary expedited review process for ACOs, since they are under rule of reason, the advisory letter that can be written by the agency is much more limited. So under the old program for business reasons you might want your ACO to get this letter so it could show the doctors and hospitals, look we don't have per se exposure here; we are clinically integrated and the agency just wrote this long letter. Under the ACO program I think you want to ask yourself what do you want the agency to tell you about, because they are going to tell you you're under rule of reason.

MR. ROONEY: Okay, thank you very much.

Back to the Future: Revisiting Class Certification in *In re Visa Check/MasterMoney* Antitrust Litigation Under the Standards Enunciated in *In re Initial Public Offering* Securities Litigation

MR. ROONEY: Please take your seats for the most innovative session for today.

This is sponsored by our Class Certification Subcommittee, entirely conceived by them, and it is going to be an exploration of class cert standards in the context of a direct and cross-examination of an expert witness.

With that I will turn it over to the moderator of the panel, Dan Brown, who will give us a little more explanation of the context and the way in which this last session will proceed. When we are finished we will then adjourn for a little while, and then dinner begins at 6:00 p.m. this evening at the University Club.

Dan.

MR. BROWN: I want to thank you all for coming to this presentation. I'm Dan Brown of Sheppard Mullin, and I'm really honored to have been asked to moderate such an esteemed panel. We have attorneys and experts here for litigants from the landmark *In re Visa Check/MasterMoney* case with us. Let me just introduce our esteemed panel.

First, we have the Honorable Judge Preska, who obviously needs no introduction to most of us. It is such an honor to have Judge Preska here; she has been on the bench in the SDNY since 1992 and Chief Judge since 2009.

We thank you so much for participating in this with us.

JUDGE PRESKA: My pleasure.

MR. BROWN: We also have Lloyd Constantine, who was lead counsel in the historic *Visa Check/MasterMoney* case which, as many you of you know, resulted in a $3.4 billion monetary settlement and an historic injunction, which the Court actually valued at upwards of $87 billion in benefits to merchants and consumers.

We have Wesley Powell from Willkie Farr, also representing MasterCard in that historic case, and he has extensive experience in all sorts of antitrust aspects, including litigation and advice.

We are also very pleased to have Kellie Lerner with us from Labaton Sucharow. Kellie was recently recognized as one of the top 40 competition lawyers under 40 Law 360.

And Eric Hochstadt joins us from Weil's Litigation Group.

Finally, we have Bruce Stangle of the Analysis Group who also has over 30 years of antitrust experience and class action experience on issues that we are all familiar with. He also served as an expert in that historic case.

If we could move onto the next slide. Of course, any session talking about class action requirements has to begin with the Rule 23 requirements of numerosity, commonality, typicality and adequacy. As many of you know, since the Supreme Court's decision in the *Southwest Telephone v. Falcon* case the Supreme Court has instructed litigants that expert analysis at the class certification stage will be subject to a rigorous analysis. That hasn't exactly been proven to be as easy as it sounds.

So we mention the *In re Visa Check* case, and a few years later in the Second Circuit, there was the *IPO* case where the Second Circuit clarified the standards that applied to class certification. As many of you also probably know, a little bit later on the Third Circuit in the *Hydrogen Peroxide* case further clarified, at least in that circuit, the standards that would apply to class certification. And the recent Circuit decision certainly suggests that the rigorous analysis probably applies to both sides' expert witness reports, sometimes entailing mini trials under Rule 23.

The goal of this presentation is to raise questions as to how the litigants in the landmark *In re Visa/MasterMoney* case may have had to adjust their presentation of economic evidence in that case. But first a disclaimer.

In preparing for this session it became readily apparent to the panel members that we couldn't possibly do justice to the complexities underlying that case. Especially with the attorneys and the experts here who lived with that case for many, many years. As a result, the expert report and the mock examination that we are about to see is only very loosely based on facts from payment card cases, which will serve as our springboard into the discussion of class action requirements.

So the expert report, which I think you all have in the materials outside, deals with what's called signature debit and PIN debit, two different kinds of debit. Important for our decision, signature debit had a two percent merchant discount on average, and the PIN debit had a .5 merchant discount. Although it is called a discount, it actually was a fee that the merchants paid.

The allegation in the hypothetical is that MasterCard's and Visa's "Honor All Cards" and "Universal Acceptance" policies required a merchant who accepted their credit products to accept their debit products. By contrast, the PIN debits were also available and were less expensive for merchants.

So in the expert report that you have in your binder, Mr. Stangle opines that the damages are $370 billion, of course then trebled, based on the amount of signature debit purchases over the relevant time period, the average category overcharge.

With that we are now going to proceed to the mock examination. So I'm actually going to ask if Judge Preska would step up to the podium, and if Lloyd and Wes would please step up to counsel table.

JUDGE PRESKA: Thank you, Dan.

MR. CONSTANTINE: Your Honor, my name is Lloyd Constantine, and I would like permission to sit down.

JUDGE PRESKA: Of course, sir. And with respect to the rules that we will have today, we will present an expert only for plaintiff. These will be simplified examinations, and in the interests of time leading will be permitted.

Is plaintiff ready to present the expert?

MR. CONSTANTINE: I am, Your Honor.

JUDGE PRESKA: Please proceed.

MR. CONSTANTINE: Again, I'm Lloyd Constantine, and I represent Kroger, Macy's, Exxon Mobil and McDonald's, which are the supermarket, department store, gas station and restaurant industry. I also represent four smaller stores in those categories, and I represent the trade associations with both large and small stores in those categories. We seek to certify a class on behalf of around 700,000 merchants in the United States.

JUDGE PRESKA: Thank you, sir. I'm glad to hear that it's a small class.

MR. CONSTANTINE: I would like to call my first witness—or my only witness, Dr. Stangle, who has filed an expert report in this case.

JUDGE PRESKA: Sir, do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

DR. STANGLE: I do.

DIRECT EXAMINATION BY MR. CONSTANTINE:

Q. Dr. Stangle, please briefly describe your education and professional credentials.

A. I have a Master's and Ph.D. from the Sloan School at MIT, and I've been a consulting economist for my entire adult career, over 30 years.

Q. What was your assignment in this case, Doctor?

A. I was retained by your firm to provide an expert analysis and testimony related to the certification of the proposed class of merchants and also to analyze the damages sustained by these merchants as a result of Visa and MasterCard's "Honor All Cards" policy, which required all the merchants who accepted credit cards to also accept signature debit.

Q. And what sources of information did you consult in doing your work?

A. I reviewed the record and various scholarly work on this industry.

Q. Did you have access to the entirety of the record, including some 300 depositions that we held or were already given prior to your filing of your report?

A. I had full access to the record.

Q. Was there anything that you asked me or any of the attorneys at our firm to provide you that we refused to?

A. No, you were forthcoming.

Q. Could you please summarize the conclusions of your report?

A. Yes. The evidence in the record indicates that each of the four merchant groups you previously described accept credit cards and also have been forced by defendants to accept signature debit at an artificially high price. These merchants have been uniformly injured by the defendants' conduct, and based on the common evidence in the record I am able to both demonstrate injury to all the plaintiffs in the class and to calculate damages for the class as a whole.

Would you like me to continue?

Q. I think that's sufficient for now. We'll get into a little bit more.

In reading your conclusions in your report I understand that you have read the sworn testimony of the CEO and the CFO of each of the named plaintiff supermarkets, department stores, gas stations and restaurants, and that they would not have accepted Visa and MasterCard debit cards at the price of 2 percent of the transaction amount, nor indeed at any price higher than the price of PIN debit unless they had been forced to, as they were by Visa and MasterCard's rules. Is that correct?

A. That's correct.

Q. I understand that you have read the sworn testimony of the chief executives of the trade associations for these merchants, where they testified that this position asserted by the main plaintiffs, which you just summarized, is predominantly true for the roughly 700,000 merchants who comprise the punitive class?

A. That's right.

Q. You have not concluded, have you, Doctor, that literally every merchant in the class would have rejected these debit cards at a price of 2 percent had that been the price?

A. That's right. I've not concluded that every single merchant has been harmed, but I believe that most of the merchants in the class have, a vast majority, and my methodology can separate them.

Q. And you have concluded that so many of the class members would agree to if they could have done so, that is rejected Visa and MasterCard debit cards at any price higher than the price charged for PIN debit at any point in time, and therefore in the so-called but for world, the price of unbundled debit cards would have been no higher and possibly lower than the price of PIN debit, isn't that correct?

A. That's right.

Q. Doctor, you considered, did you not, the testimony from store and industry executives that PIN debit is superior to signature debit not only because it costs less, but because it is much faster to process, has a tiny percentage of the fraud associated with Visa and MasterCard debit, because stores get their money much faster?

A. I considered all that, yes.

Q. And given those objective and quantifiable differences, is it your opinion that stores really wouldn't have been willing to pay the same price for Visa and MasterCard signature debit as for PIN debit given the fact that PIN debit is objectively superior?

A. PIN debit is—has features that are more attractive to merchants, and therefore signature debit couldn't clear the market at the same price. It would have to be priced less.

Q. So your damage calculation based on stores being willing to pay the same price for Visa and MasterCard debit as for PIN debit is actually very conservative, isn't it?

A. I think one could argue that it is conservative.

Q. Well, would you argue that?

A. Yes, although I haven't presented the numbers that way.

Q. My understanding of your report is that you have asked and answered the question not what would happen today if Visa and MasterCard could no longer force stores to accept Visa and MasterCard debit but what Visa and MasterCard prices would have been had they not forced stores to accept their debit cards under their rules?

A. That's correct.

Q. To your knowledge have Visa and MasterCard ever engaged in store-specific pricing for acceptance of their credit or debit cards?

A. I didn't see any evidence of that in the record.

Q. Let me expand and elaborate my question. Macy's for example, to your knowledge, pays the same price for Visa and MasterCard credit and debit as does a much more upscale and smaller department store like Bergdorf Goodman or Trailer Trashers, which is one of the stores in the class, right?

A. That's my understanding.

Q. And that's a single outlet, Topeka, Kansas, right?

A. Correct.

Q. There are slightly different prices for different classes of stores, such as different prices for supermarkets than for department stores, isn't that correct?

A. Yes.

Q. But your report has considered and accounted for those category-specific differences, and those would not make it difficult, as I understand it, to compensate class members for damage they suffered. On average the rate that they paid is 2 percent, is that correct?

A. The average is 2 percent, but my model is able to take account of the small variations in the average overcharge.

Q. Did you examine and review the development of PIN debit and Visa and MasterCard signature debit roughly simultaneously beginning in the 1970s when PIN debit networks charged stores nothing to accept PIN debit and had indeed paid stores every time they accepted a PIN debit transaction?

A. Yes, I looked at that.

Q. You have concluded, haven't you, that the current price of PIN debit at half of 1 percent was not arrived at competitively but was elevated because of predatory and exclusionary conduct by Visa and MasterCard including but not limited to their rules, is that correct?

A. That's one of my conclusions, yes.

Q. Your report incorporates the understanding that debit, PIN and Visa and MasterCard signature was developed by bank networks such as NYCE, Star, Pulse, Visa and MasterCard to replace checks and cash transactions at stores because banks save money when their customers pay with a debit card accessing money in their demand deposit account, right?

A. That's right.

Q. Most of the discount fees you have considered in your damage model were based on discount fees, most of that is made up of a so-called interchange fee, isn't that correct?

A. That's right.

Q. And there are no interchange fees charged by bank members of Visa and MasterCard when their depositors access the money in their bank accounts using checks or cash, isn't that true?

A. That's right.

Q. Isn't that why PIN debit networks, to your knowledge, like Star and NYCE and Pulse charge no interchange fees to stores or even paid stores to accept PIN debit so that banks could avoid the high cost of processing checks and handling cash?

A. That's my understanding of how that developed, yes.

Q. Doctor, you have reviewed evidence from Visa and MasterCard documents that the rules forcing stores to accept Visa and MasterCard credit to also accept debit not only allowed Visa and MasterCard to charge higher prices to stores for debit but also higher prices for credit card transactions, isn't that true?

A. That's what the record seems to indicate, yes.

Q. Specifically you have reviewed Visa and MasterCard documents saying that if the PIN debit networks, like NYCE, were allowed to grow and mature that their competitive pressure would have forced Visa and MasterCard to lower the price of their debit and their credit card transactions by amounts amounting to billions of dollars annually?

A. I think that's correct.

Q. In reaching your conclusions, Doctor, you reviewed the analysis prepared for Visa by Andersen Consulting, which is now called Accenture, that the "Honor All Cards" rule challenge in this lawsuit allows Visa to charge higher prices to stores for credit card transactions as well, correct?

A. I guess you'd call that a smoking gun document, yeah, I saw that.

Q. You saw the shark on the cover of that document?

A. Right.

Q. Did you infer anything from the shark being on the cover?

A. Sharks are predatory.

MR. POWELL: Objection.

JUDGE PRESKA: Sustained.

Q. And that the "Honor All Cards" rule allows Visa to maintain dominance and substantial market power in both the credit and debit card markets, and that it allowsVisa to suppress the business of competing networks, like NYCE and Star and American Express and Discover, but that it actually helps MasterCard, which has the same owners and members and are virtually identical "Honor All Cards," correct?

A. I agree.

Q. So you have concluded, haven't you, that had Visa and MasterCard not forced stores to accept their debit cards under their rules, the price of their debit transactions to stores and the price of credit transactions would both have been lower?

A. The way I put that is had there been more competition in the market, the prices would have been lower, yes.

Q. Now that conclusion about pricing in a market, which there was no tying arrangement between Visa and MasterCard credit and debit and never had been one, is consistent with the economic learning about the effects of unbundling two products in which the seller has substantial market power in both the so-called Stigler Model, first articulated by one of your colleagues, Professor Stigler, who won the Nobel Prize, isn't that correct?

A. That's consistent with that tying history, correct.

Q. Your report includes filings about the prevalence of PIN pads for accepting PIN debit in stores within the class, correct?

A. Yes, it does.

Q. You have reported that virtually all the supermarkets and the gas stations in the class have PIN pads but that only some of the restaurants and department stores have PIN capacity, correct?

A. That's right.

Q. However, you also conclude that if Visa and MasterCard had not employed their rules PIN debit acceptance and PIN pad would be more or less ubiquitous in their stores and indeed ubiquitous in the United States generally, correct?

A. I think the industry would have developed much differently. In fact, Canada, which I think we will talk about shortly, has a different model where PIN pads are in use.

Q. And in Canada, you've referred to this, but where there are no functional Visa and MasterCard rules forcing stores to accept signature debit but Visa and MasterCard do operate, PIN pads are ubiquitous, including at high-end restaurants and department stores, isn't that true?

A. They are widely used and there is no signature debit.

Q. The price of Visa and MasterCard credit transactions to stores in Canada is lower than in the U.S., isn't that correct?

A. Yes, there's more competition.

Q. And the price of debit transactions to stores is also lower in Canada, correct?

A. That's correct.

Q. Did you find a comparison between Canada and the United States to be a useful benchmark in constructing the but-for world that you set fort in your report?

A. Yes, it is a very useful benchmark.

Q. You've reviewed, have you not, the report of Dr. Xanadu, Visa and MasterCard's expert and the transcript of his deposition, haven't you?

A. Yes, I have.

Q. You noted that he testified the comparison of the Canadian market to the United States would have been interesting and constructive but that he hadn't engaged in that exercise, correct?

A. That's kind of odd, because the professor's a good student of the industry, so I'm surprised he didn't look at that.

Q. But you did review his testimony where he said it would have been instructive but he hasn't done it, right?

A. Correct.

Q. You reviewed his testimony that he had not reached an opinion, quote an opinion, about what effect the elimination of the "Honor All Cards" tying arrangement would have had on the price of Visa and MasterCard credit card transactions correct?

A. Yes, he didn't look at that.

Q. You read the testimony of a Visa executive, Christine Chipdejaia, did you not, about the Visa Oasis System, and you recalled that the Oasis System contains information about each and every Visa and credit and debit transaction all the way back to 1996, including the price of every transaction charged to every store, isn't that correct?

A. It is a fabulous database for calculating injury and damages.

Q. Did you consider this testimony in reaching your conclusion that any damages awarded in this case could be fairly apportioned among the class members because of this paper trail?

A. Yes.

Q. Did you consider in reaching your conclusions the practice of merchant steering, meaning efforts by a store to get a customer to use a particular form of payment regardless of what the customer might initially desire to use?

A. Yes, I considered steering.

Q. Did you consider—did you review Visa and MasterCard documents and testimony saying that asking a customer to use another form of payment when they proffer a Visa or MasterCard card violates Visa and MasterCard rules and can result in the stores' loss of their ability to accept Visa and MasterCard?

A. I considered that.

Q. Did you see that that's what the former CEO of MasterCard, Pete Hart, testified to?

A. That's right.

Q. Did you review evidence that Visa and MasterCard had taken steps to obscure the distinction and appearance between their debit and credit cards so as to make it more difficult for a store to recognize the difference at check out?

A. Yes.

Q. Did you review the testimony of MasterCard executive Edward Hogan that in 1989 Visa and MasterCard met and agreed to remove marks from their cards which identified them as debit cards?

A. That once caused me to offer a debit card by mistake, when I thought it was my credit card. Yeah, I was aware of Mr. Hogan's testimony.

Q. Did you see the documents from Visa and MasterCard saying that many cardholders don't understand the difference between Visa and MasterCard debit cards and credit cards?

A. Yes.

Q. And that the predominant first use of a Visa or MasterCard debit card is by somebody thinking they are using a credit card?

A. Right.

Q. And that 72 percent of MasterCard credit cardholders, debit cardholders used this thinking it was a credit card?

A. I'm glad to know I was one of the 72 percent.

Q. You took all of that into consideration, did you not, in reaching your conclusion that although steering sometimes occurs, it is infrequent and ineffective to avoid the vast majority of Visa and MasterCard signature debit transactions, isn't that correct?

A. Steering does occur, but I don't think that would reduce damages.

Q. Now, when it does occur, in other words, when a merchant, notwithstanding the blurring of the distinction and the campaign of deception which you testified to and the rules against it, when it does occur, your damage model accounts for that, because that's not a transaction where you would award the merchant any damages, because they have avoided the transaction, isn't that correct?

A. That's correct.

MR. CONSTANTINE: I have no further questions at this time. I'll reserve my additional questions for redirect.

JUDGE PRESKA: I have rarely seen a better non-leading direct.

Cross-examination please, counsel.

MR. POWELL: Good afternoon, Your Honor, Wes Powell, representing the defendants.

CROSS-EXAMINATION BY MR. POWELL:

Q. Dr. Stangle, good afternoon.

A. Good afternoon.

Q. Dr. Stangle, in your but-for world that you have represented in your report you posit that signature debit would not have existed at all and that the only form of debit cards that banks would have issued would have been PIN debit, is that right?

A. That's right.

Q. And to be clear, it's not your position that those signature debit transactions would have remained as signature debit transactions but albeit processed at a lower fee; you claim that all of those transactions would have occurred on some other form of payment?

A. Yes.

Q. Specifically PIN debit?

A. That's correct.

Q. And as a result of this, the banks that issued debit cards would have received half a percent fee instead of after 2 percent fee on its transactions, is that right?

A. My analysis assumes that the dollar volume on transactions, I think it was $24 billion that was shown on the screen there would remain the same, but rather than being processed as signature debit transactions, they would have all been processed over the PIN debit system, so it is a 100 percent conversion.

Q. Every single transaction?

A. Every single one.

Q. So your but-for world assumes that, despite the fact that issuing banks are going to get a reduction in revenue of half a percent to 2 percent, that the banks that issued those cards would have continued to issue and promote PIN debit to the same extent as they promoted signature debit in the real world?

A. I'm sorry, I'd have to ask for a clarification. I think it would be a reduction from 2 percent to a half percent.

Q. Pardon me, so a reduction from 2 percent to half a percent. Despite that, your position is that the banks that issued those cards would continue issuing and promoting them just the same, despite the enormous reduction in revenue?

A. Well, no. My but-for world is that because signature debit is essentially an inferior product compared to PIN debit it wouldn't even have existed in the but-for world without the "Honor All Cards" rule forcing merchants to take it; it wouldn't have existed.

Q. But whether signature or PIN, your position is that even with a reduction from 2 percent to half a percent, issuers would have promoted debit cards just to the same extent as they have signature debit?

A. Yes, debit cards.

Q. But at much greater revenue, that's your position?

A. That's correct.

Q. Dr. Stangle, are you familiar with the economic literature that identifies payment cards as a two-sided market?

A. Yes.

Q. And you know the economists who advanced those two-sided market principles?

A. I do.

Q. And do you respect them?

A. Yes, I do. They are highly respected economists, yes.

Q. Do you agree with the principles of two-sided markets?

A. By and large, yes. I mean it's—those principles are enunciated in a 250-page book, so you'd have to point me to some of the principles. I'm not sure I can endorse every single one of them, but in general it is a respected theory.

Q. Fair enough. And would you agree that this two-sided market literature contends that whether payment cards are issued by banks and accepted by merchants depends on the joint demand by consumers and merchants for those cards?

A. That's right.

Q. In other words, the more cardholders who use a particular card the more attractive that will be to merchants, is that right?

A. That's right. It is a network effect.

Q. Thank you. And that literature also shows that the two-sided market feature will affect the pricing of payment card services, is that right?

A. Yes, on both sides of the market.

Q. So the price that merchants pay for debit card services will impact the extent to which those debit cards are issued by banks, right?

A. That's the way the theory goes, yes.

Q. And that's because the portion of the merchant fees that issuers receive on debit cards is in fact the majority of their revenue from issuing those cards, is that right?

A. That's right.

Q. And when banks receive less fees on debit card transactions generally, they will likely charge cardholders more to use those cards?

A. That's the way the theory goes, but I can sort of see where you're going with this, and this so-called two-sided market theory depends on other things, like how much competition there is in the market. So you haven't included that in your question.

Q. We'll get to those issues in a bit.

When banks receive less fees related to debit cards they may also stop promoting them to consumers, is that right?

A. Right. Or as we recently saw with the position of the Durbin Amendment, if they get less revenue from their debit card, they might raise their ATM fees or their checking fees.

Q. So it may cause fees to go up.

A. So other fees could go up.

Q. So it may cost the consumers more?

A. For something else they get from their banks.

Q. Now, Dr. Stangle, you have reviewed the expert report of Defendant's expert, is that right?

A. Yes, I have.

Q. And is it fair to say that in his report the Defendant's expert applies the two-sided market principles we just went through and concludes in a world in which all debit transactions, whether signature or PIN debit, are processed at a half percent rate, instead of a 2 percent rate, the total number of debit transactions would be substantially reduced and many of those transactions would have occurred on credit cards or some other form of payment?

A. I realize that's what your expert says, but I think he's wrong.

Q. I would have expected you to say nothing else, Dr. Stangle.

Dr. Stangle, for purposes of my next few questions I would like you to assume hypothetically that in the but-for world both signature and PIN debit exist, but at the rate that you suggested, half a percent, okay?

A. Okay, I'll accept your hypothetical.

Q. And let's assume hypothetically that if Dr. Smith, as our expert, suggested a result of this reduction of fees on signature debit as a result of that reduction the banks promote the cards less, charge higher fees to consumers and as a result consumers use other forms of payment instead of debit for many transactions?

A. I'm going along with your hypothetical, not saying that I agree with it.

Q. Thank you. Let's focus on a department store like Bloomingdales. Please assume that as a result of a reduction in the merchant fee, that reduction in merchant fees, the number of signature debit transactions at Bloomingdales is cut from a hundred per day to ten per day, and assume that the other 90 transactions occur but on some other form of payment. Okay?

A. Okay.

Q. And would you agree with me that in this scenario, whether Bloomingdales would be better off in your but-for world would depend on two things: One, what form of payment is used instead of signature debit for those 90 transactions, and what that alternative payment form would cost the merchant; would you agree with that?

A. Again, I have to sort of quibble with the way you put the question. You said in my but-for world, I think this is your but-for world.

Q. Well, in a but-for world?

A. Right, with that minor correction I agree with you in this hypothetical.

Q. Thank you. Let's assume that those 90 transactions were processed on a credit or charge card that had a 3 and a half percent rate. In that scenario Bloomingdales acceptance costs will not be lower than if the transactions took place on a signature debit card at the current 2 percent discount rate, right?

A. In your hypothetical, yes.

Q. And in that scenario the merchant actually pays more for those transactions than it would if all of them were signature debit transactions at today's 2 percent rate?

A. Under the assumptions of your hypothetical, that's what would happen.

Q. And alternatively, Dr. Stangle, if those 90 transactions were processed on a PIN debit card, I assume you would contend that the merchant is better off in the but-for world at a half percent rate.

A. That is my but-for world, so I certainly would agree with that.

Q. But for that to happen the merchant must have installed PIN pads, right?

A. To process a PIN transaction you need the PIN pad, yes.

Q. Are you aware that in the damages period from '99 to 2003 that your report focuses on that Bloomingdales had not installed PIN pads?

A. I don't recall if they had or not, but I'll accept that as a fact.

Q. But I believe in response to a question from Mr. Constantine you acknowledge that most department stores and restaurants do not have PIN pads today?

A. That's because of what Visa and MasterCard did. I mean, the alternative world, so-called but-for world, would be one in which signature debit was inferior, and they would have an added incentive to install PIN pads. So in the actual world they didn't have PIN pads; in the but-for world they would.

Q. Following my hypothetical, Dr. Stangle, if a merchant did not have a PIN pad, it would not be able to do those transactions to PIN debit, right?

A. That's correct.

Q. And would you agree with me that the extent in which merchants have invested in PIN pad terminals has varied among the four categories of merchants in the class?

A. That's true.

Q. For example, as I said, PIN pads have been installed in many more supermarkets than department stores, is that right?

A. That's right.

Q. And many more gas stations than restaurants, is that right?

A. Yes.

Q. So you would agree that under the scenario that we are discussing that has been posited by our expert that the form of payment a consumer uses instead of signature debit will vary among those merchant categories, is that right?

A. It may well vary, yes.

Q. Now, Dr. Stangle, am I correct that you're not offering an opinion on whether credit card rates would remain the same or change in the absence of the alleged tie in your but-for world?

A. In answer to some questions in direct I agreed with the proposition that it's highly likely that credit card rates would have been lower, because there would have been more competition, but my damages analysis doesn't include that.

Q. It doesn't address it one way or the other?

A. It does not.

Q. And it is not something that you've reached a conclusion on for purposes of your report, is that fair?

A. That's fair.

Q. Okay. And so you're not offering an opinion on whether, Dr. Stangle, that in the but-for world the rates a merchant would have paid for the package of credit and debit transactions would have gone up or down?

A. No, I didn't address the package issue.

Q. Since you haven't considered it, Dr. Stangle, I want to ask you a few more hypothetical questions.

A. Okay.

Q. Assume that as a result of the reduction in signature debit rates in the but-for world from 2 percent to half a percent MasterCard and Visa increased credit card rates by a corresponding amount from 2 percent to 3 and a half percent, all right?

A. Okay.

Q. In that scenario, Dr. Stangle, a merchant that generally receives a large volume of credit card transactions but a small volume of debit transactions would pay a net increase in fees, is that right?

A. In that sort of hypothetical scenario, that is correct.

Q. And that's because the price of the package of credit and debit transactions is higher for that merchant, is that right?

A. That's correct.

Q. And you are familiar with data produced in this case that shows that department stores, on average, 60 percent of the dollar volume of all transactions, is on credit cards, is that right?

A. That's right.

Q. And the same data shows that at supermarkets about 11 percent of dollar volume of all transactions is on credit?

A. Correct.

Q. And under the scenario I suggested, Dr. Stangle, where the 1 and a half percent for the reduction from 2 percent to half a percent of signature debit rates is offset by an increase in credit rates, the financial results would be different at a department store than at a supermarket, right?

A. They'd have a different impact, yes.

Q. And as a result—and likewise the result would be different at a gas station than at a restaurant?

A. In this hypothetical, yes.

Q. I want to turn to the issue of mitigation that Mr. Constantine asked you some questions about. Do you recall him asking you some questions about whether merchants are able to mitigate their damages by steering consumers from signature debit to PIN debit?

A. I recall that.

Q. And you recall your testifying about reading some testimony that MasterCard's and Visa's rules somehow prohibit steering from one form of payment to another, is that right?

A. That's what the policy manual says, yes.

Q. Well let me ask you this. Have you reviewed testimony by Wal-Mart executives that the company had installed PIN pads by the 1990s, and that in the mid 1990s Wal-Mart began a campaign of prompting every consumer who swipes their debit card through a terminal to enter a PIN number?

A. Yes, I saw that material.

Q. And do you recall that same material showed that by 1999 customers at Wal-Mart used PIN debit 69 percent more often than they used signature debit?

A. That's correct.

Q. So would you agree that Wal-Mart succeeded in steering at least some of its signature debits to PIN debit?

A. Yes, apparently it did.

Q. And in fact a substantial percentage of them, is that right?

A. Right, and as I indicated, I haven't included those PIN debit transactions in the damages.

Q. Well, let me ask you, did you review evidence that Kroger and Publix supermarkets and the department store Payless Shoes had programs for steering debit cardholders to use PIN debit in the same time frame?

A. Yes.

Q. And have you seen any evidence that MasterCard or Visa told any of these companies that this practice of steering violated any of their rules?

A. I didn't see any evidence of that in the record.

Q. And would you agree that merchants that do not have PIN pads simply don't have the ability to steer consumers from signature debit to PIN in the actual world?

A. I agree. However, if the financial incentive were great enough, they would have installed PIN pads to achieve that result.

Q. But whatever the incentive, in fact a substantial number of merchants have not installed PIN pads and would not be able to steer, is that right?

A. Without the PIN pad you cannot steer.

Q. So would you agree that whether a merchant can mitigate impact from signature debit by steering them to PIN varies to some extent by merchant?

A. Yes, I do.

Q. Now finally on the topic of Canada, Dr. Stangle, Mr. Constantine asked you a few questions about whether Canada's experience of PIN debit supports your but-for world in this case, is that right?

A. Yes, he has.

Q. Do you recall seeing evidence in the record about the prominence of PIN debit in Canada under the Interac brand resulted from the work of an organization in Canada called the Canadian Payments Association or CPA?

A. Yes.

Q. And that the CPA is an industry organization that was chartered by the Canadian government and tasked with governing electronic payment systems in Canada?

A. That's right.

Q. And all of the major Canadian financial institutions that were members of the CPA agreed to develop Interac as the only debit option in Canada?

A. That's right.

Q. And as a result of doing that, Canadian banks never even considered the option of signature debit?

A. I'm not sure if they didn't consider it, because it existed across the border. But what they didn't do is adopt it.

Q. Did you do you have any information that suggests that they actually compared the features and selected PIN debit and signature?

A. I don't have any evidence one way or the other on that.

Q. So your only information is that this self-regulatory organization selected PIN debit?

A. It did.

Q. And that at no point did signature debit and PIN debit compete against one another in the marketplace in Canada?

A. That's correct.

Q. And would you agree that no equivalent regulatory body in the U.S. was ever tasked with developing electronic payment systems in the same fashion?

A. Well, the U.S. market operates differently, and the regulatory agencies don't tell the banks what technologies to adopt as a general matter.

Q. And so the evolution, unlike in Canada, the evolution of PIN and signature debit in the U.S. was not in any way dictated by a regulatory body, is that right?

A. That's correct.

MR. POWELL: Thank you, Dr. Stangle.

THE WITNESS: Thank you.

JUDGE PRESKA: Thank you, counsel.

Was there any redirect?

MR. CONSTANTINE: No, Your Honor. Thank you.

JUDGE PRESKA: Nice job.

MR. BROWN: Thanks, Lloyd and Wes and Bruce.

So now we are going to invite Lloyd and Wes up to the panel. To kick off the discussion I was hoping to hear from Lloyd and Wes about what points from your direct and your cross-examination would you emphasize if you had the opportunity to do a closing argument here; what points do you think you brought home today?

MR. CONSTANTINE: Well, to do a fully robust demonstration we would have had the Defendant's expert as well, and we tried to load this all into Dr. Stangle, so.

MR. POWELL: It is a big responsibility, playing both experts.

MR. CONSTANTINE: It is a big responsibility. There were rejoinders to every question that Wes asked, and he had surreplies and so on and so forth. So we both litigated this case actively for seven years, so we could have done this for seven more years. There would have been a couple of follow-up questions I would have asked.

But the big overarching issue that arises from the direct and the cross is the configuration of the but-for world. I think it raises the question for the Court, which is how much will the Court want to decide what the correct but-for world is before making a determination on class certification.

I mean the question that's posed by the panel and the program is how have things changed under *IPO*, and to some extent *Hydrogen Peroxide*, but mostly under *IPO*. When I read *Hydrogen Peroxide* I think I have a pretty good sense of what you're supposed to do and what you can do and should do in the Third Circuit. I have much less of a good idea, and I empathize with Judge Preska here, about what I'm supposed to do as a District Court judge in the Second Circuit after *IPO*.

IPO was obviously an attempt by Judge Newman and Judge Sotomayor to redo the work they had done in writing the decisions in *Visa Check* and in *Caridad*. And with all due respect I don't think they did a great job in giving great guidance to both District Court judges and to practitioners, like Wes and I, as to how we should do this after that. I think that their clarification raised as many questions as it answered.

JUDGE PRESKA: May I be permitted to ask, out of curiosity, how could they have sharpened it, in your view, in instructing us what we're supposed to do?

MR. CONSTANTINE: Your Honor, one of the issues that kept on arising in Judge Gleeson's initial decision, in his 45-page decision and in the averments and Judge Jacobs' dissent—by the way the case went up on a petition for cert and all of that—was to what extent do you permit a duel of the experts. We couldn't really duel here, so we loaded it all onto Dr. Stangle, and he did a great job.

Now, those who have read Judge Gleeson's decision where he said I'm not supposed to indulge a duel of the experts know that he actually did indulge a duel of the experts. There are 12 pages of the 45-page opinion which is the duel. He says Dr. Carlton says this, Dr. Xanadu says that—we have decided not to use the real doctor's name here. Dr. Stangle says this, Dr. Xanadu says that. Dr. Xanadu criticizes Dr. Stangle, but this is Dr. Stangle's response. And Dr. Xanadu admitted that he hadn't formed an opinion on this, and Dr. Xanadu said he didn't examine Canada, but Dr. Stangle says that Canada is a good empirical benchmark for the but-for world. So indeed Gleeson did indulge a very long duel of the experts.

But I come out reading *IPO* and not knowing, if I'm a District Court judge or a practitioner, to what extent should I stage that for Your Honor and to what extent you will allow me to do that. So that wasn't very much clarified. Because I think *IPO* is very much again about Judge Newman and Judge Sotomayor trying to correct what they had done.

And I know Judge Sotomayor was in your court for a time and sat on the District Court bench, but *IPO* read very much like an appellate decision not informed by the problems encountered by either practitioners or District Court Judges in dealing with these very knotty cases. So I think it is not the last word, and it certainly shouldn't be the last word.

So one thing I would have clarified is to what extent should you put on a duel, and to what extent as a judge should I indulge that? And is a mini trial required with full expert testimony on both sides and how far that can go.

MR. POWELL: Just to answer your question, clearly both sides would have focused in closing on the reason the Court should adopt its view of the but-for world. Because in antitrust cases in the class context it is always going to come down to the two but-for worlds and the competing view of what the proof at trial will be in light of this but-for world and would it be predominantly individualized or common.

I guess if I could turn it into a question for Judge Preska, most of the instruction that you see in these cases at the appellate level is that courts need to resolve whatever fact disputes are necessary in order to reach the class decision. And how does that bear out, when it's two fundamentally competing versions of a but-for world in an antitrust case. That seems to be the question that the cases—you know, both sides will argue from the cases as to what the Court is to do. But what is your view of that?

JUDGE PRESKA: I know this is not very satisfying, but it depends on the case.

The way I take it, we have been told in District Court we have to make these findings, we have to resolve fact issues. But on the other hand, we have been told that we must circumscribe the discovery and the proceedings at the certification level. And certainly one does not contemplate a three-month trial on a dueling of the experts. On the other hand, we have to understand or at least feel somewhat comfortable that the findings that we make are somewhat reflective of the reality out there.

For example, here I thought it was particularly persuasive to hear about what the situation was in Canada, because that at least gave the Court a dose of reality. But I think it is very hard, and if I could back up just for a moment, know that our court has just adopted the Rules for Complex Cases, and this was something that some of your colleagues at the bar worked on with a committee of our court. Essentially what it requires is a lot more hands-on work by the judge a lot sooner. And these cases are precisely the kinds of cases that need that. We look to you to help us understand what the heck this is about and how much is enough. That's the question here. How much is enough? And we know we have to do it now, but how much is enough without going overboard. And anything that you can do to help us kind of put a foothold on reality here, there and otherwise, not to denigrate our friends the experts, but to be a little grounded in reality is going to in my view be more persuasive.

MR. CONSTANTINE: Could I respond? One of the things—

JUDGE PRESKA: This is the real cross-examination now.

MR. CONSTANTINE: One of the big issues in these decisions in *IPO* and *Hydrogen Peroxide, Caridad* is to what extent the Court can and has to go into issues which will later on be examined by the trier of fact, whether it is the District Court Judge at summary judgment or—

JUDGE PRESKA: They sure straightened us out on that.

MR. CONSTANTINE: Right, they straightened you out on that. I can point you to a point in Judge Gleeson's decision where he said he was doing that, he was doing that already. But there seemed to have been some confusion, at least in Judge Newman's mind and Judge Sotomayor's mind—she was Judge then—Justice Sotomayor's mind as to whether or not they had been clear enough on that.

JUDGE PRESKA: I think they were blaming it on the Supreme Court saying Supreme Court had to be clear enough.

MR. CONSTANTINE: There are billions of things that came out of this, including billions of dollars that came out of this.

JUDGE PRESKA: Billions.

MR. CONSTANTINE: One of the billions of things that came out was there was some wisdom in *Eisen* about their concern. Their concern was for the defendants. Their concern was that if the District Court Judge in the context of the class certification made a decision which overlapped with the merits decision, that it would prejudice the defendants. Now, I think that actually happens, and I don't know if it's prejudice, but it happened here.

You had certain issues which were presented to Gleeson on the *Daubert* motion, and he made a determination under the *Daubert* standard. Then five seconds later he says okay, I've got to wipe my mind clear and now consider the same issue on Rule 23. Well, it is very hard to lobotomize yourself that way and say, okay, I'm now going to look at it "a tabula rasa." So he made a consistent decision five seconds later on class certification.

Now we get to 38 months later, and he has to make a decision, the same decision on summary judgment. And what do you know, he makes the same decision on summary judgment. And then a month later I'm looking at one of the lawyers who was doing this with me, Stacey Mahoney, and he then has to make the decision again on an in limine motion. Hello, he's going to make the same decision.

So once a Judge, if the Judge has been careful—you're a careful judge, Judge Gleeson is an incredibly careful, studious guy, and he knew this was a very big case and the stakes were big. So notwithstanding the fact that he was making the decision on *Daubert* and then on 23 and then on summary judgment on in limine, he's likely to do it very carefully the first time, and it is going to "prejudice the defendants," because it is not likely to turn around. It is not law of the case formally.

JUDGE PRESKA: I got it. Defense counsel be careful. Mr. Constantine is arguing your position to help you; you should all run.

Let me suggest this. The easier analysis I think is between say certification and summary judgment. Particularly now when we are told we have to circumscribe the discovery that is permitted on the certification motion. It's not much of a mental hoop or there's not much resistance in one's brain I think to saying, oh, we've had a lot more discovery now; here's a bunch of stuff that I didn't know before, because the parties didn't have the benefit of discovery. So I don't see that as particularly difficult. I don't think it requires us to overcome any or much inertia.

On the *Daubert* then going right into the Rule 23 motion, I think one could say for purposes of *Daubert* this report is good enough, it is all right, it passes the test. But then we're now told also that we may look at dueling experts. The other report might be more persuasive. So I don't see that a favorable *Daubert* ruling on a report brings any inertia on the persuasiveness when you get to Rule 23, particularly because we have the report from the other side. I'd let it in maybe, but I might not be persuaded by it.

MR. CONSTANTINE: But you'll have the other report, even on the *Daubert*.

JUDGE PRESKA: Oh, sure, but you're making a different ruling and you have to—thankfully—explain why you're doing it. So I don't see that as a problem.

I understand your point, that they are very close in time, but I don't see it as a problem.

MR. BROWN: So I was going to ask—

JUDGE PRESKA: Oh, you're here?

MR. BROWN: That's fine and you, of course, have covered a lot of the questions that I was going to ask. But I was going to ask all of the attorneys, and particularly Eric and Kellie, I know you're involved in a lot of these cases, have you seen any different trends in how these cases are being litigated on the ground now, particularly in light of the *IPO* and *Hydrogen Peroxide*.

MS. LERNER: I would say that one of the biggest differences is that bifurcation of discovery seems by and large a relic of the past. That's not the way our cases are being litigated now. Also because there is this necessity to delve into the merits, defendants are less likely to push back on discovery earlier on in the case. So in our experience we have been able to get that discovery earlier.

I would say those are the two major differences.

MR. HOCHSTADT: I would agree with Kellie in some of the cases going on. Usually I'm wearing a defense hat, and class cert, on the one hand, can strike a lot of fear, but on the other hand, depending on the case, that may be one of your greatest opportunities from a defense perspective to chip away at a case.

With Rule 23 you can look at any of these recent cases, the *Comcast* case, the recent case in the Seventh Circuit over the hospital merger, those are all 23-f interlocutory appeals. A lot of times those sorts of developments in a case can provide a window to really see if they can even go away. So I think that does present opportunities. So from the defense perspective I have seen that in a number of cases where we are willing to get into the discovery and not sort of bifurcate it between class and merits. Because at the end of the day, with an adverse summary judgment decision, there are no easy ways to sort of get back upstairs, where Rule 23-f has that possibility. So that's one comment.

JUDGE PRESKA: May I ask a question? And so is it the feeling, do people make a decision case by case on the defense side as to whether or not the time and expense of lengthier discovery up front is worth it to have that opportunity on Rule 23? Is it still made case by case, or is it one's general feeling these days that's what you do or what?

MR. HOCHSTADT: I would certainly defer to others, but I would say it is case-by-case depending on sort of where you are, what circuit you're in, the judge you have, the strength of your arguments in terms of your legal defenses, or maybe class cert might be your best way to chip away at a case. I think it is, as you mentioned earlier, Judge, facts and circumstances.

MR. BROWN: I will ask you, Judge Preska, Lloyd mentioned I think 300 depositions more or less—

JUDGE PRESKA: I was appalled. I wrote it down. Oh, my God.

MR. CONSTANTINE: At the time of the class argument 300 depositions had been concluded, and then we did 100 more in the next 45 days.

JUDGE PRESKA: Oh, my God, and you live to tell about it.

MR. CONSTANTINE: And additional evidence did come in in those additional 100 depositions. In my direct sum of the evidence, so for example, the shark came in during those 100 depositions. And since this was a hypothetical, we changed it some. But there had been 300 depositions. There had been a settlement conference already held by Magistrate Judge Mann and all of that, so it came well into the proceedings.

Because it was such a large case, and Wes can speak to this as well, everybody did everything, everybody tried everything. There were 54 expert reports, two full rounds of summary judgment briefings. The record on the class was over 50,000 pages. The record on summary judgment was 250,000 pages. So there was a lot there, and everybody tried everything because the stakes were high.

MR. BROWN: I do have a question actually. In terms of a voluminous record like this, in the *Comcast* case in the Eastern District of Pennsylvania recently, the Court held a four-day hearing. Is that something you would be inclined to do? Would you want to hear from both experts? Would you have a lengthy hearing like this?

JUDGE PRESKA: Again, it is facts and circumstances, it depends on the case, and as always, it depends on your judge. A lot of judges in our district like to get the experts' direct examination by affidavit, in addition to the report. I'm not one of those fans, but many people like to do that. I feel like I learn better if I have the report to read ahead and then hear the direct, because it helps me become more familiar. I've read it once and now I can say, oh, I remember that, I remember that, I remember that. That helps me learn. So that's what I like to do.

I certainly like to see cross, if there is some kind of a factual dispute. Now in some cases it doesn't lend itself to that. Judge Keenan of our court denied class certification in this *Fosamax* case that he had. It was a drug case having to do with the osteoporosis drug Fosamax that allegedly affected one's jaw bone. His finding essentially was that the medical situation of each individual plaintiff was so different and differed in the outcome; they were looking for medical screening. All of those facts and circumstances varied so much and the results varied so much that it was far too individualized. But he only took out affidavits. He did not have a hearing on that.

In the *Lantronix* case that I had, both of the experts did testify, and I was very happy they testified. I can't recall now, but I don't believe it was two days. I think it could have been one day. In a case like this it wouldn't surprise me in the least to get four days worth of expert testimony. But it depends on the case, and the question again is how much is enough.

MR. CONSTANTINE: I would like to add that I think this might be the $64,000 question. So in a case like this, and in the actual case, you have two really eminent economists, you know, someone just like Dr. Stangle, tremendous credentials, etcetera, etcetera. You have two really top-drawer economists, and they put forward two but-for worlds. They do not engage in junk science, okay, they support their but-for world with sound economic theory. They both give you empirical benchmarks; one says Canada, the other one says Mexico. One says Belgium, the other one says Luxembourg. So they give you something which is apples and apples, and they are both plausible. They are both supported by economic theory. They are empirical benchmarks from both, and they have both done economic analysis, and so they are both plausible. Do you at the class certification stage have to say I like Belgium more than Luxembourg. Do you feel the need to do that? Do you have to do that in terms of resolving disputes; is that one of the disputes you have to resolve?

JUDGE PRESKA: Well, it depends on the case it seems to me. It depends on whether a resolution that is necessary for one of the Rule 23 factors. I mean I assume it would be if they are spending all this time on it. But maybe it isn't. But I think if it is, Court of Appeals seems to be telling us we have to resolve it, maybe not for all times, but we have to make a determination. I don't see how we avoid that, and that's where you advocates come in.

Assuming that each expert is as fabulous, as Lloyd says, then you've got to explain it to us. Again, the more you can help us find groundings to reality, the more I think you're going to be able to persuade the judge.

MR. BROWN: Bruce, do you have something?

DR. STANGLE: What I hear you saying, Judge Preska, is this Circuit has come a long way, just like the Third Circuit has. *Hydrogen Peroxide*, you recall that case, the initial court decision was the judge only listened to the plaintiff's expert and ruled on class cert. And then the appeals court said, wait a minute, you have to listen to both sides; you can't only listen to one, you have to listen to both. You're saying the Second Circuit has come to that conclusion as well?

JUDGE PRESKA: I think that's what *IPO* was telling us. I thought it was actually very interesting; Judge Newman seemed to be—whether Lloyd thinks it was clear or not, but I thought he seemed to be sharing their thought processes with us. Here's what happened in the Supreme Court, and this is how we got misled there, and so on. But I thought it was unusual in that, and obviously it was unusual in that these two judges were on *Caridad*, earlier cases. But I thought he was really trying to share their thought processes so we knew how they got there. I'm not sure it has cleared up everything.

MR. CONSTANTINE: Well, and fix up their work product.

JUDGE PRESKA: They are entitled.

MR. CONSTANTINE: Well, of course they are entitled. But one of the problems was that Judge Sotomayor seemed to articulate a standard that the expert report goes forward as long as it is not, quote, "fatally flawed." So she writes that in there.

In *IPO* Judge Newman says it is not clear that the District Court in *Visa Check* had so ruled, and then he goes on to say Judge Gleeson's opinion does not go so far as to find Rule 23 requirements met simply because the plaintiff's expert report was not fatally flawed.

So what they are saying is Gleeson didn't do that. Judge Sotomayor said that he did that. We were wrong, footnote 7. And that's nice. It is nice when an appellate court admits error. Yes, they were letting us into their world.

MR. BROWN: So we are going to open up to the audience, but just one more question for the Judge. We couldn't have a class action seminar this year without at least asking you whether you have seen an impact of *Dukes* on the docket. One article that was brought to our attention recently said that *Dukes* had been cited 260 times, and class certification has been denied or previously certified classes decertified about two-thirds of the time.

So I wanted to know how have you seen *Dukes* impacting the docket, and have you seen it impacting the docket beyond employment cases and particularly antitrust cases?

JUDGE PRESKA: We don't have any across the board numbers or anything that I can actually recite to you. My anecdotal information is that it's just like after *Twombly* came out, everybody decided they had to make the motion.

I am surprised to hear that in two-thirds of them they have been decertified. That does surprise me, but again, I've done no research on it. I think it is flavor of the month, but certainly will have an impact on these huge class actions of any kind.

The employment situation, particularly there, where it seemed that the local managers had so much discretion, that's very different from this case and very different from some of the other cases that you people see. But I'm sure it will be used across-the-board. Why not? It keeps the lawyers in business, right.

MR. BROWN: Does anyone in the audience have any questions for any of the panelists?

MR. STEVE EDWARDS: I'm still a little unclear on the implications of *IPO* in this situation. It's hard to compare *IPO* to an antitrust case where the issue is a but-for world. Because in *IPO* the real issue was efficient market, as the plaintiff demonstrated an efficient market. And that's really a class certification question more than a merits question. In fact, in most cases you deal with that question on class cert, and once you've passed class cert, that question is over.

Is the panel saying that under *IPO* the District Court Judge has to decide whose version of the but-for world is correct, plaintiff's or defendant's, or is it sufficient if the District Court simply concludes that the plaintiff has made a sufficient showing to permit a reasonable jury, the summary judgment standard, really.

MR. CONSTANTINE: So you think the question—

MR. EDWARDS: Well let me finish the question.

JUDGE PRESKA: I knew it was your question.

MR. EDWARDS: Is it sufficient if a plaintiff has made a sufficient showing to permit a reasonable jury to decide the but-for world in the plaintiff's favor?

JUDGE PRESKA: Same answer. If it's a fact that is crucial to the determination of the class certification, I think we have to decide it.

And then you say, then we go to Lloyd's other question, so then let's just say that the District Court says fine, yes, I resolve in favor of plaintiff, case goes forward. Then we have all this other discovery, then maybe it is resolved the other way this time. And the problem, of course, for plaintiff is whether at the class certification stage the court resolves it against the plaintiff; well, then that's the end of that pretty much. And obviously the case can go on, but it is a different case. But the same answer.

MS. HART: How much of an effort was made here to emphasize the individual decision making of the merchants in terms of whether or not they would migrate to the PIN and whether that was going to be driven by consumer desire to actually use the PIN, or whether that's workable in a restaurant situation, or there might be a lot of variety. It seems to me that the economist is almost used here as a proxy that it will all be this rational decision making, not driven by the economics of it, which may well be true, but it won't be driven by some kind of quirky individual decision making on whether or not they are going to migrate based on their beliefs about the consumers' desire to deal with the PIN. I don't know whether the defendant's counsel put on a parade of all these—you had 700,000 merchants?

MR. CONSTANTINE: 5 million.

MS. HART: So don't you have this parade of crazy one-off decision makers, and you kind of try to say it is going to be—you can't put it under the tent?

MR. CONSTANTINE: The defendant's said this is going to be very different; it is going to vary from merchant to merchant; it is going to play very differently at Macy's than it is going to play at Trailer Trash. It is going to be different. McDonald's will put in a PIN pad, but at 21 Club that's just not going to play.

This came up, and Wes will remember this, at the oral argument on summary judgment. The very last thing that Steve Bomse said before he sat down—he was arguing for Visa—was there's no way that people are going to be willing to—that high-end restaurants are going to be willing to put in PIN pads, that it's considered tacky. As I walked to the podium to argue, I said they must be tacky in Canada and in Paris. Because you can go to a three-star restaurant in Montreal or in Paris and you can use your PIN debit card, and Judge Gleeson said, my family only goes to tacky restaurants.

So that's why when I heard Judge Preska say Canada was interesting to me, we offered Canada as a very strong empirical benchmark; there are differences in Canada. Wes pointed out one of the very important differences about the regulatory structure. But it is a country where they sort of look like us; they are more polite, it is a little colder, they play more hockey. But it sort of looks like us. Visa and MasterCard are very, very big up there, indeed dominant in credit. In most ways, shape and form they are very similar, yet there is this big difference. They all use PIN debit. PIN debit is ubiquitous; it is ubiquitous at restaurants and all that. So we were trying to resolve all of these questions about all of these individual decisions and say somehow this has all coalesced in Canada towards an industry-wide and society-wide decision. And the defendant's counter argument is it is very different here. It is colder up there, and it would have worked very, very differently in the United States, and all of these differences and desires for credit and debit and different environments would have produced a different result.

And the question back again to Judge Preska is to what extent does she or does the District Court Judge have to say, oh, those are both plausible worlds, but-for worlds. I've got to decide now, because my decision will affect the predominance decision, because this really goes to predominance. It doesn't hit the 23-a factors; it goes to the B-3 factors. It doesn't even go to superiority. It really goes to predominance.

MR. BROWN: One final comment by Judge Preska.

JUDGE PRESKA: One thing from the District Court's perspective again, I think I'm almost happy that we've been told that we can have the expert on the other side, because it seems to me it does help us decide. Lloyd's question was too hard. He made it absolutely symmetrical, the two experts. That's rarely the case, but at least it seems to me we're getting, District Court is getting, a little more assistance in deciding the question. Now maybe it is going to be horrible, as he suggests, where they are symmetrical, but usually it is not.

MR. CONSTANTINE: In this case, Your Honor, you had two hugely eminent economists who had collaborated and been the only outside consulting economists who Department of Justice and the FTC had invited in together to help write the Guidelines.

JUDGE PRESKA: I hear you. I am just talking about the regular case. I am not rearguing that case.

MR. BROWN: Before any reargument, we are actually out of time. Thank you so much and thank you, the panel, so much.

Antitrust Dinner
Antitrust Law Section William T. Lifland Service Award

MR. HIMES: Welcome, everybody. This is the Antitrust Law Section dinner. If you're not in the right place, stay and enjoy the food.

I'm Jay Himes, and I am the former Chair of this Section. We have turned it over to Bill Rooney, but I would like to thank all of you for coming tonight. I would also like to thank all of you who came to the day program today. I am told by our Dinner Chair that this is a record turnout for us, so we are really happy to greet you all today.

I want to thank Bill, who was our Program Chair today, who put on and organized the five panels that we did and that were so well attended. For those of you who weren't there, we had a full room, and we had a full room until the very end. So it was a very successful program indeed.

A particular thanks by the way to our Committee Chairs. We created three committees last year; they are the Horizontal, the Vertical Restraints Committee and the Class Action Committee, and they have Chairs and Vice Chairs. Those three committees each took ownership of one of our panels. They put on the entire afternoon session, and they were three terrific panels indeed. So we were happy to see that this new process is a success.

I would like to make several other thanks here. Our dinner Co-Chairs, Ilene Gotts over there and Michael Weiner over there. We thank them for putting together this very nice dinner that you are about to begin.

The University Club is a beautiful forum and a very nice location for this dinner. We get outstanding service, and we really want to thank this particular organization for having us here year in and year out.

A couple of other thanks. We have a dedicated State Bar liaison, Tiffany Bardwell, who took over this most recent year, and she has been here for us not only for this event but throughout the year in all of our activities. Our past liaison was Lori Nicoll, and there has been some suggestion that Lori was going to be out of the picture, and I can tell you that's not true at all. Lori has also been there for us, particularly for this event. But whenever we had questions, she has been—I hate to call her a former liaison, because she is almost like a co-liaison, and we thank her.

Our sponsors for this year have been unprecedented, and we really do thank all of you. We have four Platinum sponsors in particular that I will mention. They are Analysis Group, Berkeley Research Group, LexisNexis, NERA Economic Consulting. We want to thank all of you, all of the sponsors, including those who are listed on your program. You have given us record support, and we are very grateful.

Now, we have a Student Writing Award winner, and we have for a couple of years now sponsored a Student Writing Program which carries with it a $5,000 prize for the best student paper. So we would like to recognize Alex Mirkin for his paper: "We Need to Talk: Rethinking the Relationship Between Antitrust Law and Trade Law." Alex wrote that while pursuing his LLM degree at New York University Law School, and he is here tonight, so give him a round of applause, please.

I will introduce the folks up here, and I will start down at that end. We have Ilene Gotts, who really needs no introduction, at the far end of the table. Ilene has been instrumental in the activities of the Section not only this year but for many years, and as I mentioned Co-Chair of this dinner.

We have Lisl Dunlop, who is our Finance Officer and is continuing to bring in record finances, and we thank her for her efforts.

Next to her, Scott Hemphill. Scott is the new Bureau Chief in the New York Attorney General's Office. He has been there a month, and we are looking forward to having him active in our work and pursuing the state enforcement for the State of New York.

Next to him is Deirdre McEvoy. Deirdre is the head of the Field Office of the United States Department of Justice, Antitrust Division, in New York. We are very glad to see her again. She was here last year; she came to one of our Executive Committee meetings, and we are very pleased that she could be with us tonight.

Next to her is Steve Houck, who of course needs no introduction to any of you. Steve, as you all know from your program, will be receiving the William T. Lifland Award for Distinguished Service. We will get to him in a few minutes.

Now if I go to the other end of the table, down at the end is Michael Weiner, our Co-Chair for the Dinner. And Michael, thank you again for all of the work that you have done both tonight and throughout the year.

Eric Stock is our Vice Chair and outgoing Secretary, and he will be responsible for the program next year.

Len Gordon heads the Northeast Regional Office of the Federal Trade Commission. Len has been a strong supporter of this Section throughout the last few years.

We have our dinner speaker, William Kovacic, former Chair of the FTC, now at George Washington Law School, and we are really very happy to have you come deliver the keynote address tonight. We are really looking forward to it.

And Bill Rooney, who is our incoming Chair, and as I mentioned, Program Chair.

Now, I want to mention a distinguished guest that we do have here is District Judge Loretta Preska. Judge Preska very graciously gave her time to participate and moderate the last panel of the day, which was the class action mock trial. We are very happy that she could join us for dinner here tonight.

I think I have one more thing that I wanted to do, and we are all friends here, so I think I can do this. Scott Hemphill, over there, is looking for an economist, and this is in all seriousness. I've heard there were a couple of economists in the room. This is actually a great opportunity. You can be an economist for the leading state antitrust enforcement agency in the country. It is an opportunity to participate in multistate enforcement and work regularly with the agencies in Washington and here in New York. Scott did not put me up to this. It's all by myself. I've heard him, however, make this pitch to two conferences in the past week, and I know he won't be speaking. So I do want to suggest that if you are interested or do know someone who is interested, Scott will be very happy to talk with an economist. Thanks.

MR. ROONEY: Thank you, Jay.

So before I turn to my first designated duty, to which I'm really looking forward, I would like to just acknowledge and point out our Subcommittee Chairs. You probably have heard a lot of rumblings about our new subcommittee structure, which really was the motivating structural motivating force behind our program today. Those were formed this year, and we have three of those subcommittees in different areas of the law. One chair is Robin van der Meulen, who is here; another is Dan Anziska, and our third is Hollis Salzman.

Now, I have also tried to persuade and explain to some of you this evening that signing up for the subcommittees is really very easy, and we are going to make it so easy by having our Chairs at the table that greeted you on the way in. So during the dessert buffet just hand them your card, and we will solicit your participation. We think the dinner is a great success, as is obvious from the attendance, and we know that we can also have this sort of energy and participation in our committee affairs as long as we make it easy and fun for you to participate, and that certainly is our goal.

Now, I'm pleased to proceed to my privilege, and that is to recognize the important contribution of one Jay Himes.

Jay's dedication, indeed his passion for public service and the ideals of the New York State Bar Association, are unsurpassed. His leadership, his generosity of spirit, and his complete commitment to the affairs of the Section, and more generally again to the values of the New York State Bar Association, are impressive in the extreme.

Just a little anecdote. Beginning last January and continuing up until last night my email was populated with communications from Jay Himes at almost all times of the day. I don't know how he does it. But it was a complete commitment to the benefits of our Section, and for that I personally am very grateful. He could not have left the Section in better shape.

I would say the greatest testament to the vitality of Jay Himes' leadership is this dinner. I mean this dinner has more attendees than it has ever had. Ilene and Michael did a wonderful job, but it is also a testament to Jay's leadership. And for that I personally am very grateful, and I know that you are as well. And I would like to take this opportunity to present Jay with a gift and to ask Jay—and I'm very interested in this—to share just one or two of his reflections on his experience over the last year.

MR. HIMES: He didn't tell me I was going to be limited to one or two.

Bill actually is overly generous.

We have had a variety of opportunities this past year, and over and over again individual Section members stepped up, and I could not have asked for more in terms of participation.

Bill mentioned the committees, and I'm not going to go over them again. They are up and running; they are holding meetings, and doing their own programs. They published their first monthly newsletter, and that's an example of the participation and commitment.

Nick Gaglio heads our Membership Committee and also our Diversity Challenge Initiative. These are very, very important activities on our behalf, and it is another example of people who step up. Wes Powell, Jayma Meyer, Meg Gifford, Chul Pak, Robin van der Meulen, all agreed to work on our Diversity Inclusion Initiatives, and those are going forward in the next year. Ben Sirota worked with Nick to do our Summer Program, which we do regularly for associates who are here for the summer, and we are grateful.

In the program area we have Ilene who is unsurpassed when it comes to doing programs. She did our Merger program, which many of you don't know, over the summer we did a merger with our counterparts in the California State Bar, and this was a really interesting idea. We had panel members in Los Angeles and in New York City. We had people from the EC and the federal agencies. We had practitioners, and we streamed the entire event realtime over the Internet. Andy Frackman gave us offices at the O'Melveny firm in Los Angeles and New York. Not only did he do that, but he gave us technical assistance and an administrator, and Mary Marks worked tirelessly to put that program together, and it was a great success.

Bill himself did our fall program on the Role of Market Definition in Antitrust. Again we brought in Joe Farrell from the FTC, we brought in Bobby Willig, two leading economists. Two members of the Section, Doug Richards and Elaine Johnston, stepped up to participate in that program, which played to a full house in the Cornell Club. That was Bill and Robin; that had nothing to do with me.

We did comment on a very important report on Spoliation and Preservation of Evidence; Ethan Litwin did that report.

We had Bar nominations that we submitted for award recipients; Bob Hubbard, Elinor Hoffmann and Barbara Hart all put together impressive packages nominating distinguished individuals for State Bar awards. As many of you know, the State Bar's Committee on Women in the Law selected our nominee, former Section Chair Pamela Jones Harbour, as the recipient of their distinguished Kay Crawford Murray Award, and Pamela's powerful moving acceptance speech earlier this week confirmed the wisdom of that selection to everyone who was privileged to hear her in the room.

We have Bruce Prager and B.J. Costello representing the Section and the Section members generally in the House of Delegates. Probably I've missed a few individuals, but you'll notice I'm not repeating names.

You see why things got done here; it was because individuals in the Section participated and did all sorts of different things, and for that I am grateful. This really is the best group of antitrust lawyers, person for person, that you will find anywhere in this country. It has been my honor to work with all of you. So I would really ask that you give yourselves a round of applause that all of you really deserve. Thank you.

MR. ROONEY: Thank you, Jay.

Now I'll ask Bob Hubbard to approach the podium for the presentation of the William Lifland Award.

MR. HUBBARD: Can I be aggressive and ask for some quiet?

Hi, I'm Bob Hubbard. I have the pleasure and the honor to present to Steve Houck with the William Lifland Award. And I admire Steve so much that I thought I'd be aggressive enough to ask you to be quiet. I appreciate that.

Steve is a past Chair of this Section. He's long-standing in many of the efforts of the Section, served in many roles, including on the Nominations Committee and otherwise.

As Chair I remember watching him always in the background making sure that things worked right. He made an admirable effort to always make sure that things did go right. But I know Steve mostly because of his service in the AG's Office.

I think I first have to set the context for Steve's work. Steve became the Bureau Chief under Dennis Vacco, that's quite a while ago now. And Dennis Vacco had campaigned and included in some of his speeches some of our cases as not being particularly worthwhile pursuing. It wasn't a particularly auspicious event when he got elected. But Steve came and Steve made sure that things got done, and we were fine. When he arrived, there were a lot of things in the pipeline. He provided support, insight and success. There were things like our resale price fixing case against *Reebok*,[1] Rochester department stores[2] and contact lenses.[3] Steve rapidly added a lot of stuff to the pipeline. He added *Microsoft*,[4] which I'll return to. He added the *Western New York Coupon* case,[5] which was a boycott among people that wanted to stop couponing. People were double and tripling coupons. And Wegman's organized a way to stop those coupons. He negotiated settlements with everybody, and very innovative settlements where you actually got a coupon in the papers, and you could turn those in for cash at all the suppliers.

We did Farm Chemicals.[6] We did *Toys 'Я Us*.[7] I still remember *Toys 'Я Us*. We were going along with the FTC and the FTC was doing the laboring oar, and *The New York Times* reports that the FTC was doing an investigation. And you know, once an investigation becomes a public event like that, we expect there to be quickly a class action filed, and there would be difficulties maintaining the priority for the rest of us. With that class action pending, I remember Steve said, well, let's get a complaint on file. I think we did a complaint in a day.[8]

Steve had the kind of leadership in recognizing the practicalities of going forward. We took things on like the Poughkeepsie Hospital case;[9] mergers like Rochester Radio[10] and Rock Salt.[11] And Steve was also the one that, you know, got together a complaint on Tobacco.[12]

He also worked on the merger protocol, which set the standard for cooperation and assistance and coordination between the federal and state enforcers. It was useful to use a statement put on file to make sure the cooperation was throughout. It is something that I wish we could build more on. It was limited to mergers, but it worked very well.

So at the end he had an admirable result. I can remember a conversation with him where he mused that the DOJ had talked about the number of cases that they had, and he sat down and he counted the number that he had. And we had many fewer attorneys. It was interesting to note that we had managed to pull that off.

Steve did very well. He was never noisy, never contentious, not blustery; just quiet success built on preparation, support, courage and dedication.

Since he left the State AG's Office, he's been working at the Center for State Enforcement of Antitrust & Consumer Protection Law; he's been a Director there. He has helped make us better state enforcers, both antitrust enforcers and consumer protection enforcers.

He's helped provide funding for economic consulting, for training programs. He's found the difficulties of dealing with electronic materials; he's helped us through that. He's helped us be more proactive in finding cases, and he's helped the coordination on state enforcers that become AGs at the same time.

He's pushed us to come up with ideas concerning how we operate and making suggestions so we can improve further what we do. He's helped us think through what we do, and some of the best stuff that was written on State antitrust enforcement was authored by Steve: The Antitrust Modernization Commission materials, the Report on State Antitrust Enforcement at the beginning of the Obama Administration. I commend to you.

Steve has had a wide-ranging antitrust and commercial litigation practice at Donovan Leisure, and Reboul MacMurray and now Menaker & Hermann.

Someone could not talk about Steve without mentioning *Microsoft*. I think that Steve lasted all the way from starting the case, all the way through the remedies, and I think he's alone in that. There were many people that helped him along the way, participated with him and worked as hard as he did, but he was throughout the whole thing.

Steve did more than manage, support and push; he led by example. A lot of people give a lot of credit to David Boies for the deposition of Bill Gates. But off-camera a lot of those questions were being posed by Steve Houck. It is admirable that all that stuff got done. He rarely got credit for all that stuff. He pushed without being contentious, that included the DOJ. DOJ was kind of slow coming around to see the claim, and Steve was one of those who pushed it, actively tried it as lead counsel for the 20 states, sat with David Boies at the counsel table. And Steve even went first with opening statement.

The victory at trial[13] was the foundation for a lot of litigation throughout the United States, getting significant compensation for those harmed by those acts. And the skill and dedication continued well beyond when he stopped representing New York, when there was a new Attorney General.

He ultimately became the leader of the California Group. I think it's useful to think about where he started and where he ended. The California Group refused to accept the settlement that was negotiated by DOJ; they broke off from the other states and they sought a more stringent remedy than had been negotiated.[14] Unfortunately, the Court basically gave the California Group only what DOJ and New York had achieved in settlement.[15] But it went on to enforcement. The California leaders left. There were battles going on for a long time. Steve ultimately was hired by the California Group and did a lot of enforcement that made the *Microsoft* action the success that it was. He reviewed complaints, pushing for better compliance, a massive amount of detail for that behavioral decree. He became the unquestioned leader of the California Group, and he wrote clear and concise status reports.[16] Steve was always pushing for what was needed and clearly explaining why it was needed.

Extending that judgment was something that Microsoft agreed to as one part of it, but Microsoft refused to extend interrelated parts of the decree.[17] The California Group and the New York Group moved to extend,[18] and DOJ joined Microsoft in opposing that extension.[19] The Court extended the interrelated parts of that judgment.[20] So I think it is a very good illustration of how Steve goes about things. He started with the California Group, which the court had not given anything more than was already achieved in settlement, but slowly and steadily going with dedication and skill, the judge sided with the California Group at the end.[21] And that's where it's at.

So just stepping back, Steve has worked long on *Microsoft* and he didn't always have the support that he deserved. It started with Dennis Vacco and finished when Eric Schneiderman was the Attorney General. Or to put it in terms of the Presidency, he started from Bill Clinton and continued to Barack Obama, through George W. Bush. It's the kind of dedication and steadfastness that's necessary in many of these cases. And he always did that with skill, clarity and determination to get what's needed done.

Steve has always been quiet about his efforts and his successes. I am glad to have had the opportunity to give you a flavor of those successes.

Steve, with honor and pride, and on behalf of the Section, I present you with the William Lifland Service Award.

MR. HOUCK: Thank you. Thanks very much. I will confess that I was informed about six weeks ago that I was going to get this award. I had considerable trepidation, because I couldn't imagine who I might induce to get up in public and say a few nice words about me. And now I remember that I had the honor of making this presentation to Bob a couple of years ago. I figured that Bob owed me.

So thanks very much, Bob.

It's also a great honor to receive this award named after Bill Lifland, who was a preeminent antitrust practitioner, also an antitrust scholar and a wonderful person and a stalwart of the Section. So it's especially nice.

I'm going to be very brief, but since we have such a large number of young lawyers here, and as Bill said, the Section is making an effort to get young lawyers involved in the activity of the Section, I thought I'd just say a few words about what I have really enjoyed about practicing antitrust law and about the Section.

One of the unique things about antitrust is, like many other areas, it matters a lot to clients what the results will be, but antitrust is something unique because it also really has a significant public interest factor. What all of us are really trying to do is make the markets work right to the benefit of the consumer, as Bob well knows.

Another thing I've always really liked about antitrust is it is intellectually challenging. There are a few basic rules, but each case is unique and you have to think about how you are going to apply them. When you are working on a new case you are learning about a new industry. So it is invigorating in that you are not doing the same thing all the time. It's always invigorating and challenging.

The other thing I like about antitrust is, as you know, the cases tend to be big and it requires teamwork. It's always wonderful to work with a group of people. The end product is much better than any individual can make it, so that's a real pleasure. I've been fortunate to be on some great teams. I am in private practice now at Menaker & Hermann.

Jay neglected to mention that Alex Mirkin, who won the writing award, is at Menaker & Hermann. And of course, I had a wonderful opportunity to work with Bob and other people in the antitrust world.

Scott has been there just a month, but I'm sure he's already figured out he's got a great staff, so that's wonderful.

Then finally, as all of you here in this room know, if you're a lawyer, you have to work long hours, and that can be difficult on your family. I wanted to thank my family. All of them are here, including my wife Toni, who was a law school classmate of mine and the best thing that happened to me in law school. We've been together 40 years, so I appreciate everything she's done for me. And thank you.

Notwithstanding the fact that my daughters have seen how difficult it is sometimes to be a lawyer, my oldest daughter Rebecca is just a couple exams away from getting a J.D. degree. And my younger daughter Abigail is not a lawyer but she does work for lawyers. So I want to thank them.

And again, I want to thank Bob for your very kind remarks. And I thank the Section for giving me this award.

MR. ROONEY: So we will now leave you for a while. Please enjoy each other's company and enjoy the meal, and we'll be back in a little while.

(Dinner served.)

MR. ROONEY: So just to familiarize those who haven't been with us in the immediate past years, we will have our keynote speaker momentarily.

The dessert for this evening's dinner will be in that room, and it will be a dessert buffet, and it is always a splendid buffet. And I'm sure that Ilene and Michael will have it no other way this year. So that's something to look forward to.

Again, as you're having the dessert buffet, keep in mind that we will have our Committee Chairs at the table and would be very happy just to take your name, and then we will sign you up. It will be as easy as that.

So now it is my pleasure to introduce to you our keynote speaker, Bill Kovacic, Professor Kovacic, Chairman Kovacic, Commissioner Kovacic; he has held almost every position at the Federal Trade Commission that you can imagine. In the last ten years he has been Chairman; he has been Commissioner; he has been General Counsel. And outside of the Commission he has been professor and professor again at George Washington School of Law, before that at George Mason.

Bill Kovacic is a policy maker; he is a solid leader, and he is always engaging. It is my pleasure to present to you Professor Bill Kovacic.

PROFESSOR KOVACIC: I am most grateful to Bill Rooney and Antitrust Law Section for the wonderful privilege of participating in the program this evening.

For nine of the last ten years, I left my natural habitat in academia to see theory meet practice at the Federal Trade Commission (FTC). This has been a profoundly informative education for me. In my years as an academic, I had occasional encounters with practice that reminded me how parochial those who inhabit the tower of ivory can be. In the mid-1990s, I attended a conference in California on the aerospace sector. At a reception, I chatted with someone who looked faintly familiar but was not wearing a name tag. He mentioned NASA and the Apollo program. One of my teaching and research interests was government contracts, and, in professorial style, I began to say how much I knew about the U.S. space program. My counterpart sometimes interjected a comment or question, but I carried on with great authority to explain Apollo's origins, evolution, and accomplishments. As this recital came to a close, my counterpart said "You seem to know a lot about Apollo." I assured him I did, and I added that he also appeared to be well-informed. He replied: "I'm Gene Cernan. I was the last man to walk on the moon."

At the FTC I had the opportunity, if not to walk on the moon, at least to journey inside the federal antitrust system. One especially interesting aspect of the experience was to face a variant of the question that one hears routinely in the classroom. When the semester begins, students often ask: "What is the basis for a grade in this course?" At the FTC, the same query came to mind: what is the basis for the grade in *this* course? I will address this question tonight.

Four years ago, Senator Barack Obama answered an invitation from the American Antitrust Institute to state his aims for antitrust policy. The future president issued a statement ("Obama Statement") that said the Bush Administration had compiled "what may be the weakest record of antitrust enforcement of any administration in the last half century." In academia, that sounds like a failing grade. How did the Obama Statement distinguish weakness from strength? The basis for the course grade was the volume of cases initiated: You are whom you sue, with extra credit for big case. As the number and size of the agency's prosecutorial targets increase, so do its perceived accomplishments.

Judged by frequent citations in academic and popular commentary, the Obama Statement could become the words that last. This is most unfortunate. For all its power as a campaign slogan, the Obama assessment of the Bush administration antitrust program is deplorable for two major reasons. First, the Statement unwisely embraced the prosecution of cases as the measure of quality for antitrust agencies. Second, the Statement ignored a topic that demands careful attention in any discussion about the future of U.S. antitrust policy. The future head of state said nothing about the increasingly serious need to strengthen the institutional framework of the U.S. antitrust system and derive better ways to measure the system's performance. I will focus on both of these lapses in turn.

Let's begin with the assumption that the best measure of an antitrust system is its rate of enforcement activity. By this test, we gauge an agency's quality by the frequency of enforcement events. On its own terms, the Obama Statement should have elicited acute skepticism from students of modern antitrust history. Allow me to translate the comment that the Bush antitrust regime "may be the weakest" since the 1950s. For those unfamiliar with the customs of political debate in Washington, D.C., the phrase "may be" often warns that the sweeping empirical claims to follow stand on hunch or intuition rather than reliable data. The necessary starting point for a meaningful assessment of changes in enforcement activity would be a detailed comparison of activity levels across administrations. If the academics who drafted the Obama Statement performed this exercise, the document does not show it.

The Obama Statement's choice of comparison period ("the last half century") also should have raised doubts about its claims. In what sense was the comparison period's outer boundary (1958) a turning point in public antitrust enforcement? A claim that reached back only ten, twenty, or thirty years might have underwhelmed readers. For the author of a political tract, fifty years is an astute choice. A shorter period would facilitate testing and contradiction by those with a first-hand memory of events. The small band of those with a first-hand memory of federal antitrust enforcement in the 1950s shrinks daily. By reaching back to 1958, the Obama Statement's authors appear to have assumed that, before the 2008 campaign ended, no researcher would collect the data needed to evaluate the Statement's comparison to enforcement in so distant a period.

Upon closer review, the Obama Statement's portrayal of 1950s is a fiction. Ted Kovaleff's study of Eisenhower administration antitrust policy documents that, measured by the intensity of enforcement activity, the programs of DOJ and the FTC were robust. Among other measures, the federal agencies in the years before 1958 filed merger cases that shaped the interpretation of the newly enhanced Section 7 of the Clayton Act, which Congress amended in 1950. A partial list of pivotal matters filed before 1958 includes the DOJ challenge to Brown Shoe's purchase of Kinney and the FTC's move to unwind Procter & Gamble's acquisition of Clorox. Would anyone care to argue that the prosecution of such cases reveals "weakness" in merger control?

Applied to other areas of enforcement, an activity-based measure of effectiveness further illuminates the frailties of the Obama Statement's empirical claims. Even the most dedicated political partisans would concede that DOJ criminal enforcement from 2001-2008 was more substantial than the Department's criminal program of the 1950s, 1960s, or 1970s. Individuals rarely served time in prison before 1974, when Congress converted the Sherman Act's criminal offense from a misdemeanor to a felony. The expansion of the DOJ criminal program after 1974 was a slow, deliberate process, as the Justice Department worked carefully to gain judicial and popular acceptance for a norm that treated supplier collusion as a serious transgression that warranted the imprisonment of individuals. Not until the adoption of the Sentencing Guidelines in the 1980s did a criminal conviction or guilty plea in a horizontal price fixing case mean that the individual defendants routinely would serve a significant prison sentence. The criminal program that Gary Spratling, Jim Griffin, and Scott Hammond made famous—and imprinted on the minds of business executives around the world—was considerably less powerful before the 1990s.

I need not struggle too hard to gain your agreement that, by the activity criterion of the Obama 2008 statement on antitrust policy, the DOJ criminal enforcement program from 2001-2008 was more potent than the Justice Department program of the 1950s through the 1980s. Let's turn to an area in which the Obama Statement's empirical claims are true—where federal enforcement during the George W. Bush administration, measured by numbers of cases, fell below levels that prevailed from 1958 through 2000. On its own terms, the Obama statement correctly described federal enforcement trends for the Robinson-Patman Act. An examination of federal Robinson-Patman

Act case filings since the late 1950s ought to make the antitrust community uneasy about associating higher levels of activity with superior government agency performance. In the 1960s alone, the FTC initiated literally hundreds of RP matters. The exact count depends on whether certain closely related cases are treated as a single enforcement event or counted individually. By any tabulation methodology, the FTC's RP program thrived from the enactment of the Robinson-Patman Act through the 1960s.

The magnitude of the FTC's Robinson-Patman Act enforcement program elicited strong criticism, including a rebuke in 1969 from the American Bar Association 's Commission to Study the Federal Trade Commission. Enforcement began to fall in the 1970s, and it plunged from the 1980s onward. Without the benefit from instruction from Congress, DOJ declared in the 1970s that it no longer would enforce the Robinson-Patman Act and would leave all prosecutions to the FTC. Since 1989, the Commission has filed two Robinson-Patman cases, and none since 2000. Measured by case counts, the federal government's modern enforcement of the Robinson-Patman Act is the "weakest" since 1936. If we introduce a quality variable and make our standard conformity with modern views about the value of Robinson-Patman Act enforcement, the public enforcement program since 2000 constitutes better policy than what preceded it. Would it be sensible antitrust policy for the federal agencies to redeploy their resources to achieve the output of cases attained from the late 1930s through the 1960s?

I summarize the federal Robinson-Patman Act enforcement experience to underscore my second principal objection to the 2008 Obama antitrust statement. Not only was it unsupportable on its own terms, its own terms are unsupportable. The antitrust community should resist the widely accepted notion that the proper measure of an antitrust system is its volume of prosecution events. I could spend the balance of the evening with side-by-side comparison of what the federal agencies have done over time with respect to merger control and civil, non-merger enforcement. This form of inquiry serves some useful purposes, but it overlooks a serious problem in antitrust discourse. There is an epidemic failure in our field to devise performance measures that measure what ought to interest us the most: the contribution of antitrust policy to improvements in economic performance. Because we find this admittedly difficult exercise too daunting to perform, we default repeatedly to the proxy that equates activity with accomplishment.

The Obama Statement encourages acceptance of the wrongheaded assumption that the proper measure of an antitrust agency, and the certifying outward sign of its legitimacy, is the number of cases it has brought, and it reinforces the destructive tendency to dispense with efforts to assess the economic consequences of policy-making. For its own political interests, the Obama campaign ought to have been wary of elevating an activity based performance measure. If activity is all that counts, and activity levels do not increase dramatically, there is the possibility of being judged harshly by the same test. To show how such standards can behave like boomerangs, I will walk through some enforcement data for DOJ and the FTC from the time President Obama's appointees became heads of the agencies.

Let's accept the dubious assumption that the Bush administration antitrust program, measured by activity levels, had the weakest law enforcement program since the late 1950s. How much better have the agencies performed during the Obama administration? I have given you a glimpse of what the entry on the report card will be for the Robinson Patman Act. The Obama administration has brought exactly the same number of Robinson-Patman Act cases as its immediate predecessor: none. How many resale price maintenance cases have the federal agencies initiated during the Obama presidency? That amount also is zero, which is the same total produced from 2001-2008. The same result—no cases—emerges for both administrations with respect to the initiation of cases involving tying arrangements or the vertical allocation of sales territories. If the Bush administration for these areas deserves a grade of F, entry for the Obama antitrust agencies must be the same.

Turn next to the more visible and fiercely debated policy domain: enforcement of prohibitions regarding dominant firm conduct. The enforcement rate at the FTC from 2001 through 2008 era matches the agency's rate of activity during the chairmanship of Jon Leibowitz: somewhat less than one case every twelve months. President Bush's appointees to head the Antitrust Division initiated no monopolization or attempted monopolization cases based mainly on Section 2 of the Sherman Act. In the Obama era, DOJ has initiated one Section 2 matter (United Regional Health Care)—a settlement involving improper exclusion by a hospital located in Wichita Falls, Texas. I will not belittle seemingly small cases, for such cases can make big law. One need only recall *Otter Tail* (Supreme Court 1973), which laid an important foundation for the AT&T monopolization case, *Indiana Federation of Dentists* (Supreme Court 1986), which fostered important adjustments in doctrine and analysis, and *Lorain Journal* (Supreme Court 1951), which foreshadowed the concept of raising rivals' costs, to appreciate how cases involving lesser economic stakes can move the entire antitrust system.

The settlement in *United Regional Health Care* constitutes one case more than the zero number of cases that DOJ brought from 2001-2008. In mathematics, one case is infinitely greater than zero, yet the total of one case does not quite meet the expectations created by the statements issued by top DOJ leadership in the early months of the Obama presidency. Perhaps more Section 2 cases will be forthcoming. If DOJ in the Bush administration earned a grade of F based on the prosecution of no Section 2 cases, what grade should we assign to the Obama DOJ with an output of one matter to date? It is difficult to see a basis for assigning materially different grades in this dimension of enforcement to the Bush FTC and Obama FTC, respectively, given that they have issued cases involving dominant firm misconduct at the same rate.

I have tallied the enforcement numbers for other areas of non-merger civil enforcement at DOJ and the FTC, and they tell a similar story. Notwithstanding judgment calls that arise in classifying individual matters, the FTC prosecution rates for non-merger cases is essentially the same in the Bush and Obama eras. The DOJ's pace of prosecutorial activity during the leadership of Christine Varney and Sharis Posen slightly exceeds the rate achieved during the leadership of Thomas Barnett / Deborah Garza and Charles James / Hew Pate, respectively. If this were a crew race, the shells of these enforcement eras would be almost even. The Obama shell would have a narrow lead, but would not have separated itself by the blue water that Obama campaign and DOJ leadership had predicted would appear.

What about the case of merger enforcement? I have counted enforcement events that involve attempts to bar proposed transactions or to unwind completed deals. To my mind, these enforcement agency activities most directly set the boundaries that counselors consider when they advise firms about possible transactions. I intensely dislike these numerical activity comparisons, because I so distrust them as an appropriate measure of the economic worth of what agencies do. Yet, because activity is the performance measure in the Obama 2008 Statement, I have focused upon three categories of activity: preliminary injunctions authorized or filed; preliminary injunctions threatened, with the consequence that the parties abandoned their deal; and consummated mergers challenged.

Measured by these forms of activity, DOJ's program in the last 36 months closely resembles the work of the Antitrust Division in any comparable period of time during the Bush administration. During the Charles James / Hew Pate era, for example, the Division's rate of enforcement in these three forms of activity matches the rate attained under the leadership of Christine Varney and Sharis Pozen. In the fifteen months that Charles James was Assistant Attorney General for Antitrust, DOJ brought seven cases seeking preliminary injunctions to stop mergers. These included matters such as Echostar and the attempt of General Dynamics and Northrop Grumman to merge their submarine production operations. Charles James had been with the Division barely a month and a half before he threatened to stop United Airlines from buying U.S. Airways in July 2001.

If the number of prosecution events is all that matters, the James / Pate era merger program compares favorably to the Varney / Pozen era. If the numbers provide the only basis for formulating the course grade, and if the Bush Administration program grade for merger enforcement is an F, it is not clear that the Obama administration deserves any better. It should be apparent that the Obama 2008 Statement Leadership created a trap for its appointees by accepting numerical determinism as the measure of performance. To study the enforcement numbers is to see that it is difficult to assign the Obama administration merger program a significantly better grade than the failing grade meted out to the Bush administration. But perhaps there is another message in the data—namely, that the Bush program was considerably stronger than the Obama Statement suggested. Put another way, if we are to assign a relatively high grade to the Obama antitrust agencies for their work since early 2009, the grades of the Bush agencies should be revised upwards, as well.

Notice what we leave out when we focus entirely on prosecution rates. We cast aside all sorts of important non-litigation initiatives by which agencies can improve the quality of public policy. A cases-only standard casts aside the DOJ / 2010 Horizontal Merger Guidelines, the FTC's recent study on remedies in patent cases (which continues the FTC's longstanding effort contributions to policy analysis involving intellectual property), and the Department of Agriculture / DOJ hearings on competition in the agricultural sector. In a calculus in which enforcement activity levels are all that matters, all of these non-litigation matters vanish from sight. These are but a sampling of the policy instruments that are crucial to formulating sound competition policy. They constitute the thinking person's portfolio of policy tools, and they are sacrificed by a performance standard that focuses exclusively on the prosecution of cases.

By its case-centric measure of performance, the Obama 2008 Statement stepped past vital issues of institutional infrastructure that would have been valuable focal points for discussion about the future of the U.S. antitrust system. The U.S. enforcement infrastructure resembles a house that was first built in 1890 and has undergone many changes in ownership. The original structure was a Victorian mansion with turrets. A subsequent owner admired Frank Lloyd Wright and Fallingwater and added a new wing with sleek lines and lots of glass. Still another was fond of summers on the East Coast and tacked on an extension in a Cape Cod style. Outsiders who stand back and examine our institutions note this combination of architectural forms is odd and, perhaps, not optimal in light of modern needs. The U.S. antitrust community typically responds with a mix of contentment and resignation: it is old, it is quaint, it is ours, and nothing can be done about it.

Consider one dimension of the U.S. system: concurrent enforcement by DOJ and the FTC. These institutions are both complements and substitutes. They are supposed to be partners, and they unmistakably are rivals. Is this framework immutable? It is difficult to imagine the kind of the external shock that would be needed to force a basic adjustment. Congress derives so many political benefits from duality that it would take a massive force to induce a restructuring that consolidated the antitrust functions of DOJ and the FTC in one agency. The prospect of a fundamental restructuring may be remote, but it is not so improbably to justify the complacency that besets the antitrust agencies and the larger community on this point. In his State of the Union speeches in 2011 and 2012, President Obama mentioned his interest in rationalizing the framework of federal institutions. Can the antitrust agencies be entirely confident that the move for rationalization will never come to their neighborhood?

Even without a basic restructuring, there are considerable gains for policy-making for the two federal agencies to integrate their work more completely by agreement—to unify operations more completely not by ownership, but by contract. There is a tendency for the U.S. antitrust community to think that if the federal agencies are not fighting each other in the streets that link their two buildings, the dual federal system must be working well. This is a decidedly modest expectation for the level of interagency cooperation DOJ and the FTC ought to pursue.

One of my greatest disappointments over the past decade is the limited progress toward deeper policy integration between DOJ and the FTC and among all public agencies, federal and state, with a competition policy mandate. In the European Union, the European Competition Network enables the European Commission and the national competition authorities of the EU member states to achieve greater policy-making coherence. In the United States, no such mechanism exists. There is no single event in each year at which the public agencies with competition policy responsibilities meet to discuss common interests and take even tentative steps toward the formulation of a collaborative strategy. The urgency on the part of public agencies to produce more with fewer resources grows ever stronger. This should provide antitrust officials at the national and state level with stronger motivation to cooperate more fully and not simply out of occasional necessity. Amid increasing fiscal austerity, a valuable path for improved performance is for the public agencies to achieve deeper integration and cooperation. A domestic equivalent of the European Competition Network would be a useful step in this direction.

An even more modest, yet important, aim would be to improve policy-making integration between DOJ and the FTC. The clearance mechanism provides an example. As it operates today, the clearance process frustrates effective integration in several ways. One of the most important is the obstacle it creates for the development of in-depth expertise that is crucial to increase proficiency in analyzing commercial phenomena a number of sectors. My views on this are influenced by past life as an academic and in private practice involving the aerospace sector. In discussions with aerospace engineers I learned that success in designing and building new aircraft depends on exploiting learning curves within and across programs. What an aircraft producer learned in earlier programs informed its judgment about what to do to make the next program a success. Greater effectiveness in pooling and joining up experience was an important factor that separated superior firms from the rest of the pack.

The DOJ / FTC clearance process defeats this aim. Consider the custody arrangement that the federal agencies have formulated to decide which body reviews matters involving Google. The custom the two agencies have established dedicates non-merger matters involving Google to the FTC and mergers to DOJ. Google's business is an extraordinarily complex and difficult subject for analysis. It is not merely a two-sided market. It has many sides, with significant developments unfolding almost every week. In the face of extraordinary change in technology and services, it is highly desirable for the same team of analysts to handle all matters in the sector. It is foolish to subdivide production between the two agencies, yet that is precisely what happens today. It is very unfortunate that the attempts of DOJ and the FTC to reform the clearance system in 2002 did not succeed. Future, needed changes will require a three-way negotiation with the Congress, whose committees gain considerable electoral benefits from the existing distribution of antitrust authority and regard changes in the allocation of duties between DOJ and the FTC with apprehension.

Even without a reform of the clearance process, the agencies could improve their treatment of matters that straddle areas of interest. You could solve the Google allocation problem by forming a common DOJ / FTC Google team. Some matters go up for decision at the DOJ, and some would go to the Commission. The same team of case handlers would prepare the files. One team would accumulate all of the relevant experience and, one expects, become more proficient because of it.

Other steps would improve the routine disposition of mergers. The federal agencies have no routine process by which case handlers or senior managers meet regularly to share what they are learning week by week in the application of the 2010 merger guidelines. If there were two commonly owned hospitals located in the same metropolitan area with cardiology units, the two cardiology teams would consult each other regularly to discuss experience with diagnosis, operative room techniques, and post-surgical care. Many advances in health care have taken place by linking pools of information and sharing experience. So it should be with the public antitrust agencies, as well.

More generally, DOJ and the FTC could engage in a routine process of formulating a common strategy every year. They could adopt the practice of sharing of proposed texts of speeches. They could devise a common plan for international operations (what are our major themes?) and decide how best to achieve their aims—for example, to identify the ten events at which we expect to make major speeches in the coming year. Similar mechanisms could be used to improve policy coordination and integration with the states.

If the U.S. public agencies remain content with the loose amalgamation of effort that takes place now, there is the strong possibility that given the budget imperatives to reduce expenditures, they will become progressively less successful in carrying out their responsibilities. The stakes here do not involve domestic policy alone. The EU / US duopoly of influence that now sets international antitrust norms quickly is giving way to an oligopoly that will include China and India. These jurisdictions will attain the same ability as the EU and the United States set global standards in their decisions about mergers and other forms of conduct. In this environment of increasingly decentralized authority, the source of influence for the U.S. antitrust agencies will be persuasion. The demonstrated capacity to develop intellectually compelling analytical techniques (as distilled, for example, in enforcement guidelines) and superior methods for implementation will be the source of the greatest international influence. If the United States is to excel in these endeavors, there must be a fuller joining-up of effort across the public antitrust agencies than exists now. The rest of the world is exerting more strenuous effort to attain the best possible institutional framework. Within the last six years, France has gone from two agencies to one. Portugal has gone from two to one. Spain has gone from two to one. Brazil has gone from three to one. And the United Kingdom is pursuing an amalgamation of its two public competition agencies, the Competition Commission and Office of Fair Trading, into a new Competition and Markets Authority.

Through its inattention to institutional considerations, the United States is missing a great game. The jurisdiction that achieves superior regulatory results at a lower cost or realizes better results at the same cost, will lead the field. There is a tendency, given the age of our system and the experience it has accumulated, to think we have figured most things out. I recall the title of the autobiography of Earl Weaver, the renowned manager of the Baltimore Orioles baseball team: *It's What You Learn After You Know It All That Really Counts*. It is time for the U.S. antitrust community to think harder about we can improve the institutional framework that implements the laws.

The next time an antitrust agency official tells an audience of the New York State Bar Association, "We have been very busy," the audience should shout back, "Have you been very effective? How do your programs improve economic performance? How do you measure the impact of your work? What investments are you making to strengthen the institutional infrastructure that supports policy making at home and abroad?" The U.S. competition system needs better answers to these questions than it has today. That is the basis for the grade in this course.

MR. ROONEY: Thank you very much, Bill, for that provocative speech and those terrific thoughts.

Thank you, Ilene. Thank you, Michael. Thank you, Jay. And thank you all for attending. We hope you had a nice evening.

The dessert buffet is now open. This will conclude our dinner program and begin our new year.

(Whereupon, the Annual Meeting of the Antitrust Law Section concluded.)

Endnotes

1. *New York v. Reebok Int'l Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995).
2. *New York. v. May Dept. Stores Co.*, No. 9406479L (W.D.N.Y. Mar. 6, 1995).
3. *In re Disposable Contact Lens Antitrust Litig.*, No. MDL 1030 (complaints filed M.D. Fla. 1994).
4. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).
5. *In re W. N.Y. Coupon Litig.*, No. 97 CV-0707 A(M) (W.D.N.Y. Mar. 18, 1998).
6. *Missouri v. Am. Cyanamid Co.*, No. 97 4024-CV-C-SOW, 1997 WL 129408 (W.D. Mo. Feb. 7, 1997); *Texas v. Zeneca, Inc.*, No. 3-97-CV-1526-D (N.D. Tex. Jun. 26, 1997).
7. *In re Toys "R" Us Antitrust Litig.*, No. CV-97-5750 (NG) (JLC) (E.D.N.Y. May 14, 1999).
8. Compl., *New York v. Toys "R" Us*, No.CV-97-5714 (E.D.N.Y. Oct. 2, 1997).
9. *New York v. Saint Francis Hosp.*, No. 98-CV-0939 (WCC) (S.D.N.Y. 1999).
10. *United States v. Am. Radio Sys. Corp.*, No. 1:96-CV-02459 (D.D.C. Oct. 24, 1996).
11. *United States v. Cargill, Inc.*, No. 6:97-CV-06161 (W.D.N.Y. July 22, 1997).
12. Am. Compl., *New York v. Philip Morris Inc.*, No. 200361 / 97 (N.Y. Sup. Ct. Oct. 14, 1997).
13. *United States v. Microsoft*, 87 F. Supp. 2d at 56.
14. *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002).
15. *Id.*
16. *See, e.g.*, Joint Status Report on Coordinating Enforcement of the Final Judgments, *New York v. Microsoft Corp.* (D.D.C. Apr. 17, 2003) (No. 98-1233 (CKK)), 2003 WL 25681371; Joint Status Report on Microsoft's Compliance with the Final Judgments, *New York. v. Microsoft Corp.*, (D.D.C. Feb. 29, 2008) (No. 98-1233 (CKK)), 2008 WL 2156701; Joint Status Report on Microsoft's Compliance with the Final Judgments, *New York v. Microsoft Corp.* (D.D.C. Jun. 16, 2010) (No. 98-1233 (CKK)), 2010 WL 3481129.
17. Memorandum of Points and Authorities of Microsoft Corporation in Opposition to Certain Plaintiff States' Motions to Extend the Final Judgments, *New York v. Microsoft Corp.*, (D.D.C. Nov. 6, 2007) (No. 98-1233 (CKK)).
18. Plaintiff States' Motion to Extend the Final Judgment Through November 12, 2012, *New York v. Microsoft Corp.* (D.D.C. Oct. 16, 2007) (No. 98-1233 (CKK)).
19. Brief of the United States as Amicus Curiae in Opposition to the Motions to Extend the States' Final Judgments, *New York v. Microsoft Corp.* (D.D.C. Nov. 9, 2007) (No. 98-1233 (CKK)).
20. *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141 (D.D.C. 2008).
21. *Id.*

Scenes from the
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Editors
Robert L. Hubbard
Arlene Leventhal
Attorney General's Office
120 Broadway, Suite 26C
New York, NY 10271

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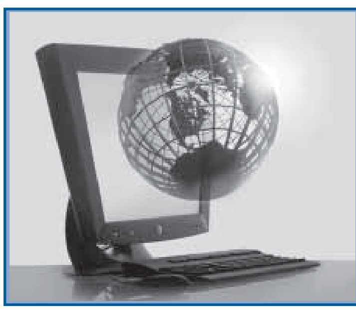
SECTION OFFICERS

Chair
William H. Rooney
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019
wrooney@willkie.com

Vice-Chair
Eric J. Stock
Hogan Lovells
875 Third Avenue
New York, NY 10022
eric.stock@hoganlovells.com

Secretary
Barbara J. Hart
Lowey Dannenberg Cohen & Hart, PC
White Plains Plaza
One North Broadway
White Plains, NY 10601
bhart@lowey.com

Financial Officer
Lisl Joanne Dunlop
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022-6069
ldunlop@shearman.com



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