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TABLE OF CONTENTS

Antitrust Developments in 2013: The Year in Review 5

Moderator
ELAI E. KATZ
Cahill Gordon & Reindel LLP, New York City

Panelists

ARTHUR J. BURKE
Davis Polk & Wardwell LLP
New York City

PROF. C. SCOTT HEMPHILL
Columbia Law School
New York City

Social Media and Competition Policy 16

Moderator
WENDY HUANG WASZMER
King & Spalding
New York City

Panelists

JAMILLIA FERRIS
Junton & Williams, LLP
New York City

DAN O'CONNOR
Senior Director
Public Policy & Government Affairs
Computer & Communications Industry Association (CCIA)

WILLIAM EFRON
Federal Trade Commission
New York City

JARED GRUSD
General Counsel
SpotifyUSA Inc.

Antitrust Trials: Lessons on Why We Win or Lose 28

Moderator
STACEY ANNE MAHONEY
Bingham McCutchen LLP
New York City

Panelists

DANIEL COOPER
President
Litstrat Inc.
New York City

DANIEL S. MASON
Zelle Hofman Voelbel & Mason, LLP
San Francisco, CA

ELIZABETH B. PREWITT
Assistant Chief
New York Field Office
US DOJ

ROMAN M. SILBERFELD
Robins, Kaplan, Miller & Ciresi LLP
Los Angeles, CA

Antitrust Class Actions—Where Are We: A 360 Degree Perspective **37**

Moderator
HOLLIS SALZMAN
Robins, Kaplan, Miller & Ciresi, L.L.P.
New York City

Panelists

HONORABLE BRIAN M. COGAN
Judge
Eastern District of New York
New York City

STEVE WILLIAMS
Cotchett Pitre and McCarthy, LLP
Burlingame, CA

RUSSELL LAMB
Senior Vice President
Nathan Associates Inc.
Arlington, VA

TERRI MAZUR
Kaye Scholer LLP
New York City

MARTHA S. SAMUELSON
President and CEO
Analysis Group, Inc.
Boston, MA

The 2014 NYSBA Antitrust Law Section Dinner **48**

ANTITRUST LAW SECTION
WILLIAM T. LIFLAND SERVICE AWARD **49**
Presented to
JAY L. HIMES
Labaton Sucharow LLP
New York City

ANTITRUST LAW SECTION
PUBLIC SERVICE AWARD **51**
Presented to
ELEANOR FOX
NYU School of Law
New York City

Keynote Dinner Speaker **53**
HONORABLE WILLIAM J. BAER
Assistant Attorney General for the Antitrust Division
U.S. Department of Justice

Scenes from the 2014 NYSBA Antitrust Law Section Dinner **64**

Antitrust Developments in 2013: The Year in Review

MR. STOCK: Good morning, everybody. Thank you all for coming. My name is Eric Stock; I am the Chair of the Antitrust Section of the New York State Bar Association. I have had the privilege of serving in that role since last January and if all goes as expected, I will be ceding that role to Barbara Hart, the program Chair, today at about noon today.

As one of my final acts as Chair it is my privilege to open our 2014 Annual Meeting and introduce Barbara, who will give us a rundown on all the great programs that we have lined up today.

I want to thank Barbara for putting together a really fabulous program. As you can tell from the materials, we are going to have panels and discussions today that cover some of the most interesting and timely antitrust topics that are around and I want to thank you all for coming here.

I want to thank our speakers both on this panel and our upcoming panels for coming and traveling here and especially everyone who made it here at the early hour for the first Antitrust Law Section program, which I know is going to be really good; so with that said, I want to pass it on to Barbara to introduce the program. Thank you.

MS. HART: Good morning. Welcome to Alaska; the good news is we can see Russia from here.

Anyway, thank you, Eric. Eric has been an amazing leader for the Section this past year and has helped me in so many ways to understand the important role that he's played and helped it go so smoothly. So, to suggest that I am program Chair and I should somehow take credit for the fabulous panelists would be to understate the fact that each one of these panels has really been self-directed and by a group of fabulous practitioners who were all just so on it. And I just essentially kicked them off a little bit and they ran with it, and then to acknowledge Eric's incredible role in giving me guidance along the way on how to get this done.

We are going to start this morning with Elai and Art and Scott and this is a wonderful tradition that I harken back to my early days being at these meetings where Bill Lifland would stand up and recap the days, the year's antitrust important decisions and Bill Lifland is, of course, one of the people that many of us with some decades into this area of practice look back on fondly as a gentle leadership, a role model, and substantive guy who just was a gentlemen in all respects and it's so nice to see Elai stepping into this role to give us the recap.

We will then move on to a really important issue of the day, social media and competitive policy, and Wendy has put together a tremendous group of panelists and I think this is one of those vortexes where the privacy issues, competition issues, and cutting edge technology are causing a lot of developing issues that our panelists, both in-house and outside counsel, are going to address.

Stacey Mahoney is going to head up a trial program that I think we really strove to push towards the nuts and bolts of why you win and lose, what are good jury instructions. Again, we have seasoned trial attorneys on that panel and Stacey is just wonderful. I am sure that is going to be great and high energy.

Mary Marks is going to lead a panel in regard to mergers and how to navigate the regulatory landscape, which is always multidimensional, and then Hollis Salzman is going to discuss antitrust class actions and class certification issues and has a bunch of very opinionated, wonderful panelists that I am sure will put on a lively discussion through that panel.

So it's just been seamless, it's been wonderful working with everybody. Having a group of high caliber people around you is really the way to go because everybody has just run with the ball and without anything further, thank you Elai, I look forward to your remarks.

MR. KATZ: Thank you very much, Barbara, and I really do look forward to the entire program today. Thank you to everyone for showing up early on this cold morning.

Today as Barbara said, we are going to be talking about developments in the past year but before we get into that let me introduce our distinguished panelists.

First on my far left and your far right is Art Burke, who is a partner at Davis Polk both in the New York office and in the Menlo Park, Northern California office. He has a broad antitrust practice: He does mergers, he does class action litigations, investigations; he has represented a wide variety of clients including Comcast and others that you are well familiar with in high tech, software, finances, and other industries.

I should say he was recently named an MVP, the competition MVP of the year by *Law 360*. Congratulations on that! And he clerked for Judge Douglas Ginsberg of the D.C. Circuit who, as you know, is one of our leading antitrust jurists of our day.

Next to my immediate left is Professor Scott Hemphill, who is a professor of antitrust law and intel-

lectual property law at Columbia Law School. He was the chief of the Antitrust Bureau of the New York Attorney General's Office. We have several people I see here in this room who have been in that very important role (and are in that very important role, I should say). He's written extensively about the balance between innovation and competition and more recently he's written on parallel exclusion.

Scott is both a lawyer and an economist: He got his JD at Harvard and Ph.D. at Stanford. He clerked for Judge Posner in the Seventh Circuit and also for Justice Scalia.

So without further ado, let's start with the program. I want to say that we, as Barbara noted, before we used to do this years ago where Bill Lifland, he was one of my mentors, really tried to go through everything that really mattered. We are not going to try to do that. Times have changed, there is a lot of information that all of you can get about antitrust news. What we are going to try to do instead is pick our favorite highlights of the year and we are going to go through those and chat about them in a little bit.

First, let's start with a Supreme Court; as always we have several important antitrust cases decided by the Supreme Court this year. The first one we are going to discuss is *FTC v. Actavis*. The Supreme Court addressed a practice that has divided the courts and generated a considerable debate in the antitrust community for quite a while, about a decade, in the sense the practice we are talking about is an arcane kind of arrangement and it really only happens in a corner of the world, a very important corner of the world but you know, pharmaceutical companies face generic competition and end up settling patent disputes. There is a lot of money here but it really only arises in that corner, at least in the arrangement that was at issue in this case.

In the challenged settlement, the alleged infringer, who was the generic drug maker, receives payments from the brand name drug company who is the patentee and delays entering the market. It has the catch phrases that are used for these kinds of arrangements either "reverse payment" or "pay for delay" and often that tells you what side of the fence people are on.

So the court ruled that reverse payments or pay for delay settlements of pharmaceutical patent disputes can violate the antitrust laws notwithstanding the existence of a patent.

What the court didn't do is they didn't do what the FTC urged them to do and rule - reverse these payments -presumptively unlawful; instead, the court said they should be analyzed under the rule of reason.

What the Court rejected was the approach that a number of circuits had adopted, which said that these kinds of settlements are lawful as long as the restrictions are within the scope of the patent.

So, a little bit about the facts before I pass it along for a more thoughtful discussion. In 2003 Solvay Pharmaceuticals got a patent for a brand name testosterone drug called AndroGel. Later in the same year, Actavis and two other generic drug companies sought approval from the FDA to market generic versions of the drug AndroGel. And in doing so under the statute they certified that the patent was invalid and their drug had been infringed on. Solvay then initiated the patent infringement suit against the generics. This is what almost always happens and then in 2006 all the parties settled. This used to almost always happen.

Under the terms of the settlement Actavis and the other generic manufacturers agreed to delay marketing the drugs for around nine years but that's prior to the expiration of Solvay's patent that was being challenged, and Solvay agreed to pay each of these generic manufacturers millions of dollars.

The FTC brought a suit. It was dismissed by the lower court, the Eleventh Circuit, then affirmed and they stated, as I mentioned before, that a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.

The Eleventh Circuit emphasized that public policy favors settlements and also that the patent holders have a lawful right to exclude others from the market.

This case went up to the Supreme Court and in a five-to-three opinion, Justice Breyer writing the decision, the Supreme Court reversed. It held the reverse payments can sometimes violate the antitrust laws and should be evaluated under the rule of reason.

Scott, you've written a lot about this and you've spoken about this, including the decision itself and the one prior to this; were you satisfied with this decision?

DR. HEMPHILL: Broadly speaking, yes. I think this is a big victory for the Federal Trade Commission and a victory for consumers.

Let me talk a little bit about why this is an important decision outside the pharmaceutical industry. It's important, first, for what it says about antitrust's intersection with intellectual property.

Second, for a different intersection between antitrust and traditional forms of regulation. And third for what it tells us about the rule of reason.

First, with respect to patent. These pay-for-delay cases in the lower courts had acquired an odor of patent triumphalism. Some lower courts, as Elai notes, had adopted a "scope of the patent" test. In retrospect, it's clear that these courts had gone pretty far out on a limb. Even the economists who supported defendants' perspective in these cases were unwilling to embrace the test that had been successful in the lower courts—that no matter how

weak the patent, no matter how long the delay in competition, no matter how large the payment, everything was fine from an antitrust standpoint, so long as the entry date wasn't even later than patent expiration.

The Court's rejection of this test fits within a larger narrative that we've seen from the Supreme Court about patent cases. The Federal Circuit today has taken the role once associated with the Ninth Circuit, as an appeals court targeted by the Supreme Court for frequent reversal. And a theme running through a lot of these cases is that the lower court has gone too far in the powers granted to a patent holder. We are now seeing from the Supreme Court a cutting back on that kind of patent triumphalism. I see *Actavis* is another move in that direction.

Second, the intersection with traditional regulation. This month is the tenth anniversary of *Verizon v. Trinko*, one of our leading cases at the intersection of antitrust and regulated industries. It's quite frequently cited outside its telecommunications context for the proposition that in regulated industries, antitrust ought to take a back seat. I think *Actavis* shows why that view of the intersection is inaccurate or at least incomplete.

The incompleteness is clear from *Trinko* itself, which says that "antitrust analysis must sensitively recognize and reflect the distinctive economic legal setting of the regulated industry to which it applies." That quotation is from *Town of Concord*, a first Circuit opinion by then Judge Breyer, who joined the majority in *Trinko* and who wrote the opinion in *Actavis*.

Now, that's pretty open-ended as perhaps you would expect from the quotation, which although it's an open-ended opinion by Justice Scalia is in turn quoting an appellate opinion called "Town of Concord" by then-Judge Breyer who went along in *Trinko,* joined the majority and who wrote the opinion in *Actavis*.

I think the point here is that it all depends. In some situations, the regulator is on the job implementing a competition function, as we saw in *Trinko* itself. In others, the regulator is not involved in doing antitrust work. We see this in pharma, where the FDA has a purely ministerial role, and goes out of its way not to get involved in competition questions. In these industries, antitrust has a larger role.

Third, with respect to the rule of reason, the Court's opinion insists that the rule of reason should be used, and explicitly rejected a particular test that had been proposed by the FTC.

Here, it's important to recognize that the rule of reason is not a single thing, it's a range of different tests. There are shortcuts. Here, the Court made clear that anticompetitive effect can be inferred from payment. If market power is needed at all, that too can be inferred from the fact of a large payment.

For those who have a deep interest in this continuum—per se to quick look to rule of reason—it's worth taking a look at the last paragraph or two of *Actavis.* There, the Court, in explaining how district courts have flexibility to work out what the rule of reason means, cites a few pages from the Areeda-Hovenkamp treatise. Those pages describe the different ways in which a district court can shorten the full rule of reason procedure. The Court is clearly leaving a lot of space for district courts to figure out how to work this out going forward.

MR. BURKE: It's very intimidating to follow after Scott on this subject since his articles were cited in the Supreme Court decision to support the majority's views, I think very effectively.

A few quick comments. This victory is a real vindication for the FTC; they suffered a lot of reversals and losses in the lower courts over a very long period of time, including the Second Circuit here on the *Tamoxifen* case, and in many other Courts of Appeal as well. Different leaders might have given up the ghost on this subject but the FTC continued to pursue this and doggedly over a decade and it was ultimately vindicated.

Obviously the FTC had advocated for even more stringent tests to be adopted by the Supreme Court. They had sought a quick look analysis, which would almost presumptively condemn these kinds of settlements, and the Supreme Court didn't go that far, but I think even though the FTC didn't get complete victory I think most observers would agree that this is very much more victory than the loss of the FTC and the fundamental reasoning that was embraced by the Court. So that is one point.

Second point, this is not the beginning of the end of this subject but it's sort of the end of the beginning because now we have a whole new set of issues to address. You know, the tests that largely have been adopted were almost a per se legality in most cases or a close per se illegality in a few but now we have a rule of reason test and what that is going to mean in practice is a very challenging thing to predict.

The thing that is really important to remember about this particular marketplace is that margins on branded drugs are very, very high. The cost of actually making the drug is very, very low; the vast majority of the expenses are minimal, making incremental pills that cost almost nothing yet generate a huge margin.

The minute that generic enters that business that margin collapses; sales prices drop by 80 percent or more, so if you are a branded company facing multiple patent challenges it makes a lot of sense for you rationally to consider settling some of those patent challenges even in cases where you are actually right.

Situations where you think you got well north of a 50 percent chance of prevailing in IP litigation if you're esti-

mating a 25 percent chance of loss but the consequence of that is an absolute obliteration of your margins, it doesn't seem to me to be surprising or necessarily inappropriate for you to settle.

How are courts going to address that situation? Scenarios where the so-called reverse payment may appear very large may, in fact, be larger than what the generic itself might be able to generate in profits. I think those kinds of issues are still open.

There are some hints in the court's opinion about how those issues might be addressed but it's going to be fascinating to watch the space going forward.

MR. KATZ: Before we move on to something else I do want to go back to something you had mentioned, Scott, about the difference between regulation and antitrust and I feel this falls in a different kind of place. Sometimes we have regulations set by a regulator, the FCC is a prime example, busy regulating industry well or not well, we can disagree on that; what I think makes this to some extent special is that you have a statute that tried to come up with some method to encourage competition and it pushed the generics towards suing early, then gave certain exclusive rights to those who sued early and should we think differently about a regulated space that is regulated just by the operation of the statute as opposed to someone who is busy watching what's going on?

DR. HEMPHILL: This is an interesting question in settings where you have an industry-specific statute that seems to take a view about the balance between innovation and competition. In those settings, there's surely an argument that antitrust should be dialed up or dialed down depending on what that specific statute says. I have done some writing that makes just this argument. *Actavis* could be taken as a decision in that vein.

MR. KATZ: Let's turn to mergers. There were some interesting mergers this year and I should note there is an excellent program later today about mergers, it promises to be a very fascinating panel; I am looking forward to it but we are going to focus on the few major merger challenges that we have to talk about, so first I want to talk about *American Airlines* and *US Airways*. Coincidentally I have to mention the three of us happened to start talking about this very case on an airplane. We happened to be on the same flight and the DOJ filed their complaint on the very same day so we are going to try to continue here and hopefully you will find it interesting too.

So the complaint the DOJ had filed alleged that the merger would create the world's largest airline, it would reduce the number of major legacy airlines from four to three but in addition to typical allegations that this would lessen competition in city pair routes, the complaint also asserted that after the merger that the airline would be—the combined airline would be less likely to offer discounts for connecting flights with one-stop flights competing with other airlines nonstop flights.

The government also claimed that this merged airline would have nearly 70 percent of the landing slots at Reagan National Airport in D.C. so the complaint was filed in August. By November, about two weeks before trial was set to begin, the parties reached a settlement and the settlement required American and US Air to sell takeoff and landing slots and dates in related facilities all around the country but most importantly at LaGuardia Airport here in New York and national airport, Reagan National Airport in D.C.

So, Art, before we talk about the settlement, which I just described, what did you think of the complaint and how would you compare it to prior airline?

MR. BURKE: I think you highlighted the issue Elai in your introduction I think historically the focus in these kinds of cases is competition for nonstop flights, that the assumption was that for most people a direct flight is definitely not a substitute for one stop or connecting flight but in this case the DOJ took a different tact and argued that connecting flights could be substitutes and could compete with nonstop flights and they pointed to US Airways advantage program.

This was a program where US Airways very affirmatively attempted to compete for certain customers by offering competitive fares for one-stop connecting flights in competition with direct flights. What the DOJ determined was that for most legacy carriers connecting flights were priced almost exactly the same as direct flights. What rational person would ever pay $1,000 for a connecting flight when that person could get to the same place on a direct flight for $1,000?

In contrast US Airways acted sort of as a maverick in this market and did compete in some unusual ways and that was different and what that did was put a lot more markets in play than would have traditionally been in play. There were obviously overlaps for certain direct routes but when you add in the overlaps between direct routes and connecting flights that actually added hundreds of additional routes to the mix that had not historically been in the mix for airline mergers.

MR. KATZ: Let's turn to the settlement. What happened, as I began to describe earlier, what happened just a few weeks before trial was set to begin that the parties settled?

MR. BURKE: I will take a quick crack at it and Scott should amplify. I think the settlement looks much more traditional. The resolution of this case, as you noted, involved an investiture of certain landing slots predominantly and most significantly in LaGuardia and Reagan National and it didn't really address this broader competitive issue. So there is a little bit of a disconnect between

the complaint that the DOJ filed and the remedies that they obtained, which remedies resemble much more of those traditional airline mergers.

This a little bit of an anomaly, you know. Press reports, and who knows how the reliable they are, say that the attorneys and parties were surprised that when the DOJ sued them in this case, that they felt jumped and they were willing to talk about settlement and investitures and were surprised that the case went so quickly to litigation.

So, it's an interesting issue here, you know, only time will tell. Maybe somebody can ask Bill Baer after the dinner tonight on what happened here but why couldn't the DOJ have gotten these remedies earlier in the process without having to commence the lawsuit and all the machinery of litigation having been geared up? So that's sort of my perspective on it.

DR. HEMPHILL: I certainly want to echo the sense of disconnect between the DOJ's theory of the case here and the remedy that they agreed to. The complaint emphasized one-stop competition, but the remedy is all about building up the low-cost carriers. Don't get me wrong—I see the point of shifting slots and gates to low-cost carriers. In principle, that might be a more potent form of competition than USAir had provided. So the question is whether this will result in more competitive pressure on the legacy carriers, compared to before the transaction. The government says yes, this settlement is even better than the injunction they could have gotten had they won the case.

Now, if DOJ is right about that, is it suspicious that USAir and American would accept such a deal? I think it might not be suspicious. After all, some of this new competition might be at the expense of Delta and United. So the parties might well agree to a settlement that is, in part, at the expense of rivals. That said, the stock price of Delta and United both rose on the deal, suggesting that the market sees this arrangement as competition reducing.

Now, in defense of the settlement, DOJ has offered an analogy to the earlier United-Continental transaction, which helped make Southwest a real competitor, in part thanks to some transfers at Newark. This is an odd example, though, again comparing this to the complaint, because the complaint argues with some regret that the United-Continental deal was a mistake.

I am an academic, so let me just say it directly: This is a subject that is crying out for further study. It's hard to imagine a stronger candidate for a merger retrospective, a couple years down the line. We have a high-profile merger in a data-intensive industry where the settlement is explicitly premised on a different theory from the claimed loss. A serious look should be taken to see whether the mismatch, the bet that DOJ has taken, pays off. We should set the wheels in motion for something like that now.

MR. BURKE: It's a very interesting point and not to get too sidetracked on this but I was recently talking with a DOJ official about retrospectives and he took the position that the DOJ lacks the authority to engage in retrospectives because they bring cases, that's all they do.

The FTC has a broader mandate. Under the FTC act, it can study markets, it can do studies and it can issue subpoenas to find out what is going on in the industry but the DOJ can't do so. Maybe that's correct, but if they can't do it maybe they should let the FTC do it.

DR. HEMPHILL: I agree—the FTC could do it, a state could do it, or the presiding judge in the Tunney Act proceeding could order it.

MR. KATZ: We have a lot more to cover. I want to talk about another merger and this a merger that ultimately was not challenged and this is Office Depot and Office Max. So the FTC closed its investigation of this proposed combination, of the second and third largest office supply superstores. Similarly to the airline merger that we had just been discussing, this isn't the first time that the agency has taken a look at this particular industry.

Sixteen years ago, or now it's a little more than that, the FTC had blocked successfully in court and affirmed on appeal Office Depot's proposed merger with Staples. So what changed over these past 16 years that would lead to such a different result?

MR. BURKE: It's going back to Staples. At the time it was surprising to many people because people said look, you can buy paperclips and post-it notes anywhere, how can you have a monopoly on that market but what was shown very compellingly by the FTC was that in fact buying those things at office superstores was very different. Those stores focused on competition with each other, they worried about each other's pricing and it was very compelling evidence that in their internal documents, in their internal pricing policies, that they priced their paperclips and post-it notes differently depending on how many other office superstores there were in the area.

So the FTC was successful in pursuing a kind of novel theory at the time that you can have that kind of localized competition. It was a really one of the first unilateral effects cases, I would say, where a court really adopted that kind of approach.

Well, what happened was that the markets changed and the FTC acknowledged that and there were two big changes that they noted. First, there was greater competition from brick-and-mortar traditional stores, a lot of firms like Wal-Mart and Target and others have gotten into this market and are very vigorous competitors and the companies' documents and their pricing policy reflected that.

Then also obviously the growth of online commerce has been very significant in those 16 or 17 years since the case was decided. Many businesses are able to acquire these kinds of products as well as individuals on internet places like Amazon, et cetera.

So the marketplace has changed, the FTC acknowledged that. I think they were careful to note there is not a magic wand to say there's internet competition, that there may be markets where the growth of the internet does change the dynamic and over time does change the market definition.

There may be other markets, however, where the online channel still is not a real substitute for traditional brick-and-mortar, so I don't think that you should assume this case means that when you're defending a merger you can always sort of point to the internet and say it's a much bigger market, don't just look to brick-and-mortar stores, but this certainly does give some ammunition to parties who want to do that.

DR. HEMPHILL: I think I agree with all of that. What we're seeing is that past performance is no guarantee of what is going to happen in the future. In airlines, consolidation has changed the terrain. Here, the issue is technological change, so that a merger that might have been unthinkable a decade ago seems unobjectionable today.

MR. BURKE: It's a cautionary tale for everybody in a sense that there's a tendency to say well, how did the DOJ or FTC or the state AG address this merger the prior five times, when a similar merger occurred? Both of these cases are illustrations that markets do change and evolve.

MR. KATZ: I think on the one hand the merging parties would like the government to look at how the market has changed, on the other hand it's predictability is so important that it's sometimes nice to say well, the last 18 mergers in this business went this way and therefore the one you are proposing now is not going to go the following way, so I think that there's a balance between everybody's desire for predictability and what is also clearly necessary, which is understanding the changes, and sometimes I think the government is slow to change the way it looks at some industries and I think it's an industry-by-industry kind of analysis.

Let's turn our way from mergers; if we have time again maybe we will come back for some more.

On a topic that is something that is near and dear to many of us here in New York, it's been several years since the height of the financial crisis but to this day we are seeing this past year and a couple years before some major investigations, class actions involving financial institutions, we have LIBOR matters, the regulatory investigations, the settlements, regulatory settlements, private class actions.

In *LIBOR* just to try to describe very, very briefly there are allegations that the banks conspired to misreport their estimated cost of borrowing when they made daily submissions to the British Banking Association, which collects this information.

LIBOR stands for London Interbank Overnight Rate; it's a widely used benchmark interest rate and it's calculated based on the panel banks reporting of their estimated cost of borrowing in London at 11 a.m., particular various kinds of funds.

So the fines here are in the billions; there was a long decision by Judge Buchwald here in the Southern District that dismissed the antitrust claims so that case is clearly ongoing.

In addition to LIBOR, though we have class actions investigations involving other financial markets, we have foreign exchange trading, we have CDS credit default swaps, that's a different kind of theory but we have North Sea Oil prices and another benchmark; so Art, is there some common theme here to these or is there some reason they are all coming up around now?

MR. BURKE: It's an interesting question. There have always been antitrust litigations in the financial services industry. If we go back to the 90s and early 2000s there were litigations involving IPO spreads, the flipping cases. Many of those cases were actually dismissed based upon security law preemption arguments.

But we've had a new wave and clearly there is something going on here. Now I think if you looked at the allegations in many of the complaints, the claims are that the misconduct arose in part because of the financial crisis. That is certainly what the allegations are in *LIBOR*, that the banks, because they were concerned that LIBOR essentially was self-reported rates, that the banks claim they can borrow certain instruments, certain currencies at certain different time periods. The concern or allegation is that during the financial crisis that borrowing price went way up and the bank actually had to disclose that. It would send a bad signal to the marketplace that the bank was very fragile, so there was a uniform suppression of true LIBOR rates to hide that fragility. I think many of these other cases also have links to the financial crisis.

One of the things that I think is driving these things are leniency programs, not necessarily just in the U.S. but also in Europe and elsewhere; many of these banks have already confessed to doing bad things in other circumstances and they are under some obligation to turn themselves in under their existing non-prosecution agreements or other settlements as well as being afraid that if they are not the person in the door someone else is going to beat them to it.

So I do think there has been sort of a rolling level of institutions turning themselves in to the government for potential misconduct and that obviously has spurred the

investigations which, in turn, has spurred the civil litigations that followed after that.

DR. HEMPHILL: This is a fascinating area. There's a big picture question that courts will have to wrestle with, which is how far does antitrust extend? What kinds of suspension of competition count under antitrust and when we do see the suspension of competition at all?

It's worth taking a look at the district court's ruling in the *LIBOR* case. The judge took the view that the LIBOR setting process isn't itself "competitive." It's just a made-up number that each of the banks throws into a big hat, and you take the average of some of the numbers in the hat. That not being a competitive process to begin, why are we talking about antitrust at all?

Now, the plaintiffs respond that this process looks like some older cases, where there was manipulation of a component of price or an input of price. The case that comes to mind is *Knevelboard*. It's a cheese case, where a bunch of cheese makers got together and fixed the price on bulk cheese, which mattered as an input to the price for milk. The *LIBOR* district judge was aware of *Knevelboard*, but responded that in that case, they were actually supposed to be competing as to cheese; in *LIBOR*, they were not. Now, there is not a clear answer at the appellate level about whether the cheese case is a good analogy; stay tuned.

These questions will also be relevant for one of the other cases that was mentioned, the foreign exchange case, where the WM/Reuters rate is alleged to have been manipulated. Let's take for granted for the moment that there is manipulation—that some traders did something bad. But still we have to ask whether they did something that was *antitrust* bad. Now, here it's a bit different from *LIBOR*, because the rate is set not by throwing a bunch of made-up numbers into a hat, but instead by taking the average of some actual trades. Here, one key question will be, what competition is being reduced?

MR. BURKE: Just hearing Scott talk about this, it actually makes me think about your comments earlier about *Trinko* and regulated industries. I think this may also be an area where courts feel some reluctance to apply antitrust in a sort of a traditional fashion because this is such a highly regulated space where you've got Securities Exchange Commission, the CFTC. Many of the cases that have been brought have not been brought by the Antitrust Division but they have been brought by the criminal fraud section of the DOJ. There are a lot of other things going on and there is sort of a sense maybe somehow that if something wrong happened here it may be wrong but it may not really be antitrust wrong.

One other point I will make is that these are all cases that were in the very early stages and we only have one significant decision, Judge Buchwald's, that obviously will ultimately be subject to appeal and so we really don't know where these cases are going to ultimately go.

One thing that I think is important to remember is that many of these cases involve allegations of essentially ad hoc trader manipulation, a trader who was talking with his friends and they wanted to push a benchmark in one direction or another so as to be able to make a better bet based upon that.

I think that is going to be very interesting to see how those claims are ultimately addressed when it comes to class certification if these cases get to that point. It's going to be very challenging and obviously I am biased having been more on the defense side but it will be very challenging I think to see how you can certify a class when the manipulations are day-to-day changing and directionally changing so some defendants or some plaintiffs may actually benefit from a manipulation depending on whether they are long or short in a certain position.

That is going to be an area that gets a lot of attention. We are probably a few years away, of course. Maybe that is something we can address next year or the year after that.

MR. KATZ: Let's talk about another a big industry here in the city: publishing. After a bench trial, Judge Cote in the Southern District found that Apple had played a central role in an illegal price fixing scheme with five book publishers to raise the price of e-books and to limit retail price competition. All five of the publishers had settled before trial.

I am going to try to give a few key facts. I will miss important facts no doubt, but hopefully I will get some of the important ones.

In 2009 about 90 percent of e-books were sold by Amazon and Amazon charged $9.99 for many of the new releases and best sellers. Publishers weren't happy with this. Apple had wanted to enter the e-book retail market and they wanted to tie that together with the launch of their iPad.

Now, this was in 2010 they were going to launch their iPad so Apple had proposed for the publishers to move to an agency model where the publishers would set the retail price and then Apple would sell the e-book as an agent, they would just take a percentage commission for each transaction.

In the proposal the prices would be higher and in addition in the proposal from Apple in separate agreements with each of the publishers there was a most favored nation-like clause that effectively required the publishers to make sure that no other e-book retailers, which of course included Amazon, would sell their e-books at a lower price than the price that was sold by Apple as that agent for the publishers. And the publishers agreed to this.

There are colorful allegations of meetings by publishers but to focus on what Apple did, Judge Cote, I will quote what she said, "that the agreements did not promote competition but destroyed it, that they removed the ability of retailers to set the prices of their e-books and compete with each other on price, they relieved Apple of the need to compete on price and allowed the publishers to raise prices for their e-books."

The decision discusses both per se, rule of reason but I think the government looked at this as a per se price fixing case and my question to you Scott is that right, should we think of this as a price fixing case?

DR. HEMPHILL: The question, as Judge Cote understood it, was whether Apple made a conscious commitment to a common scheme to do some harm. The underlying theory here is that the publishers hated a $9.99 price point, and they were also worried about disintermediation by Amazon, as Amazon developed into an alternative to the traditional publishers.

This is probably the right moment to say, by way of disclosure (or advertisement!), that my wife is a novelist. She publishes with a different part of Amazon, not the e-book part but a part of Amazon that acts as a traditional publisher. *Buying In* is the name of her novel; it's available in hardcover and Kindle.

MR. KATZ: I can tell you it's a great book; I read it, and it talks about mergers.

DR. HEMPHILL: I spent some time at the trial last summer. One of the things that was really striking was the extent to which the late Steve Jobs was the star witness. The scheme was described by Jobs as an "aikido" move—a redirection of force. It was clear that Jobs understood the overall scheme. He told his biographer, "So we told the publishers, 'we'll go to the agency model, where you set the price, and we get our 30 percent, and yes, the customers pay a little more, but that's what you want anyway.' So they went to Amazon and said, 'You're going to sign an agency contract or we're not going to give you the books.'" That is the government's theory and it's right there in the biography.

I plan, next time I teach this case, to show a short video, from right after the launch of the iPad, where Jobs is speaking with Walt Mossberg, the prominent tech reporter. During the launch presentation, Jobs discussed selling a book at a price quite a bit higher than what Amazon was then charging. Mossberg can't understand how this is going to work, and asks Jobs about it. Jobs just smiles and says, "That won't be case…. The prices will be the same."

So it's clear that Jobs understood this overall scheme and that Apple benefited from that, and I think that's described very powerfully in Judge Cote's opinion. The opinion is at pains to repeatedly credit some witnesses' testimony, and discredit and disbelieve the testimony of various Apple witnesses. Those kinds of very detailed findings will be challenging to attack.

Now, to come around at length to your question, per se liability for Apple leaves me a little bit uneasy. It's one thing to say, the publishers got together in a fancy restaurant to talk about the threat from Amazon. But Apple wasn't in that room. So you have to be a little uneasy when you have a vertical player who sort of gets wrapped up in it all, even if they knew what was going on, and conclude that we are just going to find a violation without doing any further analysis.

That raises a question. If there is a per se violation for some conspirators, is it necessarily a per se violation for all of them? I think we have some precedent that the answer is yes. Judge Wood's opinion in *Toys R Us* suggests as much, but she may have been uneasy about that, and had lots of alternative holdings to make clear that the arrangement was in fact anticompetitive.

That raises the question of liability under the rule of reason. There is not a fact pattern that is exactly like the e-books case, so you can't just take a case off the shelf and say, this is exactly like that. The closest case may be *United States v. General Motors*, a Supreme Court case where Chevrolet dealers all got together with one another and with GM to try to get rid of some other dealers. These other dealers were apparently selling cars at a discount but not taking on the obligation of servicing them. There is an analogy here to showrooming by retailers, who have to compete with online retailers.

In *General Motors*, the Supreme Court had no problem saying that the combination was a per se violation. I personally think that is wrongly decided. I think there was a procompetitive argument here, the basic free-rider argument, and that the horizontal combination of the dealers should not have been enough for per se liability. If *General Motors* were decided today, I think it's clear that it would not be decided on a per se basis.

So there is an argument for considering this case under the rule of reason instead. Even so, Judge Cote squarely held in the alternative that there was an anticompetitive effect from the price rise, and no compelling justification.

MR. KATZ: Let's turn to something else—we are starting to run out of time—but I do want to very briefly mention another Supreme Court decision, this one has to do with merchant agreements between retailers, in this case a restaurant and American Express. These agreements required that all disputes would be resolved by arbitration but it said that there would be a waiver of the right to arbitration on a class basis.

The Second Circuit said this class action waiver is not enforceable, that any one individual couldn't prosecute this claim by themselves, you had to hire experts,

et cetera and it would make it so nobody could bring cases. The Supreme Court reversed the Second Circuit. It's called *American Express v. Italian Colors Restaurant* and the court said they have to rigorously enforce arbitration agreements according to their terms. Art, should we take this as an antitrust decision, should we care about the antitrust laws or is this just really arbitration?

MR. BURKE: I mean it's highly relevant to antitrust. Basically, wherever there are consumer class actions this is going to be an issue. If the court does hold to many people's surprise that arbitration provisions in merchant agreements apply, the individual consumer wanting to bring a class action later may be likely prohibited from doing so.

So I think it has potentially significant implications. One you would need to follow is in cartel cases. How significant are these provisions because even if a consumer, one consumer, has an arbitration provision with an alleged cartel member A, it's probably not going to have that arbitration provision with cartel member B, C, D, and E. There is joint and several liability among several cartel co-conspirators. So the arbitration provision will not necessarily block the claim in its entirety but will shave off a portion of the claim. I think the courts are struggling with that issue and we will see how that plays out over time.

MR. KATZ: This claim was only against American Express.

MR. BURKE: When you've got a claim against a single defendant it should be game over for plaintiffs.

MR. KATZ: There are some other very important interesting developments in class actions cases but we are going to skip along to something else.

This next topic is not a case or really an enforcement action but it's a business model that is being examined and we are talking about patent assertion entities (PAEs). They are called—for those who don't know what that means—we often call them patent trolls. We are not going to use that word again it is apparently offensive. I am not going to attempt to define what that means but generally speaking what we are talking about are firms that buy patents from existing owners of patents and then they assert those patents and bring infringement suits or they insist upon licensing fees, but they are not in the business, they don't do research and they don't practice the patents, so these PAEs they have attracted the attention of politicians and intellectual property lawyers and now the FTC. There was a workshop over a year ago and presently there is a study ongoing by the FTC of Patent Assertion Entities, so Scott you think a lot and write about IP and antitrust and is this an area that we should be concerned about, is the FTC right to spend their time and energy on this and maybe not some merger?

DR. HEMPHILL: There is plenty of space to do both! As a starting point, we can take our cue from the President's patent shout-out in this year's State of the Union address. He said, "let's pass a patent reform bill that allows our businesses to stay focused on innovation, not costly, needless litigation." That said, as Lisa Larrimore Oullette pointed out to me, he also mentioned patents in 2011, again in his State of the Union Address. There, he said, "America still has the largest, most prosperous economy in the world…. No country has more successful companies, or grants more patents to inventors and entrepreneurs." You almost get the sense that patents were great in 2011, but now we've realized that maybe they're not so great in 2014.

With respect to PAEs, I think we could spend a whole session on this. There are three broad issues here that I want to touch on briefly.

The first and maybe most standard is the PAE as defendant, either in an antitrust or a deception case. These are PAEs that are sometimes described as "bottom feeders," firms that are asserting patents without a careful investigation beforehand and being misleading about what patents they have or are asserting or are relevant. Or misleading would-be licensees about the settlements they've reached with other targets.

I think the classic example right now is MPHJ Technology Investments. As some of you know, the New York AG's office just reached a settlement with them. Vermont has done work in this area too. The FTC had drafted a complaint against them, but the firm preemptively sued the FTC and its commissioners individually, asserting that the FTC's actions in pursuing the firm are unconstitutional.

The story here, judging from the New York settlement and the FTC draft complaint, is that the firm claims patent protection in the use of scanners on networks that have e-mail. It sent a succession of form letters to small businesses, asking for $1,000 per employee and threatening litigation. They claimed that they'd reached settlements with lots of other targets. In fact, judging from the draft complaint, just 17 firms fell for this. To be clear, enforcers are pursuing this not primarily as an antitrust theory, but as a kind of fraud and deception.

The second category features the PAE not as a defendant but as an antitrust plaintiff. For example, a PAE called Cascades Computer Innovation tried to get a bunch of big companies to take a license. Those companies relied on a company called RPX to negotiate jointly for licenses as to all of them. The district judge recently denied dismissal. I was in a conference recently where RPX described itself as "pooling the buying power of its members." This was after the antitrust complaint was filed. If you are counseling RPX or somebody like them, you might advise them to rethink their public presentation of the business model.

The third category is the alleged abuse of standard essential patents. Now, this issue is not limited to PAEs. Clearly, operating companies, which make things in addition to having patents, could be implicated in this question too. The worry here is that through the standard-setting process, firms adopt the standard, and they do so on the understanding that the license will be reasonable and nondiscriminatory, and then once everybody is hooked, the licensor increases the price or tries to enjoin an infringing user of the technology. This is an issue that potentially sounds in section 2, although there are challenges in bringing cases like that.

MR. BURKE: Just a few comments on this, this is a big problem if you talk to general counsels and I am sure many of you do, especially technology companies, but not solely technology companies anymore. This kind of litigation is accounting for a greater and greater portion of their litigation budget.

It is increasing at a rate that is very fast. I mean even as compared to two or three years ago GCs are saying they are seeing proliferation of this kind of litigation so it is a very serious problem. Again maybe I am biased. I don't see this being a reward to innovators, you know, the people who are behind these kinds of organizations say that look, we are just trying to get, you know, the fair royalties for the people that invented these kinds of products but the facts are these patents have long since been sold and the actual innovators behind the technology are not associated in any way with the claims that are being asserted.

So it's hard to see how this kind of litigation is spurring on innovation when this kind of litigation didn't even exist on its current scale until the last few years. How was this innovation actually necessary 20 years ago for somebody to invent the fax machine or the internet?

I am certainly skeptical that this is a socially beneficial kind of litigation. The problem here is to find a way under the antitrust laws to challenge the conduct because honestly it is largely legal. These are valid patents or at least when they are valid they can be asserted.

So while there are certain examples like the case that we were just discussing in New York, where people are misleading the licensees in paying royalties, that doesn't really get at the fundamental problem because the bigger players are careful not to do that.

If you are one of the very large Patent Assertion Entities you've got thousands of patents, many of them are valid, you can use them very effectively in a way that's completely legal.

So now that leads us to the final question which goes to the State of Union Address. Is there a way to solve for this in legislation? I think it's hard for me to see this issue getting resolved by the courts and there are a lot of types of legislation that are under consideration here.

The challenge here is though defining what you are trying to—it's very easy to sort of like what you say about pornography, you know it when you see it, but actually legislating against this is very challenging, defining what a patent troll is. You say it's an entity that doesn't actually produce anything. Well, then that also would sweep in universities who have lots of IP portfolios but don't actually produce widgets and we certainly don't necessarily want to sweep universities into the same bucket as we sweep these Patent Assertion Entities, and also you know, Patent Assertion Entities can circumvent that by having a small operating business associated with them and there are many, many other challenges when it comes to drafting the legislation.

So this is an important area where we really do get a chance for bipartisan reform on both sides of the aisle and people realize this is a problem but actually the legislative process is going to be very challenging.

MR. KATZ: We are coming near to the end of our session, I hope you don't mind if I steal just a little bit from the break because we had a little bit of stall in the beginning of our session. I do want to offer up the chance for some questions from the audience if there are any and if there are maybe you guys might want to bring up things that we haven't discussed.

Yes?

AUDIENCE MEMBER: There was a recent decision involving reverse payments by a lower court, which had held that reverse payments have to actually be money. I was wondering what Scott's views are and whether a reverse payment can be any consideration or just money.

DR. HEMPHILL: You're thinking of the *Lamictal* opinion. So one of the issues in reverse payment cases going forward is, what counts as a payment? What counts as compensation? One issue in *Lamictal* is a "no-authorized generic" provision. When a generic enters the market, a branded firm can launch its own generic version of the product—a so-called "authorized generic"—which greatly reduces the competing generic's profits. Or the branded firm could license another firm to do the same thing, to similar effect.

So, as part of a sweetheart settlement deal, the brand could agree not to launch an authorized generic—that's the "no-authorized generic" provision. In other words, the branded firm could agree to sacrifice some of its profits to benefit the generic firm. The effect is to smuggle some compensation to the generic firm.

Now, the *Lamictal* district court rejects this perspective entirely. It takes the view that a payment must take the form of cash. After all, the Supreme Court's *Actavis*

opinion was about cash. Now, you might disagree with me about whether a no-authorized generic provision ought to give rise to antitrust liability, and yet still reject the court's view that it has to be cash. On the district court's view, if I pay you in land or gold it doesn't count. The court must be wrong that it has to be cash, merely because *Actavis* talked about cash.

I think the Third Circuit is likely to conclude that no—AG provisions ought to be thought of the same way. There are other interesting examples of compensation that we are going to have to think about as well. For example, in the *Lamictal* case, actually the settlement was about not one drug but two, involving the same patent. The settlement has different entry dates for each drug. The drug that didn't face any additional generic competition got an early date. The drug that would face lots of additional compensation got a late date. That kind of arrangement can provide compensation too.

AUDIENCE MEMBER: There were two, one was a 50 million dollar drug the other was a 2 billion dollar.

DR. HEMPHILL: Correct, that's right. That's right. So the generic got a good deal on the little drug.

AUDIENCE MEMBER: There is a case in Delaware that counsel may not use the term patent troll in front of the jury. I don't think it's been litigated against a lot of trolls. This is very clear business model in which they send letters and make false statements in the letters and try to get unknowing people or people who can't afford any patent counsel. I am talking about pure patent troll is something people should be aware of.

MR. BURKE: The problem is though that there are some companies that are very large that are not relying on those tactics; they've got good counsel, they know how to turn right corners, but the patents or the effects especially are perhaps in a sense even worse.

MR. KATZ: I want to thank everyone, Scott, Art and the rest of the audience for listening and we certainly enjoyed it, I hope you did too.

Please stay on for the rest of the day, which has some very, very exciting interesting programs. Thank you.

MS. HART: I have failed to do a little bit of housekeeping oversight and I want to thank Art, Scott, and Elai for what they did and we have such a great audience too, with humor and intelligence, so the questions are going to be a very important part of the day and we do want to reserve time as we go along.

We are going to have a short break. Please be sure to fill out your midday attendance form and then your end of day attendance form. I am sure that in part you are here for CLE credit and please do endeavor to go online to do the evaluations. Those are important to inform the Section about which speakers really succeed with the audience. Thank you so much and now we have a brief break.

Social Media and Competition Policy

MS. HART: Could everybody come to order please.

Good morning. This terrific day is going to continue now under the efforts of Wendy Waszmer of King and Spalding.

I have to tell you I have always believed that tenacity and flexibility are indispensable to success and Wendy has bobbed and weaved and rolled with the punches on putting this panel together because it's such a cutting edge panel that many of our panelists pulled off, traveling internationally, and yet Wendy has put together such a high caliber group here and it's just a tribute to her stature and her tenacity. So thank you so much Wendy for all your effort and I look forward to hearing the panel on social media and competition policy. Thank you.

MS. WASZMER: Thanks, Barbara, and thank you for your help, everyone's help putting this together.

As Barbara said we had a bunch of shifts and I will spend a little bit of time introducing the panelists because I think the agenda and material is outdated but I will say as much as I loved the slate of people we had I like this slate even better, so maybe we can start with Jared Grusd, who we have here from Spotify, general counsel and also the head of corporate development.

I will give credit to Jared's colleague, Bart Silverstein, who did great brainstorming on this panel over lunch, helped me brainstorm at the beginning and got Jared to join us. We are so happy to have him.

Other than being the lead counsel for Spotify, which as many of you know is an innovative digital music media company worldwide, Jared has just an amazing amount of experience in this space, having also been at Google in a leadership position.

In addition to that, I was joking around with him before that he has been named to the top 100 list in Silicon Valley as well as in New York.

MR. GRUSD: By the way, top 100 to my daughters is like a fail, top 100 to my wife is pretty cool.

MS. WASZMER: As you will see from some of the insight that Jared will share with us, he not only has the legal background but also has the corporate and business development perspective that I think is important and that people will really appreciate on this panel.

Next, who probably doesn't need any introduction, Bill Efron from the FTC is here.

Bill is the director of the FTC Northeast Regional Office and also previously served as acting director of that office. He supervises not only antitrust but protection matters.

He will talk about antitrust as well as protection, and he is a great resource on that. Prior to his time at the FTC, he also was in private practice.

In addition, we have Jamillia Ferris who, as many of you know, was chief of staff of the Antitrust Division and now is a partner at Hunton and Williams doing antitrust and consumer protection.

Jamillia had supervisory roles on matters and her experience prior to the Antitrust Division and consumer protection is more involved.

And finally, we have Dan O'Connor, who we are very pleased to have join us. He's one of the directors of policy at the CCIA.

In that capacity he is an advocate as well as a great thinker on not only antitrust, internet policy and trade issues, but also has experience in the policy sector advocating for federal agencies like the DOJ and the FTC, and has previously served in roles as legislative aide to the New York Legislature, and has experience beyond that.

As he commented many times in our planning calls, he has an economics background and a policy background. In terms of his degrees he was at the London School of Economics and we are just glad we have a non-lawyer.

So let me set the stage and then I will hand it off to our talent.

I just threw some definitions up there because in our conversations we kept talking about what exactly is social media and as you will see through the panels, defining what we are talking about is important to the competitive issues.

Many of you've heard of the top seven or eight social media companies in terms of whether it's eyeball or ears or interfaces but if you do a search this is 30 or 40 or 50, but there are hundreds.

When the topic of social media came up when we met with the committee, some of our members referred to their kids. Their teenagers are the ones that are using this but a broader relevance is some of the stats worldwide. Who is using social media, what age groups? That's why this topic is timely for our speakers, they will have lots to say on what is going on.

So to start out. We will kick it to Jared in terms of defining the universe and also talking about his experience in this phase and where Spotify is.

MR. GRUSD: Thank very much, I am flattered and humbled to be here.

I just want to take a test how familiar are people with social media. I ask one, just raise your hand, do you know what a selfie is? There you go. See, this is not a privacy panel.

Look, on the one hand social media is a term that I think all of us understand. I think there is a really great danger with using the term social media and even as we prepared for the panel, I said hey, there's a real risk we are going to talk right past each other because we are all going to approach it from really, really different angles.

So you see the tabs that were up here before, and if you look at two-thirds of 2013 in particular, it's like a crazy big year for social media. YouTube surpasses one billion users, Twitter does its IPO. We have a State of the Union that Twitter is the most talked about place. Yahoo buys Tumblr, Snapshot turns down an opposition bid for 3 billion dollars and people are like how is it possible that you know 12 people in Las Angeles who just graduated college and turned down 3 billion dollars? Dropbox in the last month has raised a lot of money, 10 billion dollars U.S. evaluation.

I am not an antitrust lawyer but even from where I sit social media is so vague that it means nothing and the way I think about the world is like hey, what are the markets out there, what are the firms, who are the firms, what are the groups of firms within markets, what are the underlying technologies, what are the platforms, what are applications that sit on the platforms and what are the patterns and behavior that everyday people demonstrate as they interact with these things? I think the problem with social media is that it kind of refers to all of them and then by definition nothing, and so in that sense I would caution or encourage us to sort of move away from using social media as the basis for the conversation and so far as I think it doesn't ground us in anything particularly substantive, and if you think about competition for example, as I do, I mean largely speaking, when it comes to social media it's really been kind of two parallel but perhaps related tracks, which I think other people on this panel can talk a lot more about than I can; but the way I think about social media is really about the way in which consumers come together to either share information, share ideas, share content, play games together, do other things together, what kinds of behavior are they exhibiting and what are the companies doing vis-à-vis with this behavior?

At the end of the day it boils down to one thing, which is data. All these companies are collecting massive amounts of data about their users and the behavior of these users and rightfully so. There is an angle to social media and what's consistent among all these companies is okay, what are these companies doing with this data? There is a consumer protection angle that I am sure other people on this panel can talk more about. As general counsel we want to strike a great relationship with our users so we want you to know this is the data we are collecting from you and this is why we are doing it and this is all; it's an important bond that we form with our users. It also shouldn't be abused.

The second angle is competition. I don't think of it at all in terms of social media. In fact, social media to me is almost a utility. I then think about it in terms of marketplaces and firms and what are they doing. And Spotify, for example, is a social music platform where users come together to share, discover and consume music. It is the fastest growing music service now in 55 countries. We have more than 30 million users and we have given more than a billion dollars back to the music industry, so we are a fast growing player in the ecosystem.

As I think about the ecosystem structurally I think of it in the following way: There's a massive secular trend that is going on in the world, which is to shift from computers, which are more or less kind of dying.

In particular, as you think about third world countries, and even in the U.S. and Europe it's definitely shrinking as a preferred means of communication towards mobile and there is, in fact, a mobile revolution taking place in the world and like what we saw in the P.C., the main battle in the mobile revolution is being fought at a number of very important platform layers.

On the first is Telco. The second kind of what we saw on the computers at the operating system layer and we see it with the rise of Android. We see it with the rise of OIS, which is the Apple system. Essentially those are two dominant operating systems in the mobile space. So it says okay, if consumers are shifting to mobile and consumer technology companies they are essentially building all those platforms. All those companies are essentially building their companies on top of those two operating system layers.

It begs the question what are the rules of the road that should exist to create what I deem an element of pop and then we will talk about other forms and other things but that's where the world is going.

So the competition angle is what I would refer to in the case of Google and Apple in particular; they exist at the operating system layer. They also exist at application layer which is where Spotify plays. We deliver music; we sit on top of an operating system. LinkedIn provides a network around jobs and businesses; they sit on top of an operating system, so to some extent they too are an application.

If the question is, if you control the operating system layer and you also decide to compete in the application layer how should you play it? Are there rules of the road to regulate that? I think that's one competition issue that is certainly right for all companies that are building on top of the mobile ecosystem and the picture gets a little bit complicated.

While some of these companies are applications in the sense that they are building on top of other platform layers, they themselves at a certain level can become platforms.

For example, if you just think about Facebook. Facebook on the one hand sits on top of these platform layers, on the other hand it's become so big. They have over a billion users in the world, they've created their own platform that has invited other companies to build on top of. So it then begs the question what, if anything should regulate Facebook behavior vis-à-vis the people who are building on top of them.

So the relationship between platforms and application layer, I think, is really important and if you think about it, you may have seen last year's. So when Apple came out with their new device they used to install Google Maps and all of a sudden they just said okay, we no longer like Google, we are taking out Google Maps and I don't know if that is an antitrust problem but it truly sucks from a consumer perspective.

You know, there's still a public company called Zinga, which is a social payment company which essentially receives almost all of its distribution from building on top of Facebook. Facebook decided to change its operations and all of a sudden Zinga lost a lot of its distribution to its site. The stock market punished Zinga for that. Is that an antitrust problem that you guys will tell me or not? I don't know but what I do know is that companies can rise and fall based upon the way in which they are interacting with the underlying platforms that are feeding it and to me that's where the subtle competition issues come because they don't fit the description that I think antitrust people think about. They become much, much harder to control, to monitor, to interact with, and for people to complain about because the dynamics are moving so rapidly.

MS. WASZMER: As you can see when planning for this panel I was trying to have a free flow conversation because what we have seen before in terms of the social media or online antitrust conversation was really an attempt to bucket legal topic. I am now going to kick it to Dan, just talking about what the structure is of the various markets that Jared's company Spotify and other companies face because at least to us those are more interesting conversations, just factually getting to the bottom of how the market is operating, then all the antitrust lawyers can pile on the legal they want to use.

Dan, one of the things we had talked about on our last call is the trends that you have seen in policy and advocacy from your position at CCIA and in particular, just the idea who is competing with whom and what your take is on that.

MR. O'CONNOR: Thank you for having me, Wendy.

So just a little background about myself. About 30 members from all sides of the high-tech industry, CCIA was originally founded 40 years ago to be the clearing house of information in the original IBM antitrust case. So we've always had an antitrust core of our mission. We have been involved in some way, shape, or form for IBM 1, IBM 2, Microsoft, IBM 3, Intel, Google. So seeing the trends is something that we've always plugged in. My CO has always had antitrust very close to his heart. So coming from that perspective is an important perspective for social media.

I do agree with Jared that it's an interesting concept; it's not really a useful technique especially from an antitrust perspective although there are similar characteristics that we can identify that were definitely relevant in antitrust analysis.

So generally these are referred to as platforms. I think platforms, or they are platforms connecting you to allow you to exchange or generate content. Most, but not all, social media companies have a circle of where you can pick and choose at some level who sees what information about you.

I think everybody can agree Google Plus, Facebook, MySpace, Friendster, are the original social media companies. Where it gets a little more uncertain are companies like YouTube and Yelp—there are people who fall on both sides of that spectrum.

One prominent commentator said social media is you know it when you see it. I mean that is kind of where I am. So there are three potential ways that I've seen in literature on defining markets. I think some are better than others; there are no perfect solutions. You can either go total paid users, or registered users. I don't think the registered user is very useful because you have this concept of multi-homing where I can use Facebook and I do, Google Plus I do, LinkedIn, Twitter all the way down the line, it doesn't calculate the intensity of use.

So that's one thing to think about. The other way that people discuss the business is share of advertising revenue. So if you look at it from that way, is it just on line advertising? One of the more difficult questions to answer, is it a market for information, specifically information about users? This was alleged in the case where the plaintiff's accused Twitter of changing how third parties access Twitter's raw data.

Two of these tools are about information of users and viewers. You get creative comments—so that's something to consider. Then everybody competes with everything angle that Wendy just mentioned comes into focus. If you are a local restaurant with an advertising budget, you have a lot of options. You can search on advertising, like keywords, Manhattan. Advertisements on Facebook or Twitter are aimed at people. Targeted social media sites like Foursquare and Yelp are easy targets for users in their immediate vicinity.

That is one angle. You have a lot of different strengths there. Then you look at it from the other side, the user side. You look at the *Google* case recently. Although the FTC market definition focused on general purpose search I thought that was a little too specific. You also have Google competing with social media companies—Facebook is one of the various search tools that could be very compelling.

You will have Foursquare and Yelp that are big into food. You were able to go online and search for an Italian restaurant in Dupont Circle. I would use Google five years ago for that search. Now I never use Google. Now I use Foursquare; I'm using Yelp so it's something to consider.

If you are considering the information side it's very complicated. At least I don't know if you remember the data that was up there. I don't know if it is up there at the moment, I am not sure if Phil is going to do something about that. So these markets are very complex. That is one of the things to consider here.

One of my favorite points, and I used it a couple of times about seven or eight years ago. Market research titled *Why MySpace Is a Natural Monopoly* said: "MySpace is obviously the largest social network and its value like any other network grows as the number of users increases. It also grows in the amount of information it holds. Finding your long-lost friend's page is pointless if it says nothing about them. In other words, social networks, unlike instant messaging, require a higher level of investment from users. They must not only create a list of friends but also spend time and energy providing information about themselves. Alternating between multiple social networking sites entails a greater cost than switching between instant messaging programs. Is the economic gain of a single social network great enough for the market to naturally eliminate all other rivals? Evidence suggests a rosy future for MySpace."

For the younger people in the room they know that assumption didn't hold. It wasn't the natural monopoly they thought.

So what's really going on here you have static sufficiency versus dynamic sufficiency more of the sense of competition on internet where there are cycles of different platforms competing with other platforms in different ways.

You also have arguments about how much of an effect new entrants have. Companies rise so fast. Facebook and Google rose so fast. Those make the competition. It doesn't mean that antitrust has no role. It's just something that we have to have a little more perspective on.

I mean in 2008 MySpace had 80 percent of the market in social media. That is just Friendster, the people who invented the social media market. Many would argue that became quickly irrelevant thereafter. And network effects often get overstated in the social media world for a couple reasons. I won't go into detail on this panel. We can talk about it later if you want.

You have rapidly declining marginal returns. If you have friends on Facebook or Twitter, right after your immediate circle it drops off precipitously at some point. The costs go up, your search costs go higher, your Twitter feed becomes unmanageable, your Facebook news feed becomes unmanageable. Then there is competition for niche sites, your online dating sites, you have British Mingle and then business networks.

Another thing unique is that users can multi-home. Just because someone uses Facebook doesn't mean they can't use Google Plus, LinkedIn, and Twitter. In fact, one of my good friends who is a media techie says he joins every single social media site; he gets a user account just so he can have his cool name in case they ever take off. He might never use it again but he joins every one and a lot people do the same.

And then this is where it gets really complicated, almost all of them are multisided. I am not going to give you all the economic takeaways from that but that makes things much more complicated.

One of the most common complaints about social media space, I think, is cutting out access to a platform periodically, letting other companies access your data—simply denying your access is not in itself an antitrust violation. This is why social media companies have such strict access.

First and foremost if you let your users' data flow off your platform, then you cannot use even if you have contracts in place; it's not easy for you to control what happens to that and that is the life blood of your reputation so it's always easy to argue there are legitimate different reasons for at least keeping your users' data.

Finally, the last thing I could point out are other legal frameworks that can address competitive and consumer protection in the internet ecosystem. There is robust competition in how those companies are using the data or interacting in an online space. I think this is a really important role for our competition regulators. The FTC made a search engine disclosure when they updated 2001 or 2002 consumer alert and laid this out. Let's leave it up to the marketplace. You have to compete fairly. You are not telling me this is what you are doing and let them sort it out because it's very difficult for you to know how and where your data goes and that's one of the most important—so I will leave it for them.

MS. WASZMER: We are going to get to some of the consumer protection dealings and I think as a moderator I try to look at the antitrust you know. I think with our next group of speakers who will talk, who will be Bill and Jamillia as the enforcers, given our time, do you want

to talk about both and merge your talk? That would be great.

One thing: I promised I would give the disclaimer Bill will not be talking about enforcement matters and, of course, Jamillia will give her disclaimer. But I would ask both of you to give the audience an idea of how you see platform issues rather than social media.

MR. EFRON: Sure. I am Bill Efron and am happy to be here. I will just issue the standard disclaimer that the statements I make here today and the views that I express are my own and not necessarily those of the Commission or any individual Commissioner.

The Northeast Region is located here in New York and we work with both the Bureau of Competition and Bureau of Consumer Protection to conduct litigations and carry out investigations.

On the antitrust side we carry out mergers and conduct cases across an array of industries, including many aspects of the health care industry, hospitals, physicians, long-term care, pharmacy providers, retail sectors such as grocery stores, funeral homes, retail pharmacies, pharmaceuticals including radiopharmaceuticals, educational marketing, and herbicides. A number of the investigations that we have worked on involve the online or social media context.

On the consumer protection side we investigate a wide variety of deceptive practices, including deceptive advertising and deceptive marketing. Again, a number of these investigations involve the online space.

For example, we are currently litigating a case in the District of Connecticut with our state partner at the Connecticut AG's Office, which involves an operation that allegedly used fake news websites to market acai berry weight loss products and make deceptive weight loss claims.

On one of the slides there are references to several antitrust investigations that the Commission has conducted in the online and social media space.

Since we have limited time, I think I just might jump into some of the consumer protection matters. I want to react to some of the things others were saying.

As Jared referenced, the FTC holds a number of workshops, including workshops related to privacy and data security issues, where we bring together, among others, industry participants, academics, and consumer advocacy groups.

We recently held a workshop called the Internet of Things and this is about exploring consumer privacy and security issues posed by the growing connectivity of consumer devices. For example, you will be able to communicate with your refrigerator from your smartphone when you're at the supermarket to see if you need to buy some more milk. This growing connectivity brings consumer benefits but at the same time it can create privacy risks.

This is especially true with respect to sensitive health information, where, for example, you might wear a wireless fitness device that shares your blood glucose reading with your doctor. Do you know who is collecting your health information and how it is being used or shared?

One of the topics I'd like to discuss today is privacy cases brought by Commission against social media companies.

I will just discuss a couple of them to give people a sense of what we've done in this space.

In 2011, Google agreed to settle FTC charges that it used allegedly deceptive tactics and violated its own privacy promises to consumers when it launched its social network, Google Buzz in 2010.

Google launched Buzz through its Gmail product. According to the FTC's complaint, on the day Buzz was launched, Gmail users got a message announcing the new service and were given two options.

One said "Sweet! Check out Buzz" and the other said, "Nah, go to my inbox." However, the FTC complaint alleged that some Gmail users who clicked on "Nah, go to my inbox," were nonetheless enrolled in certain features of the Buzz social network and the user's information was shared in a number of ways. For Gmail users who clicked on the "Sweet" option, the FTC alleged they were not adequately informed that the identity of individuals they e-mailed most frequently would be made public by default. As further alleged, Google also offered a "Turn Off Buzz" option that did not fully remove the user from the social network.

As part of the settlement, Google was barred from making future privacy misrepresentations and it was also required to implement a comprehensive privacy policy to protect consumers' information.

It should be noted that less than one year after this settlement became final, the FTC settled further charges with Google for a violation of that previous privacy settlement where it agreed to pay a 22.5 million dollar civil penalty for allegedly misrepresenting to consumers who use Apple's Safari internet browser that it would not place tracking "cookies" or serve targeted ads to those users.

I would also like to mention the FTC's settlement with Facebook. The FTC charged Facebook with failing to live up to its privacy promises to consumers. In its complaint the FTC listed a number of different ways in which this occurred.

One example was in 2009. Facebook changed its website so certain information that users may have designated as private—such as their Friends List—was made public. As alleged in the FTC's complaint, they didn't warn us-

ers that this change was coming or get their approval in advance.

Other examples set forth in the complaint include that Facebook promised users that their personal information wouldn't be shared with advertisers when it actually was and Facebook told users that when they deactivated their account, their photos and videos would not be accessible when in fact they were.

Similar to the Google settlement, Facebook was required to implement a comprehensive privacy program and also was subject to independent privacy audits. The last social networking privacy case I want to mention is *Path*. Path is a social networking app where you can create and share a personal journal with a network of up to 150 people. The FTC alleged that in its version 2.0 for Apple devices, Path offered a feature that allowed users an "Add friends" to their network that provided users the option of "finding friends" from their contacts. However, whether or not you selected that option, the FTC alleged that Path automatically collected and stored information from the user's mobile device address book without the user's knowledge and consent.

In addition, the FTC charged that Path violated the Children's Online Privacy Protection Act because it collected information from approximately 3,000 children under the age of 13 without first getting their parents' consent. Path was required to pay an $800,000 civil penalty as part of that settlement.

I would also like to discuss online advertising. While there are a number of enforcement actions I could talk about, I would just like to mention two things in terms of guidance that we've issued.

The first is the Dot com disclosures. They were originally issued in the year 2000 and they were updated in March of 2013. The document provides FTC staff guidance with respect to mobile and other online advertisers that explain how to make disclosures clear and conspicuous to avoid deception. The guidance takes into account the expanding use of smartphones with small screens and the rise of social media. I just wanted to share a few key principles from the updated guidance and we can later tie them in to our broader discussion.

First is that no matter what medium you're in, whether you're advertising in TV or traditional print or the online or mobile marketplace, the same consumer protection laws apply. This means that you have to make non-deceptive and truthful claims regardless of the medium. Second is that your disclosures must be clear and conspicuous and we give examples in the guidance.

For example, if you're advertising on Twitter and that's obviously a space constrained ad, we give an example of a tweet promoting a weight-loss product and it's a testimonial by a paid endorser and she says that she lost 30 pounds in six weeks, which is an extreme outlier. The tweets need to somehow disclose that this is not typical weight loss. So we provided in the example of an appropriate disclosure using just 18 characters: "Typical weight loss: 1lb/wk" and again, that would be a sufficient disclosure in that context.

And the last principle from this that I will mention is that advertisers need to take into account where they are advertising in terms of what platforms and what devices consumers may use to view the ad, and if they don't have the opportunity to make a sufficient disclosure on that platform then they shouldn't disseminate the ad entirely on that platform and that's part of the guidance.

I would also like to mention search engine guidance, which Dan had referenced. This was guidance sent to a number of general purpose search engines and a number of specialized search engines and what we were cautioning them is to distinguish between paid search results and other forms of advertising from natural search results. This is coming up because that distinction is getting blurred in the online space, so we are offering guidance and urging the search industry to make sure the distinction is clear. This is to avoid misleading the consumer.

MS. WASZMER: One of the things that we talked about a lot when we were brainstorming is that we want to spend 90 percent of the time talking about the enforcement that's happened on the consumer protection side. Part of the reason was to give you the landscape on the activity in this space. But the biggest challenge is trying to figure out private litigation and antitrust. We had a slide and we talked about the recent activity. What theories are out there? What consumer protection theories are used in active enforcement from the FTC? What are the guidelines that are really relevant now to social media or to online platforms? What has been out there on the antitrust front and maybe why has antitrust not been as active or as developed?.

You will see one of the things you will talk about not just in terms of DOJ cases. Jamillia will talk about what is out there.

MS. FERRIS: It's true and you know from the government side Jared makes a good point, it's broader than social media and really the larger ecosystem and in that sense you do see a lot of government interest at a minimum.

For example, even at the Antitrust Division, which has three civil sections, three of those sections touch on pieces of the ecosystem, whether it's telecom or technology, broader technology, different inputs into the ecosystem they are all focused on this industry and you do see them.

And so for example, Google ITA was an enforcement challenge involving the market for online travel search capabilities, certainly not what you think about when you think about traditional social media but it is an example

of a broader ecosystem where companies are relying on the internet both to engage consumers and to enable consumers to engage with each other.

Social media has come into play in some of the most recent division enforcement challenges. I am sure some of the other panels will talk about that lawsuit, so I will only lightly touch on the recent division win *Bazaar Voice*—which is a consummated merger trial involving customer platform used on the internet.

Anyone who has purchased anything on the internet in recent years likely has clicked to see what other customers are saying about the product before they make their purchase.

One party's argument was that while there were only two competitors in the customer review platform space, in fact these two companies were competing with a much broader market that included all social commerce whether it be companies advertising on Facebook or on a blog or a number of other media, that these media were competing with the platforms for customer reviews all for the same advertising dollars and that touches a little bit on what Dan was talking about in terms of how you look at the market.

The court rejected that argument and said in fact this unique service of customer reviews was different because customers are using it as the point of purchase as opposed to just general advertising by a brand. This impresses upon the point of antitrust. You need to define the market in a more narrow way.

So, yes, companies are competing every day on different platforms, but in terms of antitrust the market can be much more narrow than that.

It is also true that we haven't seen a lot of government enforcement in the broader social media space but the government looks at the mergers that come before it and considers the conduct that they hear about.

We are going to talk more on the panel about how the agency hears about conduct and what is the best way to approach the government. But the fact that there hasn't been activity doesn't mean that there won't be, it doesn't mean that there isn't anticompetitive conduct going on out there and it's certainly an area to watch. The agencies' focus on the high-tech industry is really reflective of how important it is in our daily lives.

On the private litigation front certainly there has been a little bit more although nobody would say private litigation involving social media companies is sort of overwhelming the dockets, it's certainly not. But there are some notable cases.

There were early cases brought against MySpace along the lines that Dan talked about where MySpace was accused of preventing companies from marketing and having their products appear on their site, and Facebook has faced similar charges.

These cases have typically been brought under Section 2 of the Sherman Act, complaining of monopolization or attempted monopolization. Parties actually had some success in hitting the first prompt of that test and establishing monopoly power. In spite of some of the things that Dan said, which are perfectly valid points, courts have found that given the network effects that you see in this market there are real challenges and barriers to entry, so it may be true that MySpace is no longer here but there was a moment in time where they had their ability to garner a sufficient number of users preventing others from entering the market, and while you might have niche sites where companies engage and consumers engage sort of on particular interests, this sort of broader access to users does create a winner-take-all even for some period of time and that could hamper innovation and I think that the courts have acknowledged that.

On the other hand, companies have had a harder time proving the second prong that there is any real willful maintenance of monopoly power, that is sort of different from just a company business success, you know. I don't know if there isn't an antitrust document that requires social platforms whether they're social media companies, whether they're a platform or just a social media company to make those platforms available to their competitors, so that's been a real challenge in private litigation and I think will continue to be a difficulty for the evolution in this area to the extent that people have competition.

MS. WASZMER: One of the other items that I will have Jamillia, Bill, and Jared comment on: What's the reason why there haven't been more cases? Is there something else practically that's preventing DOJ or FTC from doing antitrust in this space or private litigants from bringing it? That's a question that Jamillia and Bill and the panel have talked about. Is there a reason that people aren't coming to the DOJ or the FTC? What's the process for a company in the social media or online space?

I thought I would have Jamillia or maybe Bill and Jared really talk about that process.

MS. FERRIS: Sure. I mean in terms of coming to the agency, the agency has an open door policy and cases are brought in a variety of contexts whether it be social media cases, merger cases, conduct cases that just arrive from a company or a customer complaining, that's how the agencies learn about what's going in on the marketplace.

What's important for companies to do really is two things—one articulate an antitrust theory, certainly the agencies want to know what's going on in the marketplace and this informs other sections, but whether or not complaining to the Antitrust Division actually results in a case will definitely hinge on tying that activity to a

competitive theory, which doesn't always happen, and it makes it obviously difficult for the agencies to act.

I think probably some companies have a reluctance or think whether to approach an agency strategically because it's kind of an open kimono now; you've raised your hand to the agency so you need to be pretty sure that you similarly aren't engaged in any type of activity that creates issues for you.

So you raised your hand to the agency and now they are going to investigate you, that could result in a letter or subpoena or just conversation that the company needs to be prepared not only with respect to this conduct but future conduct down the line, future investigations that the division might have; so how do they want to think about their presentation to be more holistically—so that's a strategic question.

And then the other times I think companies just, you know, it's not an easy road to engage with an agency nor is the timeline short. I've seen in other contexts clients who had antitrust concerns, had a business dispute with another company but they actually just ended up just resolving it in a more efficient way than going to the agency or filing an antitrust case.

MR. EFRON: We receive complaints through multiple channels. People can send us e-mails or letters. We have instructions on our website regarding how to submit a complaint and sometimes we get anonymous letters. We also have counsel representing complainants that come to meet with us, they may make presentations and we ask them questions. Sometimes we ask complainants for voluntary information, sometimes it turns into something more where we are issuing CIDs and subpoenas. Whether or not you make the decision to come to the agency, when we are conducting an investigation, we may request information from market participants, including competitors and customers.

MS. WASZMER: Jared, I won't put you on the spot but do you have companies in the online space who are experiencing some of the competitive issues that we talked about, not having the incentive to approach an agency?

MR. GRUSD: It strikes me as really weird. Government knows how to deal with that. We can look at privacy and data with the tools to do this. And all the activity we have been talking about really comes from those two things.

It is shocking to me that there is really nothing in the private litigation, I mean maybe one or two things, but in general there is really nothing in private litigation. There are no conduct cases. It can't be because people who have market power or who are like big platforms are behaving well all the time.

It's like how is it these companies that are well represented by the best lawyers in the world you can get—you know, like foot fault and consumer protection issues. There is a long list of that coming back, taking place on the competition side. It's smooth sailing and it upsets me. What are the antitrust tools available to people? Is there a system really set up for ensuring that those kinds of complaints can get heard and resolved in a timely efficient manner?

I don't think there is either in this country, in Europe or in other places, and so to answer your question more specifically, it's like if you put yourself in a position of somebody who's trying to disrupt a given marketplace or a fast growing technology or social media company, the world is so competitive, it's like I compete with you and I can define myself as a competitor because the market—it's very difficult to define what is the market and who are the players in the market and who is competing with whom? It's very much a moving target from the market definition perspective.

In these markets you compete and you rely on the very people you are complaining about so if you depend on Google to put your application on the Android platform and then you complain about them and it becomes public, you have to worry about what are other abilities Google has that are legal to make your business that much more difficult and go through that cost benefit analysis.

I would guess that 99 percent or more of the companies say that it's not worth it because you are too dependent on those places and the burden that I think regulators have are like a standard approved or evidentiary burden that you need to provide to demonstrate your case is too high to meet, so you know it's not going go anywhere and as a result; you just have to compete even harder.

MS. WASZMER: We talked about this before. Can you give examples of the kinds of things that a company like Spotify could experience from a big provider? There may not be an antitrust issue but if the experience should be a complainant I think that's interesting in terms of the vulnerability of the companies that are out there.

MR. GRUSD: Let's just say, for example, you have an application and you want to have your application set up on the Apple operating system. They charge a 30 percent tax on revenues that is derived from purchases so they have a 30 percent margin that they're collecting on top of your applications; so there are some businesses that are 30 percent margin businesses and if Apple, for example, decided to compete not just horizontally but vertically they have a systemic cost advantage. I am not saying that's an antitrust issue, I am not saying that's illegal, it's just systemic advantage that they may have and to them they have various levers to throttle up or throttle down how much promotion or distribution you get in the system, for

example. And as a result of that, it can actually play with the way vertical players are sitting on the application.

I am not saying they are doing anything wrong. I am just saying when you control a platform, whether it's an operating system layer or it's an infrastructure layer and you're also competing on a vertical layer, you have advantages that can be exploited legally or illegally and I think when it comes to the illegal parts people really struggle in the cases because then they can be damaged.

MS. WASZMER: Dan, just to go to that. I am hearing the types of damages that companies can suffer, and wondering why companies haven't banded together to do more. What have you seen in terms of the issues that Jared raised?

MR. O'CONNOR: Sure. Wow, there is a lot in that question. I've certainly heard a lot of complaints. I mean, we have Microsoft, Yahoo, Google has members with 25 other companies. There are very few of them that think the same way and they view things differently in other markets besides their own.

Just going back to why haven't you seen more of these. Most people here in the audience and I, given how difficult these markets are to nail down and articulate an antitrust case that is going to survive the D.C. Circuit, it's going to be difficult. I think a lot of times as Jared said, okay, now what do I do? What is my way around this? There was a lot of software writing to a particular platform; they were complaining behind the scenes a lot about this. They were really excited to bring a complaint. All of a sudden you can have people competing. Then you know, it's a roll of the dice and they don't want to engage in this.

The underlying variable here is why we do more on the internet? Why we have more privacy protection cases on the internet than we do straight antitrust claims. As Congress looked at the underlying variables, the internet is a tool that is built on standardized protocol that anybody can use. It stretches over the globe so it's very competitive and there are things that affect some platforms but the thing you is see more. As I said, because you have situations where the average consumer can't see everything behind the surface you kind of get that balance difference.

The internet as we've seen is very competitive. But it has its weaknesses and that's what the FTC has been doing.

MS. WASZMER: We haven't talked about it but putting that aside, Dan will be available to talk about it after. What do you think are going to be the hot issues where you can see your association and others in antitrust?

MR. O'CONNOR: Well, first of all, I should have put this disclaimer out in the beginning. I do not speak for any of my companies and it would be very hard to craft the silence that actually was supported by all my companies. As far as going forward, we have done a lot of work and I talked with Scott on the last panel. There are some very difficult antitrust issues I am trying to figure out. The FTC is in the process of conducting a study. Little is known about the business interactions with the patent transactions. In some situations you have operating companies licensing to other companies that act in unison with an arrangement saying if you don't use these patents, we say you have to use them or we take them back. So basically, go hit your competitors with these and if you don't we will take them back or they will cross reference them with some of their friends and give them on the secondary market and that becomes a difficult situation. With patent issues you have an opportunity to use the IP. Antitrust is one of the issues that people are struggling with now.

I am happy to address net neutrality. If you look at the ecosystem, just the internet access layer that the FCC lost in court is a problem because that is an area where some people have three options at most. Most people have one or two. Structurally there is an issue from a competition angle, I think, in the near term.

MS. WASZMER: I think we are winding up with time. I thought we would end with having each panelist maybe give a take-away for the future because like the internet you have given lots of information at a very high speed and our conversation was very educational but there are companies out there really trying to thrive in the working place, and none of those conversations has a very clear theory under Section One or Section Two that appears to be supported by the five or six cases that are included in the booklet. If you wanted to draft a complaint today it would be really tough.

Similarly, as the panelists have addressed that spending time and energy to go in and develop the theory with the agency would be very difficult, a lot of great innovative companies are not revenue positive at the moment. That is certainly a theme to find an explanation as to why there may not have been as many public cases for enforcement actions in the antitrust side as opposed to a huge amount of activity on the privacy side. So one of the questions I had is, are we at the stage where we can talk about that or are we at a much earlier stage? So I will just go down the line.

MS. FERRIS: So I think in some ways social media is not different than any other industry, really. Companies are out there innovating all the time and they should be looking for where the barriers are to innovation and what is preventing competition in this space, so this continues to be an area to watch.

I think you could have a panel next year and you might not see many more cases but you might see really quick evolution in the marketplace, so the bottlenecks would be different next year than they are today while maybe this is not an area that is ripe for a near term en-

forcement in terms of what we will see publicly, it certainly is an area that is right for discussion, figuring out why competition is hard in this space and identifying what the legal theories could be and whether you need to push the law in this area. I think it's just an interesting area and it will to continue to be an interesting area to watch even if we don't have an answer next year.

MR. GRUSD: Competition is good, competition happens in real time; antitrust law happens after the fact so I think that's a major problem.

Look, I agree, I think the dynamics of the marketplace, particularly as they relate to technologies, are growing fast and as a result it's really ahead of any of the tools or anything the experts can really wrap their heads around.

At this point we are going through a fundamental secular change on this side of the industrial revolution, so when we were sort of making further progress through this major secular change, markets settle down and markets saturate. Then everyone in this room has to deal with it in the meantime. The battles are taking place, the wars are being fought and not everything that's happening is happening in a great way. But that's I think going to be the inevitable reality for the conduct in the foreseeable future.

MR. EFRON: I think one of the lessons that you can take from the consumer protection side is that regardless of what the medium is, the same laws apply.

Two or three weeks ago we settled a case on the BCP side with Apple where they agreed to pay a minimum of 32 and a half million dollars. The FTC alleged that the company billed consumers for charges incurred by children in kids' mobile apps without their parents' consent. These charges generally range from 99 cents to $99. The FTC alleged that Apple violated the FTC Act by failing to tell parents that by entering a password, they were approving a single in-app purchase and also 15 minutes of unlimited purchases children could make without further action by the parent. So, while the case involves Apple and the app industry, it's enforcing a really basic unfairness principle which says you can't bill people for charges they didn't authorize.

Whether that occurred in a retail mall or online in an app store, we are applying a fundamental principle. And I think you can do the same thing on the antitrust side. For example, the *Bazaar Voice* case, and this is only from my reading of the complaint, on the one hand the court's opinion discusses the rapidly evolving e-commerce industry but at the same time the decision is largely based upon contemporaneous business documents which establish the product market and that the two companies perceived each other as their only competitor in that space.

Of course we take into account the dynamics of a rapidly evolving market, but at the same time, we use time tested tools and investigative techniques. What we do is very fact specific.

And then the last thing I would say is in terms of the privacy and data security, Dan had mentioned this and Jared had also mentioned this. You really have a situation where protecting privacy and data builds trust for companies. Companies don't just invest in this to avoid regulatory actions. People really care more and more about their privacy and where their data is going.

Teenagers adjust their privacy settings on social media sites. Some people uninstall apps. People don't engage fully in the marketplace as a result of not knowing what is going to happen with their data.

MR. O'CONNOR: Two unique theories I think you might see as antitrust claims coming up we've seen on the Section 2 side.

Joe Farrell and Carl a while ago in the software platform context discussed something that I think mixes with deception. Where you basically promise something open to your users as a way to increase market share, and we have seen this happen a couple times where you promise to be open and that's why people went to you instead of somebody else and then you hit a certain market share, you say never mind, close it up. That is one area I think you might see come up.

The other one in the merger case is disruptive firms. This is something that's huge. People aren't necessarily buying their biggest competitor. They are thinking one is going to be a good complement to my platform and two, if they are being deceptive and have an ulterior motive, who is coming up to them? What is the next competition?

There was some talk about this with the *Avis Zip* car case. There are people out there who are really worried that Avis' version of zip car might be a way to short circuit any sort of competition there. Eventually that was proved and that turned out pretty well. Avis invested a lot of money into zip cars. So, those are two things.

MS. WASZMER: I think we are winding up on time do you have any question before I close up the panel?

AUDIENCE MEMBER: So the question raised about why there weren't more conduct cases and to me a lot of them have a similar pattern. Facebook changes its algorithms, Zinga plummets, Google changes its algorithms and some advertiser search engine has its business plummet and these are all relationships that have been profitable for Facebook or Google or whoever the platform is.

From an antitrust perspective what you need is market power and exclusionary conduct. The same fact pattern sounds to people with antitrust background like a dominant ski area, all of a sudden terminating a profitable relationship. So my question to the industry guys is whether this conduct seems unreasonably exclusionary

and to the enforcers is there any interest in pursuing an *Aspen* theory? Is *Aspen* just a footnote now?

MR. O'CONNOR: I, not being a lawyer, from what I understand *Aspen Ski* was—a lot like, I think, the *Trinko* case. I talked about in the beginning you establish market power and you move on to exclusionary conduct. One of the hardest things is when you move on to exclusionary conduct you have to you know is there a legitimate business justification? Twitter had a very good business reason to end the relationship even though they had a profitable relationship beforehand.

Twitter had a very good business reason for separating that open IPO access. They wanted meter access to their data. They went through other firms basically more controlled and when they went to IPO they had to close and they ended up making a lot of money. On privacy, you have all the data and people want some of that data. If you left that open you could not be sure that you could take of your users' storage data. These are two things to consider

MR. GRUSD: It's not like a cookie monster sitting in the room eating all the competition cookies and you have the smoking gun piece of evidence. These companies are very sophisticated. They do things in very intelligent ways. They have legitimate means to compete with people is what you find.

You are not going to see cookie monster eating. You may see some of the cookie crumbs along the way. Cookie problems don't rise to the level of cookie monster sitting there eating his cookies. When you get into that environment I don't think people have put together the evidence in a good way.

And the second thing is what a ski outfit is. I know it's different than surfing in the Pacific Ocean, but when it comes to defining what market you actually are dominant in, it's very hard to do. Entry is very, very strong. MySpace is not the right example but if you look at Facebook no one is going to create a social network that Facebook has, period. It will not happen.

The only way you can compete with that is if you shift from a desk top to mobile. There's an opportunity to create that and Facebook thought of it and I think they are well positioned there.

I think you can if you set up and build a better Facebook, just like Microsoft tried to build a better Google Search and Bing could not do it. Just like Google and Google Plus is trying to build a better Facebook with all the resources in the world, you will not do that. So I think on the one hand markets are moving very, very quickly. That has been a challenge but on the other hand, in some segments, they are trying to stabilize. Maybe once they stabilize your tools will become more effective and we can go skiing then.

MS. WASZMER: During our panel discussion conversation, literally I felt the enforcer in me come up. Keep me out of all of this. It's kind of like death by a thousand paper cuts. There are certain companies that we will never hear of because they are basically taken down and won't become revenue positive. There may be 15 or 20 different reasons why that happens to them. Some of them may have been noncompetitive but the question is whether someone is going to put it together and send it to Bill or to the DOJ. So our plaintiffs over there can think about it in the hallway.

Thank you so much and thank you to the panel.

MR. STOCK: Thank you, Wendy and to all the panelists. This was a great panel. I am sure there is a lot more to be heard from this space.

So we are about to take our lunch break but we do we have two pieces of business before we all break. The first thing is that you all have the symposium that is part of the materials, the minutes from last year's meeting, including all the discussions. There's a transcript in there, I think it's page 27, the minutes from the business meeting last year. On behalf of the Executive Committee I would like a motion to approve the minutes from the business meeting.

AUDIENCE MEMBERS: So approved.

MR. STOCK: Motion carried.

Secondly and most important, I would like to ask Stacey Mahoney to come up on behalf of the nominating committee to report and commence the process of electing the officers for next year. Thank you.

Stacey.

MS. MAHONEY: Thank you, Eric and if you can bear with me for another minute I really always have to thank my colleagues on the nominating committee, it's just a joy each year to go through this process.

We do have a rather large executive committee. I am going to forgo reading all of the people who are returning for this second year of their two-year term but I am going to read to you the members that we are proposing for the next two years for a term that would end at the 2016 Annual Meeting, as well as a couple of new members, and I will be giving you our officers slate as well.

So for the folks who we are recommending for reelection to a two-year term are:

James Bailey, Rita Sinkfield Belin, Jeffery Clark, Lisl Dunlop, Martha Gifford, Leonard Gordon, Barbara Hart, Jay Himes, Elinor Hoffmann, Michael Jahnke, Ethan Litwin, Stephen Madsen, Mary Marks, David Marriott, Scott Martin, Terri Mazur, Eamon O'Kelly, Doug Richards, Bill Rooney, Fiona Schaeffer, Mark Siemens, Benjamin Sirota, Eric Stock, Geralyn Trujillo, Christine Varney, and Dale Worral.

The new individuals we would like to propose an election to a two-year term are:

David Park, Virginia Tent, and Alan Kusinitz.

In addition, we would like to propose the following as the slate of officers:

Barbara Hart as the Chair, Elai Katz as the vice chair, and Lisl Dunlop as the secretary; each of those would be for a one-year term and, in addition, Nick Gaglio as the finance chair, which would be for a three-year term that would run through January 2017.

May I have a motion to approve this slate?

AUDIENCE MEMBERS: So moved.

MS. MAHONEY: Second?

AUDIENCE MEMBERS: Second.

MS. MAHONEY: All in favor?

(Ayes voted.)

MS. MAHONEY: Any opposed?

(No response.)

Antitrust Trials: Lessons on Why We Win or Lose

MS. HART: Everyone is going to have to come together. We went over a little bit in the meeting and they are all streaming in, so Stacey is going get started and we are going to respect your time.

MS. MAHONEY: Thank you, Barbara, I appreciate it. If everyone can come on in and get yourselves situated.

I will remind you for your purposes that you do want to remember to fill in your CLE form so you get your credit for this afternoon. If you forgot to fill it out this morning I don't know how you may be able to convince the nice ladies outside that if you didn't do it this morning it is not waived, but you have made it this afternoon.

So I've got a great panel for us today and we are going to be talking about antitrust trials. There were quite a number of them this year, which is a little bit of a departure since most frequently you find that these cases are being settled, certainly on the civil side, but that's even true as often as not with indictments, et cetera, on the criminal side.

With this year, however, we have had a plethora of antitrust trials and we had a great selection to choose from, so I have a wonderful panel here and our principal focus will be basically what we do vis-à-vis the jury and how you look at those issues with regard to damages, with regard to criminal trials, with regard to presenting victim evidence, and I will leave it to my panelists to fill in the details from there.

I am just going to introduce them all starting with Dan Cooper on my left. Dan is the president of Litstrat Incorporated. Litstrat is a full source litigation consulting firm that specializes in jury research.

Dan and I go way back; he helped us do a ton of jury research in the *In re Visa Check Litigation* that actually settled after we chose the jury.

In addition to now being at Litstrat, Dan is actually a lawyer so don't think we are going to pull anything over on him. He went to Brown University, Harvard Graduate School of Education and got his JD at Columbia Law School. He also clerked for Judge Weinstein in the Eastern District of New York and, in addition to his Litstrat work, he has served as Vice President for Corporate Administration at ICM Pharmaceuticals.

Liz Prewitt is to Dan's left. Liz is the Assistant Chief of the New York Office of the Antitrust Division for the United States Department of Justice. She began as a trial attorney in 1998.

Liz actually had a couple of different trials this year, U.S. against Ghavami, which I may be mispronouncing, that was tried in the district of New Jersey in front of Judge Wigenton, a two-week trial that came up with a jury verdict of guilty in September 2013. I think there may have been a recent sentencing which may be interesting.

MS. PREWITT: The sentencing is coming up, actually.

MS. MAHONEY: To Liz's left is Roman Silberfeld. Roman has been kind enough, as has Dan Mason to his left, to join us from California.

Roman is with the law firm of Robins Kaplan Miller and Ciresi; he is the regional managing partner for the LA office and he is a member of the executive board. His emphasis practice is on multistate, multiparty and class action litigation, in particular in the areas of business and high-tech matters.

He is presently the court appointed lead counsel on the *In re Chocolate Antitrust Litigation*, which is pending in the Middle District of Pennsylvania. He is a graduate of UCLA and of Loyola Law School where he presently serves on several boards and committees for that institution.

He is also on the Board of Public Counsel, which has as its mission helping children in need and other underrepresented communities.

Primarily Roman is going to be talking to us about his role in *In re TFT LCD Flat Panel Antitrust Litigation* in the Northern District of California in front of Judge Illston where he represented Best Buy against Toshiba and HannStar, that ended in September of 2013 with a jury verdict in favor of Best Buy, but no liability finding as to Toshiba, so that will be interesting with two defendants and split verdicts.

To Roman's left is Dan Mason. And Dan is in from San Francisco, where he is a partner in the law firm of Zelle Hofmann.

Dan clerked for Judge Hamlin in the Ninth Circuit, is a graduate of UCLA and Duke University Law School. He previously served as General Counsel of the Kellogg Company in Michigan. He also represents plaintiffs and defendants, so both of our private practitioners have quite a lot of experience in trials on both sides of the "v.", which should give us a very interesting perspective.

He has served as Special Antitrust Counsel for the States of Arizona and New Mexico and, relevant in particular to our discussion today, he's also served as a legal consultant to the Supreme Court of China with regard to the Chinese Antimonopoly Laws and their administration.

He was involved in the *In re Vitamin C* litigation here in the Eastern District of New York in front of Judge Cogan and wound up with a $22.5 million dollar settlement just before the jury was charged, so after the trial

ended but before the jury was charged. He was representing Weisheng Pharmaceutical and its parent holding company, which is formerly known as China Pharmaceutical Group.

So with those introductions I am going to have Dan get started and each one of these individuals is going to give sort of their world view in a few minutes and how they perceive these issues and we will go down the panel that way, at which point I will open it up for discussion.

I encourage you at that point to feel free to ask questions. If you do and I do, the conversation will continue and it will be a lot more interesting than just having some talking heads up here. We would like this to be as interactive as possible. So thanks.

Dan?

MR. COOPER: Good afternoon. World view in 8 minutes, that's much too much time for me but Casey Stengel, some of you may remember, a famous manager for the New York Yankees, once said that managing is getting paid for home runs hit by someone else, the art of trial consulting similarly is getting paid for home runs that you as trial lawyers, including my colleagues on the panel here, get but today sort of as the surrogate for jurors to whom you try your antitrust cases.

Please indulge me for just a few moments. Over the course of nearly 20 years as a consultant I've heard many remarkable things speaking with jurors, real jurors, mock jurors, one of the most consistent, to quote John Quincy Adams, is "whoever has the best story wins."

In his book *The Storytelling Animal: How Stories Make Us Human*, Jonathan Gottschall has a chapter entitled "The Witchery of Story." He begins by quoting Christopher Morley, you guys remember what a book is right, anyway Morley said, "Lord when you sell a man a book you don't just sell him 12 ounces of paper and ink and glue, you sell him a whole new life, love and friendship and humor and ships at sea, by night there is all heaven and earth in a book, in a real book I mean."

Now, I am not so naive to recognize that trials are not fiction, that your story telling is restricted by facts or by law, by procedure, by judge, by your adversary but nonetheless, an antitrust trial from a juror's perspective is not and cannot be about the pounds of documents, the reams of expert reports, the stacks of legal briefs or the numbing legal instructions that they get far too late in the course of a trial. It is instead, or at least can be, with apologies to Mr. Morley, a whole life about fierce competing relationships between companies and their customers fighting to survive. It is a drama and there is all heaven and earth in those stories about those people and the choices they make in an effort to prevail in a real story.

So how do you engage your antitrust case to make it come alive, how do you motivate, enable jurors to learn and remember and encourage them to become your ally and advocate in the jury room? Well, first and foremost sincerely respect your jurors, don't blame, belittle, manipulate or confuse, complain, distance or patronize them; theirs is a challenging and burdensome task but most jurors sincerely try to reach the right conclusion. You need to embrace them, not fear or ridicule them.

Next, recognize the value of the teaching story model of communication. In his recent book *Jury Decision Making*: *The State of the Science*, Professor Dennis Devine writes stories play an important role in helping people make sense of daily life and there is every reason to believe jurors use these same cognitive tools when it comes to comprehending what they encounter in a trial context.

Listen to a former juror discussing his or her case and you will probably glean the makings of a story. Stories are effective because if well-crafted and well told, they capture the emotion of the listener and we are all wired to feel first and process information second.

Daniel Kahneman, in his acclaimed book on decision making. Thinking Fast and Slow, says the emotional intuitive subconscious partner always speaks and always speaks first; or as Jonathan Haidt reflected, "the emotional tail wags the rational dog": another commentator, "the emotional brain generates the verdict, the rational brain explains it."

Now, there is no time today to speak about *voir dire* but I would be remiss if I didn't mention the importance of *voir dire* in jury selection.

The fact is there will be jurors who, with all your persuasive powers and compelling facts, you will not be able to reach. You need to know who they are and if you can minimize them on your jury. Included in this is the identification of potential adverse leaders, majorities, especially majorities with a leader upfront, win most deliberations. Keeping the adverse leaders off the panel has to be a top priority because even the best story needs an audience at least willing to listen and learn but more on that another day; today remembering that one objective is to understand how your story will be heard and hopefully used by jurors.

Let me suggest that you need to do a little backwards forward thinking. Another great Yankee and yes, there is a bias here, Yogi Berra observed if you don't know where you're going you will wind up somewhere else and in thinking about your case take a few moments, hear the deliberation, discussion, the exchange of stories, jurors talking about what really happened here and why as friendly and hostile jurors exchange in a battle over those narratives, what makes sense given what they've seen and heard at the trial and what you hear when you

visualize this dialogue, what are the personal experiences jurors are using, what are the words jurors are using and what assumptions and biases are they evolving to?

Hearing this imaginary dialogue months if not years before your trial gives you an important target. If this is the dialogue you hope takes place in the deliberations down the road, how do you get there from here?

That is, core concept is listening to jurors and recognizing that you need to travel, bring your case to their world of competition and fair play, don't expect them to be interested in nor able to travel to your world.

I am sure many of you have heard the old adage if you have the facts on your side pound the facts, if you have the law on your side pound the law and if you have nothing else pound the table. We could have a robust discussion about the effectiveness of pounding anything when it comes to communicating complex antitrust issues persuasively but for today I just want to observe that the advice like so much advice about advocacy focuses on what the advocate is saying and not what the jury is hearing to make their decision.

Let me suggest, especially when it comes to jury trials of complex issues, that to improve your ability to teach and motivate jurors to speak for you in deliberations, you need to spend time focusing on what jurors hear, not just on what you say on what jurors are learning, not just on what you and your witnesses are teaching and yes, on what jurors are likely to buy, not just on what you hope to sell.

To do so you need to find common ground, the experiences, the vocabulary, the biases and the expectations of your jurors. I often refer to this search for common ground as a search for crafting a case that, borrowing from Albert Einstein, "is as simple as possible but not simpler." It is not dumbing down, it's not ignoring nuance or complexity, instead it's finding the essence or as Leonardo DaVinci said, "simplicity is the ultimate sophistication."

In short, find your engaging value-driven démarche narrative by understanding what your jurors are hearing and how they will boil it down to its core thinking, not what you need to add but what more can be taken away. And speaking of vocabulary that encourages rather than separates you and your witnesses from the folks you hope will feel they should join with you. Thanks.

MS. MAHONEY: Thanks so much, Dan.

Liz?

MS. PREWITT: So to kick this off, I will start off with something that is unexpected and just completely off-the-wall coming from a government prosecutor….

Which is a disclaimer that the views expressed are my own, and not purported to reflect those in the Department of Justice.

As many of you know the New York office has had a streak of trial wins in the past year and a half. We secured four consecutive jury trial wins with convictions of a total of 14 defendants—all charged with complex fraud schemes, among other crimes. Our most recent win came from a case that I tried along with my colleagues in September. And, in that case, a jury in Newark, New Jersey convicted an EPA Superfund project manager on ten counts—ten criminal counts that included offenses of bid-rigging, major fraud, wire fraud, international money laundering, conspiracy, obstruction of justice and tax offenses.

Of course, as you know, the Division has secured other recent wins at trial, and not just in connection with criminal matters. One of the trial attorneys from our office, Carrie Syme, was part of the successful *E-books* trial team. So, I think it's safe to say that this is part of the trend.

In 2010 I was part of a Division-wide criminal litigators working group tasked with trying to uncover and develop some best practices to increase our chances of winning at trial, and some of those practices have been put into effect in the New York office. So I thought I would share some of them with you.

First and foremost, we are trying cases more often and winning those cases, and this fundamentally influences how we perceive ourselves. We see ourselves as trial attorneys who often investigate our own matters, not investigators that every once in a while try cases. And that is a distinction with a lot of meaning for us. It affects how we develop our cases pre-indictment and it affects how we try those cases in court. This, in turn, impacts our success rate outside the courtroom. Obviously, a lot of our cases don't go to trial. A lot of them end up with negotiated dispositions. But it is our litigation-focus that helped us achieve very favorable dispositions for the government. Parties know that we have the ability to build cases that we can win at trial, and that has significantly strengthened our hand at the bargaining table.

I would like to talk to you about some of the approaches that we are taking in the New York office in terms of litigation.

We investigate all our cases now with an eye towards litigation. We are constantly thinking about evidence and admissibility from the very first time we open up a matter and start investigating, and we are always thinking of jury appeal issues.

We are being selective as to which witnesses we put on the stand as government witnesses. We are looking to put on the stand as cooperating witnesses more junior executives who will be cooperating up against more senior

executives as opposed to the other way around. Our witnesses are typically cooperating witnesses. They are individuals who themselves have faced substantial penalties for serious offenses. These offenses all carry the threat of substantial jail time. And still we are working very, very hard to find evidence that corroborates those witnesses.

There's a lot of evidence out there, especially in the area of e-mails and chats and audio, if you know how to look for it and you know how to present it to a jury in a very effective way. And I think that's something that we have learned to do and can do very effectively. Sometimes we find that the story told by the documents and the chats is often more effective than what comes out of a witness' mouth.

We are also taking a hard look at what we actually need to prove and what we don't need to prove and as a prosecutor even as a defense attorney, you can look at the Sherman Act jury instructions and come away with the impression that the government doesn't have heavy lifting to do—that the government only needs to show proof of an agreement, that we don't have to show proof of an antitrust injury, that we don't have to prove specific intent. And I think that can be very deceptive. I think that can be deceptive because juries want to see more.

It's critical to remember that you are not going to have a jury filled with lawyers. You are not going to have a jury filled with judges. In fact, if you did end up with a jury box of lawyers or judges, you know something went quite wrong during *voir dire.* So we actually need to convince non-attorneys, those I would call real, live, actual people. We have to convince them of the guilt of the defendants we are trying, and we have to motivate them to convict. And that's not an easy task. So how do we manage to do that? We focus on telling a simple story.

We learned that juries want to see that: There was a clear path to do things the right way; the defendant or defendants deliberately chose to take the wrong path; what they did was motivated out of self-interest and greed; and that an entity or person that they actually care about got hurt as a result. We start off trying to get to that place by developing very simple, opening themes and graphics (and I have submitted some in the materials), and we try to do it all with the focus on the victim. I will talk a little bit more about the victim story in a moment, but we are trying to weave from the beginning, from opening statements through the witness testimony all the way to the closing—we try to weave in common themes and vocabulary to eliminate confusion as much as possible to get to that basic story and not lose jurors along the way.

It is not an easy thing to keep a case simple—to focus on the basic themes—because as prosecutors we have a bit of ownership in our evidence. We develop the case usually over a period of several years, and it's sometimes very hard to let go. It's hard to let go of the witness that you have been working with or developing over a period of years. It's hard to let go of evidence that took you a long time to acquire and to present. So what we try to do is we build trial teams with this in mind.

We try to insert different perspectives and objectivity as early on as possible in the trial preparation process. We test our themes through a series of mocks and closings. And when say a series, I mean months out, if possible. We do this so we can really weave into our presentations the things that we learn. We take that feedback from the mock jurors and weave it through the direct examinations, weave it through in terms of what exhibits we select to present to the jury. We take experienced attorneys and assign them as part of the trial team to sit there with the examiner, the trial staff, while they are starting their initial preparation sessions with the cooperating witnesses. These are experienced trial attorneys who will give comments and feedback like "I know you like this witness, I know you like this part of the testimony but, based on the story you are trying to tell, is this witness or story really essential? Does this witness really get you that step further?"

On the subject of the victim and our efforts to try to emphasize the harm, what we are really trying to do is confront that "no one really got hurt" or "so what" defense, even if it's not relevant to an element of the offense that we need to prove or a defense. You try to showcase the victim in the most compelling way possible. I had a trial once where the victim of a bid-rigging conspiracy was a cigarette manufacturer and at the time the defense counsel just kept hammering on the fact that the victim manufactured cigarettes. He just kept going on and on, on this point. And I am wondering, "What is he doing? It's just not relevant, so why is this guy hammering on this point?" Well, you know, he was on to something… So, hopefully you won't have a victim that was a cigarette manufacturer—I hope to never have that again—but you can certainly showcase your victim witness in the best possible way.

We also prepare to meet the defense's case, partly through mock cross-examinations, and that's part of our trial preparation practice that we have adopted. It's something we do early on now. And we've also worked in redirect preparation as well to build confidence in witnesses so they don't have to battle or duke it out with the defense counsel—to know that there will be an opportunity for the record to be corrected, if it needs to be.

In conclusion, we expect to have more opportunities in the future to further develop and refine our approach to litigation because we continue to try cases. Right now we have a team in Charlotte, North Carolina about to deliver opening addresses next week in one of our Munibonds trials; we have indicted tax liens cases in Newark, New Jersey and then we also have our tour buses civil matter set for trial in June, and that case is

also being conducted with the New York State Attorney General's Office.

There are many more lessons to learn, and we hope to learn those lessons through more trial wins, so this is where I knock on the table and pass it on to Roman….

MS. MAHONEY: Thanks, Liz, I appreciate it. Roman, you're up.

MR. SILBERFELD: Thank you. So just teeing off a little bit of what Dan and Liz had to say we faced the not inconsiderable challenge of telling a simple story and having as our victim the world's largest electronic retailer, Best Buy, and that was a challenge for us.

When we began to think about the trial of this case we had 12 defendants. To begin with we tried the case against two of them to try to resolve all the claims before trial. You know, we approached the trial not just in these kinds of cases but all kinds of cases as a two-step process not unlike what Dan had to say, which is first give the jury the will to find for you and then show them the way. It's as simple as that.

The will in antitrust cases is more difficult, frankly, than in a defendant product case or breach of contract case because I think people these days come to financial cases somewhat jaded and so the defense in our case, for example, tried to make the comparison between their bad behavior, for which at least one of our two defendants pled guilty.

What Best Buy does, as an example, they got together and fixed prices. Best Buy has a price match policy in its stores where someone will call up a competitor and ask what are you charging for the smartphone and then they will match prices and that comparison, a price match policy on one hand and price fixing on the other was actually part of the trial theme that we had to deal with.

We tried to explain that one results in lower prices and one results in higher prices. That was a decision that was frankly more difficult than it should have been, so these are cases that turn on quite subtle differences, and I completely agree that words matter and so we scoured the record in our case for the e-mail traffic, the memos, and tried to actually prove the case out of the mouths of people who weren't there but their documents were and you got some examples we can talk about in a minute. But we actually collected in one place in closing the language of conspiracy and the words that were used. We collected the words of their acknowledgment of guilt that what they were doing was wrong.

One of them that I particularly liked was there was a statement in the e-mail from one of the senior executives from one of the companies that said talking to his team, you know it's fundamentally illegal to discuss prices with competitors. That's true but the next sentence was my favorite, he said: "Now stop it, please minimize it" was his response and the jurors in our case had the same reaction you did about that.

You know when you have jury trials at least in the retails in the civil cases one of the big themes always is well, who is actually paying the overcharge. Is there an overcharge? Sure, who's paying? Is it the plaintiffs sitting here or is it the ultimate consumer, which all the jurors look at it and say that is really me, so the distinction between direct and indirect claims matters and we went to considerable lengths to test this in mock sessions before the trial and put it on in a way that mattered at the actual trial.

This is just an example of a slide where we talked about the difference between two kinds of claims and the effect it has on the claims with respect to indirect claims and we actually had another slide, I think it's the next one, where we illustrated graphically what an indirect claim is with regard to price fixing panels that are sold to non-conspirators and ended up as finished products at Best Buy. On the other side we had direct claims which were panels that were made by defendants, sold to their captive finished goods makers and then sold to Best Buy. We tried to illustrate as best we could the difference between those two and we had different instructions—too complicated to get into here—but we tested before trial whether or not there was going to be leakage or concern about direct claims by reason of the presence of the indirect claims, and we did that six times. We did it a couple of times in Minnesota and a couple of times in California with six different groups and had to make a pivotal, hundreds of millions of dollars decision, about whether or not to pursue an indirect claim because of the existence of a pass on defense and the results we got in our mock trials were to go ahead and pursue that, so we did and those claims remained a part of the actual case and the actual trial all the way to the end.

Let me just flip back to those slides for a second. Another huge concept that lawyers understand but juries don't necessarily get intuitively is what were the actual prices and what the prices should have been. These slides are from our expert. They were actually animated in the real trial. This one shows the actual prices with the black line. The blue line is intended to show what the but-for prices have been, but for the illegal price fixing. The difference is the red because in our case at least we were trying to establish a conspiracy that existed over a span of eight years and the natural question from at least some of the mock jurors was well: Did they fix prices every single day for eight years? And the answer, of course, is no. There were some key areas where there were four spikes, that even controlling for external events like the very first bar, there is the Asian financial crisis which caused prices to change and had nothing to do with the conspiracy but we tried to again show the jury in a graphic way that while the conspiracy itself lasted approximately eight years, the price fixing activity was limited to certain pockets within

that time, which we then tied to actual and actual meetings.

The one thing that I said, and I will conclude with this along the lines of trying to give them the will to find for us, was one of my partners remembered a line from an important case, the name of which now escapes me, that talked about the importance of the antitrust laws. So I got up in closing argument and, referring to that case, I said to the jury, you know that the antitrust laws are regarded as important to our economic freedom in the same way that the Bill of Rights is to our personal freedoms to try to give them a sense of why this mattered and that it wasn't just about the world's large retailer fighting about money with defendants.

MS. MAHONEY: Thank you so much, Roman; I appreciate it.

Dan, if you can finish up for us. I think you may also have some slides.

MR. MASON: Just to pick up Roman's last comment on the importance of the antitrust laws, there was a case last spring tried before Judge Cogan—on a panel later today—where the defendants argued, and I represented one of the defendants, that the antitrust laws shouldn't apply to conduct that would otherwise clearly be a violation of the antitrust laws.

Typically, of course, the plaintiff has to prove the agreement in a Section 1 case. In our case involving the vitamin C manufacturers from China, the defendants did not dispute that they in fact agreed to minimum prices for vitamin C and to restrict the output of vitamin C. It turns out just about all the vitamin C consumed in the United States comes from China and is exported by the manufacturers who, in this case, were the defendants.

Most immunity defenses are decided on summary judgment or a motion to dismiss, very rarely are they tried—doctrine—and so forth. In our case the defendants asserted foreign compulsion which basically said hey, we're Chinese manufacturers and the Chinese government is requiring us to agree on minimal prices and they are requiring us to limit production because the Chinese government's view was this is an important industry and vitamin C industry ought to be protected and we are going to require that you do so whether you like it or not.

In any event, we asserted this defense although most of the times these defenses are decided on motion. The case was assigned to Judge Cogan. An MDO moved and the judge concluded that, in fact, there were fact issues involved.

What the defendants did in this case is we went to the government of China and we obtained statements, affidavits, amici and so forth from the government, which were submitted to the court and the government in fact said yes, we are in fact requiring the manufacturing defendants to fix prices because in our view and our social economy we think it is important to prop up and assist under-vested industries even when the products are exported to the United States.

The judge reviewed the affidavit and the statements and concluded that they were conclusory, that, in fact, they were perhaps defenses created after the fact to shield the conduct which otherwise would have been clear antitrust violations.

So we went to trial on that issue after years and years of pretrial practice, many motions, a lot of discovery, a lot of which was brought over from the Chinese that came over to the United States for the depositions and so forth. We wound up having the trial on this issue and the trial was very complicated in the sense that the issues were somewhat unclear because no foreign sovereign compulsion theory had ever been tried before in a court before a jury. They had all been decided on motions typically dismissed before trial and the Supreme Court hasn't spoken on the issue in several years, so the judge concluded before the trial that whether or not Chinese law compels the defendants who engage in this conduct is an issue of law that I am going to decide and so the defendants were not permitted to submit to the jury statements by the government of China which said in fact, yes, we are compelling the defendants to engage in this conduct.

The judge said this was hearsay and he didn't allow us to submit that to the jury. The judge also refused to admit the Chinese law, which the defendants contended compelled them to engage in this conduct. The judge said you can't put that in evidence because that's a legal matter and only the court decides legal matters.

What the judge wound up saying we could do, and this was after considerable pretrial argument, is that you can have your witnesses testify what they said to the defendants and their understanding of their authority but you can't use the law and you can't use the actual statement from the government that, in fact, this is the practice that we have in China.

We wound up bringing before a six-person jury in Brooklyn the person in China. now retired. who was in charge of enforcing the restrictions that I mentioned, was in charge of telling the defendants that as a point of fact you cannot engage in competition and we wound up talking about issues like malicious competition and industry self-discipline. so we had a very unusual situation where you had a government official from a foreign country who is explaining to a Brooklyn jury what he did to compel the defendants to engage in this conduct.

Of course, we were in the position of having to explain to the jury why the antitrust law shouldn't apply and why they are not important in this case because they are trumped by what the government, the foreign govern-

ment, in this case the Chinese government, says and that was a very complicated way; it was a very difficult way to present that in a way that makes sense and could engender some sympathy.

Many things happened in the trial that are unique and I think they were many times a function of the cultural differences between China and the United States.

In China there is a long history of government intervention in economics. There is a lot of history of government telling local industry, especially important industry, what to do and how to conduct themselves totally than we experience in the United States.

In this case we had several witnesses come over from Beijing, none of whom spoke a word of English, all of which was done in translation. All the documents were translated; none of them had any appreciation for American juries or how you communicate with them and that was standing with the fact that many, many days were spent trying to explain this to them and videotaping their testimony. In fact it proved to be very difficult. We had one witness blurt out in the middle of the examination and said to the examining attorney, "You are very handsome." This is the sort of thing we were dealing with.

Other witnesses would take the stand and give the cheery good morning to the jury and you could see the jury not appreciating this very much. This is all one of the cultural difficulties that we had in trying to establish our defense.

And the bottom line was that Americans are spending more money for vitamin C than they otherwise would because China is telling them to fix the prices. Our defense was, that's okay if you find that there was a compulsion defense so all these issues created unique and somewhat difficult issues to present to the jury. Just before the trial concluded, just before the charge to the jury was made, my clients settled the case for $22 million. The next day the jury came back and awarded $54 million, tripled to $162 million, and that issue is now on appeal.

This is an example of the difficulty of trying to present arguments to a jury which are very foreign to an American jury. At the end of the trial, although we did not participate in closing arguments, we talked to some of the jurors and we asked them what they thought and they said well, we understand what the judge instructed but you know, if you want to play in New York City you have to play by our rules.

Of course, these are going to be issues on appeal; the case is now going to the Second Circuit. Arguably there are some issues here but that happens when you have this sort of issue that you have to present to a jury.

MS. MAHONEY: Thank you, Dan, I really appreciate it.

I think there have been some interesting themes here that jumped out at me, which is really the presentation of the victim evidence, whether it's in a criminal case where you don't necessarily have to prove it for legal purposes, but you have to prove it to prevail with a jury. Or Dan Mason, in your case, where to some degree you were trying to represent these companies as a victim of their government's compulsion and not actually being antagonistic toward the American economy. I am just quite interested to know how that issue played out. Dan Mason, you finished with that so Liz, I will throw that to you first: When you're evaluating what evidence you are going to present, there's a difference between what you need to do for the record and what you need to do for the jury, specifically with regard to victim evidence. How are you analyzing this and making the decisions of what to do and what not to do?

MS. PREWITT: Well, obviously it depends upon the case. I think when we are looking at a witness they may not have an understanding of what actually happened, what the offense was, but they should be able to speak about the process—the process that was supposed to be followed and ultimately wasn't followed—and be able to sort of connect that together, to at least offer testimony that they were harmed in some way.

It's somewhat conclusory, but I think you can get three steps along with the jury and the jury can jump forward, unless the judge doesn't give you the latitude to go there.

I think in the price fixing case if you had circumstances where you can take a purchaser who can say their final product would have cost less, for example, if the price conspiracy wasn't there—and, really in terms of witness, comes down to sitting down with that person and saying, okay, if there's a number of people to put on the witness stand, is this the person that can communicate to the jury and tell that story in a compelling way.

MS. MAHONEY: And Roman I think this is one of the issues that you tested on behalf of your client to get an assessment how to position Best Buy properly with the jury as the victim. What lessons learned can you draw? You had one defendant who had pled guilty and one defendant who had not; that seemed to be a very critical factor for the jury?

MR. SILBERFELD: It was one not so subtle trial theme in our case. Liz, I would be interested to hear your views about this. When one defendant has pled guilty you can easily find against that one. But a plea from another defendant or a narrow plea makes connecting the plea to the claim difficult. Obviously all these pleas are negotiated and they plead to as little as humanly possible, a narrow period of time, a narrow set of problems, a narrow set of sales. Explaining to a jury that process and that these are the processes of negotiations and there is give and take,

is a challenge. What happens at the trial is the plea agreement goes up and that piece of paper is obviously important for lots of reasons, not least among them the fact that there is a description of the narrowness of the plea.

MS. PREWITT: I am happy to address that point because I believe that when we investigate a matter, we feel the need for them to accept responsibility. I think that if you were to ask the defense bar, they would comment that our cooperating witnesses take the appropriate penalty, so on cross-examination I think that our witnesses have held up very well as being very credible because they are not sitting there with the sweetheart deal and I think that is a lesson learned Department-wide and Division-wide.

I think that we really need to make sure that our cooperating witnesses take the appropriate penalty. We are not going to prevail at trial if we go in there with the approach "let's just sign this sweetheart deal, let's just immunize this witness" because you are really not getting far along because the jury is not inclined to believe that witness, and they are also going to look at the government in a certain way and ask questions about the choices we make.

MR. MASON: If I could have 30 more seconds. The notion of cooperation is a huge issue at trial, so the defendant who pled guilty in our case had reason as well to cooperate in the prosecution of the civil cases. There was no restitution so their witnesses testified and DOJ attorneys were sitting in the back of the courtroom making sure at the trial pursuant to the plea agreement that there was cooperation, which was great until the defense lawyer pointed out that there were DOJ lawyers back there.

MS. MAHONEY: Dan Cooper, when you've been involved in these testing exercises in advance of trial, what are you able to do in terms of assessing how to best present a not terribly sympathetic victim?

MR. COOPER: So typically it depends.

MS. MAHONEY: That is a very good litigator answer there.

MR. COOPER: There's a saying about law students going into law school saying I don't know and they come out saying it depends, that's sort of how we have been trained. I think the value of jury testing in part is that if you design it the right way and think you can hear how jurors talk about the issue right rather than assume a sympathetic victim or an unsympathetic victim if you present your characterization of that aspect of the case, and you listen to how jurors fill that piece into their story, I think you get a sense of their perspective and what is resonating with them and what's not.

And I think you can't predict how the actual jurors are going to react to the actual witness who's often not available. Certainly the actual jurors are not available. The actual person or victim or witness also may not be available to you. I think that you can have a clearer sense of whether or not the way you are folding that person into your story makes sense to jurors or doesn't make sense to them.

I think there are a lot of concepts here about the victim problem. I think one of the things and you guys touched on it, Roman touched on it briefly at the beginning, jurors are going to relate to the witnesses in part because of credibility or to the players in part because of credibility but also in part because they are filling gaps in the story and by that I mean, you are telling a story where your first step is to hopefully give the jurors the will; the will comes in part from them caring about the case. Who do they care about, why do they care about it? I think when you get to that level of understanding your victim and how jurors are going to relate to why they should care or not care about that person, I think you get a lot closer and I think you can test some of that in the research you do beforehand.

MS. MAHONEY: I know I have questions and at least Barbara raised her hand. I would like to know if there is anybody else.

Barbara.

MR. COOPER: So my experience has been with jurors that the values that motivate them are more fundamental than that. In other words, they are not there as protectors of the system. The values that are driving them often in these contexts have to do with fundamental fairness, have to do with honesty versus deceit, have to do with control and power versus the absence of it. So the essence of the antitrust story is how does this measure up against how we expect people to behave or not behave that way. The clear path is to a good choice versus the path of the actual choice. Ask why and how they deviated and the consequence of that not only in your case but to the jurors themselves. Ultimately, in antitrust the jurors are consumers. There is a lot of stuff here that they can evaluate as taxpayers.

In the bid-rigging cases there are levels that don't separate the jurors that much from the victim. So, with the fundamental level of honesty, fairness, you can maneuver towards that bank shot. But I don't think you can rely on the bank shot as the fundamental driver for why juries are going to care about your case.

MS. MAHONEY: Dan Mason, how do you think that played into your issue with the some of the cultural misunderstandings that were apparent from the jury and their perceptions of the various Chinese witnesses?

MR. MASON: I don't think the issue or the problem was so much that the jury would not believe that the Chinese government compels domestic industry to follow their directives but ultimately the reason the Chinese government did this is because Chinese companies could get more U.S. dollars into China and in fact that came out

during the trial and so it's very difficult, I think, for a U.S. jury have any sympathy for that; they are not interested in U.S. dollars in China and they don't like the fact that they have to pay more for vitamin C.

MR. COOPER: In this discussion one of the problems I think that I often see and I think you guys are alluding to it, is that these cases don't have all of the players present for the jury to evaluate. In other words, there are gaps just in terms of who they're being asked to assess in these relationships. In bid-rigging cases you may have the bid-riggers but you don't have the municipalities and the jury is going to want to know where are they?

In the China case you don't have China there but China is there and the role in all this, even the jurors are understanding of the case and what they should be doing about it. How you fill that gap becomes a problem because if you don't fill it in the way that works best for your case, then you know the jury is going to fill it and the judge instructing them not to worry about it is not going to matter.

So it's this unknown, it's this empty role that often is very challenging. I think as you try to construct your case, you can't leave it to the jurors' imagination because you have no idea where they are going to go with it.

MR. MASON: If I could just comment. One of the problems in the Federal Court is lawyers cannot *voir dire* the jurors. In California lawyers can. In our case Judge Cogan had a magistrate during jury selection follow the rules. But there's a huge difference between having a judge do *voir dire* and the lawyer doing it. In a case such as we had there was some obvious prejudice.

MS. MAHONEY: I just want to see if there are any questions from the audience.

AUDIENCE MEMBER: Roman mentioned the trial preparation and the mock jury he did. Now that you've seen the trial is there anything different that you would consider in the future doing in the mock jury and trial preparation?

MR. SILBERFELD: I don't think we would do anything different. I mean, these are never done for the purpose of figuring out who wins or who loses, it's solely done for the purpose of testing sensitivity issues that matter to you.

Joint and self was tested for sensitivity and found didn't matter actually, so no, I wouldn't do anything different other than pick a different live jury next time.

MR. COOPER: Can I just say quickly there is no *voir dire* in Federal Court; I know it's limited, I know judges in Federal Court are taught to keep control, don't trust the lawyers, they keep it restricted, I understand all that but the fact in my experience has been in selective cases where there are significant questions of bias or prejudice coming in we certainly had it in our case that the judges if they—if you begin to deal with this well in advance of the trial—are sensitive to the idea that maybe your case is the exception, maybe a lengthy questionnaire makes sense, maybe a larger panel makes sense, maybe allowing for some lawyer follow-up makes sense.

There are ways that under some circumstances you can convince some federal judges to expand the opportunity either for written or oral *voir dire* but it's a process that starts early on in terms of sort of preparing the judge for the types of issues that they may confront on the day that they bring that panel in.

MS. MAHONEY: Liz, you look like you want to comment; I don't know if it was a follow-up to that or something earlier.

MS. PREWITT: That is sort of key. I think the idea is that, if you have issues, you can confront them in terms of selecting a jury to get to desensitize the judge as early as possible. You should really think about putting forward some *voir dire* questions on the issues you want to get at. Now, the judge may strike all of your proposed *voir dire* questions, but the exercise is the important one—which is to sensitize the judge going forward because you don't know when that is going to pay off later on. And I think we have experienced that in some of our trials. There have been opportunities like that that we have taken advantage of, and you have seen some evolution in the judges' thinking that has worked well for us.

MS. MAHONEY: I didn't think I would have an opportunity to put a plug in. I thought I was just going to be here as moderator but I have coming out a chapter on Trials in an ABA Indirect Litigation handbook that actually gives you quite a lot of authority to use for the court to allow lawyers to engage in *voir dire* whether it's through questionnaires or actually in person *voir dire*; there's a lot more out there than you may think.

We have a common understanding that the judge is going to do *voir dire* and we can't really participate. The book is not out yet; it's forthcoming and I don't know when but it has pulled a lot of authority into one place so that might be useful for all of you.

I really appreciate that Barbara gave me a couple of extra minutes. Thanks so much to the panel.

Antitrust Class Actions—Where Are We: A 360 Degree Perspective

MS. SALZMAN: I am very excited to be here. I want to thank all the panelists. I know there is a lot to hear about what everyone has to say on *Comcast*. I want to start by saying that the United States Supreme Court has been very active the last couple of years issuing some landmark decisions regarding class certifications—in 2011 in the *Wal-Mart Dukes* case and in 2013 *Amgen* and, of course, the most talked about case, *Comcast*. The Supreme Court decision in *Comcast* is actually one of the most talked about and most frequently cited cases in class certification proceedings in the recent year.

It was a 5 to 4 decision so it was very close. The majority opinion held that the antitrust class action cannot be certified unless plaintiffs present a damages model linked to the theory on which liability is premised establishing that damages are capable for measurement on a class wide basis.

The dissent thought there is nothing different here, the same standard that courts have been applying on class certification are remaining and are strong and nothing has changed despite the majority opinion.

I think *Comcast* is primarily viewed and applied to class certification decisions and it's been telling courts that they need to do what has been termed rigorous analysis. Today we are going to talk about what rigorous analysis means and what that means in practice.

We have a very interesting panel here from all sides. We have the judiciary, we have plaintiff's counsel, we have defendant's counsel and we have plaintiff and expert witnesses to give us their take on the following questions.

While we may not find all the answers we are going to engage in, I hope, a dynamic discussion, and those questions that we hope to address today are: What does *Comcast* really mean for class certification proceedings? Has anything really changed as a result of the decision? What class certification issues are disputed today?

And let me introduce our distinguished panel of speakers.

To my left is Judge Cogan. I am honored to introduce United States District Judge Brian Cogan who has been serving the Federal Court since 2006 when he was appointed by George W. Bush.

Judge Cogan obtained his BA from the University of Illinois in Champaign-Urbana and his JD from Cornell Law School where he was on the Law Review.

While on the bench Judge Cogan has presided over many, many matters including MDL matters. One of his more recent MDL cases is an antitrust case that went to trial involving the vitamin C industry and earlier you heard some discussion on that case. The vitamin C case went to trial and there was a jury verdict in favor of the plaintiffs and the class.

Judge Cogan impressively also serves as judge advocate general in the New York Guard holding the rank of lieutenant colonel. He is a member of the Board of Brooklyn Queens Conservatory Music and he is also an adjunct professor at Brooklyn Law. Welcome, Judge Cogan.

JUDGE COGAN: Thank you.

MS. SALZMAN: Our next speaker I need to give a special shout-out and thank you. Some of you may have heard me complaining last night it was a very unfortunate turn of events that Megan Jones, who was supposed to speak on her perspectives, came down with the flu and was unable to fly across the country to speak, and the stars must have been aligned because I was very fortunate that Steve Williams, who is one of the leading antitrust plaintiffs lawyers in the country, was in town and with very little begging he agreed to step in last minute. So Steve, a special thank you to you.

By way of background Steve is a partner at Cotchett Pitre and McCarthy in San Francisco and he practices exclusively in the fields of litigation trial and client counseling with the emphasis on antitrust litigation. He serves in leadership positions in many high-profile MDL cases including *In re Automotive Parts Antitrust Litigation*, *In re Lithium Ion Batteries Antitrust Litigation*, to only name a few.

Steve received his undergraduate degree from NYU and JD from Fordham University School of Law.

Next on our panel from a defense perspective, Terri Mazur. Terri is a partner at Kaye Scholer where she is an experienced trial lawyer with a national practice in the areas of antitrust and securities litigation and regulation, primarily in the financial services industry.

She represents national and multinational corporations in cases involving antitrust issues and has extensive experience in class actions.

Her impressive client list includes YouTube, BASF Lexicon, and American Airlines. Terri is a very successful trial lawyer in numerous cases across the country.

She earned her JD cum laude at Northwestern University School of Law and she received her BA magna cum laude from Cornell.

Our next panelist is Russell Lamb. Russell is a senior vice president of Nathan Associates economic consulting firm in Washington D.C. Russell holds a Ph.D. in economics from the University of Pennsylvania. He received his master's in economics from the University of Maryland and his bachelor's degree in economics, summa cum laude, from the University of Tennessee.

Russell is an expert in antitrust economics and has testified in federal courts across the country and in Canada on the subject of antitrust liability, impact and damages. He was most recently the testifying expert last month at the class certification evidentiary hearing in the *Polyurethane Antitrust Litigation* and, stay tuned, we haven't gotten a decision on that case yet.

Last but not least on our panel, Martha Samuelson. Martha is president and CEO of Analysis Group, an economic consulting firm in Boston, Massachusetts. She is an expert in antitrust finance evaluation and her experience includes economic analysis on antitrust issues, antitrust liability damage, and class certification. She has also testified on range of economic topics and has critiqued the economic and financial analysis of opposing experts.

Martha received her JD from Harvard, her MS in management from MIT Sloan School of Management, and her BA in English from Yale University, and she's obviously the underachiever on the panel.

So let's get started. The format today is going to be we are going to hear first from Steve and then Terri on plaintiff and defendant perspectives; a short presentation on class certification and then likewise, the economic perspective from Russell and Martha. Judge Cogan has promised to jump in at numerous times and after the presentation we are going to have a question and answer. We have prepared questions but we will also open it up to the audience.

So let's get started. Steve, do you have the clicker?

MR. WILLIAMS: I think I do. Thank you very much, Hollis. I would like to thank Megan Jones who prepared the materials for today that I am going to present and I will try to do the best job that I can with them.

As an initial matter when *Comcast* came down and we all knew it was coming, the almost universal reaction of the defense bar was everything has changed. This is a new game for class certification and on the plaintiff part it was generally this is nothing new, everything is the same as before. The court said we're applying the same law, the defense said we are applying the same law and it was fact specific. It's obviously somewhere in the middle. And I know when *Twombly* came down people on both sides said the same thing, but obviously it wasn't the same.

For anyone in this room not familiar with *Comcast*, and I am sure you all are, just briefly the key issue in *Comcast* was that there was a damage model that took into account four theories of liability but only one theory of liability was able to go forward. The damage model didn't disaggregate the different theories. The District Court said that was okay and you can proceed forward and after the Third Circuit affirmed, the Supreme Court said no and announced the not remarkable fact that the expert analysis must match the liability theory, which doesn't seem to be really a new theory. So there is a great celebration in the defense bar but in terms of where things are going, it's not become clear yet.

So post-context we have had a number of cases that were sent back for review after a certification decision, including circuit court certification decisions for reconsideration in light of *Comcast*. And the two most prominent of those cases are the *Glazer* case in the Sixth Circuit and the *Butler* case in the Seventh and the one that sort of slipped in with those is called *BSH* in the Ninth Circuit.

All three of these cases are product defect cases involving clothes dryers that have a design defect that creates mold problems. In each of those cases the classes were certified, the Supreme Court sent it back and the circuit courts reaffirmed the decision below, and both of those circuit courts in doing so said *Comcast* has not changed the class certification analysis in any manner that requires any different result.

Importantly those cases did not certify damage classes so there is an open question about the extent to which this is going to be an issue in an antitrust case because in an antitrust case as part of your initial showing, you have to show antitrust injury, you have to show some impact to the plaintiff's class as a result of the defendants' conduct so in essence those cases don't answer the question *in dicta* other than I would note that Judge Posner in particular *in dicta* went out of his way to make the point that *Comcast* shouldn't change it because if *Comcast* were applied in the way that the defendants in those cases argued, it would drive a stake through the heart of the antitrust laws by essentially precluding the recovery of damages in antitrust cases. So the guidance thus far in those cases has been three circuits saying that *Comcast* hasn't changed the analysis that goes into determining whether or not it should be certified. And where those cases stand now is on review in the Supreme Court with three separate certiorari that have been up in front of the court three times in the last month with no decision. So, at some point in the near future we are going to hear from the court whether or not they are going to take those cases or let those cases stand.

In the district courts there have been a number of cases that have stood for the proposition that *Comcast* has again not changed anything and I don't know if these are materials for those whose eyes are not so good. We have five cases, which I will give to you later if you want

them, but what I want to point out is the *Cathode Ray Tube Antitrust Litigation* case and what I would like to do is take a moment and go through it to illustrate.

Cathode Ray Tube is in the Northern District of California and *Cathode Ray Tube* is one in a series of antitrust class actions that arise from the electronics industry, consumer electronics mostly involving the same defendants, and mostly involving cartel behavior and price fixing and mostly involving the same types of issues and certification, and these cases include the *In re DRAM* case, the *In re SRAM* case, the *TFT LCD* case and the *CRT* case.

All of those other than *CRT* were decided before *Comcast*. Interestingly enough, *CRT* was decided before *Comcast* by a special master upon motion. After *Comcast* a new hearing was held including testimony by experts on both sides and the special master then reaffirmed his decision certifying the class and said nothing about *Comcast* has changed whether or not this should be certified, nothing about *Comcast* has changed the law that governs my decision in deciding to certify the class.

Judge Conti on objections to that report recommendation then did certify the class, and the reason I want to talk about those electronic cases is because those cases are in a series and in those cases in my opinion *Comcast* would not have changed the decision in *In re DRAM*, *SRAM* or *TFT LCD* that came before *Comcast* nor did it change in *CRT*.

And the reason I want to make that point is because at least in those cases it illustrates that what we are trying to do on the plaintiffs' side in certifying really hasn't changed. What may be the most different is the amount that we're going to put before the court at the time that we make the motion for certification because what we face now is more merits then we did before and typically that merits fight is on impact and damages.

In most of the cases we do, commonalty is the issue, adequacy is not an issue, numerosity is not an issue, none of those things—it's always about impact and damages. And in those cases all of those pre-*Comcast* that was the issue, all of those pre-*Comcast;* the fight was over the plaintiff expert model and whether it illustrated cases where people who hadn't suffered damages would receive them, which is under the plaintiffs' model, whether people who hadn't suffered damages would receive inflated damages, and in all of those cases the courts considered the expert opinions on both sides, gave them credence, and then made determinations about whether or not the plaintiffs' argument sufficiently worked to go forward through certification and to trial so at least those cases illustrate that *Comcast* has not substantially changed how the courts are reaching or coming to their conclusions. The practice has changed somewhat, though, as we will discuss.

The most prominent post-*Comcast* case is probably the *Rail Freight* decision. In *Rail Freight* the District Court in D.C. had certified a very large class of people who had shipped using Rail Freight shipping services; that class involved I believe millions of class members and that class was reversed post-*Comcast* by the D.C. Circuit and the issue was the identification by that court of what it deemed false positives, class members who suffered no damages but for whom the plaintiffs' model would have in fact determined there were damages and the court in *Rail Freight* came to the conclusion that the command was to analyze the expert's model. If the expert's model didn't fit right, if it provided damages where none were warranted. It was rejected and if there was no model to show in fact damages there could be no class.

That case is now going back to the District Court for another run by the plaintiffs to try to put together a model to take into account what the circuit court did and that case involved data issues, another thing we are going to talk about in a moment, and lack of data.

The next case I want to talk about is I think the most interesting to me and it's the high-tech employees case in the Northern District of California before Judge Koh so very, very quickly this is a case involving a policy by Apple, Adobe, Pixar, Lucasfilms not to poach each other's employees.

This case is post *Comcast* and in this case at first class certification is denied but it was denied because the court said the defendants were not giving enough information to the plaintiffs to satisfy the standard that the defendants were holding the plaintiff to certify the class and she sent them back to do the work again.

In the fall in the Ninth Circuit, just after a petition on this, she certified the class in a very long and very thorough opinion and in the citation that is up before you she went through, Judge Koh cited to *Comcast* and *Rail Freight* and other cases to demonstrate how she would decide whether to certify the class and really nothing about that is new or different except to the extent that she focused on expert work in the case.

And the last point I want to make about that is that she began her discussion by referring to the importance of the antitrust laws, how critical they are to the free enterprise system in the United States and that I think in large part drove a lot of her analysis because in many ways it has always been an issue in antitrust cases that there are difficulties in proving damages but that the defendant should not benefit from the misconduct they engaged in if it makes it hard to measure damages, if it would permit them to avoid liability.

And in applying the principles of the importance of antitrust laws in our analysis and recognizing that the class certification rules cannot become a procedural trap that would permit case after case with guilty pleas and

people with admitted cartels the ability to avoid ever compensating the people they harm, particularly when the Department of Justice does not seek to provide remedies to those people when it settles cases with defendants in antitrust, so I thank you and look forward to the panel discussion.

MS. SALZMAN: Thank you, Steve. Terri.

MS. MAZUR: Well, the plaintiff and defense bar often do not agree but I do agree with Steve that under *Comcast* the focus is on predominance of common questions and I think in the antitrust context with class certification it will continue to hone in on the last two elements of impact and damages and merits analysis. That's clearly the battle ground at this point as it often is at the class certification stage.

Whether the Supreme Court did anything different in *Comcast*? I submit it did. As we all know from dealing with class certification motions, often the mantra is that we are not going to focus on merits evidence of impact or damages now, both from the plaintiffs and from the courts in many instances. So there have been a number of issues that get pushed until the second half of the case if a class is certified.

The Supreme Court between the *Wal-Mart* case and particularly *Comcast* has called into question that practice quite directly. As the Supreme Court in *Wal-Mart* made clear, the courts must apply a rigorous analysis in evaluating the 23(a) requirements, and if that analysis requires looking at the merits in order to resolve those questions, then the courts must do so.

And then *Comcast* followed saying in the context of Rule 23(b)(3) class certification requirements, that the court must really apply the rigorous analysis—that it requires with even greater force to the 23(b)(3) predominance issue.

As Steve noted in *Comcast* the issue was what happened with the plaintiffs' expert model. Plaintiffs had several damages theories, but the expert did not disaggregate the one damages theory that correlated with the one liability theory that the court held the plaintiffs could proceed with.

By failing to separate out the viable damages theory, there was no evidence at the class certification stage that the plaintiffs' damages could be proved on a class-wide basis, and again the court reiterated that, looking at this, it's essential to determine at the class certification stage that damages from the wrong alleged are capable of measurement on a class-wide basis to meet the predominance requirement, even if that requires inquiry into the merits of the claims.

The court has remanded the case for the District Court to consider the impact of this flaw in the plaintiffs' model and determine whether the overcharges that the model calculated did in fact exist.

The courts have split since *Comcast* over whether plaintiffs' expert models that passed muster prior to *Comcast* will stand. But it is clear at this point that the plaintiffs must provide evidence showing that the antitrust impact and damages in fact meet the predominance requirement. You can't just say our model "may" or "should" cover these things. The damages clearly must be considered at the class certification stage, and a failure to offer a viable damages theory will preclude class certification even if the plaintiffs can establish that questions of law and facts do predominate over individual questions in their case.

One open question is whether individualized damages will defeat class certification and clearly there is a split on this. Obviously courts have certified liability-only cases over the years and I don't think that will change, but in an antitrust case since you've got to prove class-wide impact and antitrust injury, so plaintiffs are going to need to come up with evidence showing, and a model that shows that the damages can be established on a class-wide basis at the class certification stage for liability.

The *Rail Freight* case really did pull apart the analysis that had been done by the District Court and the Court of Appeals criticized the District Court soundly for failing to look at the flaws in the plaintiffs' expert's analysis.

There the defense pointed out the existence of false positives; there were legacy shippers whose claims predated the conspiracy period and the model calculated damages for them, falsely showing that they were injured along with people who shipped and whose claims arose in the actual conspiracy period.

The court held you've got to look into the merits of the claim. If the damages model does not withstand hard scrutiny, then a class cannot be certified. The regression models are essential to plaintiffs' claim that they can offer evidence of class-wide injury. Plaintiffs must establish that there is antitrust injury; if you don't have an effective model—you cannot establish predominance and no class can be certified.

What are some of the takeaways from *Comcast*, what are courts doing and how is this going to impact other things? As Steve mentioned, the high tech antitrust litigation is consistent with *Comcast*, the court did conduct a thorough review of plaintiffs' damages theory and methodology following further discovery.

In other cases there's a question as to whether you can bifurcate liability and damages to avoid the problem with individualized damages under 23(c)(4). I also think we still will have discovery, you still can have bifurcated discovery as between merits and class certification. I think the parties will most likely have to produce some more information on the damages issues for class certification than has been the practice, but I think there are plenty of

issues that are merits—only that can still be held for discovery after the class has been certified.

One issue that was touched upon in *Comcast* and other courts have started to think about, is whether or not defendants need to raise a *Daubert* challenge at the class certification stage to the plaintiffs' damages experts. I think that we will see more defendants raising those challenges in order to avoid claims of waiver at a later time.

The dispute is over the methodology, I think, with the plaintiffs' damages experts' models. I think parties and courts really need to do a qualitative assessment—looking at the soundness of the statistical models and actual liability theories in order to decide whether or not the models are sufficient to support class certification.

MS. SALZMAN: Before we go to Russell we are going to take a short break.

JUDGE COGAN: I just want to preempt for a minute. You heard the plaintiffs' bar and the defense bar on this and I know that you want to hear from a judge on it.

I don't ever get plaintiffs and defendants telling me it means the same thing that they essentially have here. Why is that? That's because it's not about any of you, the *Comcast* case, it's all about me. What the Supreme Court was doing, they were sending a message to the lower court in that case saying we don't want to hear any more about how this gets too close to the merits.

You are not supposed to be afraid of the merits. If you have to get to merits in order to answer the class certification question, then go ahead and get to the merits. I am sure as I can be that if the Third Circuit had not said in these express words this gets too close to the merits cert would not have been granted in this particular case.

And it reminds me, whenever district court judges get together, there is always one judge who has had a case recently go up to the Supreme Court. Invariably that District Court judge will say you know, I read that decision, that wasn't the issue that I had before me.

And the issue before the Supreme Court really got transformed. You know it when you read the introductory part of the dissent where they say wait a minute, the question that *Comcast* asked was essentially an admissibility of evidence question, a *Daubert* question, in effect. And then the majority restated the issue to this notion of, you know, how close to the merits do you have to get. Because that's what the majority really wanted to talk about in that case.

So it hasn't changed much for any of the lawyers. I think it's correct to say yes, we had better tighten up our showing our antitrust injury, we better not have acknowledged wrong data in our model, in our analysis. That's right. But for me I think it means a lot more, which is I've got to get my hands dirty on these cases and really go into the merits. That is what the Supreme Court was saying.

MS. SALZMAN: That's certainly what we wanted to hear. Okay. So let's go to Russell Lamb for the economist perspective.

MR. LAMB: I feel I should get double the time because I am from the south and not only can I not say as much as I want to in half the time, I think slower.

I tried to continue the spirit of agreement by using the same powerful reply as a defense expert. Without belaboring all the decisions we talked about already, I want to point out, from the expert perspective on the plaintiff's side, the standard to be met by the plaintiff's expert was going to be higher than it had been in the past.

The courts held it was no longer enough to merely assert that you could do the analysis, you had to actually demonstrate that in some way you had done the analysis, provided an example of how you would do the analysis at the appropriate stage, and what follows here is building on what happened.

I am going to talk about what evidence does the plaintiff's economist and plaintiff's expert need to provide for class certification. What's the standard that courts are applying in determining class certification? The courts interpreted the rigorous analysis requirement in deciding whether a class certification is appropriate. Are we plunging over the cliff? I think there are a number of decisions. Some have already been mentioned. I will mention a couple of others in which I was involved in which courts certified classes based on a rigorous analysis of evidence performed by the plaintiff's experts, which was very much like the evidence put forward by the plaintiff's expert several years ago. The exception may be that the regression analysis was actually implemented or would have been pre-*Hydrogen Peroxide*. So I don't think that we've plunged over the cliff. I think in particular one of the central disputes among the defendants' experts and the plaintiff's experts in antitrust cases is with respect to multiple regression analysis that can be used to meet the burden of showing impact or injury to nearly all members of the class. I think the evidence, at least in cases that I have seen, is that although the defendants don't like it, you can show impact or injury to nearly all members of a proposed class using multiple regression with a single overcharge, a single measure of damages. It's not necessary to essentially conduct an individual inquiry in the guise of class certification.

I think a lot of this information is background. I would just point out that *Hydrogen Peroxide* really established that the standard for certification had changed and that plaintiffs had to do more than just promise to do something down the road. They had to demonstrate that it would be done. What kind of evidence is necessary from plaintiff's economist or plaintiff's expert to establish

class wide injury; usually two kinds of evidence. I would say broadly that the economist puts forward and I heard Terry talk about evidence and models and I think, not to put words in her mouth but what many people mean when say that is the multiple regression analysis which is used to establish the damages by measuring the overcharge. But, in fact, the economist in all the class certification cases that I have been involved in starts with an analysis of the market and of the allegations that are part of the litigation, and explains how those market factors inform whether there likely would have been injury or impact to all or nearly all class members.

In *Hydrogen Peroxide* that analysis of market-wide factors was most of the analysis of common evidence of injury to all or nearly all class because in the pre-*Hydrogen Peroxide* world we didn't estimate the multiple regression model and therefore, we didn't have a positive and significant overcharge to use as another piece of classified evidence.

So we start with that analysis in the market. That's important because there is a lot to an economic expert report and in antitrust case besides a multiple regression analysis and a model upon which multiple regression analysis has to build, has to inform by that analysis and we ought not to lose sight of that.

Of course, the second kind of evidence that was alluded to and discussed in *Comcast* and *Rail Freight* really went to the heart of statistical model multiple regression analysis, which is used to demonstrate the over charge and which is a piece of evidence that can be used to establish both the fact of injury and to measure the quantity of damages.

The multiple regression analysis is the central point of disagreement or at least a central point of disagreement between the plaintiffs and the defendants at class certification.

One question is how developed that analysis must be. Another question is whether the analysis can show fact of injury to all or nearly all class members, and whether it can be used in a meaningful way to measure class-wide damages, whether it's measuring class-wide damages.

What does multiple regression analysis really do? It's important to understand what a multiple regression analysis usually does. It aggregates the information available to the economist from the market including the prices paid by purchasers for product and the market information about the factors that should affect the price in a non-conspiratorial world.

There may be other adjustments that have to be made. The theory is that if you properly specify your multiple regression analysis you have factors that determine price in the marketplace. You can measure the effect of the conspiracy. A central question is can we use the multiple regression analysis to measure injury to all class members?

I don't want to belabor this. I think it's clear that we have to conduct a multiple regression analysis. I don't think it's a rigorous disagreement. I think *Comcast* and *Rail Freight* decisions focus very narrowly based on the particular facts of those litigations and on particular shortcomings of the expert's model. The courts found that the expert failed to appropriately account for the facts of the conspiracy and of the marketplace. Again, all of that other evidence that the economist is looking at that informed his multiple regression analysis has to be considered and looked at by the courts.

The courts have certified classes. I see again and again that an economist has provided the court with a statistical analysis, included an analysis of market factors of concentration, substitutability of the product produced by different defendants and that evidence comes up again and again in the court's decision.

I am obviously not going to discuss all these in detail. In the *Titanium Dioxide* decision in 2011, the court noted there was a battle of the experts and it had to rigorously analyze conflicting testimony. The court then went on to look at all the factors plaintiff's experts considered in terms of the market, including the concentration of the market and the plaintiff's expert's multiple regression analysis.

The high-tech decision in which the court is saying yes, there is a statistical analysis, we think the statistical analysis is sound but there's also a tremendous body of evidence that performs that statistical analysis. I wasn't the expert in high-tech employees but the court specifically noted that the plaintiff's expert had used statistical analysis along with documentary evidence of market and employee practices and that provided a structure for the lawyer to establish injury to all or nearly all members of the class.

I finally just want to say the decision we haven't heard much about is a widely decided case I was involved in. The court said class certification is not to the court's ruling. The court is going to decide merits issues only if these merits issues are class certification should the court fail to decide merits issues.

I think we actually agree about this high standard. I think that bifurcation of discovery is certainly not minimal. If you are going to ask the economist to conduct a full-blown multiple regression analysis and to understand the market, he needs to have data. He also needs to understand everything about the conspiracy, about the market, about the product. My opinion is not to hold back any discovery. The court does look into the credibility of the plaintiff in those.

MS. SALZMAN: Thank you, Russell.

MS. SAMUELSON: I am going to start as well in the pre-*Comcast, Hydrogen Peroxide* world and talk first about what economic evidence is required to certify a class before *Comcast* because as Terry said, really the same topics are very much in play right now.

Comcast added something new but it did not take away the increasingly stringent requirements that came in with *Hydrogen Peroxide* and then I am going to talk a little bit about what *Comcast* added and then about some more recent cases.

So we have more agreement than not on some topics on this panel. It's certainly the case that *Hydrogen Peroxide* brought a new rigor; it changed the discussion from whether it was possible to come up with a benchmark. It was possible to come up with an econometric model instead. It brought in the requirement that you actually had to demonstrate that you could and that you had to have either a benchmark or a regression that would actually be sufficient to demonstrate impact and to demonstrate a preponderance.

Benchmarks can be very compelling. They are supernatural experiments; with a benchmark approach you look at a geography or a circumstance where the anticompetitive practice was not in play and you would say that's how the world should have evolved.

An econometric model is different. It's a model of the world instead of an actual picture of it. An econometric model is a model, it suffers from limitations of a model, it may not be feasible to implement because you may not simply have enough facts.

Another problem or another concern with the econometric model is what it does as it produces averages and this is a topic that is very much talked about in all of the cases. If a regression is going to be sufficient to certify a class it has to demonstrate impact on all class members and also account for different impacts on different class members and the concern is that the averages may be concealing something.

There are two very fundamental tasks. One is to look at subgroup and one is to look at individuals. I think I am just going to show these pictures.

So this is a model, let's say this is an econometric study trying to ascertain whether there is a type of practice and let's say on the left we see the model applied to national classifiers and we can see clearly that there is impact. But if we break this up and on the right-hand panel we have a group of East Coast buyers and we have a group of West Coast buyers, so here we can clearly see East Coast buyers aren't impacted. This is a growth that should be in this class and based on this econometric study, this class shouldn't be certified.

Then there is the question of predominance of common issues. Here again is an econometric study and this econometric study shows that prices have gone up in the pre-conspiracy theory period; then when we look at circumstances of individual potential claimants during the conspiracy period, we can see their prices are going all over the place and some are going up and some are somewhat flat, some down and what that tells us is this model is not sufficiently explaining price; something else is going on that is likely explaining the impact on these various potential claimants and this would be like a situation where at least this econometric study is not showing the preponderance of common issues over individual issues, you've got to dive down and find out on an individual potential claimant level what's affecting the prices.

I want to talk a little bit about benchmark progressions in general. What are the challenges to them? The challenge to a benchmark is it's just too complicated or it's just too distant. For example, in interchange cases it's often suggested to look at the interchange rates in Australia as a possible benchmark for what interchange rates should be here but the problem is the credit card market in Australia is widely different, there is much less penetration of cards, rewards programs don't exist as they do here, it's just an incomplete benchmark.

A regression is a model and so a model is inherently not going to be a complete representation of the world. The question is whether the averages or the incompleteness of the model are sufficient for it not to be informative and Russell, you touched on some of these topics. I think there are characteristics of the industry, which will make it more likely to be one where a regression is going to be sufficient and complete.

Basically, the simpler the market, the more transparent prices are and the more transparent the products are. Where a regression is inherently more complicated is if products are differentiated as when prices aren't transparent, prices are negotiated on an individual customer-by-customer basis, customer's value and different things available in different regions.

So the world was changing, I think, in terms of the stringency of evidence to certify a class before *Comcast* but *Comcast* certainly added something more.

What the *Comcast* ruling held was that damages have to be tied to a particular liability theory that survives. As Russell said, that means something and as the judge said, this brings merits in to the courtroom, and Russell gave some examples of the types of topics in which evidence is now valuable in the courtroom and industry structure concentration generally, the amenability of the market to collusion, the amenability of the market to exercise monopoly power.

Where multiple theories of liability exist the disaggregation question is important. Each theory of liability has to be matched with a theory of damages because again, we don't know what theory of liability will survive.

I wanted to make something really clear. The world is now very different than it used to be. I worked for probably a decade for Microsoft on various overcharge cases and the classes were always certified. The plaintiff's model would be Microsoft's products, which are more profitable than the average software industry product, and every class got certified based on that. I actually think now that model would flunk *Hydrogen Peroxide.* It would certainly flunk *Comcast*. Nothing in how Microsoft affected competition is tethered to that model. Clearly those approaches also flunk the *Rail Freight* case.

In the *Rail Freight* case everybody has talked about the question is whether the model produces false positives, and again back to my Microsoft cases, is if your model is looking at the profitability of the defendant and compare that to the average industry profitability, everybody above the average is going to have to demonstrate damages through that method, so the false positives would have also torpedoed those approaches.

I am going to skip the next thing. Right now to me this has been a real change over the last four or five years from requiring the model to be a benchmark model to be specified to requiring the connection to the theory of liability to acquiring no false positives.

In the *Nexium* case the court was concerned enough about certifying the class that the court held that it would come back during the trial and raise the issue of impact and preponderance at that phase of the case.

MS. SALZMAN: Thank you, Martha.

Those were all great presentations. Now we are just going to ask some questions and different panelists are going to answer different questions but the first question is for Judge Cogan. And from a judicial perspective what information does the court want and need to know to decide class certification and can you describe best practices that you've seen and that you would like to see?

JUDGE COGAN: The discourse is on the high level that Martha left it. I think what we really need to see as judges are pictures, pictures and charts. It sounds silly but I am really not kidding about that. A lot of these concepts, a lot of regression analyses are, for someone like me who is visually oriented, the only way to really understand it. Charts and graphs, that's a big help.

On a broader level, I will tell you, consistent with the comment I made before, because we feel we are now compelled to answer the question, not just identify, whether there is a colorable claim or there is an issue. And I am sure the lawyers here are going to do this, everything you've got has to go to the judge; you have to view this as if you are trying a case in the ICC or some European court where you make your complete submission on these issues as if you were trying the case to the judge.

You know, I have not yet resolved for myself whether the recent trend in the appellate and Supreme Court cases would cause me to apply a preponderance of the evidence standard to finding, for example, antitrust injury, so I can find a common issue, or whether I would find that part of Rule 56 or Rule 50 that says at the very least a reasonable jury based on admissible evidence could come out in the plaintiffs' favor on this factor. And I am not sure there is a practical difference when you have to make a decision between those two tests. You might write it differently, but in your mind it's coming out essentially the same. I would say that you need all the evidence you can get. Because the ultimate test is you have to be pretty darn sure that injury has been demonstrated and that the question is predominant. So you really can't hold anything back.

I know we might talk a little bit about discovery but this enters into discovery as well.

MS. SALZMAN: Thank you.

JUDGE COGAN: I am sorry, one more point that I wanted to make.

What you are hearing from all the panelists is that the question of class certification converging, in physicists' terms, what you call a theory of one, all matters are going into one motion. The class certification motion is really converging with the *Daubert* motion. If there is a summary judgment motion because of the inadequacy of an expert under *Daubert*, that is going to be heard at the same time and the practice that prevailed when I started many years ago, and I see a few people here that started around that time, of, well just make a colorful case and we will certify the class, and you don't have to go into that and therefore do that at the outset of the case and at the early stage of the case make some minimal discovery—that's all done.

I think these matters are now coming together. And they are coming together because there is such an overlap towards the end of the merits discovery period. Not everything on the merits may go into the class certification analysis, but enough of it will, that I have to agree with everyone who said this bifurcating class and the merits discovery is over in most cases. Everything is qualified in the law, but in most cases it's pretty much a dead letter.

MS. SALZMAN: Terri, this an off-the-script question but how do defendants feel about all these increased costs of discovery that have been required for class certification proceedings?

MS. MAZUR: We don't like them, that's simple, but I am not sure that it's always true that there will be increased costs. I think some of it obviously is that the plaintiffs are going to be asking for much more damages-related evidence at the class certification stage, but perhaps what is needed is more focused, refined discovery and analysis by plaintiffs at that stage—you know, to

hone in on the alleged injuries that are actually going to match the liability theories that are being pursued in a case.

I don't think, for example, that you still need to have every piece of cost data to resolve class certification; you probably need sufficient cost data (it depends on what the claims are) but obviously you know the problem for the defense. One of the issues for the defendant corporation is the cost of all this and the desire to have the class certification issue resolved so that if it's not going to be certified, the defendant can save the time and expense of going through every last document, which is a big one, and before it gets turned into bet-the-company litigation because potential damages are so huge.

But I think it will take more work on the part of the lawyers and the economist and the other experts at the class certification stage and I think it may be in some regards a crafting exercise.

MS. SALZMAN: Anyone else have a comment?

MS. SAMUELSON: Terri, isn't it better still to have the discovery burden than to just have the class certified given that may you know, back to Judge Cogan's observation, that previously the state of the world was that this was practically *pro forma*, so yes, it is cost but any other cost is still going to be there.

MS. MAZUR: Absolutely. It's still going to be better at the class certification stage to focus the issue that may result in denial of class certification—it's probably worth the expense.

MS. SALZMAN: Just following up on the cost for discovery and what's required for class certification stages we have a hypothetical and the panelists are familiar with the hypothetical. I will read it slowly so that everybody can follow.

This is the hypothetical: Plaintiffs want more detail cost data during the class certification discovery. Defendants have it but they don't want to produce it because it will cost a substantial amount of money perhaps, $25-$50,000 at least to produce. Plaintiffs move to compel and attach an affidavit from their expert that having this data will prove the statistical significance of the expert's analysis. Plaintiffs have asked for the discovery or ruling that the defendant cannot raise the issues related to the model that the better cost data could have cured in opposition for plaintiffs' motion for class certification. And before we go to Judge Cogan for a ruling, Steve and Terry do you have an additional argument for the hypothetical?

MR. WILLIAMS: I don't know if it's an additional argument but I will comment and I want to start with what Judge Cogan said; he said everything you've got has to go to the judge. I don't think there's a fair way to have the defendants concede they are not going to argue something they wouldn't give you prevents them from opposing your motion and the 25 to 50 you cite, the cost is really low because the costs are so enormous in everything we are doing and going back to what we were talking about a minute ago, what worries me the most is the costs are changing the substantive law.

You know *Twombly* was based on costs—that was the reason for the decision and it seems to me that there has to be a better way to address what is appropriate for the purposes of discovery that will lead to class certification. This is what I would say if I was in court: We want full merits discovery. It is impossible for us when we are scheduling; you are typically setting your schedule and putting your class certification schedule before you started your discovery. It's all happening at the same time; you can't take the risk of doing anything less than full merits discovery if you want to have a good chance at certifying your class on the plaintiffs' side.

It seems to me that the argument I would make here would be that the defense would have to produce the material. They are going to put us to the test when we put our motion in. As Judge Cogan said, we have to put in everything we've got and presume this is our shot on the case because if the class is not certified the case likely doesn't move forward and the idea of limiting what a defendant can do in response to me would just create the risk of either class is denied, which means we go back and do it again at much more substantial cost. So to me I think the answer would be to compel them to produce it. Otherwise we are going to waste time, money and resources that none of us can afford.

MS. SALZMAN: Terri, you have any thought before we go to judge Cogan for a ruling?

MS. MAZUR: Again, echoing what I said a moment ago, I think part of the issue it's hard to do—where you don't have the facts to do the analysis. Obviously there needs to be sufficient data to do the analysis but whether it has to be everything the defendants have seems to overstate it.

I think that we need to come up with ways to produce sufficient cost data without breaking the bank, but plaintiffs must do the work to show the antitrust injury matches their antitrust liability claim. In the high tech case, in between the initial class certification motion and the court's reconsideration and ultimate grant of class certification, the plaintiffs went back and took 50 depositions. They basically talked to the heads of the companies, the HR people, and there was a lot more document production, so you know, I hate to say this, it does depend on the facts of the case but I still think the defendants don't have to produce the whole world of documents to resolve class certification.

JUDGE COGAN: The plaintiff's lawyers in the room may not be all that happy with what I am about to say. I think the answers to these questions increasingly turn on

a concept that was inserted in the rules either last year or became effective last year, or became effective this year. And that is the concept of proportionality. And more and more and you know, $25 to $50,000, that's really nothing in these cases. I mean the judge could practically pay that himself in order to avoid the issue. It is more like two and a half to five million, but the fact of the matter is that the judge has to form a sense of proportionality. That is, how likely is it that the information sought is materially going to affect the outcome of the analysis? And if the judge believes that it's likely, it's more likely than not, and the judge has to be educated as to why this information is or is not important, then we will do it the traditional way, and the defendants will be ordered to produce it whatever the cost.

On the other hand, if the judge feels that it is a no-stone-unturned exercise by the plaintiffs, then what I have done in smaller cases, I don't want to cause anyone to quake with fear, but I have said to plaintiffs' attorneys, you're going to have to pay attorney's fees for the defendants to produce this information. You might get it back if you win the case, you will win it back as costs, but if it's going to cost five million dollars I want you to come up with two and a half million dollars out of your own pocket. And you know, I actually had a plaintiff that stood in front of me that said—I did not order this on that case—but the plaintiff's firm self-financed without any line of credit or bank loan or litigation funder about four million dollars in costs. Amazing, but they did. And I think plaintiffs' firms are going to be called on more and more to do that when they are reaching for something that the judge thinks yes, there's a two percent chance that what you get for this five million dollars may materially help you, but it's only a two percent chance, so you're going to have to put your money where your mouth is if you really want it. So that's one possibility.

The other possibility that can be tried is to wait it out. I will tell the plaintiffs I am not giving this to you now, but let's have the class certification motion and see what the defendants say is wrong with your economic analysis. And if, in that economic analysis attack, there is a slew of information, as is frequently the case, I think the defendants have a very hard time in saying but we don't want to go to the cost of producing that information because obviously at that point it's material, it's being relied on, and you can put the class cert motion on the shelf if that information has not been given and you have supplemental briefing. So I think, as everyone acknowledges, it has to be a case-by-case analysis, but judges are getting creative to make sure that the burden on the defendant is not so enormous that it forces a settlement in a case that wouldn't otherwise settle, while at the same time making sure that plaintiffs get information that is really essential to their analysis.

SALZMAN: Thank you. One more question that we have is you often see in antitrust cases that there is a criminal component of the case where defendants appear in a criminal court to plead guilty and they request and an independent court agrees, that restitution will not be provided for as part of the criminal guilty plea because of the pending civil class actions that are parallel to the criminal case. Then what happens is you get into this civil litigation and the defendants fight tooth and nail class certification which would in fact provide a vehicle for restitution to the victims of the antitrust cartel. How does that fighting on technical issues in class certification seem fair in light of the guilty plea?

Judge Cogan?

JUDGE COGAN: I think the criminal process is something that is woefully underused by the plaintiffs' bar in class actions.

Now, there is the Crime Victims Restitution Act that encourages you to come forward. You will meet resistance at the Justice Department. They don't want to hear from you. They are interested in getting their conviction and that is all they are interested in. But the judge is interested in you. The judge wants to know real people who are hurt by a defendant's conduct. And, in particular, if you make a public filing in the criminal case, not signed by a lawyer but signed by your client, saying here is how I've been victimized, then the judge is going to start thinking what can I do to help these people. I have an acknowledged felon in front of me because all these cases ultimately plead out in a criminal case, and you may be able to get the judge on the criminal case on your side.

There's a lot the judge in the criminal case can do to help you if he or she wants to do that, like imposing a probationary term on a corporate defendant that requires cooperation with the plaintiff in a civil action, and that cooperation may go on for years. Or the judge can require a detailed allocution instead of the usual, perfunctory, "the elements are satisfied on the criminal charge," that we get. A judge at the criminal plea hearing can say, "Tell me exactly what you did," that's an admission. You can use that. Again, the prosecutor will resist you but the judge I don't think will, more and more often.

MS. SALZMAN: That's terrific advice.

Do we have time?

MS. HART: I think you should open it up because we are at time.

MS. SALZMAN: Does anyone have questions?

AUDIENCE MEMBER: I am not clear about the burden of proof on the motion so let's say—

JUDGE COGAN: That's all right, we are not clear either.

AUDIENCE MEMBER: It's admissible so both courts are totally conflicting. What is the judge going to say well,

that's reasonable or is that enough or do you have to say I believe one as opposed to the other, what's the preponderance of the evidence standard, is that the standard, what do you have to show?

JUDGE COGAN: Preponderance of the evidence means if the judge were sitting as the trier of fact the judge would find in favor of the plaintiff. That is what it means.

The Rule 56/Rule 50 standard that I articulated really says if a jury came back and found this, would I set it aside because it's unreasonable? That's an easier standard. Which one applies, we don't really know yet.

MR. WILLIAMS: Could I respond to Bernie's question and ask Judge Cogan, in *Nexium* Judge Young called it a preponderance of the evidence standard but then he said he wasn't—and he said it was the same or similar to what he would do if he was determining one, whether to admit an expert opinion, two, whether to admit co-conspirator hearsay or three, whether to grant a preliminary injunction.

What do you think of those?

JUDGE COGAN: I think that it shows how many angels we're trying to get on the head of this pin. I do think that in terms of admissibility that's a separate inquiry. That is a much lower burden. Admissibility just means the information could come in. It does not mean it's credible. It's a minimal evidentiary showing so I do not think that is the equivalent.

It is similar, I think, to a preliminary injunction where you actually have to, on a preliminary injunction, make findings of fact conclusions of law and your finding that this is likely what happened.

Now, I don't recall offhand whether that is articulated in terms of being a preponderance of the evidence but it is a likelihood of success on the merits. The difference becomes academic at a point. If the judge is convinced, you win, if not, you lose.

MS. HART: Thank you so much everyone.

Thank you, Hollis, thank you to all our moderators for the day.

The associate happy hour is at Sutton Center, which is that way and we are hoping you join us and thanks everyone else who is not going to the cocktail party. Have a great day.

The 2014 NYSBA Antitrust Law Section Dinner


Eric Stock

MR. STOCK: Good evening, everyone. I have the privilege to welcome you to the 2014 annual dinner of the New York State Bar Association Antitrust Section.

This is an honor that I am particularly pleased to be here because this dinner caps off a really amazing day of programming that we had, and I want to thank Barbara Hart for organizing such an excellent day. I will be very short, I want everyone to be able to get to back dinner conversations but I do briefly want to introduce everyone up here who is on the dais and give you a sense of what is going to happen tonight.

Let me start to my left first, there is Ilene Gotts, partner at Wachtell Lipton, and the heart and brains of our Section.

Next we have Bill Efron, who is the director of the Northeast Regional office of the FTC.

Sitting next to Bill we have Eleanor Fox, a renowned law professor at NYU in antitrust and international antitrust and a recipient of our Public Service Award for 2014. You will hear a lot more about her in the time to come.

Next is Nick Gaglio who is at Axinn Veltrop and is our new financial officer of the Section.

Next to Nick you have Lisl Dunlop; she is with Shearman and Sterling and she is our new secretary of the Section.

Then moving on to my right we have Barbara Hart, partner at Lowey Dannenberg and the new Chair of the Section.

Next to Barbara is Bill Baer whom we are very honored to have here. Bill is the assistant attorney general in charge of the antitrust division and he has graciously agreed to come and deliver the key note speech tonight.

Next to Bill we have Jay Himes. Jay is a former Chair of his Section and he is partner at Labaton Sucharow and the recipient of this year's Lifland Public Service Award. You will hear a lot more of Jay as well in the time to come.

Next to Jay is Elai Katz. Elai is the Vice Chair of our Section and he is a partner at Cahill Gordon.

Next to Elai is Jeff Martino; Jeff is the new head of the New York regional office of the Antitrust Division.

Next to Jeff is Mike Weiner, a partner at Dechert. He and Ilene are basically dinner co-chairs tonight and we very much appreciate all of the work that they did to allow us to be here.

I also want to give a quick thanks to our platinum sponsors Analysis Group, Berkeley Research Group, Compass Lexecon, and NERA. Thank you all very much for also making this night possible for us.

At this point I would like to introduce Barbara to take to the podium and start the event. Thank you.

MS. HART: The first thing that I have to do is thank Eric for his service, he has really raised the expectations for the executive committee that each month we all get together at beautiful offices and have a high caliber discussion with noted speakers, and Eric has been a driver for a greater caliber for each month's meeting. In honor of that, the Section would like to give you a gift and I would like to personally thank you for all the help that you have given me in the transition as I try to fill your shoes. Thank you so much Eric.

MR. STOCK: I am just going to say a couple of thank yous and then I am going to introduce the process of presenting the Lifland Award.

First I want to thank some of the lawyers that really mentored me and helped me through this year, especially Steve Edwards and Ilene Gotts as well as Bruce Prager—without whom I never really could have finished this year.

Second, I want to thank some of the people that really made the Section run this year, Dan Shulak, Andrew Sein,


Bill Baer, Eric Stock, Lisl Dunlop

you did an incredible job helping out as well as Robin van der Meulen. As for every year, I really want to thank you.

Third, I want to thank the staff of the State Bar, Tiffany, Barbara, Laura, you always do a great job and I want to give a quick pitch for the State Bar for those of you who are interested in antitrust but not yet members of the State Bar. There are incredible opportunities to join our executive committees and four subcommittees, so I really encourage you to get involved.

Lastly, I do want to thank the New York Attorney General's Office I am now the chief of the Antitrust Bureau and I do want to thank the office for allowing me to continue as Chair even as I move into that position.

Antitrust Law Section William T. Lifland Service Award

MR. STOCK: Okay. So with that done, I want to move to the next part of the program, which is the very important work of the William T. Lifland Service Award. This award is presented to an antitrust practitioner in recognition of his or her contributions and accomplishments in the field of antitrust and especially to acknowledge those who throughout their professional careers have distinguished themselves as antitrust practitioners and also by serving the broader antitrust community in a leadership role. So I want to ask Renata Hesse who has graciously agreed to come up and present the award on behalf of the Section. Renata is a leading antitrust lawyer; so thank you, Renata.

MS. HESSE: I thought I was going to have an opportunity to have another glass of wine before I had to do this. It's really great to be here, particularly because I am talking about Jay who, as you may have noticed, kind of rolled his eyes when Eric was talking about him; that is classic Jay.

Renata Hesse

Jay, as you all know, is receiving the Lifland Award and I was really humbled when he asked me to introduce him. Hopefully he won't regret having done that by the time I am done so I promise this will be quick, although there is a lot that one could say about Jay.

I met and got to know Jay when I was a chief in the Antitrust Division and he was running the Antitrust Bureau at the New York AG's office for almost eight years and we worked on a bunch of things together, Microsoft, Oracle and—but it was really Microsoft which was kind of the trial by fire that formed the basis of our friendship. We spent a lot of time together and as I got to know Jay over the course of the years we worked together there were a few kinds of characteristics, traits, qualities that began to come to the surface. So I have a Top 10 list for you. It may seem a little bit unfocused around New York and I apologize for that because I practice in D.C. and I have to say it's not in any order of importance, so don't attach anything to what I start with and what I end with.

First, number one, he is I think more stubborn than I am. I mean that in a good way but that does mean that he's pretty darn stubborn and I am sure those of you who know him know that to be true.

He has a virtually encyclopedic knowledge of state and federal antitrust laws, a quality I am told that he shares with Bill Lifland, which makes getting this award even more suitable—whatever the subject—mergers, IP, criminal litigation, state enforcement, federal enforcement, Jay knows it and I am sure many of you have experienced this when you have spoken to Jay. And many of you have probably benefited from it when he's arranged programs, participated in them and that's happened a lot over the course of the years. It really is impressive.

He is really passionate about what he does. This is number three. He thinks creatively about problems, he works assiduously to get to the right answer and he zealously represents his clients.

And one of the coolest things is that his client for almost the entire time that I have known him has in fact been the consumer. He has been and remains dedicated to the public service and the public interest and that I think is just really cool.

Number four, he is an awesome person. For those of you who know him he is smart, funny, exceptionally nice, and a loyal and really good friend.

Number five, he is interested in a lot of different things. When I was asking about what he thought I might focus on for this he sent me a list of the publications that he has written and they range from state enforcement against patent trolls to restitution for crime victims and myriad different antitrust cases. And a bunch of them were articles focused specifically on issues of the importance to state enforcement—resale price maintenance, the Donnelly Act and it really it was kind of incredible.

He is devoted to this Section. He chaired the Section and continues to serve it with energy and leadership.

He is devoted to his family, his wife Amy and his son. I see Amy sitting here tonight.

He does not, this is number eight, he does not like being the center of attention, which is why I think it's a good thing that I am almost at the end of the list.

Number nine, he is an exceptional and talented litigator. I've gotten to watch him do a lot of things and I've talked to him about complicated litigation issues. He is great at what he does.

And number 10, he is obsessed, and again I think this is in a good way, with seeing if he can avoid ever having to boot up a computer in Windows and ever having to run a Microsoft software program.

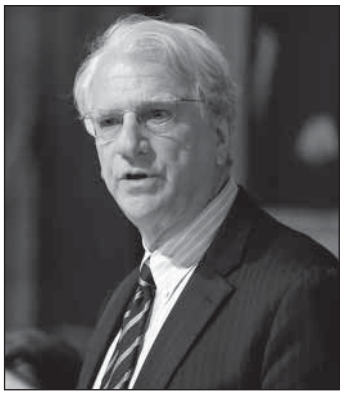
I can't tell you how happy he was many years ago when he called me and said that he had actually managed, in the Microsoft case, to file a pleading over the filing system, on a laptop that was running on Linux for a document that was created using Office and open over a Firefox web browser.

So I continue to tease Jay about this and I am shocked that he has not taken my suggestions about writing all of this down for everyone in an article entitled "My Life Without Windows." I think he can really save many of us a lot of time, and I am sure there are others who are interested in this as well.

That is my Top 10 list. The list, needless to say, doesn't begin to encapsulate all that Jay has done during the course of his career as chief of the antitrust bureau. I can say without hesitation there is nothing that matches the depth of knowledge that Jay has, and we have all benefited from that. So, Jay congratulations, it's a very well deserved recognition. We value tremendously not only your contributions to the world of antitrust but also, and more importantly, the pleasure of being able to count you as our friend.

MR. HIMES: Thank you, Renata. Yours are overly generous remarks.

I am particularly touched to have them come from you. Frankly, if someone said to me you could pick any three people you want to practice antitrust with, I would start with Renata. Then I'd think a lot harder about numbers two and three.



Jay Himes

I am very grateful to the Section for seeing fit to include me among the recipients of the Lifland Award, which of course recognizes one of our Section's early and most distinguished members. It is a great honor to share some kinship with him.

As many of you know, I spent much of my professional life as a complex commercial litigator with lots of antitrust. I sort of retooled myself when I joined the AG's office in the early part of 2001. Since then I have been an antitrust practitioner full-time, but more importantly since then I had been privileged to participate in the Section, which has been very good to me.

I have had the opportunity to serve both as Section vice chair and as Chair. But perhaps even more important, I have had the opportunity to participate as this Section flourished in recent years.

We have grown not only in membership but also in diversity of membership. There is much more of course that we can, should and will do there, but we have as just a recent example the expansion of our fellowship program, so this summer two law students will be able to work in city and federal antitrust enforcer offices. We are one of very few State Bar sections to adopt such a program. We should all be very proud of that.

We have expanded our special programs that go on throughout the year. Some are part of this event today, and we have a program that varies throughout the entire year. We have world class participants come in and we are also running CLE programs both in New York City and upstate.

Literally dozens of individual Section members have contributed to this and other efforts. We should recognize all of them. This commitment by so many has been my own activity in the Section so immensely satisfying.

It also just gives me great pleasure to be here tonight with Eleanor Fox, the recipient of the Service Award. Eleanor has long been a friend of the Section and a personal friend as well. She has distinguished herself not only in this country, but throughout the world, and she is a committed and dedicated advocate for competition and an inspiration to students, practitioners and enforcers.

I happened to be in Las Vegas last week for a witness deposition and as I flew back I struggled to try to think of something that would be relevant about that trip to tonight. Now, I admit that if this were a group of U.S. Attorneys, it would be much easier. But I do think that I've come up with something and in fact, a couple of things. So let me share those thoughts with you.

First of all, one thing that Las Vegas and antitrust have in common are rules. You go to a casino and they all have rules. But you know, under those rules in the long run the house always wins. The rules in casinos are rigged—stacked to achieve a long-term outcome.

Antitrust has rules, too. They are rules to promote a free and open competitive process, a process that rewards innovation, efficiency, risk taking, and diligence. The rules of antitrust, unlike those of the casino, don't predetermine the winners or the losers; instead they promote the opportunity for individual success and, in turn, the betterment of society as a whole.

Now, of course the antitrust rules aren't perfect, nor are they perfectly applied—like legal principles more generally. Industry players overstep the rules. Markets fail. And so there are times when remedies for injuries are needed, and when restoration of competition is necessary as well. And those circumstances are inevitable. Without that inevitability, many of us would not practice in this area of law.

So yes, Las Vegas and antitrust do connect. One operates under rigged rules, and the other fortunately does not.

I would not, however, want you to think that there is no true unrigged competition found in Las Vegas. I had the opportunity to look at the many brochures for area attractions that my hotel had, and I discovered no less than four businesses established in the area that compete for customers wishing to fire machine guns, among other firearms. One of those businesses promotes this activity as a chance to let out your inner counter-terrorist. Another has an age requirement for firing range customers—ten years of age or older with a legal guardian.

Now I am not making this up. The brochures have it. And frankly, I mean, the Second Amendment, I guess, is embraced quite literally in certain parts of in this country. And that, at least for me, is painfully true and scary.

So a second message from Las Vegas is this: All of us, let's not forget: it's only antitrust.

So in conclusion, I express my deep appreciation to the Section for including me with earlier distinguished recipients of the Lifland Award.

I also thank my dear wife Amy, who has supported me throughout, even when occasionally on the receiving end of my rare mood swings.

I thank you very much.

MR. STOCK: Please enjoy your dinner.

(At this time, recess was taken for dinner.)

Antitrust Law Section Public Service Award

MS. GOTTS: I am honored to present the Public Service Award. This award has only been given out three times since its creation almost a decade ago. It seeks to recognize a very special person—an antitrust lawyer with significant stature in the antitrust bar who has also contributed, in a meaningful way, to the public interest in the service of the bar and to the objectives of the Antitrust Section.

Ilene Gotts

It seems a little odd for me to be standing here and having to say anything to this group about who Eleanor is and why she has been selected for this award but please indulge me just for a few moments.

Eleanor Fox is the Walter J. Derenberg Professor of Trade Regulation at the NYU School of Law. Going to the NYU website, you see the usual things that you see when you have a professor of her stature; her bio has this very long list of articles, prestigious positions, et cetera but search more broadly on the NYU website and you will find under "news" for the school a story entitled "Eleanor Fox Goes on Global Tour." It states: "Don't look for Eleanor Fox at the beach in coming weeks. Instead Fox will be cross-crossing the globe."—And then, I love this, this map appears and it's interactive if you actually take your little pointer and you click in one of those little arrows in those boxes, it will tell you where she spoke and when and what the topic was. I believe this illustrates effectively Eleanor's role as what I would dub the competition ambassador of the world—a role much more extensive in scope than merely a summer hiatus.

NYU Professor Harry First, Eleanor's longstanding colleague who unfortunately could not be here tonight to help present this award, concurs that no one deserves this award more than Eleanor, and he notes the following:

> Over many years Eleanor has not only advanced the work of the antitrust bar in New York but also the enterprise of antitrust, and not only in New York but throughout the world. In her work Eleanor has exemplified what it means to be from New York.
>
> Eleanor's concerns have not been parochial but international, not just with wealthy industrialized countries but with newly emerging developing countries.
>
> Eleanor has never seen antitrust as confined to narrow concerns but has constantly reminded us that the importance of a social global concern that has historically been part of the fabric of antitrust.
>
> Eleanor is now playing an important role in helping new competition authorities around the world implement their competition laws. This is a service of the highest order.

Eleanor's passion for competition for law has been evident throughout her entire career.

Eleanor joined Simpson Thacher and Bartlett as an associate in 1962, right after the birth of her first child. I note

that some of Eleanor's family is here tonight at Simpson Thacher's table.

Her talents were immediately recognized by one of the finest antitrust litigators in the country, Whitney North Seymour, and under his tutelage she developed a love for antitrust law.

Eleanor became the firm's first woman partner in 1970 and remained a partner with Simpson until 1976 when she embarked on her full-time academic career at NYU while remaining affiliated with Simpson in a counsel role.

Eleanor has provided service to the bar and to the development of the law in a wide variety of areas. Her current roles include—and this is just the abridged list—being a member of the Board of Directors of the Lawyers Committee for Civil Rights Under Law, a fellow of the American Bar Foundation and of the New York Bar Foundation, a member of the American Law Institute, a member of advisory boards and executive boards. There are almost a dozen academic competition policy centers as well; it's really incredible.

Former positions include serving as an commissioner of President Carter's National Commission for the Review of Antitrust Laws and Procedures, as a member of the ICPAC during President Clinton's administration, numerous officer and executive committee positions including vice president of the Association of the Bar of the City New York, vice-chair of the ABA Antitrust Section and of particular note for this Section, as Chair of the Antitrust Law Section of the New York State Bar Association from 1978 to 1979.

Eleanor's CV evidences her extensive scholarship with what you would expect, the long list of books, articles, essays and chapters on antitrust law. What may not be fully evident by looking at the list is how thought-provoking Eleanor's competition writings often are. She challenges us to see the human aspects of industrial policy. Eleanor has looked beyond a narrow lens of economic goals to a more expansive set of goals to the creation of an environment and a set of rules and principles that will best incentivize firms to—using Eleanor's words—lively, creative, innovative and responsive to produce and invent what people want.

Eleanor's writings transcend antitrust and she has always been a role model for women and a champion for women in the profession. She wrote an article in 1989 for *Fordham Law Review* which was entitled "Being a Woman, Being a Lawyer and Being a Human Being."

Eleanor starts out by clearly stating we have a unique ability, a unique opportunity to rehumanize an increasingly specialized technocratic compartmentalized and sometimes unresponsive profession.

Eleanor then lays out the foundation for the article by telling in very graphic and moving terms what it was like to be in law school in 1958 when women comprised only 3.8 percent of all incoming law students (we have made like some progress here), what it was like to begin practicing law when there were no women partners and to join a law school faculty in 1976 when very few full-time faculty were woman.

Eleanor describes herself in the article as an "optimist" and indicates that she believes that "optimism succeeds… change is slow but possible and it comes about if we work for it. At the edges and at the core affirmative change must be rooted in who we are, what we feel and how we do and should respond as human beings. Compassion, empathy, insight, knowledge, logic and skill must all combine."

Although written about women and the profession the ending of this article perhaps sums up why Eleanor continues to work endlessly for promoting both within the profession and globally those human values; it is with this "can-do" optimistic attitude and compassion that Eleanor has made a difference to all of us who have ever been fortunate to know her, to count her as a friend and to witness all that she has achieved in the United States and globally to make the world a better place.

I share Harry's sentiment, that I cannot think of anyone who is more deserving than Eleanor to receive this Service Award tonight. I am truly honored to have been chosen to give this to her at this event. Thank you.


Eleanor Fox

MS. FOX: Ilene, you have taken my breath away. Thank you very much. And thank you, New York State Bar Antitrust. I am very, very honored to get this award and very pleased to be here tonight.

When I was asked if I would accept the award I thought back on my experience with the New York State Bar Antitrust Section and realized that I was the Chair in 1978 to '79. I was presiding over this annual dinner of the New York State Bar Association Antitrust Section 35 years ago today! I want to tell you a story about that dinner.

Before I do, let me say a few words about the antitrust setting. Then I want to recall President Carter's National Commission for the Review of the Antitrust Laws and Procedures, as background for the annual dinner of 1979.

In 1978, it was just after the Supreme Court decided *GTE-Sylvania*. The law on vertical restraints had just been revolutionized. It was before *BMI* and the category of per

se violations was still growing and growing. It was of course before the Reagan administration and that means before Bill Baxter's first merger guidelines. We were operating under Don Turner's merger guidelines of 1968, and if you don't know them you should read them. They fairly reflected the law. Most mergers of competitors were illegal, most mergers of big buyers and suppliers were illegal, and big conglomerate mergers were suspect. The Hart-Scott-Rodino pre-merger filing law had been enacted, but implementing regulations had not yet been adopted so effectively. Hart-Scott-Rodino went into effect just about the time that I was the Chair of the Section. It was a kind of Wild West of merger law. It was actually a fun time for practicing merger law. We went to court a lot on preliminary injunctions. There was a lot of case law. Merger practice was a litigating field, it was not a regulatory field.

Also, the United States' monopolization case against IBM had been going on for ten years. This was the big monopoly case of the time and it looked like it would never end. It was thought to be almost impossible to manage a big monopoly case.

Against the background of the unwieldy big case and problems of overregulation and excessive exemptions from antitrust, President Carter convened the National Commission for the Review of the Antitrust Laws and Procedures in 1978. I was a member. The other academic member was Larry Sullivan. John Shenefield, who was then head of antitrust at DOJ, was chair. Mike Pertschuk, then head of the FTC; Alfred Khan, then head of the CAB, and Barbara Jordan, Howard Metzenbaum, Peter Rodino, Ted Kennedy, Jacob Javitz and other members of the Senate and House were members.

The 1979 annual dinner of the New York State Bar Antitrust Law Section was scheduled to be held just a couple of days before we were to present our report to the President.

The night of the dinner arrived. It was raining. It was not just raining. It was pouring. John Shenefield was scheduled to give a preview of the Carter Commission report.

As Chair of the Section I had the privilege to invite the podium guests and had invited my dear senior partner, Whitney Seymour, a great man of the bar, a great, gentle, elegant, smart, witty person who, among other things, was a past president of the ABA and one of the best Supreme Court litigators in the United States. On the podium that night, I was seated in the middle. Whitney was on my left; a seat for John Shenefield was on my right. We were in the Grand Ballroom of the Waldorf Astoria and the room was packed. The guests were seated for dinner. The chair on my right was empty. John hadn't arrived. It was pouring and he was coming from Washington. We were a little concerned, but we expected him any minute. Dinner was served. Still John didn't arrive.

The time came for the dinner speech. I turned to Whitney and I said, "Whitney, would you like to give the dinner speech?" and he said, "Sure." So we started the dinner program. I reported that John's plane had not yet landed and I introduced Whitney.

Now, Whitney had this great sense of humor. He was famous for his story telling. He had deck of cards, index cards, of about 100 stories. But he knew them all by heart. So Whitney got up and he gave the dinner speech. It was hilarious. It was a series of one line stories. I remember several that he told that night. I will just tell one. This one is about Calvin Coolidge. Calvin Coolidge was the President of the fewest words ever. He held a dinner party to which Dorothy Parker, the writer, was invited and was seated next to the President. Dorothy Parker said, "Mr. President, I have made a bet. My fellow writers bet me that I cannot get you to say more than two words to me at dinner. The President turned to her and said, "You lose." Whitney told about 20 more. The audience was enthralled. John's plane was still somewhere up in the sky and at the end of Whitney's dinner speech the manager came up to the podium and said to me, "You have a message from a Mr. John Shenefield. His plane has just landed in Washington. It tried to land in New York but didn't make it."

So that was the story of this dinner 35 years ago almost to the day.

Thirty-five years ago my children were young teenagers and today two of them, Doug and Randy, are here, along with my daughter-in-law, Trisha. Today they are all experienced professionals. And my dear partner Jerry Bruner is seated there with them. I want to recognize all of them. I am very proud of them.

I am very grateful to you, Ilene, for giving that generous introduction. I am really a New York girl at heart, and a New York State Bar Antitrust girl. Thank you.

Keynote Dinner Speaker
Honorable William J. Baer

MR. STOCK: Okay. This is the time for our keynote speaker. One thing I just want to mention quickly before we start is that the acoustics of this room are very difficult and I know that a couple of people on the sides expressed to me a concern that they wouldn't be able to hear. I just want to make sure that everyone please keep the table talk to a minimum while Bill is up here speaking out of consideration for others who are very interested, as all of us are, in hearing what he has to say.

I want to thank Bill Baer very much for coming on behalf of the Section. I want to ask Molly Boast, who has agreed to formally introduce Bill Baer, to please come up to the podium. Thank you.

Molly Boast

MS. BOAST: Thank you, Eric I am very honored to do this. I have a contract with Bill, he was supposed to be on by 8:30 and I am out of time, so I will shorten up what I proposed to say about the honor of having worked with Bill for his management skills, his sense of humor, his precision, his ability to get to the critical facts right away and all the tips I was provided from practicing in front of him. Instead I would like to focus on four little known facts about Bill Baer, and for this part of his introduction I have to acknowledge assistance from his two sons, Michael and Andrew.

First little known fact: Bill is a cheesehead. He grew up in Wisconsin; he is Packers fan and so much so that he once turned up at an ABA winter meeting wearing a Packers jersey. Now, you might have thought this was just boosterism but in fact it was his way of telling the leadership of the Section that he was really unhappy about having missed the game that night in order to attend Section events.

Second little known fact about Bill Baer: He is an exercise fanatic. He used to take his exercise outdoors kind of Parris Island style, in a public park. It was a Marine boot camp approach that was not for the faint at heart. This was known as the Sergeants Program and the motto, fittingly enough, was "Be all that you can be."

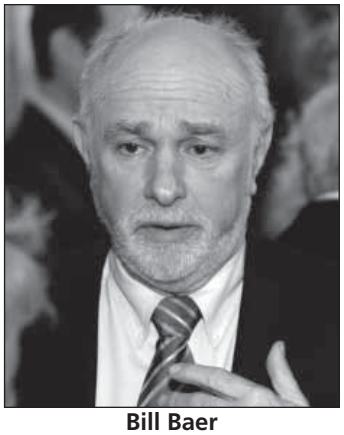
Third little known fact: Bill loves to cook and the spicier the better. It is said that in the kitchen he shares with his wonderful wife and fellow *Downton Abbey* fan Nancy Hindry, that he is known as Mrs. Patmore.

Fourth little known fact: Bill loves to travel. This desire dates back, I think, to his college days when he spent a semester in London and then traveled with his buddy Tom throughout Europe. They dubbed each other Guiseppe, that was Tom, and Antonio, that was Bill, and at each destination, pretending that they were long-lost comrades, they leapt off the train and went into the crowd, and then ran up to each other as though they had just found each other. Guiseppe! Antonio!

Let me close with one comment about Bill as a professional. At the helm of the Antitrust Division, our leading antitrust agency, he is exactly what you would want. He is tough but he is fair, and I think anyone who has appeared before him knows that.

So Assistant Attorney General Bill Baer, it is a real pleasure to have you here.

MR. BAER: Good evening and thank you, Molly, for your warm introduction. Thanks also to the New York State Bar Association for inviting me to speak tonight. It is a privilege to be here with so many outstanding antitrust practitioners, including tonight's honorees, Professor Eleanor Fox and Jay Himes. Congratulations to you both.



Bill Baer

I arrived at the Antitrust Division about a year ago. As I look ahead to the opportunities and challenges facing the division, I think it a good time to review what this talented and hard-working group of public servants—who have braved undeserved pay freezes, budget cuts, and government shutdowns—has accomplished over the past five years of antitrust enforcement during the Obama administration.

I want to make three preliminary observations.

First, for many years—including these last five—antitrust enforcement has been successfully non-partisan. There is important continuity between the efforts of our predecessors, both Republican and Democratic, and the Antitrust Division's current enforcement efforts and policies. Political affiliation means little in this job. Prior Assistant Attorneys General and I share the goal of protecting ompetition and consumers by making sound and factually supported law enforcement decisions. Of course, our judgment calls occasionally may differ in some cases and on some issues, but I believe the similarities in goals and methods vastly outweigh those differences.

Second, in returning to public service after a 13-year hiatus, I was reminded of the importance of the Antitrust Division's close partnership with our enforcement colleagues at the Federal Trade Commission (FTC). This should not be a stunning observation, but sometimes the occasional clearance dispute obscures just how much and how well we work together. Whether it is the revised merger guidelines, health care and intellectual property guidance, or promoting sound, transparent, and equitable antitrust enforcement internationally, we are partners in significant and lasting respects. I am honored to team with Chairwoman Edith Ramirez and her talented colleagues on these issues. We applaud—and the department was proud to support—the FTC's important victories in the Supreme Court this past term in the *Actavis* and *Phoebe Putney* cases.[1]

Third, I claim no personal credit for the division's achievements that I highlight tonight. That credit goes to a quality team of dedicated career professionals and to Assistant Attorney General Christine Varney and the talented lawyers and economists who have honored the division with their service over the last five years. Our cur-

rent front office team—Renata, Leslie, Aviv, David, Brent, Terrell, Sonia and I—thank them for leaving antitrust enforcement in a strong position. We salute as well the leadership and support of Attorney General Eric Holder—he has been with us every step of the way.

With those preliminary observations in mind, let me focus on the progress antitrust enforcement has made these last five years. President Obama promised during his first campaign that his administration would vigorously enforce the antitrust laws.[2] He pledged to "step up review of merger activity," "take aggressive action to curb the growth of international cartels," and "ensure that the benefits of competition are fully realized by consumers."[3]

I think the record shows the Antitrust Division has followed through on the President's pledge.

Criminal enforcement provides an excellent starting point. We continue to vigorously pursue and prosecute international and domestic cartels. Since January 2009, we have filed 339 criminal cases, a more than 60 percent increase over the prior five years. We secured $4.2 billion in criminal fines in that period. Many people do not appreciate that these dollars do not recycle into our antitrust enforcement budget. Instead they go into the Crime Victim's Fund, which aids Americans harmed by all types of crimes across the nation.[4] The fund provides victims with shelter, crisis intervention, and assistance with medical and counseling expenses, among other services.[5]

Effective cartel enforcement requires holding accountable both corporations and the senior executives who orchestrate their unlawful conduct. We have charged 109 corporations with criminal antitrust violations since 2009. We have ensured that those corporations have paid appropriate—and stiff—criminal fines, and those 109 corporations together have paid the highest five-year fine total in division history.

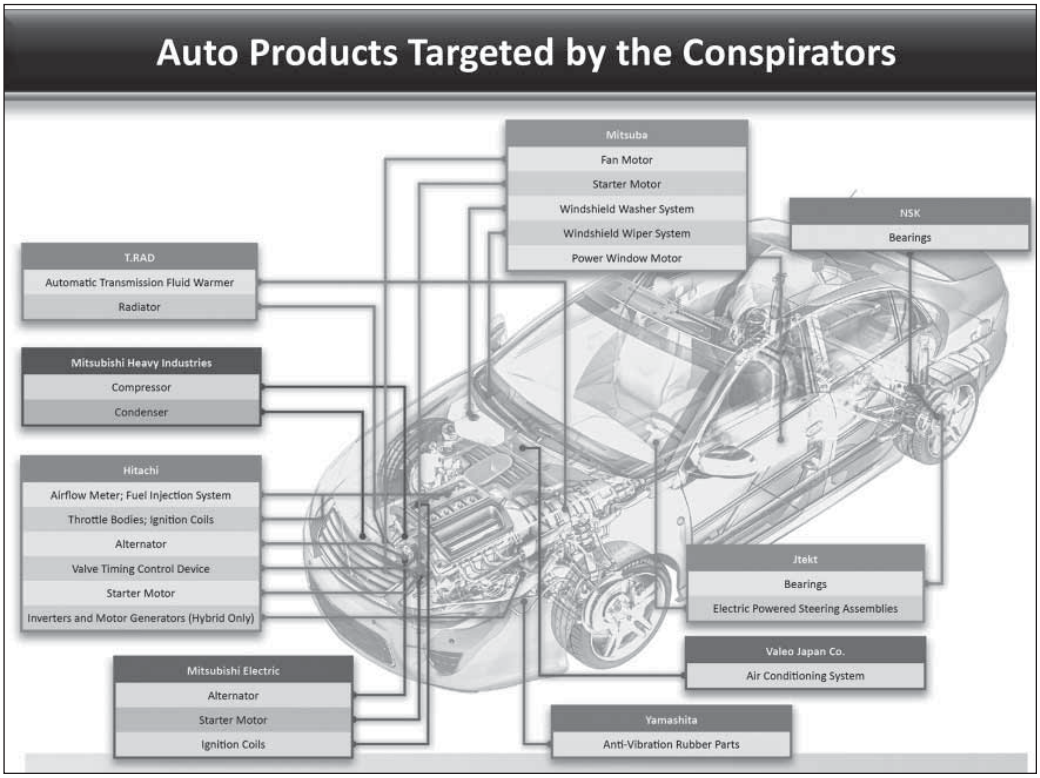
The division also charged 311 individuals with antitrust crimes during the past five years. Experience teaches that the threat of prison time is the most effective deterrent against criminal antitrust violations. We seek sentences commensurate with the economic harm caused by the perpetrators. The statistics show that the courts are embracing the effort to hold company executives accountable for their bad behavior. The average prison sentence in our cases has increased from 20 months in the period 2000-09 to 25 months during the years 2010-2013.

Of course, we can never know for certain the full deterrent effect of our enforcement efforts. But we do know that self-reporting under our leniency program remains at high levels and that, increasingly, non-U.S. companies are reporting anticompetitive behavior. They are responding to the fact we are prosecuting off-shore conduct with a U.S. impact. In recent years the number of foreign nationals sentenced to U.S. incarceration has increased threefold. The message should be clear: the division will vigorously and successfully prosecute international cartel behavior that harms U.S. consumers regardless of where that conduct takes place.

As I detailed late last year in joint testimony with the FBI before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee, our partnership with the bureau is key to successful investigation and prosecution of economic crimes.[6] By making increased use of the bureau's expertise and talent, we are better able to uncover unlawful behavior that harms American consumers.

The division has brought criminal cases in a range of industries over the past several years. One of our most significant ongoing investigations involves the auto parts industry. We are prosecuting price fixing and bid rigging involving a number of parts that were installed in cars sold in the U.S., including wire harnesses, instrument panel clusters, and seatbelts. This chart, which I used in my recent Senate testimony, identifies the component parts caught up in this web of conspiratorial conduct.[7]

To date, we have charged 24 companies and 26 executives with participating in multiple international conspiracies, and those numbers are sure to grow as the investiga-



tion continues.[8] These charges have resulted in $1.8 billion in criminal fines, including the third-largest criminal antitrust fine ever.[9] Of the 26 executives charged so far, 20 have been sentenced to serve time in U.S. prisons or have entered into plea agreements requiring significant sentences.[10]

During the past several years, the division also prosecuted international price-fixing conspiracies involving liquid crystal display panels. These conspiracies hurt U.S. consumers by dramatically inflating prices for computer monitors, notebook computers, and televisions, among other products. In 2012, the division secured convictions of Taiwan-based AU Optronics, its subsidiary, AU Optronics Corp. America, and three former top executives for their participation in such a conspiracy.[11] The trial against AU Optronics was the first time the division proceeded under the alternative fine statute, 18 U.S.C. § 1571, which allows for fines up to two times the gain or loss resulting from the conduct.

The division proved beyond a reasonable doubt to the jury that the combined gains to the participants in the conspiracy were $500 million or more and that the defendants' conduct accordingly merited a fine exceeding the Sherman Act's $100 million maximum.[12]

Another recent matter that has resulted in guilty pleas and a trial victory for the division is our investigation into a conspiracy to fix rates for coastal water freight transportation between the continental U.S. and Puerto Rico.[13] This scheme harmed consumers in Puerto Rico who rely on goods imported from the mainland U.S., including food, medicine, and other consumer items. Three companies and six individuls have pleaded guilty or been convicted at trial in the course of this investigation and $46 million in fines have been imposed.[14] The culpable executives have been sentenced to jail terms ranging from seven months to five years.[15] Trial against a seventh individual is scheduled for this May.

Price-fixing and collusion are not limited to tangible goods. As many of you know, recent division prosecutions have shown that financial services markets also are susceptible to unlawful conspiracies that will trigger vigorous antitrust prosecution.

Bid-rigging in municipal bond markets is one example. Working with the FBI and the Internal Revenue Service's Criminal Investigation Division, the Antitrust Division—led by the folks in our New York Office—uncovered and prosecuted conspiracies to defraud municipalities across the nation by manipulating the competitive bidding process for the investment of tax-exempt bond proceeds. These illegal schemes reduce the amount of money that cities and towns can spend on civic projects, such as hospitals and schools, road repair, and affordable housing. Twenty individuals have been charged in this investigation so far and 16 have been convicted or pleaded guilty.[16] One corporation also has pleaded guilty.[17] These prosecutions resulted in $745 million in restitution, penalties, and disgorgement to federal and state agencies.[18]

The division also has cooperated with the FBI and the Criminal Division in prosecuting manipulation of the London Interbank Offered Rate, known as LIBOR. Our coordinated effort exposed schemes to rig benchmark interest rates in order to improve the trading positions of certain financial institutions. This pernicious conduct undermines confidence in the financial markets, which still are recovering from the 2008 financial crisis. To date the department has charged eight individuals and reached resolutions with four banks in this matter. The total global criminal and regulatory fines, penalties and disgorgement obtained in this investigation are over $3.5 billion.[19]

We remain concerned about fraud and manipulation of financial markets. Just recently, the department publicly confirmed a new joint Antitrust Division and Criminal Division investigation into collusion in foreign exchange markets.

Cartel enforcement is demanding and resource-intensive. And the criminal conduct is not limited to international cartelists. When the Antitrust Division consolidated its field offices three years ago, we committed to continued pursuit of local and regional antitrust violators. We are honoring that pledge. Indeed, with the budget crisis behind us, we are adding prosecutorial staff to our D.C. office to pursue these crimes.

The real estate market is one place where consumers have been victimized. As part of the Justice Department's commitment to fight financial fraud, the division and the FBI uncovered multiple conspiracies involving bid rigging and fraud at real estate foreclosure auctions in multiple states. These schemes exploited the housing market collapse that followed the 2008 financial crisis. Conspirators bought foreclosed properties at non-competitive prices, victimizing both financial institutions and homeowners. So far, the investigation has resulted in charges against 70 individuals and three companies. Sixty-seven individuals have pleaded or agreed to plead guilty to these charges.[20] As we take a number of these cases to trial, you will see the results of the hard investigative work that uncovered this highly problematic conduct. The division also continues to prosecute individuals and entities who have conspired to rig bids at municipal tax lien auctions.[21]

There is more to come. Our criminal prosecutors in D.C., San Francisco, Chicago and here in New York are working under the guidance of Brent Snyder, our new Deputy Assistant Attorney General for Criminal Enforcement, to pursue a wide range of domestic and international cartelists.

There can be little doubt that the division vigorously prosecutes wrongdoers. But we respect the rights of those

under investigation. That is why, after a thorough review of the division's policies regarding corporate plea agreements, I announced last year certain changes to the division's approach to non-prosecution protection for company employees.[22] The new policy provides that in negotiating corporate dispositions, the division will continue to exclude from non-prosecution protection—or "carve out"—employees the division believes to be culpable.[23]

But the division no longer carves out employees for reasons unrelated to culpability.[24] And the division no longer includes the names of these likely targets in publicly available plea agreements. Instead, the names are listed in an appendix, which the division seeks to file under seal.[25] So far the division's requests to file under seal the names of individuals carved-out of corporate plea agreements have been granted by the courts in 15 cases. Public disclosure is appropriate if and when we file charges. We appreciate the judiciary's embrace of our effort to respect the rights of the unaccused.

Like cartel enforcement, merger review is central to the division's mission. Unlawful mergers restrain competition, resulting in higher prices, lower quality goods and services, and reduced consumer choice. Over the past five years, the division has shown that it will take all steps necessary to challenge anticompetitive transactions.

In some cases that means filing a lawsuit and proceeding to trial. Two recent trial victories illustrate the division's willingness to litigate and block anticompetitive mergers. Just this month, the division prevailed at trial in its challenge to Bazaarvoice's $168 million consummated acquisition of PowerReviews, its closest rival in the U.S. market for Internet product ratings and reviews platforms.[26] The outcome reinforces a number of key aspects of merger enforcement:

- An anticompetitive transaction that is not reportable under Hart-Scott-Rodino and is already consummated still is subject to Section 7 challenge;
- Where, as here, the evidence of an effort to deny consumers the benefits of competition is strong, the division will act;
- Post-merger evidence of competitive effects that could arguably be subject to manipulation is entitled to little weight; and,
- As Judge Orrick's thoughtful opinion explains, the antitrust laws apply with full force to transactions in the high-technology sector.[27]

We look forward to working with the court in fashioning appropriate remedies to undo the harms caused by Bazaarvoice's misconduct.

In 2011, the division successfully enjoined H&R Block from acquiring TaxAct, its competitor in the market for digital do-it-yourself tax preparation software.[28] The division proved that combining the second- and third-largest competitors would substantially lessen competition in this market, which affects tens of millions of U.S. taxpayers. Indeed, since our trial victory, the market has become more competitive—all three major competitors have launched mobile apps and now couple live tax consultation services with digital do-it-yourself products at no extra charge.[29]

Merger litigation is costly and time consuming. But the last few years demonstrate that we will not hesitate to challenge in court anticompetitive transactions where that is the right course. Of course, the division is always open to meaningful settlement offers from parties that resolve our competitive concerns—both before and after we have sued to block a deal. But the key point is that we will continue to reject settlement terms that do not ensure consumers the benefit of a competitive market.

For example, last year we rejected an inadequate settlement offer from the parties and sued to stop Anheuser-Busch InBev's (ABI) proposed acquisition of total ownership and control of a leading rival and aggressive competitor—Grupo Modelo. Our investigation showed that the transaction would have reduced competition in the U.S. beer market, leading to higher prices. After we sued, the parties quickly agreed to divest to Constellation Brands Modelo's entire U.S. business, ensuring that Modelo would remain an independent horizontal competitor to ABI and MillerCoors.[30] This outcome preserves competition in the U.S. beer market and avoids the price increases and significant consumer harm that would have resulted had the original deal gone through.

More recently, the division sued to block the merger between US Airways and American Airlines. The merger guidelines, and courts applying them, warn about the anticompetitive threat of mergers in increasingly concentrated industries.[31] As proposed, this transaction would have reduced competition in air travel—an industry that is increasingly concentrated and oligopolistic—and raised prices for consumers. Once again, during our investigation the parties did not offer meaningful structural relief. That attitude changed on the eve of trial. The settlement we then negotiated requires the parties to surrender key assets at capacity-constrained airports across the country—including 138 slots at Reagan National and LaGuardia Airports and multiple gates in Chicago, Boston, Miami, Dallas and Los Angeles.[32] These divestitures will provide non-legacy competitors the opportunity to expand their national footprint and increase system-wide competition to the benefit of the American consumer.

In other cases, parties abandoned their anticompetitive transactions in the face of a division challenge. In 2011, the division sued to block AT&T's proposed acquisition of T-Mobile.[33] After months of litigation, and in light of factually compelling concerns articulated by both the Antitrust Division and the Federal Communications Commission, the parties abandoned the deal.[34] As I note

later, since then competition in the wireless sector has flourished and consumers have benefited.

Similarly, in 2011, NASDAQ and Intercontinental Exchange abandoned their plan to acquire NYSE Euronext after the division informed the parties it planned to challenge the merger.[35] The division determined that the transaction would have combined the only competitors in several businesses critical to the U.S. equities markets, including stock listing services and stock auction services. And, in 2012, 3M Co. abandoned its plan to acquire Avery Dennison's Office and Consumer Products Group after the division told the parties it would sue to block the deal. The parties were close competitors in the sale of adhesive-backed labels and sticky notes and 3M would have maneuvered to hold a more than 80 percent share of both the labels and sticky notes markets post-merger.

Other recent significant transactions were remedied by settlements before a contested lawsuit became necessary. In 2011, the division entered into a settlement which resolved the competitive problems presented by the proposed joint venture between Comcast and NBC Universal.[36] This settlement included structural and conduct relief that will protect emerging forms of content distribution. In 2010, the division negotiated a remedy in the Ticketmaster/Live Nation matter that protects competition in ticketing for entertainment events.[37]

There are lessons to be learned. In dealing with problematic mergers in concentrated markets during my years at the FTC and here at the division, I have seen some companies and their advisors assume the antitrust agencies will approve a problematic deal so long as the parties offer up a fig-leaf asset divestiture or an unworkable conduct remedy. Often in horizontal mergers the strategy seems to be to eliminate a big rival while proposing a remedy that allows for a small rival or new entrant with limited resources to nip at the heels of the few remaining big players. Experience, our past antitrust enforcement, and our merger guidance should put companies on notice that this strategy is unlikely to succeed.

It did not work for AT&T, which abandoned its effort to buy T-Mobile and reportedly paid a massive break-up fee as a result.[38] It did not work for ABI, which apparently thought it could acquire a leading U.S. rival by offering up some modest concessions, but wound up divesting all Grupo Modelo's assets relating to its participation in the U.S. markets, including a state-of the-art Mexican brewery that will be built-out to supply anticipated growth in U.S. demand.

As these actions demonstrate, a key lesson from merger enforcement in the Obama administration is that the division will go to court to challenge problematic transactions to get solutions that resolve anticompetitive concerns. We are always open to good faith remedial proposals from parties. But we will not waste our time with plainly inadequate settlement offers. And, merging parties inevitably delay resolution of their matters by not seriously addressing our competitive concerns when proposing settlement terms.

The business community, consumers, and antitrust enforcers all are better off if anticompetitive mergers die on the drawing board. Our Horizontal Merger Guidelines advance that goal.[39] The FTC and the division issued revised guidelines in 2010 following an open and transparent process, which included public workshops and the release of a guidelines draft for public comment. The result is updated guidance that more accurately reflects current merger review practice at the division and the FTC.

Guidance on remedies is important as well. In 2011, the division released an updated Policy Guide to Merger Remedies, which provides insight into current thinking at the division about how to remedy anticompetitive transactions.[40] The policy guide foreshadowed how the division would analyze the divestitures in the US Airways/American Airlines matter. The guide states that the division will not approve a potential divestiture buyer in an oligopolistic market where that course of action increases the likelihood of post-merger coordination.[41] It should come as no surprise then that the divested slots and gates would go to carriers most likely to enhance rather than inhibit competition.

We understand that merger review can be expensive and time-consuming and that most transactions the division reviews are not anticompetitive. We are committed to reducing the burden on merging parties. As part of that effort, the division has expanded its acceptance of cutting-edge document production techniques, like predictive coding, that have the potential to save parties time and money while providing the division with the documents it needs to fully evaluate transactions.

Let me spend a few minutes discussing the real-world significance of effective antitrust enforcement. The audience here tonight consists of experienced and sophisticated antitrust practitioners. Even for this group, antitrust law often can seem abstract and theoretical, due at least in part to the jargon we use and the difficulty we sometimes encounter in articulating how effective enforcement and competitive markets provide real benefits for American consumers.

Some years ago—in an effort to demystify antitrust enforcement—I gave a talk about "The Dollars and Sense of Antitrust Enforcement."[42] Viewing division enforcement over the past few years through that prism is worthwhile. It enables us to look at the tangible ways in which consumers benefit from competitive markets and how anticompetitive mergers and bad conduct threaten those benefits.

Since 2008, the nation has battled a financial crisis and then the resulting deep recession. Many Americans have

struggled to make ends meet. Antitrust enforcement has served during this crisis to protect and promote competition in markets that affect the bottom lines of American families. Our actions enforcing the antitrust laws in the e-books, wireless and health care markets are illustrative.

Consider the serious and documented economic harm caused by the e-books conspiracy recently orchestrated by Apple Inc. and certain book publishers. On July 10, 2013, Judge Cote issued a 160-page opinion finding that Apple had violated Section 1 of the Sherman Act by conspiring with publishers to raise e-books prices and to end e-books retailers' freedom to compete on price.[43] Judge Cote found that the conspiracy was effective: the publishers' e-books prices increased across the board once the illegal agreements were in place.[44] Overnight, the price of the defendants' bestselling e-books rose from $9.99 to $12.99 or $14.99.[45] As Judge Cote explained, "from the consumer's perspective…the arrival of the iBookstore brought less price competition and higher prices."[46]

The evidence of consumers benefiting from post-injunction price competition is equally compelling. Current pricing data shows that since injunctions against Apple and its book publisher co-conspirators were entered, the average price of the top 25 best-selling e-books dropped from around $11 to around $6.[47] Further, our state attorneys general partners secured settlements with the publishers that will return more than $160 million to e-books consumers through seamless credits to their accounts.[48] This refund process is already in motion.[49]

The final judgment[50] in the e-books case put a stop to Apple's anticompetitive conduct. Equally important, it established an external compliance monitor to review and evaluate Apple's antitrust compliance policies and procedures, as well as the antitrust training the final judgment requires.[51] External monitors are an important part of civil law enforcement, whether in the antitrust, civil rights or environmental context. And a monitor in this case is especially important—given the record evidence of Apple's unapologetically anticompetitive conduct, the extent of the consumer injury, the involvement in the conspiracy by high-level executives and lawyers, the findings that their sworn testimony lacked credibility,[52] and the absence of a culture of antitrust training and compliance. As Judge Cote has noted, Apple abused the competitive process and injured U.S. consumers.[53] The public is entitled to remedies that will ensure that Apple changes its ways and does not again engage in anticompetitive conduct in the e-book business or any other markets in which it competes.

Evidence from the wireless market also shows the tangible consumer benefits of antitrust enforcement. Since AT&T terminated its effort to eliminate T-Mobile as a rival, T-Mobile has spearheaded increased competition in wireless services. Shortly after the merger was abandoned, T-Mobile announced a $4 billion investment in modernizing its network and deploying 4G LTE service.[54] It then made a series of moves to offer cheaper and better customer contracts, including offering plans without annual contracts and selling Apple's iPhone 5 on better terms than the competition.[55] Just this month, T-Mobile announced a deal with Verizon Wireless to acquire additional spectrum.[56] And T-Mobile recently offered to pay the early termination fees of its competitors' customers, if they switch to T-Mobile.[57]

These moves are paying off. T-Mobile announced gaining 648,000 wireless subscribers in the third quarter of 2013—its second straight quarter of subscriber growth—besting both AT&T and Sprint.[58]

Pushed by T-Mobile, the competition has responded. Sprint began offering unlimited plans with aggressive prices and innovative service arrangements.[59]

AT&T recently offered T-Mobile customers a $200 credit, plus money for smartphone trade-ins, to switch.[60] And, after T-Mobile announced a plan which allows subscribers to trade in their handsets for an upgraded model twice a year, AT&T, Verizon and Sprint all announced plans that allow customers to upgrade more often.[61] Competition today is driving enormous benefits in the direction of the American consumer.

The division also continues to focus on contractual provisions that artificially increase health care costs. With that in mind, in 2010, the division and the Michigan Attorney General's office challenged Blue Cross Blue Shield of Michigan's contracts with health care providers that included most-favored-nation clauses (MFNs).[62] These MFNs caused hospitals to raise their prices to competing health insurers and reduced competition in health insurance. As a result, Michigan consumers paid more for their health care. In 2013, after almost two years of litigation, the state of Michigan passed a law prohibiting health insurers from including MFNs in their contracts with health care providers.[63] This law squarely addressed the harm we alleged in our complaint, so we moved to dismiss our case.[64] The message is getting out. Since we brought suit, a number of states have restricted the use of MFNs in insurer contracts with health-care providers.

And health insurers in other states have chosen to stop using MFNs in their provider contracts.

Enforcement actions by the division and the FTC understandably command a lot of public attention. But it is important not to overlook our pro-competition advocacy and our focus on policy issues that we believe have a tangible impact on American consumers. Intellectual property issues involving standards-essential patents and the availability of injunctive relief illustrate the point.

In January 2013, the division teamed with the U.S. Patent and Trademark Office (PTO) to issue a Policy

Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments.[65] That policy statement concluded that in many situations it may not be in the public interest for the U.S. International Trade Commission (ITC) to issue an exclusion order "where the infringer is acting within the scope of the patent holder's F/RAND commitment and is able, and has not refused, to license on F/RAND terms."[66]

A few months later the administration applied the policy to a specific ITC decision. Relying on the analytical framework laid out in the joint Department of Justice/PTO policy statement, the U.S. Trade Representative disapproved an ITC exclusion order that would have halted U.S. sales of certain older-generation Apple products, ensuring that U.S. consumers will continue to have access to more affordable technology.[67] That the division worked so hard to ensure fair treatment for Apple, which itself has been found unwilling to abide by antitrust norms, demonstrates our commitment to even-handed, merits-based antitrust enforcement.

The final topic I want to touch on tonight is international engagement. U.S. antitrust enforcers appreciate that our enforcement actions and policy announcements are watched closely in jurisdictions around the world. The division continues to engage internationally and to promote policy convergence around sound antitrust principles, transparency, procedural fairness and enforcement cooperation. One of tonight's honorees, Professor Eleanor Fox, has made this her life's work. I know she delights in and deserves credit for the progress we have made, both in bi-lateral and multi-lateral forums. Fourteen years ago the Justice Department and the FTC helped found the International Competition Network (ICN). At last count the ICN had nearly 130 members from 111 jurisdictions.[68] The division, along with the FTC, is also an active participant in the Organisation for Economic Co-operation and Development (OECD), and I am privileged to chair OECD Working Party 3 on cooperation and enforcement.

Much of the division's international engagement takes place in the context of its bi-lateral relationships. During the past few years, we have worked hard to cultivate and deepen those relationships. We meet regularly with our good friends and partners in the European Commission (EC) and we have enhanced that relationship over the past years. In 2011, the division, the FTC, and the EC celebrated the 20th anniversary of the U.S.-EU bi-lateral antitrust agreement and issued an updated set of best practices to coordinate their merger reviews.[69]

During the Obama administration U.S. enforcers have broken new ground in relations with China and India. In the past few years, the division and the FTC have entered into Memoranda of Understanding (MOU) with the Chinese and Indian enforcement agencies.[70] These MOUs have led to annual bi-lateral meetings between the U.S. antitrust enforcement agencies and agencies from these nations. Indeed, earlier this month, I attended with Chairwoman Ramirez a bi-lateral meeting with the Chinese authorities in Beijing. We see candid engagement with the Chinese and Indian agencies as important, and we look forward to increased cooperation in the coming years.

Cooperation also plays an important role in our international criminal cartel investigations. Working with competition enforcers in non-U.S. jurisdictions, we share information where we are able; and we can plan coordinated raids around the world, reducing the opportunity for key evidence to go missing or be destroyed. For example, the Japanese Fair Trade Commission (JFTC) recently uncovered a conspiracy to fix the prices of bearings sold to car makers in the United States and elsewhere. After the JFTC executed search warrants against the bearings conspirators, a number of the companies involved reported their role in cartel activity affecting the U.S. and offered full cooperation with our investigation. Late last year, the Attorney General announced the first results of these joint efforts as certain bearings conspirators agreed to plead guilty and to pay hefty criminal fines.[71]

Let me conclude with a couple of quick points. The people in this room know better than anyone that antitrust analysis can be a complex undertaking. We need to continue to work on sharpening our analysis and to getting to the right answers on the complex policy and enforcement issues we confront every day. It is not always an easy process, but I believe it is critical to effective antitrust enforcement.

We are proud of what the division has accomplished so far during the Obama administration, but there is much work to be done. We look forward to the challenges the next few years will bring. We aim to build on the energy, vigor and success in protecting competition that have marked antitrust enforcement these past five years.

Thank you.

MS. HART: Well, wasn't that fantastic. Thank you all so much. I want to thank all of the law firms that have so generously contributed to what is known to be a lavish dessert buffet; there is also going to be some piano playing.

Thank you all for your quiet and respectful listening, I know I must sound condescending but I really appreciate it and I think it's been a tremendously successful day.

I would like to thank Eric again and I am very excited about 2014. Thank you Bill for your time and your remarks and your humor and we are also very proud that you are serving your country and all of us.

Thank you.

Endnotes

1. FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013); FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013).
2. See Barack Obama, Sen., Statement of Senator Barack Obama for the American Antitrust Institute 1 (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.
3. *Id.*
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Scenes from the 2014 NYSBA Antitrust Law Section Dinner

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