NYSBA

2015 Antitrust Law Section Symposium

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Cocktail Reception and Dinner
The University Club
1 West 54th Street
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Introduction and Welcome

MS. HART: I anticipate that we are going to have some people still joining us, but we have such an amazing day of programming that to be more permissive about start time will eat into our content-rich day that Elai and our other colleagues have worked so hard to assemble.

So it's my great honor to introduce the 2015 Chair of the Antitrust Section, Elai Katz, who has worked very diligently and yet seemingly without any anxiety putting together what is going to be an amazing day of conflicting high-level discussion, so important to the advancement of antitrust thinking and to our base knowledge, and I really deeply appreciate the way Elai has done what is a very difficult task so seamlessly and with his inestimable talent for being humorous and graceful and yet very productive.

And so I'm looking forward to this year of Elai's leadership and to today's programs. To Elai and the many others who have put this together, thank you.

MR. KATZ: Hi. Good morning. Thank you everyone. I'm glad to see so many familiar faces and some unfamiliar faces.

We're going to get started because we have so much to do. I know that there will be more people coming in as they dredge their way through the snow. So I wanted to just very quickly tell you a few things about today.

As many of you know, to the extent you want CLEs, you have to make sure you sign in and out, the beginning and the end of the morning and afternoon sessions. So please do that.

Also, I'll tell you a little bit about this morning's panels and we'll speak again separately about this afternoon's panels.

What we have is the Antitrust Development Panel that will start in just a minute. After that, we're going to have a panel on mergers. I'm very excited about both of these and the ones that are coming up in the afternoon.

Before we get started, I would like to thank Barbara for all the work that she's done over the year and we will have many chances throughout the day and in the evening to just speak about her accomplishments.

For those people who are speaking later in the day, there are some name tags for you up here. In between sections, you can come by and get your name tags.

So let's get started.

Antitrust Developments in 2014: The Year in Review

MR. KATZ: We have an excellent panel today. We also have a special guest appearance. Hopefully our guest will actually make it from the secret location where he currently is.

This panel is headed up and organized by one of the panelists, Wes Powell, a partner at Willkie Farr & Gallagher.

So without further ado, I'll let you guys take over.

MR. POWELL: Thank you, Elai.

First of all, as many of you know, this for the last few years has been the Elai Katz panel, and I thank Elai for asking me to step into his shoes this year. Thank you all for the early arrival.

Let me first introduce my panelists who are well-known to this Antitrust Law Section.

First, we have Ned Cavanagh who is a former chair of the Antitrust Law Section. He's a professor of law at St. John's. He teaches in the areas of antitrust law and civil procedure, law and economics and a number of other areas. Prior to teaching, he spent some time in private practice in New York, and he's a graduate of Notre Dame and Cornell Law School.

Next, we have David Park who is a current member of the Executive Committee of the Antitrust Law Section and has been for almost two years.

MR. POWELL: Global competition counsel for Bloomberg LP, here in New York, where he focuses on antitrust competition issues in the U.S. and abroad. He works on M&A transactions, joint ventures, litigation, regulatory issues, antitrust compliance and the like.

Prior to that, we were happy to have him as a colleague at Willkie Farr where he was special counsel with a focus on antitrust and competition issues, and I know from our time together that he has an encyclopedic knowledge of antitrust law and economic issues. He is a graduate of UT Austin and has both a JD and a master's degree in economics from Duke.

And finally, as the name card hints, Eric Stock is going to be joining us in progress today. He is speaking at the FDA section program now about the very topic that he will speak on here. So he couldn't clone himself. Therefore, he will join us in progress today. But obviously everyone knows Eric well, both as the current Chief of the Antitrust Bureau of the New York Attorney General's Office, as a former chair of this Section, and prior to his government service as a partner at Hogan Lovells. He should be here around 9:30 or so if all of this goes according to plan. But we will be nimble, if needed, in case that time doesn't work out.

As any of you who have been at this panel before would know, the nature of this review of the major developments from 2014 requires us to go wide and not so deep.

So if we give a short shift to a topic of particular interest to you, you'll forgive us for that and you'll have an opportunity for Q and A at the end.

One note, we're not going to cover a couple of items that would be on most people's greatest hits list for 2014 because they're going to be discussed at subsequent panels today.

One is the collection of sports cases, particularly the *O'Bannon* case concerning NCAA limits on compensation to football and basketball student athletes. That's going to be the subject of a panel this afternoon.

And likewise, there have been some developments with respect to the FTAIA and the issue on the jurisdictional region of U.S. antitrust laws. That, we expect, will be covered with a panel later today. So you won't hear us talking about those.

And with that, we'll plunge right in and hope that we can cover at least the lion's share of what we had set out to cover today and then we'll end with some time for questions.

We're going to begin with the U.S. Supreme Court, and this was not in contrast to some prior years a big antitrust year on the court.

There was one decision of note that we'll cover and then there are a couple of other interesting cases that have been briefed and now argued, but a decision awaits, and we'll touch on those as well.

The first case is the Mississippi AG's case against AU Optronics that resulted in a Supreme Court decision on the issue of whether the Class Action Fairness Act and its provision on mass actions would permit the removal of an action brought, a parens patriae action brought by a state Attorney General on the grounds that it is a mass action as defined under the statute.

And that obviously makes clear that that is an interesting civil procedure issue. It's not directly about the substance of antitrust, but from the perspective of state enforcers, it was a very significant decision impacting their ability to effectively enforce the state antitrust laws in their choice of form of state court.

As many of you who practice antitrust law know, the *AU Optronics* case, which was one of the many cases con-

cerning an alleged cartel among LCD manufacturers, there was criminal activity, criminal investigations and prosecutions and pleas by the U.S. Department of Justice. There was follow-on civil class action litigation and there was a lot of state enforcement activity.

One significant type of case that is commonly brought in that context is a parens patriae case brought by state Attorneys General.

For those of you not familiar with that Latin phrase, you know, it has been given different meanings, but generally means that a state is acting in its capacity as the protector of the general economy and the consumers of their state and they bring the claim seeking various forms of redress for the benefit of the state and its consumers.

That was the nature of the case that had been brought in state court in Mississippi.

The defendants sought to remove or did remove that case to federal court on the grounds that it was a mass action, meaning it was brought on behalf of 100 or more injured parties in state court, and it was therefore subject to being removed to federal court under CAFA.

The district court or ultimately the Fifth Circuit concluded that, yes, in fact, a parens patriae case that is in the nature of a derivative action, it seeks to act on behalf of individuals within the state to pursue their claim. That is in the nature of a mass action even though there is but one plaintiff, the State of Mississippi, in that case.

The Supreme Court found otherwise. A unanimous decision by Justice Sotomayor held that the language in CAFA that says there must be 100 or more plaintiffs means that the single plaintiff, the State of Mississippi, doesn't satisfy that, and therefore the case should be in state court and removal was improper.

So that is the case in a nutshell. It was, I think, a much watched case for state enforcers who, as I said before, viewed the decision as an important one in terms of their capacity to effectively enforce state antitrust laws.

MR. CAVANAGH: Wes, can I add something here?

MR. POWELL: Yes.

MR. CAVANAGH: On one hand this was a really easy case, it was a no-brainer, because when you go back to what the Class Action Fairness Act was about, it was about plaintiffs bringing actions in these magnet courts, in Madison County, Illinois, securities cases under state law, antitrust cases under state law, to avoid what was perceived to be an inhospitable federal bench. So the idea suing in a state court in cases that are really nationwide, you'd like to get them into federal court.

But there was an exception for matters that were truly state matters. If, for example, if two-thirds of the cases involved state actors, it could be remanded to state court. But here, parens patriae cases are quintessentially state cases, and there's only one plaintiff here. From that perspective, it's a no-brainer.

But there's a deeper problem you pointed out, and I think it was from the nature of this case. You've got the flat panel case, a huge multi-district case. You've got direct purchaser cases, indirect purchasers all over the lot, state law cases, federal law cases, and now you've got the State of Mississippi coming in parens patriae.

Now, the concern for the defendants here is how many times are these indirect purchasers going to recover?

And the notion that this is an ongoing problem with direct purchaser, indirect purchaser, and in parens patriae, the problem is with multiple and overlapping damages. I think that's what the defendants were trying to address here, somewhat clumsily.

On the one hand, doctrinally from a civil procedure perspective, I think it's a no-brainer. But from a deeper antitrust perspective, there are concerns about how you parse along damages and you make sure that the defendants don't pay more than once.

MR. POWELL: So we'll move on to the two cases that are interesting to keep an eye on that have been briefed and argued, but no decision has been reached yet.

The first is the *FTC v. North Carolina Board of Dental Examiners* case.

That case, in a nutshell, concerns whether a set of rules issued by the dental association, in this case concerning whether or not non-dentists can sell teeth whitening services, is a state action such that there is immunity from antitrust enforcement.

And so, the basic concept behind the state action doctrine, which is found in *the Parker v. Brown* case and the *FTC v. Phoebe Putney* case from the Supreme Court, among other decisions, is that the federal antitrust laws shouldn't be read to bar states from imposing market restraints as an act of government.

What that case really comes down to is whether the dental board in North Carolina is properly viewed essentially as a state agency, or whether it is better viewed as a private organization to which has been delegated some state regulatory authority.

And the answer to that question, which of those two things that board really is, determines what legal standard is applied to assess whether the state action doctrine should be applied.

The dental board points to the fact that the legislation creating it calls it a state agency.

The Federal Trade Commission points to the fact that these are entirely private actors. They are dentists or other market participants who are basically saying they're going to protect themselves from competition from others who might provide teeth whitening services.

That is really the crux of the issue. Oral argument occurred in the fall and that decision will come out soon.

The last case is *Oneok v. Learjet*, which concerns whether the Natural Gas Act preempts state antitrust law which challenge practices that directly affect the wholesale market for natural gas, when in this instance the claims were asserted by plaintiffs who had purchased gas at a retail level.

The language of the NGA says the Federal Energy Regulatory Commission will have exclusive authority to regulate wholesale gas rates and practices that affect those rates, and here is a set of private plaintiffs who sued based on retail gas transactions.

Defendant's position is that even though it was a retail gas transaction, the regulatory scheme still applies and there should be immunity because action in the retail market has an effect on the wholesale market.

That case has been briefed, was just recently argued, and we will see how it comes out.

I think that's it for the Supreme Court this year. We'll now turn to Ned to walk us through some of the major developments in civil litigation and regulatory enforcement.

MR. CAVANAGH: Thanks, Wes.

I also want to thank you, Wes, for all the work you did in putting this panel together, and also all the reading you gave us, which was monumental.

First topic I want to address is predatory invasion.

A big pod of cases has come out involving Keurig. I think we're all familiar with Keurig, the universal coffee maker that is in almost everybody's offices. As a matter of fact, you know, the penetration is probably 90 percent at least or maybe even the court suggests close to 100.

The Keurig coffee maker, the big innovation here I think is one cup at a time. So you've got the pods, and you make no fuss, no mess, nothing is left over. So, it's obviously very popular. And, of course, the Keurig coffee maker system is patented.

But the pod system is kind of a peripheral area where some entrepreneurial sellers thought they could make some money here by making Keurig-compatible pods or generic pods.

And, of course, much like the after-market cases or the peripheral equipment cases, Keurig wants 100 percent of it. So it's competing with a lot of companies for that smaller space for the pods.

And Keurig now has introduced the Keurig 2.0. Many of you may have gotten that for the holidays as a present.

The concern that some of the generic pod makers have is that they claim that the Keurig 2.0 now has technology that can read the source of the pods, and if you're not an authorized source of the pods, you cannot make coffee in the Keurig.

There have been a series of cases where the generic makers have sued alleging monopolistic exclusion.

Now the very, very interesting question here is, is this innovation, or is it exclusion?

Take a step back to the '70s and the early '80s, the IBM peripheral equipment cases. You know, again, IBM high-end computers, high-tech, a lot of patents. Very few companies can compete there. But in peripheral equipment, more flexible technology, less upfront cost, much easier and great profit opportunities.

And, of course, the allegations were that IBM introduced new mainframes that had new plugs that were not compatible with the peripheral equipment.

The history of those cases, if you will recall, is that IBM, I think, won every one of them—maybe not immediately, but eventually won every one of them.

What it came down to with the courts was how do we judge innovation? How do we decide whether this is exclusionary or true innovation?

What the courts have said there is basically if consumers view this as something good and buy it, that's good enough for us; we're not going to get into the technology, into the science of the situation, we're going to leave that to the consumer choice.

Now, on the other side of that there is one case that some of you may remember. It's the *Bard* case. The *Bard* case involved biopsy guns. You know, you had a gun that would shoot a needle to get a biopsy sample, and it was a great innovation because instead of doing invasive surgery, you just had this poke of a needle through a gun.

Of course, again, very much like Keurig and the mainframes, you had the gun which was patented, but then you had the replacement needles. They needed replacement needles. And you had people seeking an opportunity in replacement needles. And then what does Bard do? They introduce a new gun and all of the replacement needles are now incompatible.

Bard lost that case. The reason that they lost that case is that there were terrible documents that indicated that they clearly knew what they were doing, that there was absolutely no innovation in it. The purpose of this was to occupy the field and drive up the costs for rivals.

Generally speaking, courts have taken the view that if this is viewed by consumers as something good, then we're not going to second guess it. We're going to leave it up to the manufacturer, the master of its product. If it wants to introduce a new product, we're not going to second guess it. We don't want to chill innovation.

Similarly, iPod, Apple iPod, iTunes have the question of whether or not music that was purchased from vendors other than Apple iTunes can play on iPods, or not. They're not compatible.

Apple says that we need—again, there are consumer suits here and there's a whole range of competitor exclusion, and in those situations Apple again has been successful because the courts have bought the idea that Apple did this as a matter of innovation.

I'm not sure if the *Apple* case is stronger than the *Keurig* case, but Apple said we needed to screen, in order to protect the integrity of the vendor product. We needed to have a higher security system, if that meant excluding rival's products, then so be it.

But again, you're faced with the question of who decides this. And in *Apple* it was the jury.

MR. PARK: It was a jury instruction. The Court instructed the jury—I think it's interesting—there were different versions of the iPod technology and the instructions basically said the first several versions are off the table, but the version (iTunes 7.0) that is at issue here, you have to look at it, and the Court said that you can't deem the new version anti-competitive if you think it's a genuine improvement.

So, there was no balancing or weighing of the improvement. The jury was instructed that, if this is an improvement, we're done. And that's the result that Apple got.

MR. POWELL: By the way, that issue will be the primary issue on appeal to the Ninth Circuit. It was also a case that ended up being a class action plaintiff lawyer's nightmare, where during the trial the judge essentially disqualified all of the class reps. So, they ended up in the middle of the trial without any class representatives. It was a difficult case all around for the plaintiffs.

MR. CAVANAGH: Ultimately we're faced with this question of who decides whether or not this is innovation as opposed to a predatory exclusionary act.

MR. POWELL: And we will touch on this again in the context of pharmaceutical litigation later because that, of course, becomes an issue in these product-hopping cases where the allegation is that the pharmaceutical company has come out with some new product, you know, means of dispensing the medicine and the like, that that is not a true innovation, it was just designed to prolong the patent rights.

MR. CAVANAGH: All right. I'm going to skip down to our materials because I feel very conflicted about *Twombly*. As a civil procedure professor, *Twombly* is an absolute disaster because it is just so contrary. If you read and understand the Federal Rules of Civil Procedure, it is so contrary to that.

On the other hand, from an antitrust perspective, I understand discovery is expensive, we don't want marginal cases parading through the system forcing defendants to expend lots of money, forcing a lot of court time, and then essentially compelling some sort of settlement based on cost-benefit decision by a defendant who may have done nothing illegal and how that adversely will possibly impact the competition chill.

I also have to admit that *Twombly* hasn't been the curse that I had predicted and everybody else had. I think we've kind of settled down, although the notion of what constitutes a plausible claim is still not clear and is still pretty much whatever the Court says it is. So it's pretty much still a gut test on a 12(b)(6) motion, but it hasn't turned out terrible.

When the Advisory Committee on civil rules was considering whether to do anything about *Twombly*, the question that they asked, and it was a good question, is how many cases have been dismissed under *Twombly* that wouldn't have been otherwise dismissed. And the answer to that question is not very many.

So as *Twombly* has been invoked by the courts, I think there is still a lot of confusion, but it hasn't been absolutely disastrous.

But still, there are some interesting issues, and I wanted to discuss a couple in particular.

In *Re Online Travel Antitrust Litigation*, some of you are wondering like I wondered when I went on the various travel sites, Expedia and Orbitz, why the prices all seem to be the same.

Well, there's a group of plaintiffs that said this is because they conspired, particularly with hotels.

So there was a class action against the major online travel companies as well as against major hotels that alleged really two kinds of conspiracies; one, a set of vertical, bilateral conspiracies between each of the travel agents, the online travel agents and the hotels; and then a sort of master conspiracy where the hotels were kind of the CEO.

The second theory, the Court didn't really buy, but it looked into the first theory.

And basically, the hotels negotiated with each online travel agent a resale price maintenance agreement for what we could sell rooms at.

Once that agreement was reached, it was agreed that the online travel agents could sell at that and the hotel would sell at that.

Then there was a second element which was basically that the hotel as MFN procedure, wouldn't give anybody a better deal.

So when Expedia tells you that if you can find a better rate we'll give you $50, you're not ever going to get the $50 because everybody is charging the same thing.

Well, not surprisingly the defendants here moved to dismiss.

The question, was there a contract combination or conspiracy in restraining trade and how do we look at this under *Twombly*?

And, of course, there wasn't any of the classic direct evidence of conspiracy. So what you had here was essentially an implied conspiracy. It was basically conscious parallels in plus. You had to get the conspiracy. You had to find plus factors.

And here, the Court, looking at this case very, very narrowly went down one by one that there were a lot of meetings that everybody came to and that prices all seemed to be the same.

The Court dismissed all of this as simply parallel behavior, you've got to show more than this.

One interesting area or so-called plus factor that happened was that there were European investigations on the same issues, and the Court there was dismissive of that. One, it was an investigation. Two, it was in Europe and there could be different standards there. So the Court ultimately found that there were not sufficient plus factors and dismissed the complaint.

But, they dismissed the complaint without prejudice. And this is the interesting tact that a lot of courts are doing. They're giving the plaintiffs a second chance. They're willing to toss these. Then they're putting the ball in your court. If you can't do it the second time, then you lose.

So we'll see about that case. But I'd say *Twombly* is alive and well and the courts are still, in terms of what you have to plead with respect to conspiracy, courts are very strict.

The one thing that troubles me as a civil procedure person, when I read these decisions of courts throwing out a case at the complaint stage for not alleging a relevant market, for not alleging antitrust injury, that is not what the civil rules of civil procedure say at all. But the courts, particularly the lower courts, are getting away with this.

Now this kind of jumps ahead for a second, but particularly when Eric comes here, the post-FTC *Actavis* case is not a re-coming out and the question, of course, that you have to focus on is whether or not the consideration that's given on the settlement was excessive, and how do you plead excessive?

I think you're going to see a lot of cases where courts are now going to be tossing cases out at the pleading stage for not sufficiently pleading a relevant market. I don't know if you guys want to say anything about that.

MR. POWELL: Yeah, I think we'll touch on it again when we get to the pharma discussion. But in a nutshell, we can address this now. In cases in which courts have found after *Actavis* that something other than cash can constitute a reverse payment and a reverse payment settlement, and the Court is looking at whether whatever that non-cash payment was is of a value that is large and unexplained, as the Court said, whether or not in the pleading stage the plaintiff has actually provided enough factual information from which a court can conclude whether the payment was excessive or not. Several cases have been dismissed on that basis, even where there was some valuation, talking about the value of the drug and what portion of that would be conveyed as part of this non-cash term. That wasn't enough from the district court's perspective.

MR. CAVANAGH: David?

MR. PARK: So, just a couple of civil cases next, there are several benchmarking cases that are out there. Judge Buchwald issued a decision in the *LIBOR* case last year, which I find a confusing decision.

Judge Buchwald takes LIBOR—a benchmark that was calculated based on banks reporting what interest rate they were paying to borrow money —and she finds that that process was not meant to be competitive. There wasn't really a product market involved in the collaborative setting of LIBOR.

So, the Judge says that whatever cooperation might have occurred at that LIBOR table, it couldn't support antitrust injury for some market that is downstream of that cooperation.

First, it's not obvious that there isn't some level of competition in setting LIBOR.

The plaintiffs alleged that the banks wanted to show the world that they were strong and they each had an incentive to report borrowing at low interest rates to show that people liked and trusted that bank.

So, you can imagine that if you were an outlier bank, you might be uncomfortable putting in a low rate unless you're sure that your fellow banks were also putting in a low rates. But that's not really how the Judge saw it—she viewed LIBOR setting in a different way.

Then, in terms of the actual logic, the Judge says that there is no antitrust effect of LIBOR downstream. Once you've set this LIBOR rate, it's just like a benchmark where each bank is setting a price at LIBOR plus something (e.g., LIBOR 2 percent or LIBOR plus 4 percent).

The Judge says LIBOR is incidental, whatever that number is it is just a benchmark, it doesn't matter to competition.

You could imagine a world where that LIBOR rate has got some anchoring effect, if banks are setting downstream pricing off of that base price, it's going to have some effect on competition. But, the Judge doesn't go down that route at all.

And the last thing I'll say about it is, even setting aside how you view the case—I don't know the case that well, I'm just going off what's in the opinion—to me it seems like it's more like an information-sharing case, where the banks share some information at the table, it's not per se illegal, they just shared some information, but you would need facts to figure out whether or not that information sharing led to conduct downstream that is subject to antitrust review. It wouldn't be obvious to me that, without more, you would just dismiss the case on the grounds that the plaintiffs haven't pled antitrust injury.

Just yesterday, the judge in the *Foreign Exchange* case, Judge Schofield, wrote an opinion which I found to be extremely clear. In that decision, the defendants had filed a motion to dismiss the U.S. claims. There were also foreign complainants in the case, and the Judge ruled that, based on the FTAIA, which is another topic, the claims are dismissed.

But, interestingly, the plaintiffs in *Foreign Exchange* actually hit a couple of things that were addressed in the *LIBOR* decision where the defendants in *Foreign Exchange* tried to use the *LIBOR* opinion to support their motion to dismiss, but Judge Schofield didn't agree with the defendants.

My favorite is the defendants' in *Foreign Exchange* arguing that each defendant could have unilaterally chosen to manipulate the relevant benchmark and obtained the same result as the alleged conspiracy, and therefore there is nothing to worry about here.

Judge Schofield points out that the plaintiffs alleged there had, in fact, been a horizontal conspiracy. If it were enough for defendants to be able to argue that the same results could have arisen from independent conduct, then you wouldn't ever have a horizontal case.

Anyway, it's worth reading both decisions.

MR. POWELL: The two other batches of civil cases that I think were interesting this year, one set of the employment cases in the Silicon Valley Software Engineer employment cases and now there is a set of follow-on cases alleging that Apple, Intel, others who had hired software engineers in Silicon Valley, had entered into a horizontal conspiracy not to compete with one another to poach employees to copy down salaries to software engineers.

There are follow-on cases concerning animators that are against DreamWorks and some of the other big animation feature film companies alleging that a similar conspiracy was applied to salaries of animators. All of this had followed at an extensive Department of Justice investigation.

The cases are interesting because they're all built on horrible e-mails by Steve Jobs to the effect that we should not go after each other's employees, and that's all headline grabbing.

For me, perhaps the most interesting thing about or development in the year was that in the prior case, the *High-Tech Employee* case, where there was a settlement of over $300 million to be paid to the class of employees, Judge Koh denied preliminary approval of the settlement.

And for both the class action plaintiffs' lawyers in the room and the class action defense lawyers like me in the room one usually thinks of preliminary approval as a layup for the parties, that really the fight comes, if there is to be a fight, at the final approval stage.

But the standard for granting preliminary approval is essentially that the settlement has to be within the range of reasonableness.

And Judge Koh denied preliminary approval because she said the evidence in the case was so strongly in favor of the plaintiffs that the amount of recovery was not reasonable, that the amount of the settlement was not reasonable in light of the potential or likely recovery that the plaintiffs could get if they actually took the case to trial.

The postscript on that is that, as I suspect Judge Koh predicted, the defendants agreed to a larger settlement, I think increasing it by a little bit less than $100 million. So an interesting outcome in that case.

MR. CAVANAGH: Can I just add one thing?

MR. POWELL: Yes.

MR. CAVANAGH: These cases involved engineers and high-tech employees, and then you saw them filtered down to some other technical employees, animators and things like that.

But that may just be the top of the iceberg. We may be seeing that in a lot of industries—in nursing cases—and you may see even more now, people are going to be emboldened to start bringing lawsuits based on the *High-Tech* cases because this process of agreeing or no poaching may be much more pervasive than anybody ever thought.

MR. POWELL: And if you look at the e-mails and the evidence cited, these agreements, both in the nursing context and in the *High-Tech* context, had been described by the alleged participants in it as a gentleman's agreement not to step on each other's toes and things like that.

So that becomes escalated to what was alleged to be a horizontal conspiracy.

I think with that, I'm going to invite Eric to join us.

MR. STOCK: Thank you, guys.

MR. POWELL: Eric, before you arrived at the start of the day, I gave an introduction of you and explained why you would be joining us late.

MR. STOCK: Thank you. None of it is true.

MR. POWELL: Well, the next section will focus on civil litigation in the pharmaceutical industry, and the bulk of this discussion will be of Eric and the State Attorneys General, a very interesting New York case where Eric recently obtained a preliminary injunction against Actavis and Forest Labs.

Just to put it in context, we've made references to the *Actavis* decision. I think there are many in this room who are quite expert in what that decision is and what happened since it. But I think it is helpful to provide some context here.

It's been an active year for litigation in the pharmaceutical context. Much of that litigation focuses on allegations that a branded maker and marketer of prescription drugs has engaged in some activity designed to prolong their patent period to avoid what's commonly referred to as the patent cliff where the patent expires and suddenly the company's revenues dry up.

And one set of those cases is what can be described as post-*Actavis* cases where the Supreme Court issued its decision, in the *Actavis* case in 2013 in which it held that a standard rule of reason analysis should apply to determine whether when a branded drugmaker and a generic drugmaker enter into a settlement resolving the branded maker's patent suit against the generic that contains a reverse payment, a payment by the branded maker to the generic drugmaker, whether that was an anti-competitive payment or whether it was reasonable. And the Court said you look to whether the reverse payment was large and unexplained.

And Justice Roberts in his dissent said, in effect, good luck to the federal district courts in figuring out what all of this means and how to apply it.

And I think it's fair to characterize the last year as district courts figuring out what all of that means.

And one of the main issues, which we touched on earlier, is this question of whether the large and unexplained payment must be cash only to be covered by *Actavis*, or whether it can be some other transfer of value, whether it's, you know, granting an exclusive period for the generic that has a certain dollar sign attached to it.

And there has been a split in decisions among district courts with some courts saying *Actavis* says a payment means cash, it can't be some other transfer of value, with other courts saying it said payment, it didn't say cash, and so it can be other forms of value.

For those courts, and again we touched on this earlier, we had found that the payment can be non-cash, that that will bring it within the *Actavis* framework and the question still becomes is that payment large and unexplained such that it's suggestive that the parties entered into it to simply extend the patent term anti-competitively?

The courts have had to grapple with whether the plaintiff has sufficiently pled under *Twombly* that whatever that non-cash value was is large and unexplained. And at least one of the courts has dismissed now, I think, two cases at the motion to dismiss stage on that basis finding essentially that while, you know, it may be that a non-cash payment is sufficient, that there was insufficient pleading of what the value of it was, how it can be characterized is unexplained.

So those cases are on appeal to the Third Circuit at this point.

The second category of cases that I think have been interesting in this year, and Eric's case is in that category, is what's referred to as product-hopping or product-switching cases where a branded manufacturer of a drug who has the benefit of a patent sometime prior to the expiration of the patent comes out with a new version of the drug. Perhaps it's a change from it being an immediate-release drug to an extended-release drug.

The effect of that is, the purpose and effect it's alleged, is to switch all the customers of the drug that has a soon-to-expire patent to the new drug, which will have a full patent term.

And the plaintiffs have alleged in those cases that this was really a not meaningful innovation and that it was done simply for the purpose of avoiding the patent cliff.

And the defense, of course, has taken the position that no, this is a very important innovation and we want to put our investment behind that innovation and not behind the old drug that's less beneficial to our end-users.

So those cases are progressing now, and one of the most interesting of those was brought by Eric. So I'm going to turn it over to him.

MR. STOCK: Thank you.

Thank you for inviting me. I do have to give the disclaimer that although I was an attorney on the case, I'm speaking here in my personal capacity and not speaking on behalf of the Attorney General's Office or the Attorney General himself.

Also, I'll do my best to describe the case in neutral terms, but I'm not going to try that hard. And so I'll leave it to the defense attorneys here or to the panel to correct me where I've gotten it wrong.

I also will say that if there is a question and answer period, I will try to answer questions, but it's very hard to answer questions about a pending case that's currently being fought on appeal.

MR. POWELL: We will have a question and answer period and you can accept or reject the questions as you see fit.

MR. STOCK: Thank you.

So it's a very complicated case. I'll try to cover it quickly. I'm going to cover five topics.

Actually, the most important thing, before I even go into the five topics, is what do we call the case? We can't call it the Actavis case. So we need to come up with another case.

So you can call it the Forest case, because this was really done by Forest Pharmaceutical before they were acquired by Actavis, but you can call it the Namenda case. I think I'm going to call it the *Namenda* case.

So what was Forest doing? The five topics are what were they doing, why were they doing it, what are the allegations, what are the defense arguments, kind of, and what did the Court decide?

So starting with what are they doing. Well, Namenda is a drug used to treat Alzheimer's disease. It's the only drug in its class with this mechanism of an MDA inhibitor. It's usually used together with the only other type of drug that treats Alzheimer's disease. They're used together.

So obviously, we argued in the case they're not substitutes for one another. Namenda really provides a very important function on its own.

What exactly are they doing? They're really calling it a Forest switch. And it's not my term. It's used by the CEO in this quote.

We all know that manufacturers face a patent cliff when their exclusivity period runs out and that they typically introduce or frequently introduce a new product that they try to switch people to before the patent cliff happens so they can preserve some of their sales.

It's very profitable for branded companies because it helps them preserve some of their sales instead of losing them to the patent cliff and there's not necessarily anything wrong with that strategy in terms of just developing a follow-on product. But there are different methods of encouraging switching, and what we have here is called a forced switch.

Industry insiders sometimes distinguish between a soft switch and a hard switch. A hard switch is a forced switch.

Now a soft switch is you introduce a new product and then you very aggressively promote the new product and you don't promote the old product anymore. This is what AstraZeneca did with Nexium. And you don't force people to adopt the new product. You don't encourage people to adopt the new product.

In contrast, a hard switch or forced switch involves putting up impediments to patient access to the drug in order to coerce patients into switching to the new follow-on drug.

So our case involves a hard switch or forced switch, as the CEO said. And what Forest decided to do was they were going to take a period of either six—well, they first announced this to happen in August of last year when they thought that their exclusivity might end in January. So I think we could say they were going to take about a 6-month period before generic entry, and what they wanted to do was create an artificial shortage of Namenda IR, the immediate-release version of the drug, so that they could force patients to switch to the extended-release drug.

And just to tell you what that means in practical terms, it means you have hundreds of thousands of Alzheimer's patients, they've got a prescription for Namenda IR, they've got say three refills on it, their first 90 days runs out, they go to the pharmacy, they go to CVS to refill the drug and there is no drug on the shelves. They can't get the drug even.

That's what they wanted to do. Then those patients are forced to call their doctor, I can't get the drug, I've got to get the drug, what do I do? And the doctor has been informed by Forest that this immediate-release version is no longer available, you must prescribe all of your patients the extended-release version of the drug.

And so it forces everyone, virtually 100 percent of patients, to switch to the extended-release version of the drug. That's the forced switch.

Now after we sued Forest, they changed the plan slightly. I'll leave it to people to decide how important they think this change is.

They still ensured that the drug would not be on the shelves at CVS, but they did decide to make it available through a mail order pharmacy in Missouri and you could order it by mail through this pharmacy, but you also had to get your doctor to certify that it was medically necessary. And they said that in their press release they expected that less than 3 percent of people would be able to do this.

In our view, it was still essentially the same plan with a little bit of nicer veneer depending on if you were one of the doctors that would have to fill out that paperwork or not.

So that's the forced switch.

Why did they do it? Well, you see one explanation from the CEO here. These are all public documents. This is from the Internet actually.

And so why did they do it? Well, the CEO explained that, too. If we do the hard switch and we convert patients and caregivers to once-a-day therapy, it's very difficult for generics to reverse back, they don't have the sales force, they don't have the capabilities to do that, it doesn't mean it can't happen, it just becomes very difficult, it's an obstacle.

Essentially for those of you who understand how pharmaceuticals work, generics compete by engaging in a price competition at the pharmacy. In order to engage in that price competition at the pharmacy, the pharmacist has to have a choice. He has to be able to switch out the brand for the generic.

And under the applicable law, including state substitution laws, in all states the pharmacist is not allowed to swap out the brand for a less expensive generic unless they're AB rated.

So what the CEO is explaining there and what everyone in the pharmacy industry knows is if you switch everyone to the extended-release version of a drug, the generics are going to have a very difficult time trying to get them to switch back to the immediate release because the pharmacists can't switch them without calling up a doctor or a doctor's office and getting permission.

And then the second problem, which the FTC has commented on in an amicus brief in the case, is that there is a free rider problem with generics if they wanted to actually market to doctors or market to consumers to encourage people to switch back to the immediate release.

So what's the free rider problem? Well, when a drug goes generic, anyone who practices in the pharma industry knows that the brand manufacturer doesn't market the branded product anymore. Why? Because if they're going to go out there and market the branded product probably most of the sales are going to go to generic.

The same problem exists for generics. Let's assume there are ten generics on the market and you are one of those generic manufacturers. If you go out and try to send detailers to physicians or do direct to consumer advertising, you're going to spend all this money trying to encourage the use of Namenda IR. But let's say there's ten of them, you're only going to get 10 percent of the sales. Ninety percent of the sales that you advertise for are going to go to your competitors.

So there's a free rider problem here that essentially greatly limits the use of advertising or detailing once a product has gone generic.

So as the CEO explained, it's very hard to move those people back to the immediate release after they've all been forced to switch.

So my next topic is going to be what were our arguments that this is an antitrust violation.

Well, we have two types of claims, Section 2 and Section 1 claims.

Here was our Section 2 claim. Under Section 2, you need to prove monopoly power and you need to prove exclusionary conduct.

So as you can anticipate from my description of the drugs, we argued at trial that this Namenda product was a monopoly. There are no therapeutic substitutes. To the extent there are other products to use for Alzheimer's, they're used together with it. And in the Court's decision, the Court accepted a lot of those arguments.

So then the issue is, is this exclusionary conduct, is it exclusionary conduct to withdraw your product from the market?

Well, so we look to the balancing test as used to determine whether there is exclusionary conduct under the burden-shifting test of *Microsoft*.

You first look at whether there is an anti-competitive effect. We argued that there was a clear anti-competitive effect here. This strategy would shift the entire market to the extended-release version and really impede price competition at the pharmacy because every substitution decision would need to be approved by a physician, essentially raising the cost of competition and in reality impeding generics dramatically. That's the harm to competition.

Then under the *Microsoft* test, the defendant is allowed to introduce evidence of pro-competitive justification.

Here is where the case gets extremely interesting.

We did not challenge the introduction of Namenda XR, the extended-release version. We're happy to have it on the market. Let patients and doctors choose.

This in some ways distinguishes our case from many of the other cases, for instance in *Tricor* when they've alleged that the new product was not legitimately on the market.

What our argument is, is we're challenging the conduct of withdrawing Namenda IR.

In order to justify that conduct, the defendants need to provide a pro-competitive business justification for withdrawing Namenda IR from the market as opposed to giving patients a choice.

As you can see, the defendants had a pretty steep hill to climb to argue a pro-competitive justification when their CEO had already explained the reason for the hard switch was to harm generic competition.

In any event, I'm sure they will take a different view, but our position was that this is the obvious reason for the withdrawal and there was no efficiency or other benefit,

and therefore you don't even have to go to balancing because there really was an anti-competitive effect and an anti-competitive purpose, and that essentially ends the analysis.

What are their arguments? And again, I'm not going to try to do a fair job. I don't want to try to say to someone that I've fully categorized their arguments, but I'll give you two of their high-level arguments, which you may recognize from Law 360.

So they're very focused on the remedy. Their perspective is that if withdrawing a product from the market is illegal, then you're essentially forcing them to sell a product and that there is something inherently wrong with that type of remedy. And if something is wrong with the remedy, then there must be something wrong with the claim. And so they're saying that you can't force them to sell a product, so refusing to sell a product can be illegal.

Our arguments against that are that there are legions of antitrust cases challenging refusals to sell. And what the Courts have said in those cases is that they're subject to antitrust scrutiny, they may be subject to high standards, but they're subject to antitrust scrutiny. So you can't just wave a magic wand and say, product withdrawals are free from antitrust.

Second, the defendants argue that this conduct must be okay because extended release is better than immediate release, it reduces the patient pill burden from two pills to one pill.

And here is, again, where how you describe the conduct makes all the difference, because, again, we're not challenging the introduction of extended release. So, the fact that it's better may justify bringing in the extended release. But that doesn't explain why you have to withdraw the immediate release as opposed to offering both products.

In our view, we certainly are fighting them on the merits of that claim, the extended release, that it makes a serious difference to patients who are already taking a ton of pills to actually switch from two to one, or that that difference is a cost savings—but essentially our argument is that that whole debate is not really one the Court needs to have. Let the market decide if it's better.

Whether extended release is better than immediate release is not really germane to the case because that wouldn't explain why you would need to pull the IR out of the market. Pulling IR out of the market might be explained by some sort of efficiencies or a safety problem with the product, but it's not automatically or materially justified by the fact that you have another product that you think people could take instead.

So what did the court do? The court applied the preliminary injunction standard. It actually applied the serious questions test which is a well-established part of preliminary injunction jurisprudence. We in the antitrust trust section know it from the debate over the FTC and DOJ differing standards.

But the serious questions test applies whenever the plaintiff has demonstrated a certain level of balance of hardships that tips in its favor, which the Court found that we did here.

It was a preliminary injunction. It was not a decision on the merits. But the Court found that we met the preliminary injunction standard for all the elements of our claim, for monopoly power, for exclusionary conduct.

And the injunction essentially enforced a status quo until a final decision can be reached on the merits.

So the defendants are prohibited from creating this artificial shortage of Namenda IR during the pendency of the preliminary injunction. They are required to make Namenda IR available, as they have in the past.

There is an emergency appeal in the Second Circuit. The defendants are arguing that the Court exceeded its authority in ordering them to continue to make the immediate-release drug available. They have other arguments and our brief is due in about two weeks. So we'll see what the Second Circuit does and then I'm sure I'll be back here again.

So that's it. And I do want to recognize Elinor and Bob and Alex from my office. This was a case we had to try within 90 days of filing it and it was very exciting, but very challenging. We all worked extremely hard to get it done, as did, by the way, the defendant's counsel who also were having a lot of sleepless nights working very hard. They did an admirable job as well. So thank you for having me.

MR. POWELL: Thank you, Eric. We are going to have a few minutes for Q and A at the end.

If my fellow panelists have questions then, we'll take it up then, because I do want to give David the opportunity to give us a very quick course in what happened in the world of mergers this year.

MR. PARK: So thanks, Wes, for inviting me and also thanks for all of you who have worked getting all the materials together. Any fault is ours, not theirs.

And, I should say as a disclaimer, I'm not speaking for Bloomberg LP or anyone else, probably not even myself, but I'm trying to keep it entertaining.

So, last year, I'd say there was a winner and a runner-up for the most interesting merger, from my perspective, and they were both non-HSR mergers.

The winner would be *U.S. v. Bazaarvoice*. And I think a lot of people may have seen this case because it's interesting. There's something called R&R (ratings and reviews). For example, if you go to Amazon and you want to look at

a book, you can look at ratings and reviews by customers. The customers generated that content.

So, Amazon has approximately 28 percent of this market for R&R. But, not surprisingly, there are other retailers that don't like to use Amazon for this, and so they rely on independent companies, and the biggest of these was Bazaarvoice and the next biggest was PowerReviews.

Bazaarvoice and PowerReviews closed their transaction. The deal value was $100 million, but they got the HSR exception based on the size of the parties.

Two days after they closed, an investigation started and DOJ wound up bringing a case. Judge Orrick in California found it violated Section 7. You had a merger of the two closest competitors and the judge predicted that it was likely that there would be anticompetitive effects in the R&R market.

In case you walked into the wrong room, Section 7 of the Clayton Act prohibits mergers that may substantially lessen competition or create a monopoly, and the plaintiff has the burden to show the conduct would have anti-competitive effects in a relevant market.

So the thing about this merger, I think in 30 seconds I can give you a sense of how the judge came out on this. This quote is from the first substantive comment in the opinion.

"The evidence that Bazaarvoice and PowerReviews expected the transaction to have anticompetitive effects is overwhelming.

Bazaarvoice recognized PowerReviews as its only real commercial competitor, and vice versa. Exhibit after exhibit manifest that Bazaarvoice and PowerReviews viewed themselves as operating in a 'duopoly' and that removing PowerReviews, an established company offering R&R at cheaper price points with a significant customer base as measured by the Internet Retailer, which is a well-recognized list of the top 500 internet retailers, would eliminate Bazaarvoice's only meaningful commercial competitor."

So I think you can guess how it turns out.

People say a lot of times to their clients, look, this would really be Exhibit 1. So I'd like to read to you Exhibit 1.

These are quotes from people who work for Bazaarvoice, including some senior people, and I don't know the case well enough to tell you exactly who they are, but they apparently were all working for the company when they said these things.

Okay. This is Bazaarvoice referring to PowerReviews, the target. "It's worth considering to take out the only competitor we have."

"Reasons to consider PowerReviews as our first acquisition, elimination of our primary competitor."

"Potentially taking out our only competitor, who is both suppressing our price points by as much as 15 percent," according to Osborne, could be "a highly strategic move."

And this, again, this is page 1, "eliminate primary competitor thereby reducing comparative pricing pressure."

It's all there. You don't have to work to find these quotes.

So, DOJ puts on a prima facie case. The market shares, DOJ cut them a couple of different ways, but they were all combined shares, about 50 percent.

Actual entry? No. Merger efficiencies that were specific? No.

The defendants had a lack, a dearth of documents suggesting they had efficiency in mind, which was problematic in terms of contemporaneous documents.

Now the customer testimony, a lot of people commented on this and it's interesting.

The judge, in terms of the merits, it's a weird case because the transaction closed, but DOJ was investigating it two days later. So, the parties said, hey, we didn't raise price, things look good, just move on.

And the judge said, well, DOJ was investigating it. I'm not sure I can really trust that what we've seen done in the last six months is what's going to happen later.

So, when the customers were interviewed, they said, I'm not opposed. But it's not so crazy because the judge's logic was, in part, this is a small price, small input in terms of the customer's business. Because it's a very small amount of money, the customers are not focused on this business. They don't have the evidence.

But, I think, largely, it was the judge seeing DOJ hovering over the conduct and wondering who knows what's really going to happen later.

At the same time, the judge did value the customer's testimony in terms of market definition. And he relied on customers heavily in defining this market of R&R platforms to retailers and manufacturers and excluding a lot of arguments the defendants made about market definition.

The other thing about this, which is amazing, is be careful what you wish for. Because there was no HSR filing, Bazaarvoice closed the deal and will have run the PowerReviews business for a while and then it will lose it.

The remedy here then is sort of brutal for Bazaarvoice. PowerReviews gets a license to sell to Bazaarvoice syndication services. So, if you think about syndication services,

if you've got shared reviews, same product reviewed on multiple sites, the more sites you have, the more reviews you can share, it's a network effect. The reasoning here was that if PowerReviews is going to be spun off, it's going to have a very small network to start with, so Bazaarvoice is going to have to license its syndication services, which is a key point of competition in this space.

MR. POWELL: The remedy came about 18 months, I think, after closing. So it was, they had a year-and-a-half to unwind.

MR. PARK: It's tough.

Bazaarvoice had to remove trade secret restrictions on employees so they can go work for the new acquirer of PowerReviews. Bazaarvoice also had to license patents that it had for R&R platforms to the new acquirer. And lastly, as a bonus, Bazaarvoice had to give customers the freedom to switch from their existing Bazaarvoice contract to a new contract with the acquirer of PowerReviews. It's impressive relief.

Number two case, the runner up, was *FTC v. St. Luke's Health*. It's only $60 million, but this case is also interesting.

There was an HMO with primary physician groups in a town west of Boise, Idaho, called Nampa. The HMO had 80 percent market share. It's pretty straightforward. You had documents suggesting that the buyer thought it could get a price increase, it could pay its doctors more money because the merged entity would be able to raise prices. And, you have diversion ratios (i.e., ratio of business lost by one of the merging parties that was likely to go to the other merging party) that go 33 percent one way and 33 percent the other way.

But, if you read the opinion, the judge seems to be struggling with the case because he's recognizing that American healthcare has issues and he seems to actually think, he goes back and forth on this, but he basically says that the rationale for the deal was to improve quality of care. And he seems to actually believe that the doctors think the quality of care will be better post-merger. But, he concludes that the price increases aren't going to outweigh those improvements, and so no luck for the defendants. He also said the merged parties were planning to do all great sorts of things, but those things are not merger-specific, so no luck with efficiencies.

The other thing that I'll mention in the merger world is consent decrees. This case was covered a lot, but approval of the consent order happened in April of last year, so I think it's worth covering here: the DOJ suit that challenged the proposed US Air/American Airlines merger.

The judge approved the final judgment. But, it's really interesting. If you read the amended complaint, the DOJ's theory in the case was that the merger was going to reduce the number of legacy airlines from four to three and low cost carriers like JetBlue and Southwest have a totally different business model. So, DOJ's amended complaint says that these low cost carriers can't compete against the legacy airlines, they have a totally different business model.

In addition to the merger creating high concentration at Reagan and LaGuardia Airports, DOJ suggested there would be a systemic problem that's not going to be addressed by the low cost carriers. Somewhat like the recent AT&T/T-Mobile case in terms of the concept of national vs. regional competitors.

The parties negotiated a settlement and they submitted it for review by the court, and there's a lot of controversy about whether the settlement actually addressed the DOJ's theory of harm or not.

In the settlement the defendants had to divest a bunch of slots at Reagan and at LaGuardia and at a couple of different airports.

But, the relief doesn't really match up exactly with what DOJ said the theory of harm was. And the judge recognizes this and basically says that's not necessary. That's not the standard here. The relevant standard [under the Tunney Act] is whether the settlement is in the public interest. The question is whether the remedies served the public interest.

I think this is good in terms of giving you a sense for just how much contrast there is.

The judge says that the final judgment does not create a new independent competitor—which would be what you normally think of if you're trying to impose a merger remedy because we need to replace the competition that is being absorbed by the merger. OK, so, first there is not going to be a new independent competitor.

Two, the remedy does not help with American's capacity plans. American was coming out of bankruptcy and had plans to expand their capacity—we're not getting any of that planned capacity increase.

Three, it does not affirmatively preserve the US Airways Advantage Fare Program. The argument was that US Air has a different structure, a different business model, and the merging parties competed on price more than the other airlines.

You don't get any of those three things in the remedy. Here is what you get. "The U.S. predicts that it [the remedy] will impede the industry's evolution to a tighter oligopoly."

Can you imagine saying to DOJ or FTC—I've got a proposed settlement for you, it's going to impede—maybe—a further reduction in competition from occurring? The remedy here appears to be a *potential* competition remedy.

MR. POWELL: The only other thing I'll say in the merger context is there obviously were a number of very high profile mergers that we watched, mergers had been watched like Comcast, Time Warner, the AT&T DirectTV deal, which remain unresolved, and we'll hear about those perhaps depending on whether the outcome is interesting enough at next year's annual development program.

With that, I'm going to open it up now for questions. I'll note that we have a table of contents in the materials. You'll see a few other topics that had we more time, we would have covered today, and some cases on those topics that are worth reading, and I'll leave it to all of you to have a look at that.

So any questions from the audience for Eric or anyone else?

Q: I wanted to ask about your opinion of the proposed SoftBank transaction and in your opinion what happened there?

MR. PARK: If it's to me, actually I'm not familiar with the SoftBank transaction, sorry.

MR. POWELL: I'm not sufficiently familiar to comment on that.

MR. PARK: Anybody here?

Q: This is for Eric, and I know you may not be able to answer directly, but I still want to ask the question.

In your matter, am I right to understand that the focus, as you put it, is not on the introduction of a new product, but the pulling of a product already in existence?

You showed some very strongly worded documents and they were, as you said, public documents, but generally speaking companies do decide based on many reasons when to introduce a new product, when to take out product. Often it is actually for competitive reasons and their goal is to make more money. It seems to me all of that is, generally speaking, okay. Should one focus on the pulling of a product or is there something else one should focus on in terms of thinking about where one might run into trouble under this theory?

MR. STOCK: Sure. It's a good point for emphasis, because I do want to emphasize this.

We are not challenging and have not challenged the introduction of the extended-release product. There was no case that we brought when they introduced the extended-release product.

Our case only challenges the subsequent decision really more than six months later, to withdraw the immediate-release product.

And again, we are not challenging the introduction of the new product, which is why it's our position that it really doesn't matter if the new product is better.

Our position is that both products should be left on the market and the market should decide. Doctors should have the right to decide which drug the patients get. Patients shouldn't be forced to switch because of a shortage in the market, going to the pharmacy and they're out.

Keep in mind, this is a drug where ten or more generics are poised to enter. So it is kind of amazing that they would have the ability to produce, and however many generics would have the ability to produce, but no patient who wants this drug can get the drug.

I mean that is not the intent of the law here. So that, I think, is important and we are challenging the withdrawal.

Secondly, our position is that there is absolutely no business reason for the withdrawal, unlike when Apple withdraws an iPhone or something like that, there is no business reason for the withdrawal except to impede generic competition. And we were certainly aided by the fact that the CEO explained to investors that the purpose of the withdrawal was to impede generic competition.

So I think that makes this case different from any other case where a pharmaceutical manufacturer or any other type of manufacturer actually does have a business reason for withdrawing its product. That does not relate to increasing the cost faced by its rivals.

MR. POWELL: Bill?

Q (from BILL ROONEY): Am I correct that the law is that the generics can't compete unless the brand is on the market?

MR. STOCK: That is the law.

Q: So if the laws were changed—

MR. STOCK: So you're saying as a matter of FDA law? That is not my understanding. I'm not an FDA expert. Maybe I should clarify.

Our preliminary injunction motion only seeks to require the drug to be available until generic entry. Our preliminary injunction motion does not seek an injunction to require the defendants to continue to manufacture as long as generics are on the market and therefore there is no longer a shortage.

And the reason for that is it's our understanding, I may not get it exactly right, that even if a brand is not on the market, as long as they haven't pulled their code, like in *Tricor*, or engaged in other conduct, generics can be approved and be marketed even if a brand isn't on store shelves, that can still happen.

So that's why our preliminary injunction does not seek continued sale after the introduction of generics.

Does that answer your question?

Q: Yeah. The question really is if the law were changed so that generics could rely upon a previously obtained

NDA, even if the manufacturer were not producing under that NDA, given the research that supported the NDA, I take it you would not be concerned?

MR. STOCK: No. I think that's not right. Because the conduct here doesn't really relate to the NDA. The conduct here is creating this six-month shortage of product.

So even if the law were, as you said it, and frankly I'm not sure it's all that different from the way you said it, as long as generics are kept out of the market until July and there is no product on the shelves starting in January, there is this six-month period where people go to the pharmacy and there is no drug even though there are ten factories ready to produce it.

Q: And then, as you said, there would be the free rider problem with generics trying to switch back?

MR. STOCK: Right. So generics trying to get patients to switch back, trying to tell doctors, trying to advertise to consumers, are impeded by the very same factors that cause a brand not to continue to market the product after generic entry.

MR. POWELL: I think you had a question, it will have to be our last one.

Q: If it can't be answered quickly, I don't want to go overtime, but I just wanted to compare this *Namenda* to the *Lipitor* cases, if you could.

It seems very different because Lipitor was competing with the generics at the same time. They tried to extend the patent, but then what happened, and this is where things get complicated and it's not just antitrust anymore, or it's a different kind of antitrust, it's not competitive behavior in the sense that the insurance providers and the company, the pharmaceutical suppliers that go with the health plans have a certain list of drugs that are the preferred drug, and the non-preferred drug, and I think what happened with Lipitor was whoever manufactures it, they got the people that you actually obtain the drugs from to either charge the same as the generic or to insist that the branded Lipitor, if you are, say, on the Oxford plan, you have to get the Lipitor. If you wanted the generic, you pay more than you did for the Lipitor.

So I know these are a lot of things that intersect, but I just wanted to see if anybody could speak to this, since you didn't talk about the *Lipitor* case, so I just wanted to speak to the different tentacles that come in there.

MR. STOCK: All I can say about the *Lipitor* case is it's a very different factual situation.

And the primary focus of our case is this six-month window of no drug available, and that is not the case in *Lipitor*. So that is really what I think puts *Lipitor* in a very different category.

But because you made the point, I think it's worth emphasizing yet another case, the *Nexium* case, which I think is a really nice comparison with our case. In *Nexium*, AstraZeneca had a huge blockbuster in Prilosec and they shifted a huge portion of their market to Nexium, to a drug that according to many people in the market and the plaintiffs, the drug, is really no different at all than Prilosec. AstraZeneca made presumably billions of dollars with that switch. And yet that switch was deemed to be okay because the market is supposed to decide whether it's better or not. The Court wasn't going to second guess that question.

Now in our case, we're the ones saying the market should decide. We are the ones saying that both products should be left on the market and the market should decide which is better. And it's not up to the court to say, well, I think this new drug is better, so I'm going to approve the withdrawal of the old product.

So I think those cases are nice contrasts with one another.

Q: Isn't one of the arguments that I guess you're running into is that, in effect, you're having the court make a decision as to how manufacturing plants ought to be run? You're basically saying the way you tool your manufacturing plants to make your decision, you've got to produce, you can't do it 50/50, you've got to do it the way we want it done, you can't do it, isn't that something—

MR. KATZ: I am going to interrupt. It's a good question. I know we'd love to talk about this and also many of the other topics you guys raised.

However, we're about to have a break. I do hate to cut you off. It's a good point, but we have run out of time. I do want to give you guys the break that we promised that you would have. We have a short break. So I think it would be okay if you guys came up with some questions, I don't know if you have to have a final word.

I want to thank this panel, really a superb panel, outstanding. The amount of material that you guys went over in an hour and 15 minutes was excellent, and I know that many of us would love to hear from you for another half hour if we could, but we can't.

So I just want to let you know that we're going to have a break. We're going to come back at 10:30.

At 10:30, we're going to have a program on Efficiencies—The Cheshire Cat of Merger Analysis.

That's going to go on until 11:45. At 11:45, there will be a short business meeting. Then after that will be a lunch and we'll reconvene at 1:15.

Before you get up for your coffee, please everyone thank you for this wonderful panel.

(Recess).

Efficiencies—The Cheshire Cat of Merger Analysis

MR. KATZ: We're going to let you guys make your way back to your seats.

While you do so, I would like to mention a special thank you to U.S. Legal who are our court reporters today. They have provided us with complimentary court reporting. We very much appreciate that. So thank you very much.

As you are gathering your food and your drinks, our next panel is yet another excellent outstanding panel. This one is on mergers. The title is Efficiencies—The Chesire Cat of Merger Analysis.

The moderator for our program is Mary Marks. She is of counsel at Greenberg Traurig.

So without further ado, I will introduce Mary Marks.

MS. MARKS: Thank you, Elai.

We have a handout, and I don't know if people got it on the way in, but that would be the slides that we're going through.

As you can see our title is Efficiencies—The Cheshire Cat of Merger Analysis.

The debate over appropriate emphasis efficiencies should receive in merger analysis goes back many years, at least to the 1960s.

Although in theory the agencies and the courts agree that efficiencies should be considered, the relative weight and importance are still being decided.

Counsel to merging parties often note that while the efficiencies won't win the case, they still need to go through the analysis for that.

The merger guidelines say the agency's experience is that efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. So it's a close call where the strong efficiencies should make the difference.

However, a recent FTC study found that merger efficiencies, even within the FTC, economists accepted the efficiency arguments three times more than their counterparts at the Bureau of Competition.

In April 2014, FTC Commissioner Josh Wright dissented questioning the difference in the burden of proof required for anti-competitive effects as cognizable efficiencies.

Courts routinely treat efficiencies in a negative light. We'll discuss that and different opinions, which may not be surprising since litigated mergers often pose the most serious anticompetitive concerns.

Our panelists are going to consider the economic meaning of efficiencies and the legal approaches that are taken both based on the merger guidelines and the types of evidence that agencies and courts find persuasive.

We'll run through some industry-specific approaches, because it does matter where we're discussing the efficiencies, and then we'll consider how to prove the efficiencies in front of the courts and the agencies and the factors impacting their credibility.

On our panel, I'm going to start at the end, furthest away from me, is Lisl Dunlop—the other panel members, we have our full bios in the book and you can pull them up on the website, so I'll just give a brief who's who—Lisl Dunlop is a partner in Manatt's New York office. She advises leading U.S. and multi-national companies in a broad range of industries and in antitrust counseling, litigation and transactional matters.

Next to Lisl is Tasneem Chipty, who is joining us from Massachusetts. Thank you for coming. She's managing principal at Analysis Group and she's an expert in industrial organization antitrust economics. Her work spans both the areas of antitrust litigation, mergers and acquisition, and she'll be speaking a bit about healthcare. She currently serves as an advisor to the Massachusetts Health Policy Commission for which she's evaluated the competitive effects of healthcare transactions in Massachusetts.

Ken Heyer, whom you'll identify as the male on the panel, has served since the summer of 2012 as Deputy Director in the Bureau of Economics at the FTC, after serving 29 years in the Antitrust Division at the Department of Justice. He supervises approximately 50 Ph.D. economists and provides economic analysis and recommendations to the agencies and advises their commissioners. He also has worked on a variety of investigations involving mergers and monopolists.

On my left is Elinor Hoffmann who is Deputy Chief of the New York State Attorney General's Antitrust Bureau. She focuses on antitrust issues arising under state and federal laws in diverse markets, including healthcare, pharmaceuticals and financial services.

So we're going to start with, as I mentioned before, an overview of what we mean by efficiencies and some economic meanings.

So our economists Ken and Tasneem will get us started.

MR. HEYER: Good morning.

First, I want to thank the folks who were good enough to invite me to come. They sent me this long invitation about what the program was going to be about and the

day and everything that was required and not required. I e-mailed back and said, "You had me at Manhattan." It's the greatest city in the world.

So I'm going to talk a little bit about the economics of efficiency.

I admit to being somewhat parochial about mergers and antitrust. I tend to think that it's all about economics. Many others on the panel will explain that may not be quite true, but that's my perspective.

We're going to be talking about efficiency, and it helps to have an idea just what it means, what it is, before we get into when it should be credited and how to measure it and that kind of stuff.

So people have all these definitions they throw around allocated—they've got productive, they've got dynamic. It's like you get an article published just by coming up with another definition.

This is what efficiency means to me. You can think of it as any combination of making more valuable things with the same number of resources, or using the resources to come up with new and better things that people place a higher value on than what they're consuming currently. There are a lot of things that efficiency can mean.

One thing that I would point out that is lingering through some of my other slides, which I think you have, is that this doesn't say anything about who benefits from the efficiencies.

I know we'll talk a bit more about that. That's obviously a critical thing in the law and economists have something to say about that.

I forgot to mention that I have to issue a disclaimer that what I say doesn't reflect the opinions of the Federal Trade Commission, or any commissioner, or anybody else.

We know what efficiency is. The economy is working best when it squeezes as much value as it can out of its scarce resources.

Now let's talk about mergers and some economic questions. I've got two down there that I wanted to flag at the outset.

Efficiencies in markets where there is no competitive concern, and efficiencies that are not passed through to final consumers through lower prices.

These, in some respects, are actually related because they get at actually whether anybody might be harmed and what do you do when that might happen.

I've got some slides that were handed out. I actually have some notes, pages below the slides, that you have, which apparently were not shared for good reasons.

But if you e-mail me at kheyer@ftc.gov, I'm happy to send you more detail about what those slides do and don't mean or answer any other questions.

MS. MARKS: Those pages are annexed at the back.

MR. HEYER: Right, it's got graphs, but not stuff underneath them.

So let's talk briefly. Efficiency in markets where there is no competitive concern.

The example I like to give is airlines. Consider an airline merger where the firm wants to re-organize its entire network after merging with somebody else and improve the efficiency of getting from Points A and B, to C and D, all over the country.

However, the merger creates an overlap problem going from New York to Puerto Rico. Those people are going to get screwed. Okay. There's no doubt about it. Entry is impossible. Demand to go visit grandma is really high and prices are going to go up on that route.

No efficiencies going from New York to Puerto Rico either. Do you challenge the merger?

Well, what do you make of arguments that others in the economy might benefit from a re-working of the system? Does that count? One might think that if you block the merger, you are raising the prices to those people. That's one way an economist might think about it.

You might think you're preventing a price increase to PR by blocking the merger. But if you block the merger, you may be preventing a price decrease to other people.

There is an argument for thinking about these as a whole when the harms and the benefits are inextricably linked to each other. You can't have one without the other. In some cases you can, and that involves a lot of thinking by the competition authorities and by the courts. Do you need the merger? Do you need the anti-competitive stuff to get the pro-competitive stuff elsewhere?

That's an interesting issue. It's going to be very fact-specific.

What about efficiencies that are not passed through to final consumers through lower prices? This is the pass-through question. When do efficiencies get passed through?

Most attorneys whom I talk to are familiar with these terms that economists often used by fixed costs and variable costs.

Even beginning attorneys already know that there's something really good about marginal cost reductions, but we probably don't care so much about fixed cost reductions.

As an economist, personally, again not speaking for the agency, if you save resources for the economy, that's a good thing, whether you call it a fixed cost savings, a variable cost savings, a consumer saving, a producer saving—a saving is a saving, okay. That's just me.

But there is obviously a lot of effort on the part of the competition attorneys and the law to get a handle on the extent to which and whether efficiencies are going to be passed through to consumers.

I have some pictures in the back, in the appendix. In various different scenarios you can get different degrees of pass-through.

One thing that many of you may know, if you don't it might be worth my saying, even a monopolist would tend to lower its price and sell more units if it achieves a marginal cost reduction.

And the economics of that are if it has lower costs, it earns a bigger margin and it would like to sell a little bit more. And the way to do it is to lower your price.

If you don't think monopolists would lower their price and sell more when their cost goes down, ask yourself whether you think a monopolist would raise its price and sell more when the cost goes up—it's the flip side.

Now I have those slides. I can tell you that when demand is linear, if you have a marginal cost reduction half of that gets passed through to consumers and half gets kept by the firm. I've got a picture showing that.

Final thing I wanted to say before turning it over to the other panelists, I was trying to think of some kinds of clever interesting things that may not immediately come to mind to attorneys, but can be shown with simple economics that have to do with efficiencies.

One is that there are cases where a variable cost savings will not be passed through to consumers at all, notwithstanding everything I just said.

I have a picture on one of your slides there and it has a situation where firms are bidding for the business. This is not your simple set the price of cookies and put it on the shelf and people buy as much as they want at that price.

Let's say you have people bidding for a contract. Before a merger the firm with the lowest cost is going to win and they're going to charge ballpark just below the costs of the next lowest guy. And the reason we sometimes get concerned about bidding markets is if the two lowest cost bidders merge, they can raise price to the third highest or the third lowest bidder and still get the business.

That's the anti-competitive effect we sometimes worry about in bidding markets, which is why you find economists coming into the agencies and saying, oh no, these two guys are not the two lowest cost, it's the first and the third. So the constraint remains the same, the second guy is still there.

The interesting thing about efficiencies that I wanted to mention about this example is if you have the lowest cost bidder buying someone else, there is no reason to expect that if the lowest cost bidder has a marginal cost reduction he will pass it through to consumers.

The reason is that if he was already winning the bid at his previous price and then he has a cost savings, there is no reason to expect he's going to lower the price when he would have won the bid anyway.

That's an interesting example of where even a marginal cost reduction might not be passed through to customers that had already been served by the guy who got the cost savings.

With that, let me turn things over to some others.

MS. CHIPTY: Actually, I want to just pick up where Ken left off a bit talking about bid markets.

As you can see, it's just a little more complicated than what Ken described.

In the case where there is a cost reduction in bid markets, the interesting thing is that the cost reduction may benefit the consumers of the other firms.

For example, if you have a differentiated product market and the merging parties tend to win certain types of business, but not other types of business, then if the merger creates cost efficiencies, the buyers of the merging parties won't benefit exactly because of what Ken described.

But the customers who would have tended to buy from the non-merging parties may actually benefit because the merging parties now become more aggressive bidders for that business.

And so it, again, becomes a question of how do you value the different benefits and harms to different categories of buyers.

Of course the greater the market share of the merging parties the less likely there is this other category of consumers that might benefit from that cost efficiency.

I wanted to transition a little bit before we start talking about how do you prove merger efficiencies and what is the legal standard for merger efficiencies? I wanted to talk just practically about what are the types of efficiency claims that parties try to put forward?

How you build the case is very closely linked to what those claims are. So I went through several of the cases that we will be discussing and I have a little laundry list of what I think you should have in the back of your mind.

The most common one is the elimination of duplicate expenses. Firms downsize, eliminate sales forces, consolidate management.

And there you have to think really hard about these fixed cost reductions or marginal cost reductions, and what the nature of the elimination is will depend on how easy will this be cognizable and merger-specific and so forth?

Then there is the second most common that I've seen, which is the expansion of production, achieving of economies of scale.

Where firms argue economies of scale, you have to ask why did you need the merger to do this? If you had a better product, maybe you could have produced more anyway. And what you have to think hard about is the economies of scale argument merger-specific. And also, how do you prove it? Maybe with economies of scale you can look to prior behaviors, prior acquisitions, to see if the merging party was able to lower cost when it was able to gross scale in some historical experiment.

Another category we see often is more efficient network management. This happens a lot with hospital mergers, and we'll talk a little bit about two specific healthcare transactions. But it can happen in a wide variety of industries that have a flavor of logistics management or heavy transportation costs; you could reconfigure your network if you have more footprint in the country.

And then some very healthcare-specific claims that have come forth in Massachusetts with the Partners Healthcare transactions, in Idaho with the St. Luke's transaction, better coordination of care, keeping care local. Maybe the healthcare system would bear less burden if the transaction resulted in patients using now better quality community care as opposed to tertiary facilities, and just a variety of synergy arguments.

The synergies are usually the most black box and you really have to ask what are these synergies? It's a generic term that people put different meanings on. So you really have to dig case by case for what is the meaning of this synergy?

So let me stop there.

MS. DUNLOP: I would add to that a couple of minor points about the "black box" of synergies.

In non-healthcare mergers, some of the things that you hear about are elimination of duplicate R&D and sharing innovation across different businesses, even if you're not reducing R&D, which is something that we'll come to talk about in the context of the merger guidelines.

If one company has an innovative production process which is not generally available, and they have the know-how, sharing that with the target company may, may bring about a synergy and an efficiency in production which will result in a reduction of marginal cost.

MS. MARKS: So why don't we move on to—these are the types of efficiencies claims, what do we need to say about the efficiencies for them to be recognized?

MS. DUNLOP: I think some of the points that Ken has made might have already highlighted to you that while in theory you've got efficiencies being good for the economy and theoretically being able to outweigh anti-competitive harm from a transaction, proving them might be a different matter.

Looking at the legal approaches to synergies, there is nothing in Section 7 of the Clayton Act about efficiencies. The Clayton Act just prohibits acquisitions where the effect may be substantially to lessen competition or create a monopoly.

But the idea of efficiencies has been recognized by courts and the agencies for a long time and a lot more attention has been paid recently.

Early court decisions and agency guidelines only considered efficiencies in really exceptional cases. But in 1997, there was an addition to the agencies' horizontal merger guidelines that introduced a much more expanded discussion and treatment of the idea of the efficiencies defense.

In 2010, the revised horizontal merger guidelines basically reiterated the 1997 statement, with some minor but important changes.

The horizontal merger guidelines say that to be cognizable—which means to be credited by the agencies in defense of a transaction—efficiencies need to be merger-specific, verifiable and not arise from anticompetitive reductions in output or service.

The last point is fairly straightforward and doesn't usually raise too many problems. It means, for instance, looking at the R&D example, which is in the guidelines itself, if the impact of the efficiencies reduction in R&D head count, in combining the two R&D organizations would be overall to reduce innovation, then you've lost innovation competition. So that efficiency probably wouldn't be cognizable.

Where efficiencies usually fall down are in the other two areas. First, is the efficiency merger-specific? That means is it likely to be accomplished with the merger and unlikely to be accomplished without the merger? It is something that you have to tie directly to the transaction.

And second, is the efficiency verifiable? Can the agencies independently by reasonable means verify and quantify what the efficiency is, how it is to be obtained, the time frame in which it's to be obtained, and how big it is, and then what the overall impact of it will be on competition.

Moving on from the merger guidelines, a lot of merger court decisions have considered efficiencies in one way or another, interestingly very rarely being successful at the court level.

Heinz is one notable exception where the efficiencies were considered by the district court and were successful.

In that case the efficiency was a consolidation of baby food production in Heinz's underutilized Pittsburgh plant; I think Ken might talk about that a little bit more later.

But in other cases, like *Oracle*, which people remember as a great defensive victory, in that case the efficiency defense wasn't made out. The Court found that the efficiencies weren't credible and that they would have been insufficient to rebut an anti-competitive showing under the Clayton Act.

The Court said the estimations of cost savings were speculative. The efficiency defense was based on future innovation, which, when verified by internal documents, wasn't supported by evidence. The decision on efficiencies was a very critical decision in contrast to the rest of the case.

H&R Block is another case you can look at where efficiencies were knocked back. I'm sure there are people in the audience here who had a lot of experience trying to argue those.

Labcorp, Central District of California, was another case that went against the FTC where I think the efficiencies were credited. That one might stand out as a bit of an outlier. The Court held there that the efficiencies were cognizable and gave sufficient weight to cost and supply savings of about $22 million. There was some hard numbers put forward there and considerable weight given to that by the Court.

We talked about *Bazaarvoice* in ane earlier panel. I think the parties had such an uphill battle there in terms of the documents. They put on an efficiency defense and the efficiencies were knocked back as not being merger-specific, highly speculative, just not cognizable. That finding may have been colored by all of the other evidence going the other way.

Finally, *St. Luke's*, which I know Tasneem is going discuss later and which David Park mentioned in his most interesting mergers of 2014. That is a case where the efficiencies that were potentially obtainable through the transaction were very serious in terms of patient outcomes, service to patients, and those types of concepts. The Court did consider them and grappled with them very seriously. Ultimately, I think where they fell down was the non-merger-specific aspect. And the parties are taking issue with that in their appeal, which will be something to watch.

MS. MARKS: Elinor, with regard to the documents mentioned in *Bazaarvoice*, can you tell us a little bit about the types of evidence that Courts do consider in looking at efficiency?

MS. HOFFMANN: First, I want to make sure that you understand that everything I say here reflects my own opinions and not the opinions of the New York Attorney General or any member of our office. Second, I want to get back to the standards for proving efficiencies.

It's really tough. Once the government has made out its prima facie case of showing an anti-competitive effect and especially where there is a significant anti-competitive effect, the courts and the guidelines say that the efficiencies have to be extraordinary to overcome that, to rebut the presumption that there is harm flowing from the acquisition. It is a very tough standard.

In the investigative stage, we typically invite the parties in to present their cases. We want to hear from both parties.

We find presentations helpful. We look at documents that reflect things like operating costs, labor costs, back office operations. In a healthcare situation we look at plans and projections. For example EMR, electronic medical records, an integration of IT. We focus on projections that are contemporaneous.

Just getting back to the *Bazaarvoice* example. When there are contemporaneous documents written by executives concerning the purpose of the acquisition or, for example, Eric showed some contemporaneous documents in a non-merger situation showing the purpose of the conduct in the *Actavis* case, it undercuts any post-investigation preparation of material.

So, even the Supreme Court back in the *Kodak* case in 1992, a non-merger but important case, said when we've got facts and we've got theories that are inconsistent with the facts, we normally pay more attention to the facts.

MS. MARKS: So those are the types of evidence and how they're looked at.

We're going to now move into some industry-specific discussions of efficiency.

MR. HEYER: One quick point about the documents and the import of documents and such.

The *Bazaarvoice* discussion earlier was a very good example of what folks said. I don't care what they comment efficiency-wise afterwards. One thing to keep in mind, though, is as we get to a subsequent discussion of whether the standard for weighing efficiencies should be similar to the standard for weighing market power, we're going to talk about Commissioner Wright's statement. If parties are talking internally about business reasons for the deal and they're talking internally that they want to do the

deal because they anticipate cost savings or efficiencies of various sorts and they are not talking about raising prices, presumably they have an argument that that should be given considerable weight, notwithstanding the other evidence. So it's something you've got to think about both sides.

MS. CHIPTY: Right. May I add that from the practice of the merging parties, when we have firms coming to us for assistance in proving their competitive effects case before one of the agencies, we look very hard at whether the claims of efficiencies actually appear in the documents before the fact.

And when they don't appear, we really wonder and worry about why don't they appear. Because if efficiencies really are going to win the day, they'd better be showing up in some normal course of business documents. Either that or there better be a really good explanation for why they're not so that we can tell the story and look for the appropriate evidence.

MS. HOFFMANN: Can I just add one more point?

In some cases efficiencies perhaps might be easier to quantify than in others.

Again, I'm going to use the healthcare example where the efficiency claims generally stem from what's called clinical integration, and that means coordinating services and protocols and IT to provide better quality, better access, hopefully lower cost to healthcare services—if that sounds amorphous, to some extent it is—so the documents or the types of proof that you have that are less clear perhaps than labor costs or backroom operating costs.

MS. MARKS: And that moves us into our next topic.

As you can see from the cases that Lisl went through just now, the types of efficiencies and the analysis differs by industry, and some of the industries that we're going to look at, we'll do healthcare, there are a number of areas to discuss there, manufacturing, and then some high-tech and innovation markets.

So Tasneem, do you want to start with healthcare?

MS. CHIPTY: Sure. Let me give you a sketch of the efficiency arguments in *St. Luke's*.

So we've heard several times both today already, and also in the course of the prior year, that the Court didn't credit the efficiency arguments in *St. Luke's*.

So I thought for those of you who haven't either read the Court's opinion or paid much attention to the public transcripts, I'd just review the types of evidence that were actually presented by the parties that essentially influenced the judge's opinion.

And I should state, as my disclaimer before talking about this, that we at Analysis Group actually worked on *St. Luke's* for the private plaintiff. We did not work on the efficiency arguments. That was, in fact, part of what I'll describe, what types of experts were used for building those efficiency claims. It wasn't the economists. Maybe it should have been, but it wasn't.

But in any case, let me describe to you with that disclaimer what the efficiency arguments were.

So just a word of background. St. Luke's is the largest hospital system in the Boise area. It also has a group of employed physicians, many of which are primary care physicians serving the city called Nampa. The Saltzer Medical Group that St. Luke's acquired was the largest standing independent physician practice serving the greater Boise area, but in particular Saltzer had a core group of primary care physicians located in Nampa.

From a traditional antitrust analysis, the structural effects of this acquisition were just on its surface pretty bad. I think David described the market shares. The market shares were bad. There were lots of concerns from Blue Cross/Blue Shield. The payers were worried, the patients were worried, the competing hospital system was worried. So there were lots of competitive concerns.

But let me tell you about the efficiency arguments.

What St. Luke's claimed is that the transaction, as Elinor said, would let them improve their coordination of care. It would let them roll out their epic system, which was their EMR system, to the Saltzer physicians and bring them in-house. The transaction would let them coordinate care among PCPs and specialists. They also said that the size of the increase in the patient volume that the now St. Luke's physicians would handle would allow St. Luke's to engage in more risk-based contracting. Some of the work in the public health area shows that risk-based contracting gets physicians to make more correct decisions that are good for patients and good for resources.

So these were the types of ideas that were floated.

Now, the parties put forward two types of evidence. One was evidence by seasoned experience practitioners.

For example, the FTC put up someone named Ken Kaiser. Ken is a professor at UC Davis. He's also a physician and he used to head the Veterans Administration. He could talk about models of coordinated care without the employment model.

And the parties put up someone named Alain Enthoven. He's actually a professor at Stanford, and I think he's an economist by training, but he does a lot of hospital management work.

He talked about the need to fully integrate to deliver the types of benefits that St. Luke's talked about.

And Dr. Enthoven really talked about the Kaiser model in California and the Cleveland clinic model. These are two models which he called natural experiments in

the market where you have hospital systems that own the physicians in the area, and he talked about the success they've had.

But to contrast that evidence, the plaintiffs' expert Ken Kaiser put forward descriptions of the Veterans Administration and other examples of independent physician groups around the country that were achieving a really close coordination with hospital systems without the employment model, and he also talked about examples of independent physician groups, including in Nampa, that were already using risk-based contracting without the size that St. Luke's said you needed in order to take on risk-based contracting.

So that was one strand of competing evidence.

The other strand of evidence was really from the CEOs, the hospital administrators and the physicians on the ground talking about why the Saltzer doctors thought they needed the deal at St. Luke's.

What they said is that Saltzer physicians could not be moved to epic without the transaction, that the financial burden would be too great, and you can talk as much as you want about achieving that integration without the deal, but as a reality it wasn't going to happen.

The parties countered this explaining that there was no dispute that interoperability between EMRs is essential for coordinated care.

In many ways it was what Eric was saying. There was no dispute; that if you want to introduce something, introduce it.

The plaintiffs didn't dispute the need for interoperability, but they pointed to examples of why they didn't need the employment model to achieve it.

And one of the pieces of evidence that I thought of sitting in the courtroom waiting for the judge was a program that St. Luke's was ready to roll out where it was going to incentivize independent docs to come on to their epic system and it was going to subsidize them to do so. And they already had 15 physician groups in the greater Boise area interested in signing up for this program, but the plaintiffs said because of the shadow of this lawsuit, the program didn't roll out.

The judge took that as evidence that if employment weren't allowed, there would still be some move towards interoperability.

And lastly, there was testimony from Blue Cross that explained and provided real numbers of how there were a fair number of independent doctors already doing risk based contracting.

That was the breadth of the evidence that was put forward. You could see a lot of it was qualitative by practitioners on the ground.

And what the judge concluded was that he believed that the Saltzer doctors were incredibly high quality, he thought St. Luke's was an incredibly high quality organization, he believed that coordination of care was important. What he questioned is whether you needed the merger to do it. And what he said is that he already saw independent physician groups engaging in risk-based contracting and that he didn't see the need for employment to create committed teams for coordinated care.

So really that's where it came out.

MS. MARKS: Elinor, can you tell us a little bit about Utica and then we'll go to manufacturing industries.

MS. HOFFMANN: Sure. Just one word about *St. Luke's*. In *St. Luke's*, with everything Tasneem had said, the Court really didn't find the efficiencies to be merger-specific.

It raised one question in my mind, if you're going to improve quality, wouldn't you have the same incentive to do that if you were operating in a competitive world? Why do you need the merger to want to do all of that? And I think that is something that comes up again and again, given the standards.

On Utica, Utica is an investigation that was conducted by our office, and specifically Bob Hubbard, Amy McFarlane and Eric Stock, I think very intensely and very creatively. It involved two hospitals in the Utica, New York area, the only two general acute care hospitals in the area.

Both were not doing well economically. There had been a huge shift of patients from commercially insured to Medicaid or an uninsured that had depleted the resources of these hospitals.

Utica is an area with 25 percent of the population composed of refugees. So there are huge numbers of people who are uninsured, who have difficult medical problems. So that was the context.

But nevertheless, this was a merger basically to monopoly. There was some competition from let's say ASCs, ambulatory surgery centers, outpatient-type clinics, but it was a merger to monopoly if you consider the other hospitals.

There were other mitigating factors. For example, the hospitals didn't overlap entirely in terms of services. In fact, there were significant services that were already provided by only one or the other hospital.

Our office concluded that there would be competitive harm. The parties came back and said, look, we can achieve certain efficiencies here that we wouldn't be able to achieve absent the merger, and they're the kind of efficiencies that were on the slide that were shown before.

And, you know, faced with this kind of scenario—and we also knew that the hospitals, neither hospital alone would be able to service the needs of the community—so given the scenario, Bob, Amy and Eric came up with a very creative solution, which involved basically a behavior and conduct remedy.

Those kinds of remedies are generally disfavored for lots of good reasons in merger situations because they involve monitoring, compliance that's ongoing and difficult, and involves expertise that we don't have.

But in this case it seemed appropriate. There were reasons to allow this merger to take place, but there were also reasons to be very careful about what was going to happen in the future.

The remedy that they came up with was essentially to make sure that the parties really put their money where their mouth was. If there are efficiencies, you've got to achieve them and you've got to prove them before you can actually raise prices to the level that you might want to raise them to.

There was a five-year rate protection period during which the hospitals had certain restrictions on how much they could raise rates. The way it worked is that they negotiated with insurance companies if they couldn't reach a deal, they had to negotiate separately but with a rate protection cap, based on past experience, and they had to meanwhile develop a program of certain qualitative and quantitative goals that were going to be achieved and report to us and the Department of Health after they believed they had achieved those goals. There is an independent monitor that had to report to our office that these goals had been achieved. Then the rate protection period would end.

So it is a relatively novel remedy. I should say that the State of Pennsylvania has done this in a number of cases and we'll see how it works out.

MS. MARKS: I want to make sure that we have time to discuss how we're improving efficiencies, but before we get there, I'm going to ask Ken and Lisl to talk a little bit about the highlights in some manufacturing case studies.

MR. HEYER: I can go through this relatively quickly and I'll also recommend some additional reading for you if you're having trouble getting to bed tonight.

The *Baby foods* case which was alluded to earlier, is a really good case. The district court actually would have been the first prominent situation where you had a case, one, on the basis of efficiencies despite possible competition concerns, but that was overruled by the appellate court.

I want to recommend to all of you an article called "The Role of Efficiencies and Merger Review," by Bill Kolasky, which does an excellent job laying out the efficiency claims and some of the synergies and benefits that were alleged to arise from that merger.

A word about synergies, which has been described as a bit of a black box. Let me give you my own take on that. When I think of synergies, I think of putting together complimentary pieces that one or the other firm has that's better than the other guy.

So you can think of someone maybe who is particularly good in some dimension and the other guy is particularly good in a different dimension.

Baby foods, we can think of as a plant that had lower marginal costs and the other guy had some very good brands, recipes and plans for developing new ones, but a high cost plan to try to operate them. Putting those two together would be a synergy.

Now what always comes up, and there is no magic bullet to resolve this, is the question of whether these kinds of things could be done through contract versus merger.

That's going to be very fact-specific. The kinds of things you might look at if it's available would be evidence of firms having tried to do things themselves and had difficulties, failures, high cost from trying to do it, and also documents as to whether they expected that only through the merger they would be able to achieve the benefits.

The second matter that's up there is this Miller-Coors merger, which was also very interesting, a very highly concentrated merger in the beer market. The antitrust division cleared the merger.

The argument, and there were a lot of internal documents and internal studies helping to confirm this, was that Coors had plants located in only two places in the country, whereas Miller had plants all over the country. Coors' customers were all over the country. And the idea was that you could reallocate production across these plants so that you would be closer to your customers.

And interestingly, without necessarily saying that I know that the results are bulletproof, but if you're interested there is a recent working paper by three folks, one of them is at the Federal Trade Commission now. The authors are Ashenfelter, Hosken, and Weinberg, and they performed a test, which was creative.

It turns out that beer prices vary across different states because of regulations about the pricing. And what they did was they looked to see whether after the merger the places where you might have expected there to be these cost savings from reallocating production had lower prices as a result. And they also looked at places where you didn't think that reallocating production was going to lower prices to see what happened there. And they tended to find that the efficiencies were, in fact, achieved.

And in the places where you didn't have the efficiencies, there was some upward pricing.

On balance, they figured it was sort of a wash. Fortunately, they didn't conclude. The antitrust division totally screwed it up; I was there at the time. That was an interesting one.

And then the final thing I'll say, as a lead into Lisl, is about the synergies *into Ardagh/Saint Gobain*.

Josh Wright, one of the commissioners, put out a statement in that case, which I think we might spend a minute or two discussing. The main thrust of that case, at least from the perspective of the Federal Trade Commission bringing the complaint and filing expert testimony before it settled, was that there were a variety of efficiency claims that were made by the parties, but that the merging parties hadn't substantiated them or documented them sufficiently.

It wasn't so much that there are a million other ways to do something, although there was a little of that. It wasn't so much that they wouldn't all be passed through. It was more that they said a bunch of things, but hadn't really proved them sufficiently, and so they weren't going to be credited.

MS. DUNLOP: That is a good lead in. Ken is getting his word in first there on *Ardagh*. I was counsel for Ardagh and so I lived this for about 18 months.

This was a deal in the glass bottle industry, the glass container industry, which is a bit of an old-fashioned manufacturing industrial business.

Saint Gobain, which is a big French company having a whole range of businesses, is in the glass manufacturing industry, and in the U.S. they had a subsidiary that had 13 facilities with 29 furnaces, dotted all over the U.S.

And Ardagh, which is an Irish company with glass and metal packaging operations worldwide, had entered the U.S. through acquisition of what was essentially a company that had been in and out of bankruptcy over the last 15 years called Anchor Glass, which is a fairly common household name.

Ardagh at the time of the acquisition had nine plants with 17 furnaces, and their facilities were mainly located in the East and Midwest.

And you know there was some clear pro-competitive rationales for doing the deal, you know, scale economies was an obvious one, geographic footprint theoretically, allocation of customers reallocating across plants, there was some plant specificity in terms of manufacturing capabilities.

The other type of efficiencies that you see in just about any merger, the kind of headcount reduction consolidation of SG&A, those types of things which are fairly readily quantifiable on paper, spreading the same amount of management and administration at the corporate level and across a greater footprint.

There were some other efficiencies that the parties felt very strongly about, felt that there was really good evidence for, but we had an uphill battle proving them at the FTC. These are described in the papers that were filed in the district court litigation.

One of these things is what they called "pack-to-melt" improvement. When you make glass bottles, the glass comes through the furnace and into the machinery and then down onto a conveyor belt where it goes through various other processes. The amount of glass that goes into the machine versus the amount that actually gets packed onto a truck to go to a customer is not the same. There's a lot of glass that can go wrong in the middle. There are problems in manufacturing when you switch from making one type of bottle to another type of bottle; you lose a lot of stuff. If you change the color, that can also result in a lot of lost glass. A lot of that glass goes back into the furnaces as cullet, but that involves re-manufacturing.

So pack to-melt is a real and quantifiable measure of a plant's efficiency. And Ardagh had achieved levels of pack-to-melt efficiency in its European plants, and in the U.S., the Anchor plants had achieved even better levels of pack-to-melt efficiency.

When Ardagh looked at what the Saint Gobain plants were achieving, they thought they could do a lot better. But then the real question is, why weren't the Saint Gobain plants doing better on their own? What was it about them that they just weren't able to do this? And it's very hard to know that.

So that's where you get a merger specificity argument with business people and glass experts on one side saying we're just better at this, we have the know-how, we have the expertise, we've tested all of these different things and that's the know-how we'll be able to bring to the acquired business. And the acquired business is saying, well, of course, we do the best we can.

So that was one area that there was a very difficult debate on.

The other area which again was a very special area of synergy, bringing something from one side to the other, was soda ash reduction. Soda ash is a component of glass manufacturing. It's a raw material, and one of the most expensive raw materials that goes into making glass.

Ardagh had developed a method in Europe, which it had rolled out over a significant number of European plants, to significantly reduce the amount of soda ash that you need to make glass bottles and for the glass to perform to quality standards.

This had been tried over the years. There was testimony by many glass manufacturers. It was a bit of a

Holy Grail of glass manufacture to reduce your soda ash consumption, and had been tried and failed at the Saint Gobain plants.

Ardagh felt fairly confident in saying that they had solved the problem; they were then testing it in U.S. plants and they had planned to roll this out and were convinced it would result in really significant cost reductions. We're fixing it, we are testing it in our U.S. plants already and we plan to roll this out and it will result in really significant cost reductions.

But again the counter argument was that there just wasn't sufficient evidence that this would work, that it could work in the specific plants that were being acquired. I think the major obstacle to being able to put on a more effective case in proving those efficiencies was the barrier of having access to only so much information about the target entity and to be able to produce evidence of a sufficiently rigorous high level that that would persuade the Bureau of Competition staff and the Bureau of Economics staff that those merger efficiencies fit into the cognizable, independently verifiable and merger-specific criteria of the merger guidelines.

In *Ardagh*, there were three commissioners who said anticompetitive effects definitely, looked at it as a three-to-two merger, and efficiencies, non-cognizable, non-merger specific, speculative, we value them at close to zero. I think that's a reasonable summary of the majority opinion.

MR. HEYER: I think that was a reasonable summary of the majority opinion.

MS. DUNLOP: But Josh Wright, bless his heart, had a different view, which is that the competitive effects were actually not so significant. He accepted some of our arguments about regional and local geographic markets, specificity of manufacture, and that the efficiencies actually had been made out, were cognizable, and if valued he approximately put them at six times the level of the potential price impact of the merger.

Commissioner Wright goes on to say that his concern is that there is an asymmetry in the level of proof on competitive effects and in the efficiencies defense. The agency needs to prove on a probabilistic basis what the competitive impact of a transaction will be. But when the burden shifts, the merging parties certainly do bear the burden of proving efficiencies and have to prove those efficiencies to a much higher standard than the probabilistic standard of the competitive effects. You have to prove them with much greater certainty, much greater rigor for them to be credited, found to be cognizable and found to be merger-specific.

And he viewed that as unfair on the parties, and possibly resulting in the prevention of efficiency enhancing and pro-competitive transactions.

MS. MARKS: Ken, what can you tell us about the agency's view on that?

MR. HEYER: Well, I think I mentioned that I'm not speaking for the agency. I'm still not speaking for the agency.

But let me just say this about symmetry and asymmetry in treating efficiencies and harms. I mean I think the statements, which are in their packet, are worth reading.

So what Commissioner Wright's statement is trying to do, in part, is talk about why he thinks the deal should go through. I think for him this is primarily a teachable moment.

He wanted to get on the record a debate over what the standards should be in crediting efficiencies versus crediting harms.

And there is an impression that courts and regulators tend to be extremely skeptical of efficiencies and they seem to be fairly certain about harms.

And that's worth at least a little bit of discussion. We talked briefly earlier about the issue of documents and internal communications.

It strikes me, as I was just listening to the discussion, when you find a hot document that talks about maybe prices going up as a result of the merger, that becomes Exhibit A.

On the other hand, if you find some documents where they talk about getting efficiencies and that's the main reason for the deal, that gets put in a folder called "let's explain this away at some point if we have to."

So that's not quite a symmetrical treatment of the two things.

I think we especially, perhaps economists, have become maybe a little bit too comfortable with the models that we have for predicting competitive effects.

They don't work perfectly. I think you know if you've tried cases that there are lots of assumptions built into them. But they do generate neat numbers. And their authors have French names. So they seem really solid. And often they are. And they're certainly more helpful than just waving your hands.

But the fact that we don't have standard models for efficiencies, my sense has always been that the efficiencies tend to be much more case-specific than market power issues tend to be, although they both have elements of that.

Efficiencies are very idiosyncratic to the deal. They're not something where you get an off-the-shelf economics model and it tells you what the effect is going to be from merging firm A and firm B and when the concentration is X. So they do require more evidence.

But controlling for that, there is this issue of whether efficiencies and harms are getting equal weight in the treatment of regulators and courts.

MS. CHIPTY: Could I add, I actually don't think they're getting equal treatment in even the preparation of the case evidence.

So there are tools that economics and other disciplines could bring to bear that could speak to efficiencies. I just don't see them as seriously being deployed as they are on the competitive side. So I think partly we're seeing arguments on the efficiencies and more serious arguments on the competitive side.

MS. MARKS: So we just have a few minutes left and we happen to have four types of evidence we've discussed and four panelists. So maybe you could each say one or two minutes on the types of evidence used and considered.

MR. HEYER: Let me just use my one minute not on the types of evidence, but talking about how the agencies in my experience deal with efficiency claims, as I would contrast with my impression of the courts in many cases.

The FTC, and when I was at the DOJ, efficiencies claims, when they actually were made seriously, were treated very seriously.

Very often firms don't make serious efficiency claims, and that's maybe because they don't have good evidence. It may be because they just think that the regulators aren't going to pay attention, and so they're going to fight the fight on whether market power is going to be created.

The FTC just recently had two cases. One of them our economist used a merger simulation model and they built into it characteristics of the marketplace; they filtered into it the size of the efficiencies that had been claimed, and under different assumptions they turned out the net effect of the whole thing. So that was fully modeled, taking efficiencies into account.

And the other merger, which again I will not name, involved both vertical and horizontal aspects. So there was a merger of two guys and one of them had the dominant downstream compliment, and the merger had both horizontal and vertical effects.

And we modeled what the efficiencies might be from things like removing double marginalization compared with what the horizontal effects might be from merging two competitors upstream, and under reasonable assumptions we calculated that the harms would exceed the benefits, and it was on that basis that we decided we would challenge.

So we did take all of this seriously and integrate it. I don't know the extent to which the courts do that, especially in highly concentrated mergers.

MS. MARKS: Tasneem?

MS. CHIPTY: Let me take it in reverse order because maybe I talked a little bit about the independent studies on that list.

MS. MARKS: Okay, great.

MS. CHIPTY: So ideally, you want to triangulate, so others will talk about the other categories.

But depending on the facts and the data and the types of efficiencies being claimed, it may be possible to do something quantitative, perhaps looking at prior transactions. There may be—I'll give you a specific example, it's actually in your reading packet—for those who are interested. Massachusetts Partners Healthcare, in its desire to acquire Hallmark Health, has put forward an efficiency claim that one of the big benefits of the transaction is it will allow them to keep care local.

And as evidence of that claim, they put forward an efficiency that this will be the cognizable benefit from this transaction from keeping care local. But their evidence for that was having spoken to a handful of clinicians in their system and they did some sort of back-of-the-envelope calculations based on what those clinicians thought. The redirection would be from tertiary care centers to community hospitals.

And so what we did as part of the health policy commission's work is look at what I call natural experiments.

In the greater Boston area, Partners owned three other community hospitals. We looked at the evidence in those local markets and asked how well does Partners do at keeping care local in those markets and how does that reconcile with their claimed ability to redirect after the Hallmark transaction.

And so we re-did, we re-evaluated their efficiency claim using this, if I can call it quantitative or empirical analysis. We came up with very different answers. According to us, there would not be this redirection and there would not be this cost savings.

So I think that there are things, as I said, that can add on to what you were saying. There are times when you can bring more sophisticated tools to bear, not always, but until we deploy these resources to those types of questions, we won't know.

So there is room here to think really hard about some of the same tools we bring on the competitive effects side to the efficiency side.

MS. MARKS: Does anybody have anything to say about experts?

MR. HEYER: They're very expensive.

MS. DUNLOP: That's a point. I could discuss executives and experts, wrap them up together, because I've

experienced both types of cases, the kinds of cases where there are serious gun-jumping section concerns, stopping the parties from getting into each other's data and business and things like that, and an industry, and given a timeline as well where there isn't time to bring in some outside third party to have a lot of detailed work done either because the burdens of getting them up the curve on things are too high or the parties believe that they, themselves, know how these things work. That was the *Ardagh* case.

But there really is in the court decisions and in the guidelines a hostility to simply relying on the testimony of your executives.

As Ken points out in relation to documents, that does stand in contrast to relying on statements of your executives on what they intend to achieve competitively in the market by the merger.

We had a lot of strong testimony and statements from business people about their success in achieving synergies, in particular in past acquisitions, and this is a company that had done a lot of deals and was fairly rigorously deposed on those topics. But ultimately that evidence was unpersuasive because they weren't independent and obviously they wanted to get the deal done.

By contrast, a case that I was involved in many years ago before the Justice Department that had a longer time frame, and we brought in a third party, independent management consulting firm to run the black box, both from the perspective of integration planning and development of the efficiencies case. It was a very useful synergy, if you will, in terms of the merger defense that we could put some of that effort to work in the integration planning, which is often of great value to the business people in preparing for the closing of the merger. You can sell it that way to your clients.

But it is very expensive. It's very time-consuming. It involves a lot of work by the independent third party. And ultimately the quality of what is produced may not be great. In that case, though, when that work was done, the staff took it very seriously. They deposed the independent person, and I think ultimately they did credit a lot of the efficiencies in that matter. So I think when you do get the outside consultant expert and can put the work in and give them sufficient data to come up with something, it will be taken seriously and it can be very effective.

MS. MARKS: We're going to give the last words to Elinor.

MS. HOFFMANN: Just to follow up on something Lisl said, in the *H&R Block* case, the Court specifically said we're talking about verifiability of efficiencies. The Court said we've got the testimony, the judgment of executives, but we really can't credit that while they may be good at business planning or cost planning. If we credit it too much it would basically swallow Section 7 of the Clayton Act, because management is always able to present their view, their big picture view, their best business judgment, but it's not the same as having independently verifiable efficiencies that we can rely on.

And then the last thing I want to say is, and I think Tasneem actually said this before, if experts are developing opinion evidence on efficiencies, they have to develop it based on what's in the record, what happened contemporaneously, what the parties actually considered when they were contemplating the merger, and that will be probably more effective than anything else.

And even in *St. Luke's*, where I think the Court really was struggling with what it knew was health policy, which was encouraging coordination of services and basic antitrust law, you've got a presumption of harm here. There was testimony from the executives that the real purpose of this transaction was to raise the price of services.

So that becomes the highlight of the case and puts the parties in a very bad position, having a significant uphill battle.

MS. MARKS: Thank you. All right. We'll hand it back to you, Elai.

MR. KATZ: Thank you to the very excellent panel. It is really a good debate.

I don't know that we might entertain questions. I think we're running out of time. So to the extent you have any, I'm sure these people might be willing to chat with you later.

So thank you very much for an excellent panel.

We have our annual Section business meeting that we're going to do in just a minute.

But beforehand, I just want to make sure that everybody is aware of the remainder of the schedule.

We are to reconvene back here at 1:15. We have three superb panels this afternoon. It's really a packed afternoon. We're going to be talking about international cartel enforcement. We're going to be talking about the history of antitrust. We're going to be talking about sports, amateur sports in antitrust. We're going to try to pack that all in between 1:15 and 5:00. So hopefully you can get back here on time at 1:15.

Again, I'd like to thank this panel. Please give them a hand.

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

MS. MAHONEY: For those of you who are members of the Executive Committee, I invite you to stay. We have just a few minutes of business to take care of and then I can release you for lunch.

For those of you milling about, if you could just take the conversation outside so that we can attend to these details, that would be fantastic.

My name is Stacey Mahoney and I am the Chair of the Nominating Committee for the Section. We have two things we need to cover here. One is we'd like to move to approve the minutes, which is really the symposium from last year's meeting.

Do I have a motion for approval?

Thank you.

Do I have a second?

Thank you.

All in favor?

Any opposed?

The motion passes. Wonderful.

Now I get to the fun part.

So we have the nominating of the Executive Committee members for the next 2 years and also our officers. So it is a 2-year position, as many or all of you know, and I am going to forgo reading the names of the people who are just going to be continuing on. But I am going to read the list of Executive Committee members that we propose who would be starting their term today and finishing it up in 2017.

So bear with me for a moment. I'll go through them all.

Barry Brett, Ned Cavanagh, Bruce Colbath, Kerin Coughlin, Steve Edwards, Bill Efron, Harry First, Larry Fox, Nick Gaglio, Ilene Gotts, George Hay, Adam Hemlock, Steve Houck, Bob Hubbard, Pat Jannaco, Elaine Johnston, Elai Katz, Scott Lent, me, Joel Mitnick, Saul Morgenstern, Chul Pak, Bernard Persky, Wes Powell, Bruce Prager, Eric Queen, Pat Rao, Harry Robins, Hollis Salzman, Aidan Synnott, Steve Tugander, Robin van der Meulen, Yvonne Quinn, Wendy Waszmer and Michael Weiner.

So those are the folks that we are re-electing for a 2-year term.

Bear with me for one moment.

The Nominating Committee has proposed the following individuals, new members, for election to a 2-year term to the Executive Committee, including Dan Anziska, Rachel Brandenburger, Jessica Delbaum, David Emanuelson, Jeff Martino, James Masterson and Abby Rudzin.

And then our offices slate is, I'm proud to propose, Elai Katz as Chair, who is obviously your wonderful meeting coordinator today, Lisl Dunlop as Vice Chair, and Michael Weiner as Secretary. And also to continue on, as Finance Chair through 2017, Nick Gaglio.

So do I have a motion for that slate?

So moved.

And a second?

All in favor?

Any opposed?

Thank you. Passes unanimously. Really appreciate it. Looking forward to lunch.

(Recess).

Conflict and Comity in International Cartel Enforcement—Cutting Edge Issues

MR. KATZ: Ladies and gentlemen, welcome back. We hope you had a good lunch.

I just wanted to give a quick reminder to everyone that if you want your CLEs, you have to sign in and sign out for today.

We have three superb programs this afternoon. There's one coming right up about International Cartel Enforcement. We're going to later discuss antitrust history, New Wine in Old Wineskins or Old Wine in New Wineskins? 100+ Years in Antitrust. Our last program is Amateur in Name Only? The Intersection Between Antitrust Law and College Athletics.

Before I introduce this panel, the one thing I do want to say to everyone is will you please switch off or mute your phones so that we don't have calls during the program?

For this program we have assembled a very wonderful group of people. The title of the panel is Conflict and Comity in International Cartel Enforcement.

Our moderator is Michael Weiner, a partner at Dechert, and I will let him take over. Thank you.

MR. WEINER: Thank you, Elai.

Our panel is, indeed, on conflict and comity in international cartel enforcement. There's a lot of activity in this area, both on the criminal and the civil side and that activity brings both conflict and comity.

Just to set the stage, conflict first. Let's take China, for example.

In the last year Chinese investigations of foreign companies have multiplied dramatically. Corporate targets have included Abbott Labs, J&J, GlaxoSmithKline, Microsoft, Qualcomm, et cetera, et cetera, et cetera.

This has been described as a concerted campaign against foreign businesses. A Jones Day lawyer in Hong Kong talked about a clear pattern of using the anti-monopoly law to favor Chinese companies.

The Chambers of Commerce in the EU and the United States have criticized China. Then-U.S. Treasury Secretary Jack Lew reportedly wrote a letter to his Chinese counterpart warning that these investigations were sending U.S. and China relations down a dangerous path.

At the same time, MOFCOM filed an amicus brief asking the Second Circuit to overturn the price-fixing judgment against Vitamin C producers.

MOFCOM submitted a declaration stating that Chinese law required the defendants to participate in a pricing committee. The Eastern District judge rejected this as a post hoc attempt to shield defendant's conduct from antitrust scrutiny.

MOFCOM called the Court's statement profoundly disrespectful and argued that a U.S. District Court must accept a foreign government official's interpretation of its own law as conclusive.

So, conflict.

As for comity, we've recently seen new levels of international cooperation among enforcers. This resulted last year in the first extradition of an alleged antitrust violator. We've also seen continued cooperation among enforcers which in part contributed, no doubt, to fines generated in the last year.

So that's just setting the stage. Hopefully we see some comity among our panelists, although we have an awful lot of stuff to cover, and my job is to provide the conflict in terms of keeping us on schedule, which I'll try to do.

We have assembled just a terrific panel, whom I'll introduce in alphabetical order, starting with Subrata Bhattacharjee, who is a partner in the Toronto office of Borden Ladner and National Vice Chair of his Competition and Foreign Investment Review Group. His practice focus is not surprisingly on criminal matters and quasi-criminal matters, and he's involved in domestic and international cartel investigations.

Jennifer Driscoll is a partner in the Antitrust and Trade Regulation Practice at Sheppard Mullin in D.C. and she's previously worked here in New York as well as in Paris and in London. Her practice involves antitrust investigations, litigation counseling, including international investigations, including something about the auto parts industry.

MS. DRISCOLL: Just a little.

MR. WEINER: Hideo Nakajima is the Deputy Secretary General of the Japan Fair Trade Commission where he is in charge of international affairs, including heading the Japanese delegation for meetings of bilateral and multilateral talks among competition authorities. He earned an MPA from Woodrow Wilson School at Princeton where he majored in economics as well as an LL.B. from the University of Tokyo Law School.

Hollis Salzman from Robbins Kaplan is court-appointed lead counsel in *In Re Automotive Parts Litigation*

and *In Re Air Cargo Shipping Services* and is experienced in all sorts of other class action representations ranging from *Lorazepam* to *Puerto Rican Cabotage*.

Alvin Hiromasa Shiozaki is a partner at Nishimura & Asahi in Tokyo. Shiozaki-san holds an LL.B. from the University of Tokyo and an LL.M. from University of Chicago Law School. He's a leading Japanese antitrust counsel. You're better off asking him which global cartel investigations he and his firm have not been involved in than which ones he has been involved in, because they have been involved in so many.

And last alphabetically, but certainly not least, Brent Snyder, who serves as the Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division. He was a trial attorney in the Criminal Enforcement Section from 2003 to 2011, served in the Division's San Francisco field office prior to that, and graduated from the University of Texas Law School.

We've divided the panel into two main topics, first the criminal side for issues on leniency challenges and penalty considerations and, to lead things off, here we have Brent Snyder.

MR. SNYDER: Thanks. I've been asked to address what are critical differences between major leniency programs and the way that people interact with other regulatory regimes.

I will highlight a few differences that I think are important to know if you're considering bringing a client in for leniency.

But before I do, I want to just say that different jurisdictions have different approaches to cartel behavior. Certainly in the United States we have a criminal system and we pursue cartel violators criminally. Other jurisdictions are a mix of criminal, civil, and administrative jurisdictions.

So inevitably, because of the differences in approach, there are going to be differences in the way that they apply their leniency programs.

But I'll say that different leniency systems work well depending on the type of jurisdiction, the type of approach that a jurisdiction takes.

And just because there are differences in the way that, for instance, our friends in Japan will approach leniency in some ways from the U.S., our systems are compatible and we are able to work very well together despite those differences.

Likewise, given the number of multi-jurisdictional leniency applications that we see where people come into Japan, they come into Europe, the United States and other jurisdictions to seek leniency, it doesn't appear that the differences in our systems pose significant hurdles to leniency applicants or provide any significant disincentives to leniency applicants from coming in in multiple jurisdictions.

And it's the United States' practice in appropriate investigations where somebody comes in for leniency to encourage them to actually go in and self-report in other jurisdictions both for their own sake and also for our ability to then effectively coordinate with other jurisdictions.

I'll just very briefly touch on what I think are some of the differences to keep in mind at the marker stage, also when we're talking about the issuance of conditional leniency letters, and then also for companies that aren't the ones that come in for leniency, but nonetheless find themselves subjects of an investigation.

So starting at the marker stage, the first difference between jurisdictions is the amount of information that is necessary in order to secure a leniency marker.

In some jurisdictions, including the United States, we set a relatively low bar for obtaining a marker. Usually all we are going to require to give a marker is some evidence or information suggesting that the leniency applicant has committed an antitrust violation in a particular industry or with respect to a particular product or service.

By setting a low bar, we're purposefully limiting our discretion about whether or not to give a marker. And we do that because we want to make a company's ability to obtain a marker more predictable.

When a company is going to come in and decide to some degree to self-report and identify themselves to the Antitrust Division, we want them to know that it's going to be quite predictable that they will, in fact, be able to get a leniency marker, if one is, in fact, available.

This is really a conscious decision on our part and those in other jurisdictions that take a similar approach to favor speed, the speed at which somebody comes in to seek a marker, over the completeness of the information that they're providing us.

And the reason we do, and I'll speak more to the U.S. as a reason for taking that approach, is that, first, it allows us at an earlier stage to exert some influence over the leniency applicant's internal investigation. It allows us to get a better sense of where they're going and, to the extent that it makes sense, to help direct and focus a company's internal investigation on the particular conduct that we think might be the most promising from criminal antitrust perspective.

It also allows us by getting somebody in more quickly to suggest possible covert cooperation. If a company has come in quickly, it's more likely that they are coming at a time when conspiracy conduct is still ongoing.

If conspiracy conduct is still ongoing, it provides opportunities for us to think about whether there are covert opportunities that the leniency applicant may be able to help us with.

And finally, it allows us at an earlier stage to begin planning and carrying out our investigation both covertly and then eventually overtly of the leniency applicant's co-conspirators.

Very generally speaking, jurisdictions with potential criminal sanctions usually are among those that set a lower bar on the information that is necessary to obtain a leniency marker. That's not absolute, but generally speaking that's the case.

We are in the minority, however. The majority of jurisdictions, including the EU and our friends at Japan, generally require a greater showing in order to get a marker, and that includes more detail about the conspiracy at the time that the applicant comes in, as well as requiring justifications for why the applicant is either eligible or entitled to a marker.

There are two benefits of that approach for those jurisdictions. First, it allows them to avoid what are called false positives.

Generally by requiring more information from the leniency applicant, in order to qualify for a marker, there is a higher degree of predictability that the leniency application is going to have merit to it and that there is, in fact, an antitrust violation and allows those jurisdictions to more efficiently invest resources. There's less risk that the resources they invest in that leniency application are going to be wasted if it turns out that, in fact, there is no cartel violation.

The other significant reason for requiring more information to receive a marker is it provides those jurisdictions with more reliable and more useful information right at the outset of the investigation.

Another difference between jurisdictions is the amount of time that you will be given to perfect a marker at the time you come forward. And that ranges across jurisdictions from anywhere from 2 weeks on one end to 90 days on the other end.

In the U.S., we usually will give a leniency applicant 30 days for an initial marker, but if the applicant is making progress and demonstrating reasonable efforts to move the marker forward toward perfection, we are almost always going to grant appropriate extensions.

I'd say most jurisdictions allow extensions, but not all jurisdictions do. I believe Japan is a jurisdiction that does not generally allow markers to be extended beyond the initial time period.

Third, there can be differences in what's the form of confidentiality waivers across jurisdictions.

Confidentiality is a critical, absolutely critical component of all leniency programs. And the leniency programs of all experienced jurisdictions are usually going to require some type of a waiver from the leniency applicant in order to share information related to the leniency with other jurisdictions.

For instance, if a leniency applicant seeks a marker in the United States and in Japan, the applicant is going to have to give us permission or a waiver of confidentiality for us to be able to discuss their leniency application with the Japan Fair Trade Commission.

The form of the waiver, however, may vary. Some jurisdictions, including the United States, will allow oral waivers, taken over the phone. Others may require some form of written waiver.

In the U.S., as I said, it usually is oral and that's very often because leniency applicants are concerned about civil discovery. If they get a written waiver from us it may be something that is discoverable in civil litigation. But again, other jurisdictions will require the waivers to be in writing.

Also what information requires a waiver can also vary across jurisdictions. In the U.S., we only require a waiver if we are sharing specific information about either the leniency applicant's identity or the specific information that the leniency applicant has provided to us. But we don't require a waiver to more generally disclose information about the fact that we have an investigation that we may be preparing to execute search warrants or similar information not specific to the leniency applicant. Some jurisdictions also require a waiver for that more generalized information about their investigations.

Another difference is the nature and amount of cooperation that is necessary to obtain a conditional leniency letter. That can vary. And that can range from as little as providing a detailed attorney proffer and some relevant hot documents on the one end of the spectrum to really providing more fulsome production of information and making witnesses available for interviews and providing witness statements.

And again, there can be a distinction here between criminal jurisdictions and civil and administrative jurisdictions.

Criminal jurisdictions, like the United States, which have a higher burden of proof, are generally going to require more information and a higher level of cooperation both before and after a conditional letter is granted.

Finally, and this is the last point that I'll make, there are differences in the benefits that jurisdictions provide to companies that are not the first to self-report their conduct. In other words, what is the benefit of cooperation if you represent a company that isn't the initial leniency applicant? This can vary across jurisdictions, but I also

think this is largely a matter of semantics. In virtually all jurisdictions, only one applicant is entitled to complete amnesty for participating in a cartel.

However, most experienced enforcement agencies are also going to provide some form of fine reduction for cooperation to non-amnesty companies that come forward and begin to cooperate.

Some jurisdictions, like Japan and the EU and Canada, will actually call that leniency. We don't call it leniency in the U.S., even though we offer fine reduction for cooperation.

However, there are some differences even within that. In some jurisdictions, Japan being an example, they limit the number of companies that can earn or qualify for reduced fines and/or they'll set a specific range for fine reduction. So the second company in the door will get 50 percent, the third company in the door will get 40 percent, et cetera.

Under this approach where there are many corporate subjects, not all companies may have the ability to qualify for some form of fine reduction and, thus, may not have the same incentive to cooperate once they're under investigation.

In the U.S. we tend to take a more flexible approach where we don't limit the number of companies that can receive credit for cooperation and the amount of that credit can vary based on the value of the cooperation the cooperating companies provide during the investigation.

MR. WEINER: Thank you. I'm sure we'll have a number of questions on that later on.

Let's move on and discuss Japan's experience with its leniency program as well as with the general enforcement of administrative and criminal penalties in Japan.

MR. NAKAJIMA: Good afternoon. My name is Hideo Nakajima, working for the Japan Fair Trade Commission. I am pleased to be here with you all at this panel.

Let me start with the disclaimer. I am participating in this panel in my individual capacity, and so any views expressed in my remarks this afternoon should be my own ones and not be regarded as official views of the JFTC.

Now, on the outset of my presentation, I would like to touch upon the basic legal framework of Japan's anti-cartel enforcement. The AMA stipulates a dual framework for anti-cartel enforcement, that is, administrative one and criminal one. So, in Japan, cartel activities are subject not only to administrative sanctions but also, in some cases, to criminal sanctions.

Regarding administrative enforcement, the JFTC is to issue a cease and desist order and a surcharge payment order to those enterprises, either individuals or corporations, implicated in the cartel activities. Surcharge amounts imposed are calculated as a fixed percentage of a firm's turnover of the sale of those relevant cartelized products or services.

The fixed rates of surcharge are stipulated in the AMA and vary, depending only on the size and types of the business (manufacturing, wholesale or retail) of the parties concerned.

The basic surcharge rate for cartels is 10% of turnover of the cartelized products for each year of the infringement, up to a maximum of three years. This surcharge rate is increased to 15% in cartel cases for so-called ringleaders and repeat offenders.

So, unlike the fines imposed by the EU, the JFTC does not have any discretion in determining the amount of surcharge to be imposed on an infringing party.

Whether and how much the parties under investigation cooperate with the Commission in its investigation does not affect the rates of surcharge applied. In other words, even if they are found non-cooperative in our investigation, there is no provision in the AMA which increases the amount of surcharge imposed upon them for their non-cooperative actions.

Now, let me refer to the leniency program in Japan.

Under our program, the first party which self-reports to the JFTC on its cartel conducts before we initiate our investigation is to be granted full immunity of the payment of surcharge, otherwise imposed on it.

The second party self-reporting their infringement to us is granted 50% reduction of its surcharge payment. Third one is 30% reduction.

Even after we open the investigation, the parties self-reporting their infringement to us are granted 30% reduction, so long as the total number of those companies applying for leniency program reaches five.

Under our program, leniency is not to be granted to those entrepreneurs:

1) whose leniency submissions include false information, or

2) who coerced other entrepreneurs to commit the relevant violation or blocked another entrepreneur from discontinuing the violation.

Here let me emphasize one feature in our leniency program, particularly in comparison with those of other jurisdictions such as the EU.

In our leniency program, once the companies submit information concerning cartels they have been implicated in, which is to enable the Commission to launch or advance formal investigation, then leniency is basically granted.

And the level of the reduction, 100%, 50% or 30%, depends only on the timing and order of respective applications. The level of usefulness of leniency submissions, or the degree of cooperation of leniency applicants during the Commission's investigation, is irrelevant.

In terms of ensuring effective implementation of leniency program, the JFTC is to protect confidentiality of leniency submissions by the following ways:

1) like other agencies, the JFTC allows oral application instead of written one, if the applicants so wish;

2) the JFTC is to disclose the identity of a leniency applicant on our website only if it requests the publication of that information;

3) also, the JFTC takes every opportunity to clarify its position to the courts concerned in charge of private damage actions at home and abroad that leniency submissions should not be subject to discovery requests or orders in civil litigations.

Now let me turn to the implementation experience of the leniency program in Japan.

We introduced a leniency program in 2006, 9 years ago. So far, I believe that this program has been working quite well in our country.

Actually, the program has been utilized extensively and, as we expected, those applications have been found to be valuable source of information for us to detect and investigate cartel conducts.

In particular, leniency program has had much positive impact on the JFTC's capability to detect and investigate international or cross-border cartels affecting competition on the Japanese markets, thereby enhancing significantly inter-agencies' cooperation in investigating those cartels.

Before concluding my remarks, I would like to mention briefly about criminal penalties against cartels in Japan.

Regarding criminal enforcement, the JFTC is to refer the case to the Public Prosecutor General (Attorney General) for criminal prosecution when the Commission regards it as vicious and serious violation of the AMA, thereby having an extensive adverse impact on the people's life.

In that case, both of the entrepreneurs, and their executives or employees who are implicated in the cartel activities, are referred for criminal prosecution. Upon receipt of the Commission's referrals, the Public Prosecutor's Office prosecutes the concerned parties criminally if it is deemed necessary and appropriate.

As I explained earlier in my presentation, our leniency program is legally applied to the Commission's administrative surcharges. However, as a matter of its implementation policy, in order to encourage leniency applications, the Commission has publicly announced that it does not refer to the Public Prosecutor General for criminal prosecution, the first leniency applicant prior to an initiation of the Commission's formal investigation and its executives or employees as well.

Now, the recent development of criminal enforcement in Japan.

In the last 10 years, the JFTC referred a total 8 cartel cases (among around 160 cartel cases) to the Public Prosecutor General, and in all those cases the relevant companies and their executives or employees were indicted and found guilty.

Actually sentenced jail term is, in my own calculation, on average, around one year and 8 months (20 months). The longest one is 3 years, which used to be the statutory maximum length of imprisonment before the 2009 AMA Amendments expanded it to five years.

However, so far, in Japan, none of individuals found guilty of cartels have been actually jailed since executions of those jail sentences to all of them have been suspended or stayed.

Though, based upon this fact, there are some people who argue that Japanese court judges remain rather hesitant in putting cartelists in jail, it should be noted that the sentenced jail terms in the court's rulings concerning cartel cases have a tendency to increase, reflecting the recent growing sentiment of the general public in Japan against cartel activities.

Also, as mentioned earlier, the statutory maximum jail term was expanded to five years, from three years, by the 200 AMA Amendments, and Japan's Criminal proceedings Act prohibits stay of execution of more than 3 years' jail sentences.

We will see how the future court rulings will develop on cartels.

Thank you for your attention.

MR. WEINER: Thank you. Again, very interesting.

Turning to some defense counsel perspectives, Jen, will you start with the perspective of U.S. defense counsel?

MS. DRISCOLL: Yes. First I should say that my remarks are made in an individual capacity and do not reflect necessarily those of my firm, and I'm sure that everyone wants to tack on that, although they're not necessarily saying my firm, but their respective organizations.

In terms of being defense counsel or acting as defense counsel for corporations, whether you're trying to perfect a leniency marker or be the second company in to avail yourself of those benefits, the critical factor is getting into

the agencies of all the relevant jurisdictions as quickly as possible.

We've seen many instances, most recently with the wire harness case where a company received leniency in one jurisdiction, but was undercut in another.

It happens frequently. It means that it's incumbent on U.S. counsel to work with their affiliate foreign firms or their foreign offices and make sure it is a coordinated effort across the board so that the company is not left vulnerable in a single jurisdiction.

Now leniency is a counterintuitive process, even to U.S. companies. It is hard to explain to non-U.S. corporations and executives why it's a good idea to come forward to a government entity that has criminal prosecution powers and start confessing your wrongdoings.

As one of my colleagues mentioned last night, it involves a lot of hand-holding, a lot of support, and a lot of personal relationships. And without that, all the documents in the world, all the interviews in the world just aren't going to get you there.

There is a lot of psychology that is involved with bringing a company into the government and getting them over that hurdle.

Of course, the first step is to issue a document hold in every office subsidiary and the headquarters of the company so that the individual employees and high-ranking executives are very clear that basically the documents need to be kept in an almost photographic state at that point, that it is not the time to start parsing the texts on your smart phone; even your personal hand-held devices are subject to the scrutiny of the government, which again is something that is not necessarily known to non-U.S. companies and executives—e-mails, instant messaging, everything is fair game.

What we have found lately is that the DOJ is very specific in what they want in terms of their document production, and the burden falls on defense counsel and the corporations to comply with that request.

Recently, what I found is that the DOJ will very graciously give us search terms that are helpful and give us a direction in which we should go. But our requests thus far have been to produce not necessarily all relevant documents, but just hot documents.

That involves a lot of groundwork with the associates, with the company employees and executives who are already blindsided by nuances of U.S. discovery and adds an additional layer of complexity in terms of either getting leniency or perfecting your status as a second company.

The final issue that I'll touch on is obstruction. Obstruction, it's a very human, very understandable impulse in these cases.

Again, I think it goes hand-in-hand with the idea of not necessarily wanting to go to the government and open up about bid rigging or other misconduct, and it's something that we're seeing over and over and over again, and counseling our clients on.

MR. WEINER: Mr. Bhattacharjee, you represent Canada here. Do you take the defense or the prosecutor's perspective?

MR. BHATTACHARJEE: What I'm going to do is to limit my comments to what I'll identify as the recent changes I think in the environment again that are relevant to those of you who are involved in cases with a Canadian aspect.

A very keen associate has prepared some 38-page declaration that's in the materials that explains the general outlines of our program and sort of the cartel enforcement region.

I'm going to talk to you about five things that are, in my view, signs of a bit of a shift in cartel practice in Canada that I think you'd want to know about.

The first thing is that we have beefed up sanctions now. Prior to March 12, 2010, our conspiracy provisions of the Competition Act, in fact, were not per se. They were what we called modified rule of reason or hybrid rule of reason.

Post March 12, 2010, we then moved to a structure that is very similar to Section 1. So now we have a per se provision.

The per se provision was then accompanied by fines that at least on paper are amongst the most significant in the developed world of cartel enforcement. We now have in theory maximum fines of 25 million Canadian dollars and potential imprisonment of up to 14 years.

So what we have done essentially is, number one, probably made it easier for the prosecution to secure convictions than would have been the case under the old provisions, and those of you who have been involved in cases where conduct straddles pre-2010, post-2010, will have seen that there is a difference in how we present those cases, for example, to our bureau in the leniency context.

And the other thing I'd highlight about the provisions is it remains the case, despite the fact that they did change it to try to harmonize it with Section 1, it remains the case in Canada that there is no limitation period for cartel conduct, which is an interesting thing to note.

The bureau, quite rightly, has cited our new approach or our new provisions as a reinvigorating cartel enforcement in Canada. That's point number one.

Point number two is, it appears now there is a higher likelihood of jail time in Canada.

I will say that despite some of the tough statements that have been made by senior members of the bureau's criminal matters branch, it does remain the case that in international cartel cases no individuals have yet served custodial sentences.

In fact, in cases where individuals have been convicted, at least in domestic cases, the majority of those have really been in people serving time in the community. We call that non-custodial.

We have now made changes to the criminal code, which may make it more difficult for courts to avoid custodial sentences if they deem that imprisonment is something that is required.

The result of that is that the bureau now believes that there is a higher chance that, for example, if you have individuals involved in investigation, that they will be able to get jail time for those people.

Now it remains to be seen what Canadian judges will do with that.

I will be blunt with you and tell you that Canadian courts, if I may stereotype them a little bit, remain reluctant to resort to jail for economic crimes. That is changing. There are good reasons for that change. But the judicial landscape is quite different from here. And so it remains to be seen what judges do with these changes to the criminal code.

The third thing I want to emphasize that I think is also useful to those of you who may be involved in Canadian leniency processes is that I think there have been some attempts to tighten up that process in Canada.

To some degree the bureau's reasons for doing that are intertwined with its experience in very significant global cases like auto parts.

It's probably fair to say at the moment that the bureau is much more aggressive than it traditionally has been on marker and proffer management.

And part of that is if you look at auto parts, the bureau said in an affidavit that had been issued as part of a subpoena, at least 164 markers to 10 cooperating parties—this was some years ago—that those numbers have now increased.

And the difficulties that our agency had, first of all, in trying to make that work with the markers had been granted on the jurisdictions, plus of course the scope of markers that may have been granted in Canada, led it to be much more disciplined in the stream of both markers.

So those of you who are engaged in processes in Canada are probably seeing a little on the part of the bureau in these cases.

The other thing is that the bureau, and Brent's comment about working together to ensure that intentions to the ability to complete your proffer are reasonably granted are important—that remains the case in Canada generally.

But I will tell you that the bureau has actually taken a little bit of a harder line about what it will do if it thinks that parties are not cooperating quickly enough.

In 2011, the commissioner openly said at the ABA/IBA cartel workshop that the bureau would be willing to pull markers where parties fail to meet those requirements.

It hasn't really happened that much, but you are in a situation in Canada where if you are in an international investigation and you are trying to tell the bureau that Canada is one little part of a much bigger case and we need more time, the bureau is actually going to be a lot harder on you to try to explain why you need that and will not be cowed by the fact that you're saying that you're part of a very large thing where the client is obviously worried about its exposure in larger jurisdictions.

And I think from a practical perspective that's creating some tension. There is the difficulty of the bureau in not willing to simply take a back seat to investigations, leniency processes and other jurisdictions, and counsel have to manage that.

And the last thing I would really want to point out is that I think we may be seeing a new approach to sentencing cartel cases and that is simply because, you know, traditionally we have a proxy-driven approach. The bureau applies actually defined discounts depending on how fast you are to get in and what your position is in line.

Traditionally, when those fines are dealt with by way of guilty plea, Canadian courts have rubber stamped them without a lot of oversight.

There is a recent case called *Maxzone* in federal court. The court decided to emphasize that courts should not be doing that and, in fact, arguably raised the type of information that the parties and the bureau have provided in support of a settlement, a fine recommendation, and of course a resolution.

So I think that's what I wanted to say in terms of things you might want to know about, and I'll pass it back to the next person.

MR. WEINER: I'm going to pass it back to Brent for a couple of questions.

First of all, can you discuss the possibility of leniency for ringleaders or alleged ringleaders?

Second, can you talk a bit about fine calculations and the extent to which there's double counting or potential double counting from a defense perspective in looking at indirect purchasers and possibly fines around the world as well?

MR. SNYDER: Okay. I will try to deal with those quickly.

The second question, in particular, has already been the subject of entire panels and probably will continue to be in the future, so I'll try to very quickly touch on that.

With respect to the ringleader question, the antitrust division's leniency policy has a provision that the applicant must not have been the organizer or ringleader of the conspiracy it is reporting.

The reality is that nobody has ever been denied leniency for being the ringleader of a conspiracy in the United States.

In fact, in 20 years, no company that has self-reported its conduct has ever found itself charged for that conduct for any reason.

The leniency program is successful because it's predictable. I know my predecessors would say the same thing. We are very reluctant to deny leniency to a company that has voluntarily identified itself and implicated itself for a Title 15 violation.

With respect to the ringleader requirement, a company is not disqualified simply because it is one of the ringleaders or one of the major participants or organizers of the conspiracy. That's not to say that the requirement wouldn't or the exclusion wouldn't apply in an appropriate situation. But it would take a pretty egregious set of facts for us to decide that a company was disqualified for leniency—probably facts that if they became known, it would not raise significant questions.

Not having seen that case, I can't tell you about an example, but I could hazard a guess that it probably would be a situation where first the company is the singular leader or organizer of the conspiracy in a situation where none of the other participants appears to have taken any voluntary action.

And this would likely involve a combination of very significant market power in an industry or with respect to a particular product or service and coercion on the part of that ringleader.

I would guess that probably the greater the market power that the leniency applicant has, and the greater the evidence that that company is, in fact, the singular leader and organizer the less we would need to see evidence of coercion. But some level of coercion would likely need to be present.

But the fact of the matter is that we would not exclude somebody from the leniency program just because they played a major role in the formation of the conspiracy.

Secondly, with respect to fine calculations and double counting, there are a lot of potential issues that are embedded in those topics.

So let me try to very quickly first address the issue of what I would call intermediate goods. These are essentially component parts that are made and incorporated into finished products overseas and then are imported into the U.S. and sold in the U.S.

And when talking about this issue, I think it's important to distinguish between the Foreign Trade Antitrust Improvements Act, on the one hand, and sentencing and fine calculation on the other hand.

The FTAIA, where it applies, goes to the reach of the Sherman Act. Some courts have found it to be an element of the actual Sherman Act offense. It is not a sentencing statute. It doesn't amend the sentencing guidelines.

From the Antitrust Division's perspective, we have not yet brought a criminal case involving foreign commerce that did not involve some U.S. import commerce, such as direct imports of that component part into the United States.

As such, that makes the FTAIA inapplicable because there is an import commerce exclusion from the FTAIA.

That said, even where there are no sales of the price-fixed product itself in and for delivery to the United States and the FTAIA does apply, the statute would permit us to bring cases purely based on the sales of those component parts manufactured into a finished product if that conduct and those sales have the requisite effect in the United States. And we would certainly consider bringing cases on that basis alone.

As mentioned, the FTAIA doesn't apply to sentencing or fine calculations. The sentencing guidelines refer in general terms to commerce affected by the conspiracy without any geographic limitation and allow us to rely on worldwide sales of the price-fixed product in calculating fines.

As a practical matter, the Antitrust Division to date has exercised discretion and sought to calculate fines that both reflect the harm to U.S. commerce and U.S. consumers and that provide adequate deterrence.

So in that way our approach has reflected the same concerns that FTAIA takes into account, and we have not, to date, ever sought to base a fine on the worldwide sales of a price-fixed product.

In most investigations fine ranges under the sentencing guidelines are going to be calculated and have been calculated based on sales of the goods that are imported directly into the United States or for delivery to the U.S., which would be the direct imports.

Components parts that are made and fabricated into finished products overseas have generally been considered in deciding where in that sentencing range based on import commerce the fines should be placed.

So, for instance, if using direct imports we do the guidelines calculation and it produces a fine range of $100 million to $200 million, we would then in appropriate circumstances consider the sales of component parts into the U.S. in the form of finished products in deciding where in that $100 to $200 million range to place the fine.

This has been done only in cases where imposing a fine at the bottom of the guidelines range calculated solely on the basis of direct imports would significantly understate the harm to U.S. consumers.

With respect to the issue of double counting, I'll just very quickly explain that double counting occurs where two jurisdictions base cartel fines on the same sales or revenues.

For the U.S., there is nothing in the sentencing guidelines that precludes us from including sales in the affected commerce calculation when another jurisdiction considers those sales in determining the appropriate fine under that jurisdiction's competition laws.

Each jurisdiction should punish the conduct as necessary to address the harm in that jurisdiction.

Jurisdictions do coordinate, however, to the extent that our various fine systems permit in order to avoid double counting.

I think the Air Cargo investigation is a good example of that, where some jurisdictions agreed on the extent to which fines would be based on sales of inbound cargo or outbound cargo. That's an example where jurisdictions coordinated to try to minimize any potential for double counting.

My own view, and there may be disagreement in the defense bar, is that perceptions of double counting are greatly overstated.

There are few specific instances that people can actually point to where double counting has taken place.

There are also situations that I don't think we have made public because of the nature of our process where the U.S. has actually reduced fines or not pursued cases against companies that were penalized in another jurisdiction where we concluded that the penalties imposed in that jurisdiction adequately vindicated our prosecutorial interests.

MR. WEINER: Thank you. Shiozaki-san, we have to get you into this conversation. Can you give us the Japanese defense counsel perspective on this?

MR. SHIOZAKI: Thank you, Michael.

I also repeat Jennifer's comments that my comments today do not reflect the views of my firm; it will be my personal perspective and views.

In international cartel cases, it's very common that the Japanese company is not aware of the alleged antitrust law violation until they receive a subpoena from the DOJ.

The subpoena is addressed to the client's subsidiaries located in the United States and not to the client's headquarters in Japan.

These U.S. subsidiaries are mostly companies with sales or manufacturing functions and there may not be any legal staff there.

The first challenge for Japanese companies is for the U.S. subsidiary to report about the subpoena to its legal department in Japan so that the company can review the situation and conduct an internal investigation, determine which jurisdictions they need to consider in addition to the U.S. in making a leniency finding.

I've seen cases where the U.S. subsidiary misunderstands that this is only a local problem that does not involve the Japan parent company and it is such an unfortunate situation. I've seen the company lose valuable time in making a comprehensive judgment as to how the Japan parent should deal with the case globally.

Once the Japanese company finds out about the international cartel and internal findings show that the allegations can be confirmed, the company is advised to make leniency filings in the effective jurisdictions.

When the company decides to make a leniency application in Japan, some U.S. counsel as well as attorney-client privilege can be preserved in Japan. This is because, in principle, JFTC requires leniency applications to be made by written filing, which can include detailed facts about the price-fixing or bid allocation conduct.

The important thing for Japanese counsel in such a situation is when filing for leniency within Japan to ask JFTC to allow the company to conduct an oral application with respect to detailed facts about the conduct. This arrangement will allow the company to provide detailed facts to JFTC without jeopardizing the attorney-client privilege the company has in the United States.

When we deal with JFTC that this is part of an international cartel, generally JFTC will allow sensitive facts to be provided orally. While attorney-client privilege is not a concept under Japanese law, JFTC understands the importance of privilege in the United States and assists the company in making a full disclosure to JFTC.

One of the other difficulties during the leniency process is to inform the Japanese company about the DOJ amnesty policy and to tell them that the company needs to conduct an internal investigation not only about the product that is indicated in the subpoena, but with respect to other products that may also have been a target of price-fixing or bid allocation. In many cases where the

memories of the individuals involved are vague and documents are few, I work with the company's legal department to find out about any conspiracies involving new products, and I believe that the diligence of many of these legal departments' staff of my clients and other Japanese companies have helped initiate many new antitrust investigations in the U.S. and elsewhere.

MR. WEINER: Thank you.

Talking about the defense representation of individuals, I think we've heard this afternoon about the difference between sentencing and time served. But, Jen, would you care to comment on representing individuals and jail time and extradition?

MS. DRISCOLL: Sure. I'd be happy to.

I very much enjoy representing both corporations and individuals. But when you are representing an individual, it is a very different relationship. It's a very personal one. It's unique and there is a certain amount of emotional attachment that occurs over time when you are talking to these people, on a very consistent, regular basis about personal issues.

Right now the focus of my practice is in Asia. And the idea of going to jail for working with competitors is not mainstream and is, in fact, contrary to established business practices that have existed for many years.

Some of the cartels that I've investigated go back as far as 25, 30 years, and those who started them are deceased, but they have passed down over the years the tradition of speaking with your competitors. It's presented almost as a job requirement. You are in position X and part of your job is that you talk to such and such competitors.

So then when they're confronted with the jurisdiction of going to jail for a year or two years, it comes as a real shock.

I think, and perhaps my Japanese colleagues could correct me, but when Japan first started getting hit in the auto parts industry, there was a lack of press in the beginning or a reluctance to publish the names of the individuals in the Japanese press because there was a certain degree of shame attached to having to go to jail in the United States for some of these crimes.

And I remember representing one of the first individuals to be sentenced, and he had a very difficult time telling his parents. He was afraid that his wife would divorce him. And they didn't tell their children where he was going. They just said that he was going to the U.S. for a business trip for a year and wouldn't be back. It was heart breaking.

But the companies, in cooperation with the DOJ, are making the employees offers that they cannot refuse in terms of the equation of do I stay here in my home country and wait it out, or do I go to jail in the United States for a discrete period of time?

I think that extradition from Asia is only a matter of time. I think it will be very difficult, if not impossible, for the Antitrust Division to ignore the number of indictments that are just hanging out there that basically increase with every investigation.

There are many executives, particularly those approaching retirement age, where at least part of their pensions are state funded, who are perfectly content to just stay in their home country and live their lives and not surrender to the U.S. authorities and serve time in jail.

But I do think that the time for the first extradition case may be coming. It will be a big test. I can't pretend to know what's going on behind the scenes. But if I had to speculate, I would say that the Division is very carefully examining some of these indictments and is waiting for the right opportunity, perhaps the most egregious misconduct in terms of bid rigging or some combination of bid rigging and obstruction of justice and may make their move relatively soon.

MR. WEINER: Let's get two more global perspectives on the individuals. Let's start with Japan and then go to Canada after that.

MR. SHIOZAKI: Okay. During the course of the DOJ investigation, the DOJ at some point informs the company of the names of individuals that the DOJ considers as persons of interest.

At that point the company and its counsel will consider selecting separate counsel for these individuals.

When we consider determining who should be separate counsel for these individuals, we look for antitrust counsel who has experience in defending antitrust cases for Japanese or maybe other Asian defendants.

Such background gives comfort to the Japanese conduct that the individual counsel will understand that whatever the employees did, it was not done for that person's personal benefit, and also it is important for the individual counsel to understand, to be able to understand the organization's structure and reporting line of the Japanese company and the rather undefined scope of work for that individual, which could be different from a typical company in the United States.

After the individuals are represented by their respective separate counsel, important timing for the company and company counsel to assist the counsel representing these individuals is when the DOJ determines which individuals should be carved out from the plea agreement that will be agreed to by the company.

In order to assist the individual counsel's efforts to keep the individual carved in, the company will agree to offer other employees to be interviewed by the individual

counsel, and the company may also allow the individual counsel to use the company's meeting facilities to conduct necessary interviews or document review.

So in this respect, it's very important for the company to maintain a good relationship with the individual counsel so that they may cooperate closely in these circumstances.

In Japan, individuals are also punished for cartels under criminal law, and as Mr. Nakajima explained earlier, criminal charges can be brought to individuals.

However, in practice, Japanese individuals will receive a suspended sentence, as Mr. Nakajima mentioned, even if they are found guilty in a criminal court in Japan.

This is because the charge will be usually the first criminal offense for these white collar individuals and many will be found in court to have good character and have repented. Japanese individuals do not fear extra jail time in Japan. I note that they have great fear of jail time in the United States.

MR. WEINER: Mr. Bhattacharjee?

MR. BHATTACHARJEE: I would say one thing. I was keeping you on your toes, because I said I would talk about five topics, but I only got to four—so consider this the fifth.

It's really just a quick observation on jail time.

The one time that you will have heard if you listen to what our agency is saying about the importance of continuing to pursue individuals is that in the cases since 2009 where the bureau says we've gotten 21 people sentenced, those are all primarily domestic cases. Frankly in one gas retail case in Quebec, which facts are pretty awesome—but in international cases I do not think you're going to see much difference in treatment at the moment.

So I think the bureau is right to say we think this is important, but I think primarily there's going to be consideration in domestic cases, I think the jury is out.

MR. WEINER: Turning to the civil side, there are no jail times, it's only money, but there is a lot of money involved. Hollis, are we looking to more global conflict on the civil side?

MS. SALZMAN: Well, certainly there is civil exposure that is associated with the criminal fines that are occurring in the U.S. and in other places around the globe.

You'll see in guilty plea allocutions on the transcripts that the judge speaks to the pleading party and says he or she is not going to order restitution because of a pending civil litigation. In the U.S. that means class action litigation.

In the auto parts case, for example, the defendants are being sued on multiple fronts in class action matters by direct purchasers, indirect purchasers, multiple levels in the chain of distribution on the indirect purchaser's side. There is individual opt-out; there are governmental entities, as well as state AG's actions.

So certainly the civil exposure in the U.S. is a commonplace side effect of violating the U.S. antitrust laws.

But certainly it doesn't stop in the U.S. That's been changing for quite some time now. There are many countries, including Canada, that have a class action mechanism, and with the recently passed EU directive, which is modeled in most part after what you see in the UK for collective redress where you have indirect purchasers, there is not treble damages in the UK, but there is post-judgment interest which can be significant given that some of these cartel cases have been ongoing for many years.

So the EU directive, which was recently established, gives all the European countries, I think, up to 2 years to put into process these collective redress mechanisms.

And while that process is taking place, you have three countries in particular in Europe that are really far ahead of the other countries—the UK, the Netherlands and Germany.

I think that's only the tip of the iceberg. Things are changing around the world and I would not be surprised for other countries around the world besides the U.S. and Europe to establish collective redress penalties or cases against defendants that violate the antitrust laws.

MR. WEINER: Thank you. Shiozaki-san, remedies in Japan?

MR. SHIOZAKI: Let me introduce how this would work out in Japan, if this were a purely domestic case, not involving international aspects. For example, after the JFTC announces a press release about the administrative surcharge order addressed to the company, the company will go out to all its major customers and explain about the press release, assure the customer that the company's antitrust compliance was reinforced and such instance will not happen in the future. It's a standard procedure for Japanese companies. Many companies still have wishful thinking that by taking these steps, customers will not seek damages against the company in Japan for these illegal actions that took place.

However, many Japanese customers in Japan, which are listed companies, cannot simply sit back and do nothing.

On the other hand, many customers do not wish to litigate against the suppliers in Japan when they consider their long-term business relationship.

Therefore, it is common that these major customers will ask the company to conduct discussions about damage compensation.

The goal is for the parties to agree to a damage amount that would be sufficient so that the customer will not be sued by shareholders for breach of the director's fiduciary duties, and at the same time the damage amount would not materially damage the infringing company's financial bottom line.

The discussion will include price movements in the market before, during, and after the period affected by the conspiracy. Basically the deciding factor is, what is the best amount that can be agreed upon by the parties?

It is very common that these private negotiations will be successful for antitrust violations in Japan and such damage claims are usually not brought to a Japanese court.

I note that this is different from the international auto parts cases where a large Japanese manufacturer such as Toyota or Nissan will make damage claims for damages in the U.S. for infringing on companies or their U.S. subsidiaries and U.S. counsel. What I said earlier was how it would play out if this were a Japan domestic case.

MR. WEINER: Thanks.

Brent, I noticed that the Division filed a withdrawal of its opposition to civil discovery in the auto parts civil cases recently. Would you care to comment on the division's role or lack thereof in civil cases?

MR. SNYDER: Ideally, we have as little a role as possible. I can answer this very quickly.

Generally, we are only going to intervene in civil lawsuits either to safeguard the integrity of the grand jury's investigation, usually in the form of a discovery stay, whether it's a blanket discovery stay or a stay of particular types of discovery, or if we think it's necessary to prevent the disclosure of information in order to safeguard our leniency program in some way.

But generally speaking, we don't try and we don't want to put our finger on the scale of civil litigation. We don't seek to advantage one side or the other by intervening and taking positions and civil litigation.

MR. WEINER: So we're almost out of time and we've had a great panel. I think we have a few minutes for Q and A.

MS. DRISCOLL: Michael, did you want me to comment on the *Vitamin C* case?

MR. WEINER: I did. Jen, would you comment on *Vitamin C*?

MS. DRISCOLL: Okay. Well, first I want to thank you, Michael, and my fellow panelists for a great panel.

You know, DOJ deserves tremendous credit for their enforcement effort and I congratulate you on your success with fines and jail time.

MR. SNYDER: We can congratulate a lot of the people, including those here from the New York field office. They are the ones that are getting the fines and jail time.

MS. DRISCOLL: I think that given the increased focus on non-U.S. defendants and of course to the extent that more and more non-U.S. executives and citizens are being affected by what's going on with the DOJ enforcement, that's going to grab the attention of their governments.

And I think what you're seeing with these filings by foreign government agencies is an effort to push back, perhaps a futile one, given that the reach of U.S. jurisdiction is quite broad in these cases.

But at least they're being heard, and perhaps there will be some momentum for more and more amicus briefs to be filed in these cases.

MR. WEINER: Thank you.

MR. KATZ: Thank you very much. That was a tremendous amount of material. Excellent presentation. Thank you very much.

As you know, I think we have a lot to cover this afternoon and we have still two more in the program. So we'll try to do the switch-over as quickly as possible.

In the meantime, I would want to say again that the amount of effort that has been put into this program and all the others is really quite tremendous. So I thank our guests for traveling from afar and for all they've done. Thank you.

(Recess).

New Wine in Old Wineskins or Old Wine in New Wineskins? 100+ Years of Antitrust

MR. KATZ: Everyone, if you could make your way back to your seats, please. We are about to begin. We are about to begin our next session.

The title of this session is New Wine in Old Wineskins or Old Wine in New Wineskins? 100+ Years of Antitrust.

Our moderator is Jay Himes, a partner in Labaton Sucharow. I won't take up any more time because we have a lot of interesting things to listen to.

Go ahead, Jay.

MR. HIMES: Okay, and I won't take up very much time either.

We have four panel members. Just going alphabetically, Deborah Feinstein, Director of the FTC's Bureau of Competition, previously the head of Arnold & Porter's antitrust practice in the U.S., a well-recognized and honored member of the antitrust bar.

We have Eleanor Fox, who is of course familiar to you all, virtually everyone here. She is the professor of trade regulation at NYU, previously a Simpson Thacher partner and certainly one of the world's most distinguished voices for competition law.

Ilene Gotts everybody knows, former head of this Section, former head of the ABA antitrust law section, currently a partner at Wachtell, and another one of the world's leading antitrust practitioners.

Next to me, Bill Kolasky, who is a Hughes Hubbard D.C. partner where he does all manner of antitrust practice—litigation, mergers, counseling—formerly a Deputy Assistant Attorney General for the Antitrust Division. He also manages to find time to teach somehow.

With that, you can find full biographies, but we're going to go right into the program. Eleanor will talk first about Section 3 of the Clayton Act. Deborah will talk second about Section 7 of the Clayton Act. Bill will pick up with Section 5 of the FTC Act. Ilene will talk about Section 8 of the Clayton Act. And if you don't know what that is, you better hang around. And if everyone plays nicely, I will tell you something about the treble damage provision.

MS. FOX: Thank you very much, Jay. Thank you, Elai. It's my pleasure to be here and a pleasure to celebrate the 100th anniversary of the Clayton Act and the FTC Act.

My task today is to talk about Section 3 of the Clayton Act, which as you know concerns certain exclusionary practices.

One of the big supporters of Section 3 of the Clayton Act was Louis Brandeis, who advocated such a law before he became a Justice of the Supreme Court. Brandeis said: "We can either have democracy in this country or we can have great wealth concentrated in the hands of a few, but we cannot have both." Brandeis stood up for "the little guy," his right to economic opportunity, and his right to be free of abusive practices of big corporate business.

Before we go into background of Section 3 of the Clayton Act, I will put the language of Section 3 on the screen. Here it is:

> It shall be unlawful for any person…to lease or make a sale…of goods…or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods…of a competitor…, where the effect of such lease, sale, or contract…may be to substantially lessen competition or tend to create a monopoly….

As we think about this language and the treatment today of exclusionary practices not specially linked to consumer harm, we may want to ask: Are we really *celebrating* the 100th anniversary of Clayton Act Section 3, or has Section 3 of the Clayton Act become obsolete? In complaints that involve exclusionary practices, we seldom see Section 3 invoked today. And if it is invoked, it's the much junior partner of Section 1 of the Sherman Act.

We will ask: Was Section 3 really intended to prevent abusive exclusions of the little guy, and if so, do we honor that concept anymore? What did Congress want when it was drafting the Clayton Act, what did it do, what do the words mean, and what is the resonance, if anything, in the world?

The elections of 1912 were important elections. There were three parties, the Republicans, the Democrats and the Progressives. Interestingly, they all agreed on one thing—that the Sherman Act and its interpretations and especially the *Standard Oil* case of 1911 was so vague that business didn't know what it could do and what it could not do. Most of the legislators from all three parties thought: "All we have to do is list the forbidden exclusionary practices in the law and then it will be clear what business can do and should not do." Woodrow Wilson said: "Everyone who has even read the newspapers knows the means by which these men built up their power and created these monopolies. Any decently equipped lawyer can suggest to you statutes by which

the whole business can be stopped." The consensus was that by good drafting we could put our finger on the exclusionary practices that were unjust to the local dealer, foreclosing of worthy competitors, and perhaps harmful to consumers.

One of the things that we saw through many years until the late 1970s is that exclusionary-practice antitrust law in the United States saw a reciprocal connection between exclusion of competitors and better deals for consumers. Competitors, blocked from the market, might have given a better deal to consumers. Opportunity for the blocked competitors, along with clarity of the law, was a central motivation for enacting Section 3 of the Clayton Act.

Almost everybody in Congress supported the Clayton bill. There were a few dissenters. The dissenters had something interesting to say that might resonate with many people today. Dissenters from the House of Representatives' bill said: "The antitrust laws have been carefully considered for 24 years. What possible good can come from more law? Leave business alone."

However, they were a pretty small minority, and Wilson held sway over Congress. The draft legislation at first contained a list of prohibited conduct, such as: "buy my goods and don't buy the goods of my competitor"—but when the bill went to committee the legislators added the language with the split infinitive: where the conduct "may be to substantially lessen competition." The added clause made the offense less clear and more complicated, and the idea of a simple list of dos and don'ts failed.

In any case, it was very clear that Section 3 of the Clayton Act did mean to highlight as worrisome particular exclusionary practices such as: "I'll give you a rebate if you don't deal with my competitor." Foreclosing rivals from significant parts of the market was thought by almost everybody to be the real key to whether there was a violation. Foreclosing rivals from a significant share of the market was presumed to harm the market.

How was Section 3 understood and interpreted in its informative years? I looked at the Attorney General's Report of 1955. This was the authoritative antitrust treatise of its time. The Report reflects the common understanding that practices foreclosing competitors presumptively harmed the market.

Now let us fast forward to modern times. Modern times have been tough on the perception that exclusionary practices that exclude competitors, even from a significant share of the market, are harmful to competition and consumers.

Early modern cases include *Jefferson Parish*. The concurring opinion of Justice O'Connor in *Jefferson Parish* was the beginning of the end of a strong presumption that exclusionary practices such as tying by firms with market power are almost surely likely to harm the market. When we get to *Trinko*, although not a Section 3 case, we see clearly the philosophy and perspective that almost everything that a firm does alone and not in combination with competitors is presumptively legal. *Illinois Tool* applies the *Trinko* perspective to tying. The mainstream view is: "We no longer worry very much about using leverage to fence out rivals. We should hesitate to condemn the conduct. It might be efficient." And in loyalty rebate cases, although rebates are a specific object of concern in the language of Section 3 of the Clayton Act, Section 3 of the Clayton Act is almost never invoked.

This is the state of the law in the United States. Is it mirrored in the world? Does the world worry about exclusionary practices as a special category that needs justification? Most of the world does. EU law, Article 102, lists examples of exclusionary practices that amount to abuse of dominance. One example encompasses tie-ins. Under Article 101, agreements to give a good deal to a customer on the basis of not dealing with your competitors is presumptively illegal. Similarly, the UNCTAD Model Code treats the conduct as suspicious. Developing countries are especially concerned about exclusionary practices. Their markets often work poorly and depriving competitors of the opportunity to compete on the merits may deeply undermine their quest for robust markets and inclusive development.

[Pointing to the image of Brandeis] Is this man still relevant in the United States? Should foreclosing or exclusionary practices be on the list of serious antitrust offenses? To me, yes, he is still relevant. To me, he will always be relevant. But Justice Scalia may have a different view.

Thank you very much.

MR. HIMES: Debbie, I'm going to get your slides up in a minute.

MS. FEINSTEIN: Thank you.

Well, it's a pleasure to be here. Not only is it the 100th anniversary of the Clayton Act, but importantly for those of us who work at 600 Pennsylvania Avenue, it is the 100th anniversary of both the FTC Act, which we've already celebrated, and in March, the day that the Federal Trade Commission opened its doors. So it's really fun to be at the FTC during this historic period.

I have to start with the usual disclaimer, which is that the views I express are my own and not necessarily those of the commission or any commissioner.

Disclaimer two is that I didn't realize that everybody else was going to have all of these lovely pictures of all of the people who authored all of these bills. I don't have those.

But if you come visit 600 Pennsylvania Avenue, you can see the actual pictures of every single commissioner who has ever served, and they're really quite nice portraits. So if you're in the building and you haven't walked

around the first floor before, get somebody to take you the longer way around next time.

Disclaimer number three. History was never my favorite subject, and I also knew I was going to be on a panel with, among others, Bill Kolasky. He likes to study the history of antitrust as sort of a hobby. If you haven't read some of his articles in the ABA's *Antitrust Magazine*, his biographies of historical antitrust figures, I really commend that series to you.

My personal favorite, of course, was the one on Thurman Arnold, former Assistant Attorney General for antitrust who was the founding partner of the law firm at which I spent 25 years. He was quite a character. He became a judge and did something that few judges do: he stepped down from the bench and went back to private practice. When he was asked why he made that unusual move, he reportedly said that he would rather talk to a bunch of damn fools than listen to them.

So I commend this series.

So that was a long way of saying that my last disclaimer is that my history of Section 7 is going to start in the more recent era.

I worked with a number of colleagues at my law firm who seemed to know every case that had ever been written. My view—somewhat in jest—was if the case was written before I was born, it probably wasn't really good law.

So I'm going to start with *Brown Shoe*. In discussing the key Section 7 cases, I'm going to start slowly and then jump ahead to more recent cases and end with a discussion of the future of Section 7.

As enacted in 1914, Section 7 related only to stock acquisitions. It covered the lessening of competition between the acquiring and acquired companies or acquisition that tended to create a monopoly.

The 1950 amendments to the Act did a couple of significant things.

First, they plugged the loophole regarding assets. Of course, the Hart-Scott Act has still had to deal with new structures such as partnerships and limited liability corporations.

Second, they deleted the phrase "between the acquiring and acquired company." And it's interesting that now we sort of think about that phrase as meaning unilateral effects. The reason that the change was made then was to make sure that they could pick up vertical acquisitions and conglomerate mergers. The deletion was to ensure the Act covered more than just competition between the companies, but competition more broadly.

Congress basically said you needed to look at the acquisition in context. You needed to see if there was a trend towards concentration. But they made clear that you didn't just look at the market shares and be done. You had to look at whether or not the transaction enabled emerging firms to compete more aggressively against a larger firm.

And, of course, some parties took that argument to the extreme. If you go back and look at, for instance, the *Heinz* baby food case, one of the parties' arguments was that if you combine number two and number three in a three-person market, they would be able to compete better with number one.

While that clearly had its roots in the congressional changes in 1950, the court in *Heinz* said we're going to put a stop to that, that's taking things too far to say that number two and number three need to combine to compete with number one.

In the 1950 amendments, Congress also talked about failing firms, which obviously is an issue that comes up on a fairly regular basis. It has really gotten increased scrutiny these days because the argument that the firm may be failing is an issue that's come up often in hospital mergers. Currently in the *ProMedica* case the parties are arguing that the Supreme Court should grant cert in part because they argue that the Sixth Circuit had too harsh a standard of what was required to be failing.

So a lot of these things that Congress thought about in 1950 are still extremely relevant today.

Of course, Section 7 has always been forward-looking and the test is whether the transaction may be substantially to lessen competition.

I gave a speech shortly after I got to the Commission talking about the forward-looking nature of Section 7. That's a very big part of how we think about Section 7, particularly in evolving markets such as pharma markets. We do think that antitrust has a role to play even if the market is evolving. You have to take a very careful look at the facts and do the best that you can with what's before you to predict the likely effect of a transaction on competition.

Let's talk a minute about *Brown Shoe*. Because it is amazing that you really can't read an antitrust brief these days without seeing a reference to *Brown Shoe*. The transaction involved a combination at both the manufacturing and retail levels.

There was also a vertical component. The transaction was consummated by the time it was challenged. And after a year or two, Brown Shoe had become the largest outside supplier to Kinney.

A big part of the case was about market definition. The Court talked about reasonable interchangeability or cross-elasticity of demand, the very same concepts that we talk about today. You will rarely see a market definition discussion without a reference to *Brown Shoe*.

The Court looked at submarkets. They looked at men's, women's and children's shoes.

The parties argued that that was simultaneously the wrong way to look at it because that definition was too narrow and too broad. They said children's shoes can't be a market because boys wear different shoes than girls. And then they said these could not be appropriate markets because there were high-end shoes and low-end shoes, and a continuum of the quality of shoes.

The Court basically said we're not going to draw lines. I don't have the exact prices memorized, but there were shoes that were $3.99 and other shoes that were $4.25. How do we draw the line that one is low quality and one is high quality? And as I'm reading this I'm thinking, they sold shoes for that price? That's not what they cost now.

The Court lumped boys and girls shoes together because it said the competitive conditions for those types of shoes are alike. Although they didn't use the phrase, that is the concept of a cluster market, much the same way now that we lump together hospital services when we bring those cases. Obviously, knee surgery is not the same thing as obstetrics, and yet we lump them together because the way that they're provided, the way they're negotiated for and the like are the same.

As to the horizontal combination, the court had concerns because there was a trend to concentration. And that's pretty much where the discussion ended. There was no discussion of whether or not the theory of competitive effects was coordinated or unilateral. There was no discussion of the mechanism by which prices would increase or the ability of other manufacturers to expand. There was no discussion of the issues we now think about as setting forth the theory of harm.

On the vertical aspect, there was a trend toward vertical integration. The policy that the parent had of forcing its shoes on its subsidiary is what we think of as reasonable integration now. It might even eliminate double marginalization. Today we would analyze that in terms of whether there was an incentive and ability to foreclose. They didn't do any of that.

It's still an incredibly important case. It remains a leading case on market definition. It talks about how market shares can lead to presumptions that must be further examined. It makes clear the concern is about probabilities, not certainties. Where the effect may be substantially to lessen competition, *Philadelphia National Bank* says a merger is not saved because on some ultimate reckoning of social or economic debits and credits the transaction may be deemed beneficial. That's a long way of saying the efficiencies better be really good if you're going to have them outweigh the competitive concerns of the transaction.

It's still good law. But at the same time, I want to assure everybody that we, at the FTC, don't bring cases just based on the *Philadelphia National Bank* presumption. We do a lot more work. We make sure that there is a coherent story. I think you will see when you read our complaints and the Justice Department complaints as well, that we spell out in great detail our theory. We do not start and end with market share. But it is still good law. It is still the way courts talk about it. So we still cite *Philadelphia National Bank*.

I will commit that it's very unlikely that you will see *Von's* any time soon in a brief. Bill essentially said in his speech that there's general consensus that it probably went a bit too far in terms of the presumption. I think it's going to be hard to disagree with that.

And then, of course, there is *General Dynamics*, which says you have to look at the future competitive significance of the firm. And I think that the reverse is true as well. A firm could become more significant going forward and, therefore, it's important to think about that in assessing the competitiveness of a firm.

My time is running out. So I'm just going to mention one sentence about each of the cases on this slide. I think these are important cases for a variety of reasons.

Staples/Office Depot because it looked at the actual effects of competition between companies.

H&R Block, because it made the important point that even if there is another closer rival to each of the merging firms, the transaction can reduce competition if there is still substantial competition between them.

ProMedica makes the point that a flailing firm defense doesn't exist. In fact, the court called it the Hail Mary pass of presumptively doomed mergers.

St. Luke's has an important discussion of the need for efficiencies to be merger-specific.

Bazaarvoice says you can't just presume entry because somebody *could* do it. Entry must be likely. It also makes clear that even where a market is evolving and dynamic there can be competitive concerns.

If I had to say what cases I'd like to see tackled under Section 7, I think there's a lot more to be said about potential competition and future competition. I also think we'll be seeing a lot more about the healthcare industry in the coming years.

So that's my brief tour of the history of Section 7. Thanks.

MR. KOLASKY: Thank you, Jay.

As Debbie mentioned, antitrust history has become something of a hobby of mine, and so I'm absolutely delighted to have an opportunity to talk on this panel.

I'm also especially delighted since, as just a second year partner in a New York law firm, having an opportunity to speak to this assembly is indeed a thrill.

What I want to talk about today is an article that I've been working on, off and on, for the last 3 years, on the the legislative intent behind Section 5 of the Federal Trade Commission Act.

A copy of the full article is included in the materials. So for any of you who are having trouble sleeping and want a sedative, I commend it to you.

Even though the Federal Trade Commission just celebrated its 100th anniversary, as Debbie mentioned, last fall, we are still debating the scope of its authority under Section 5; in particular, to what extent its authority extends beyond conduct that would already be prohibited by the Sherman and Clayton Acts.

As I will try to show briefly today, I believe that the legislative history of Section 5 has a great deal to teach us on that subject and unfortunately has been too long ignored.

Eleanor started out by talking a little bit about the election of 1912 and I want to go into that a little bit more.

That election truly was probably the only time antitrust was a central issue during a presidential campaign and the election really turned into something of a national referendum on antitrust policy.

Each of the three candidates, as Eleanor said, had a distinct and different approach to how to regulate business.

Taft, the incumbent, was a former judge. He had appointed most of the justices that decided *Standard Oil*. He believed that *Standard Oil* and the rule of reason were right and that the right policy was strict enforcement of the Sherman Act in the courts using the rule of reason. In fact, after he lost the election, he wrote a book saying exactly that.

Teddy Roosevelt, past President, argued instead that we should accept monopolies as inevitable in a modern industrial economy. He, therefore, wanted to subject them to government regulation as we had done with the railroads.

Woodrow Wilson, the Democratic candidate, had to find some way to differentiate himself from the others. So he argued that instead of regulating monopolies, as Roosevelt wanted to, we should regulate competition in order to prevent them.

Wilson won the election decisively, capturing a record 435 electoral votes. The voters plainly agreed with him and he took that as a mandate to reform the antitrust laws along the lines of the literature.

Two of Wilson's key policymakers were Louis Brandeis and George Rublee. All of us know Louis Brandeis. Eleanor has already mentioned him. He was the one who argued that the purpose of the FTC should be to regulate competition instead of monopoly. That was a campaign slogan that he supplied to Wilson during the campaign.

But the other principal architect of Section 5 was George Rublee who started out as something of a disciple of Brandeis. Brandeis is the one who brought him to Washington. He, too, argued that the object of Section 5 should be to prevent the creation or continuance of monopoly through unfair methods.

The difference between them is that Brandeis liked the Clayton Act, thought that we could define which practices were anti-competitive in a statute, and he thought that the FTC should just be a sunshine agency, that it should have no enforcement powers because publicity was the best disinfectant against monopoly.

Rublee, who Brandeis left behind in Washington when he went off to do other things, became quickly disenchanted with the Clayton Act. He and many Democrats in Congress became convinced that there was no way that he could define in legislation all of the different ways a company, a monopolist, might exclude its competitors. And so he argued that we should give the FTC some enforcement teeth, and that was the purpose of Section 5, which he wrote.

He kept Section 5 very simple, very much like the Sherman Act. It has two operative sentences. The first one: "Unfair methods of competition in or affecting commerce are declared unlawful." And the second: "The commission is empowered to prevent persons from using unfair methods of competition in or affecting commerce."

Obviously, extremely broad, extremely vague terms, much like the Sherman Act itself.

By the time Rublee persuaded Brandeis and Wilson to add Section 5 to the FTC Act, it had already passed the House without that provision.

So when it was introduced on the Senate floor in June 1914 with this new Section 5, there was an enormous outcry both not just from Democrats, Republicans, Progressives, really across the board.

Senator after senator charged that Section 5's language was too vague, that it would confer upon five men a power more arbitrary than that possessed by any king or potentate on earth.

In order to overcome that opposition, the senators who were sponsors of the new Section 5 had to spend 10 weeks over a long hot summer in Washington persuading or overcoming those objections.

In order to do so, they ended up enunciating three key principles that they argued should govern the FTC's enforcement of Section 5, principles that I would argue should still govern the enforcement of Section 5.

The first governing principle is that Section 5 gives the FTC authority only to outlaw exclusionary practices, not exploitative practices.

Senator Francis Newlands, for example, who introduced the bill on the Senate floor and the chair of the committee that sponsored it, said forthrightly: "The commission is not to recognize monopoly, but to destroy it. Instead of regulating monopoly, we are regulating unfair competition so as to destroy monopoly in the future in the embryo."

They were trying to distinguish themselves from Roosevelt who had wanted to give the FTC authority to regulate monopolies. They said no, we're not going to give them the authority to regulate prices. That's why the FTC's decision of 2010 to challenge *N-data* was so fundamentally at odds with the legislative intent behind Section 5.

The second governing principle—and here is one where I think Eleanor may disagree with me—was that the purpose of Section 5 is to protect competition, not less efficient competitors.

Again, this was a consistent theme throughout the debates on the floor of the Senate. It was first raised by Senator Borah who was concerned that Section 5 would undercut the Sherman Act, because he believed the Sherman Act's purpose was to encourage competition no matter how strong, and that many small rivals thought that strong competition was unfair because they couldn't match the efficiency of their larger competitors, and he thought that a statute that outlawed unfair competition would outlaw price cutting by more efficient large firms.

"Un-huh," said Senator Albert Cummins and all of the other sponsors and proponents of Section 5. They made it very clear that its purpose was not to protect smaller less efficient competitors, but to protect the public from the harms of competition, restrictions and output and higher pricings.

The third governing principle is that Section 5 requires a rule of reason analysis in which the ultimate question is whether a practice may exclude equally efficient competitors.

Well, Eleanor is right that the initial reaction to the *Standard Oil* rule of reason decision was highly critical of it. By 1914, most of the senators and congressmen who spoke about Section 5 had come to recognize that that was the only analytical framework that could be used sensibly to enforce the Sherman Act or the other antitrust laws.

One of the principal proponents of Section 5, Senator Henry Hollis, whose speech was written for him by George Rublee, said on the floor of the Senate: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who by reason of their efficiency might otherwise be able to continue in business and prosper."

That's almost exactly the same test for monopolization that Judge Richard Posner has proposed as an equally efficient competitor test.

To speed up and finish, after some 8 to 9 weeks of debate on the floor of the Senate, the bill passed. It was sent to the Conference Committee. The Conference Committee tweaked it a little bit. They added language to require a finding that a proceeding under Section 5 would be in the interest of the public to make it clear that Section 5 was not simply intended to protect smaller competitors, and they strengthened the judicial review revision to make sure that the commission would interpret and enforce the law in a manner consistent with the legislative intent.

With those changes, the amended bill passed both houses by overwhelming margins.

At that point, World War I broke out in Europe. There was sort of a hiatus in antitrust enforcement. But when the first case under the FTC Act reached the Supreme Court in 1920 with Louis Brandeis as one of the sitting justices, the Court basically adopted an interpretation of Section 5 that was consistent with the legislative intent, as I've just outlined it.

Over the years, of course, things waned and webbed. During the 1960s, we had one justice on the Supreme Court, Justice White, suggesting that unfair competitive practices were not limited to those that violate the antitrust laws, but those that could violate the "spirit of the antitrust laws," sort of a new-age interpretation.

Subsequently, the lower courts moved away from that and started using the rule of reason in reviewing actions by the FTC under Section 5.

Now let's see if this works.

But we're still debating this, and so the beat goes on.

(Pause).

Anyway, the animation, since you missed it, was Sonny and Cher singing "And the Beat Goes On."

MR. HIMES: Since I downloaded it, it's my responsibility for messing up the animation.

Okay. Now you're going to learn what Section 8 is.

MS. GOTTS: Thank you, Jay. I'm so glad you volunteered to work the AV.

So you've heard a lot today about the elections that led up to Clayton Section 8 from both Bill and Eleanor.

It was clearly the center of a presidential debate. And believe it or not, at the core of all of it was a concern about interlocking corporate directorates as hidden sources of economic power. So it wasn't just that antitrust was important to stop monopolies, but they were concerned about interlocking corporate directorates.

The Stanley Committee, which was focusing on railroads and steel, wrote a report in 1912; the Pujo Committee—these were both congressional committees—did something similar on financial institutions—both of which were to lay out the case that interlocks existed.

I did have fun finding the clip art and putting it on this slide.

So we see President Wilson again, we see Louis Brandeis, a young Brandeis as mentioned in Eleanor's presentation. You've got to picture how effective he was. This is before he goes on the Supreme Court or anything else.

He takes the concern to the people. And at that time there isn't YouTube and the TVs and everything else. So it's *Harper's Weekly*, a series of really sizzling articles with titles like "Other People's Money"—I love these drawings—and "Serve One Master Only."

The "Serve One Master Only" article is particularly important. The theme is that the large bank houses were colluding with businesses to create trusts in major industries.

Brandeis criticizes the Pujo Committee report as not going far enough. Although it would "alleviate the present suffering and aid in arresting the disease, a cure is not possible without treatment"—this is coming from him—"which is fundamental. A major operation is necessary. The fundamental treatment required is simple, serve one master only."

President Wilson addresses Congress. It's hard to believe, the speech actually leads off on attacking interlocking directorates:

"Great investment banks have usurped the place of independent industrial management, and by prohibiting interlocking directorates you are to bring in new men, new energies and new spirit of initiative. And as a result of this, you're going to take scores of men who have been obliged to serve when their abilities entitle them to direct."

There is no mention of women, but let's take it step by step.

The original Section 8 had a very low threshold for us. But back then, that was a lot of money. When you think you could buy a pair of shoes for $3 dollars—a million dollar jurisdictional threshold is a lot of money. It applies to all horizontally aligned corporations. It was directors only.

And notably, it's the only substantive Clayton Act provision that banned the practice without any inquiry into effects. You know, it's a very easy thing. Are you both on the same board? If so, guilty, end of story.

On the next slide, here is a picture of Clayton, who was definitely a lot older than Brandeis.

Subsequent revisions were modest. Even though there were seven amendments, they all related to banking. Banking was a big focus.

The 1990 amendments were the first really major amendments. They raised the jurisdictional limits to $10 million and indexed it consistent with the intent. It was supposed to really affect big companies.

It added a de minimis exception. Now, this is the most important part of the entire statute for those of us who have to actually in practice try to figure out whether you have a problem.

The basis was that many U.S. corporations were having difficulty recruiting top quality business professionals, especially—now we get to—women and minorities. So we need to figure out a way in which we're not just saying that "just because the two of you are on the same board, you're guilty." We had to come up with a de minimis test.

The de minimis test is de minimis, but it's amazing on advising on this issue, for how many boards you do find that you're able to advise your clients that it's okay. There's still a lot of debate about what is a competitive sale and some of the other things, but to the extent to which the revenues/overlap is not just U.S., but international.

There were other things that Congress considered. One of them, to me, made even more sense than the de minimis exception, but it was rejected. The reason I'm a little biased is that I was involved with the ABA that proposed the change, which was that there would be a market share exception, basically a 10 percent test.

So if the corporations didn't have a 10 percent share, the idea was you could serve on each other's boards because you wouldn't have an exchange effect. But Congress wasn't going to go there.

The amendment also extended the interlock prohibitions to officers. The AMC considered, but rejected, the recommendation to repeal.

Now unlike when Eleanor was talking about Clayton Section 3 and intent really being something you see required around the world, as well as agreement with the idea of not wanting to have tie-ins permitted in all cir-

cumstances, just the opposite exists for Clayton Section 8. There is no other jurisdiction that I am aware of that has an outright bar against an individual or even their deputy serving on two boards, serving as officers in two different corporations.

Instead, the focus of the other jurisdictions that even look at this tends to be on the effect. And the effect has to be one in which there is a competitive restraint.

In the EU, for instance, it is in the context of conduct, or a conduct investigation, or a merger review, that the relationships of the corporations become relevant. And the same is true, I would submit to you, in places like Japan.

Interlocks are common worldwide. The U.S. remains an outlier in having a statute that bars the interlock.

Assistant Attorney General Bill Baer said that Section 8 violations are rare. I would say they're rare because companies really seek to comply with the law.

I actually actively counsel clients, as do others, on these issues. Major Fortune 500 companies, when they're about to put someone on board, have a questionnaire, asking what other boards do you serve on, and we actually look and think about this.

Government investigations still occur, particularly at the FTC, and also in the merger context, particularly when you have minority investments being made.

And I would note in the last 5 to 7 years there have been some real highly noted public situations where in the Silicon Valley high-tech industry in which directors—due to investigations by the FTC—resigned.

We have Google's CEO Eric Schmidt, who resigned from the Apple Board of Directors; Arthur Levinson, who was the former Genentech head and was serving on both the boards of Google and Apple and he resigned; and John Doerr, who had been on the Board of Directors of Amazon and Google, resigned from Amazon's Board.

Private enforcement also comes up, proxy fights/merger challenges, we see Clayton Section 8 being raised.

And so, my conclusion is that any reports that Clayton Section 8 is dead have been greatly exaggerated. It is alive, for better or worse, I'll note, and must be attended to absent its repeal by Congress.

With that, I met the time limit.

MR. HIMES: You did.

MS. GOTTS: I wanted to make sure you had time.

MR. HIMES: You were very nice. See, I did a Power Point because it was easier than thinking up questions for the four of you.

This is going to be about Section 4 or the treble damage provision. I suspect most of you have experienced it at one time or another either on the plaintiff's side or the defense side.

But here it is. You've seen it. I'm not going to leave it up there for very long.

Treble damages for everyone injured in their business, or property, including as well cost of suit and reasonable attorneys' fees.

How many of you have pondered about where it comes from? The answer: Section 7 of the Sherman Act.

And this—if my laser pointer works—it doesn't, okay. These are excerpts. Apparently the real signed bill down in the lower left, I think that's the President, Benjamin Harrison, and the other guys that had to sign are on the right. The full document is included in your material. It has to be authentic because it was on the Internet.

And, of course, there it is. It looks really a lot like Section 4 of the Clayton Act.

So how is it that everyone thinks about Section 4 of the Clayton Act when, in fact, it really was at one time Section 7, the Sherman Act?

We'll walk through it really quickly.

Thanks to Senator Sherman, after all—no really, why?

Let's go back right before the 51st Congress that passed the Sherman Act, and Senator Sherman, the Congress before introduced his first antitrust bill, it was called Senate 3445. It had a double damage provision and it applied to any person you see or corporation injured or damnified by what's called restraints of trade.

Bad language, right?

No. It's actually a legal term. I never knew this. It has something to do with injury. You can find it used in the surety business. And actually even in this millennium, you find occasionally court decisions that will construe the word damnified.

So the Senate Committee on Finance of which Senator Sherman was a member watered the bill down and essentially imposed what would amount to a rescissionary remedy. Not terribly unlike the common law.

Into the Senate. The Senate actually split the bill, created two provisions; one the rescission remedy, and one a single damage remedy.

And you have to really recognize the times here. To create a private right of action, even for single damages, was very unusual in the 19th century.

I don't know when Congress first enacted a private right of action under a federal statute. The earliest I know of comes after the Civil War in one of the enforcement acts, but I don't know of anything before that. So this is pretty unusual stuff, even for single damages.

Okay. Nothing happens with 3445. But Senator Sherman was first in line for the 51st Congress' first legislative proposal for the new Senate, S1, and that's the Sherman Act, Section 2. He had learned from the Senate the term before—we'll start with just full consideration, no more, no less, and the bill was referred back to the Senate Committee on Finance, which, by the way, Sherman sat on, and this time the Senate Committee on Finance went from the rescissionary remedy to twice again, no more damnified, I guess maybe they didn't like the language.

How do we get to treble from double? S1 was changed. It was actively debated in March of that year. There were a couple of sessions where a whole bunch of Christmas tree amendments were added to the bill and eventually the Senate actually gave up. And it referred S1 to the Committee on the Judiciary of which Senator Sherman was not a member. And the Committee on the Judiciary was directed to report back in 2 weeks. It actually did its job faster, reported back in 6 days, and it had taken Senator Sherman's bill and rewritten it.

What was previously a three-provision bill became one of several provisions, and Sherman's stuff is the stuff there with the lines drawn through it. Okay. That is his entire bill.

Midway down you start to see the Senate Judiciary Bill. That is several sections and is what eventually came to the floor of the Senate. And that is the first time that you see treble damages in this history of the legislation. This is what amounts to Section 7.

The Senate debated the Judiciary Committee's version—very briefly—and mind you, when you go back and look at the legislative history of the Sherman Act, most of the legislative history you'll see is about language that was never passed, but there were a couple of proposed amendments, one for concurrent state court jurisdiction was rejected, one for kind of class action joinder, and you'll see the rationale.

You know, there was not uniform embracement of Section 7. Senator Morgan: "When a plaintiff is allowed reasonable attorney's fees, if he has but 75-cents, he will always be very likely to find an attorney who will prosecute his case."

However, I think that you know commentators, and this is a particularly noteworthy monograph by Hamilton and Till, 50 years after the antitrust laws were enacted, thought this was a pretty important enforcement mechanism to put in a statute.

"The main reliance seems to have placed on a private suit," a man again—a man knew when he was hurt better than any agency or government could tell him, make it worth his while as the triple damage clause was intended to do, and injured members could be depended upon to police an industry. So that was sort of the underlying rationale.

The Senate Judiciary Committee version was adopted by the full Senate. There was some conference back and forth with the House. And Harrison eventually signed the bill into law.

Now, I have not mentioned, by the way, the House in any of this development. There is nothing that I know of or I think that any historian has found in which any of the House bills—and there were a dozen or more of them—had any kind of damage provision.

They typically had a provision that would permit rescission, which was consistent with the common law. And that was the extent of the remedies provisions that you found in the House. So that when the Senate Judiciary Committee version was presented to the House, it was the first time they had a damage provision.

Okay. So who wrote this particular provision? None other than the Massachusetts senator, Senator George Hoar, by the account of all the co-leading historians.

George Edmunds, a paper that is cited there, he was the Chairman of the Senate Judiciary Committee and he probably had a pretty good idea who wrote that particular section.

So from where did Hoar get the treble damages? Don't forget, this was unique. There was nothing like it in U.S. law.

You will see, of course, metaphorically depicted, a big pond which describes how the United States came to have a treble damage provision. It got it from the mother country, which was starting to sink on the lilly pad in the late 19th Century, but the U.S. was standing high.

And you have the treble damage provision passing from England through to the United States via a statute called the Statute of Monopolies, passed in 1623, in the reign of James I—and the full thing is listed or shown in your material, and if you try to parse through all of this English, written in ways we can't really understand, the first part of it declares "monopolies heretofore made or granted or hereafter to be made or granted to any person, are altogether contrary to the laws of this realm, and are and shall be utterly void of no effect"—anyway, and continuing on to the damage provision—if any person shall be injured by the exercise of monopoly, then in every such case the same person shall have his or her remedy.

And if you get all the way down—and "shall recover three tymes"—T-Y-M-E-S—they didn't have spell check back then—and that's your treble damage remedy. Way back in the early 17th century under the first of the Stuarts.

If you're thinking, oh boy, this is really cool, it's populist legislation in England back in the 17th Century—the answer is no, not quite. This is parliament and the king fighting. The king was granting monopolies. The parliament didn't like it.

Other parts of this bill make all kinds of exceptions to the voiding of monopolies. And the bill itself, in fact, creates certain criteria for the granting of patents. It's sometimes thought of as one of the primary bills in the foundation of English patent law and subsequently U.S. Patent Law.

So it's an entirely different environment, entirely different context, and I don't think there was any class action statute in England at the time.

So back to Clayton 4. What happened there? Basically nothing. Congress saw the treble damage provision of Section 7. Section 4 was a reenactment, didn't generate any debate at all meaningful in the Clayton Act debates. There were changes in the private remedy provision, because Section 7 was thought to be ineffective; as a result you see in the Clayton Act a tolling of the limitations period during the pendency of a U.S. antitrust case, you see the prima facie effect provision in the Clayton Act for a successful U.S. judgment and a private right of action for injunctive relief, all of which were quite interesting.

There was, by the way, no federal statute of limitations period at the time. But whatever it was, it was tolled.

The *prima facie* proof provision, of course, dealt with limitations on the doctrine of collateral estoppel or issue preclusion which were not very well developed at that time.

This was a big deal and there's lot of debate on this particular provision and how weak or strong it should be.

The private right of action is straightforward. That's Section 16. The Sherman Act permitted equity actions only by the U.S.

Parenthetically, there was an amendment to permit the state Attorneys General private enforcement authority. That was not passed, but of course you can find it in the law as a result of the Hart-Scott-Rodino Antitrust Improvement Act of the '70s.

So whatever happened to Section 7? Repealed. Unnecessary. Congress found a law that was unnecessary, so it repealed it in 1955. Section 4 applied to the Sherman Act, The Clayton Act, and the Wilson Tariff Act, which prohibited combinations in import commerce. Section 7 of the Sherman Act just prohibited violations of the Sherman Act. That's all there was. So you didn't need it anymore. And there was other legislation in 1955 dealing with some antitrust matters, including then the adoption of the 4-year statute of limitations that you all know today.

And that's the end.

MR. HIMES: We've got about one minute. Questions?

MS. FOX: I think there is a real misunderstanding that Brandeis was for inefficient business. Brandeis was for opportunity and freedom to compete on the merits.

There's a huge question, we know, about what is competition on the merits. But there was, in the first three-quarter century of the Clayton Act, an assumption that foreclosing restraints would block opportunity on the merits and diminish the freedom of the little guy to compete. This law was not to protect inefficiency but to open markets.

MR. KOLASKY: Very quick, and the point is that, yes, in the debates, and mind you Brandeis was not the moving force behind Section 5. He was basically out of the picture throughout the debates. His only role was to support Rublee in convincing Wilson to sponsor Section 5.

But during the debates, there was a great deal of emphasis on the importance of making sure that there was equal opportunity so that everyone would be able to compete on the basis of efficiency, but no desire to protect those who lost out of that competition because they were less efficient.

MS. FOX: Agreed.

MR. KATZ: Go ahead.

Q: It was more a comment.

Jay, I don't know whether in analyzing the Donnelly Act and whether it can be a class action because of Article 9's prohibition on penalties as class actions, whether your legislative history ever came up, which indicates that it's an incentive, not a penalty

MR. HIMES: Barbara, I'll cut it short. I can't tell you how many times we briefed that in the AG's office, and finally in the end, since I had lost it in three or four cases where we were amicus, I said to the appeals section, you take it, I'm not doing any good, I'll sign whatever you come up with. You know, it was decided 7-0 in the Court of Appeals, and the legislative history was developed for the state's law.

MR. KATZ: I want to thank this panel. This was a superb lesson both about history and also how we apply it to today.

Thank you very much.

(Recess)

Amateur in Name Only? The Intersection Between Antitrust Law and College Athletics

MR. KATZ: If everyone can make their way back to their seats.

We're now going from history to sports. You know, today we started with developments. We went on to merger, we talked about cartels and then history, now sports.

This is the last panel of the day. I do want to let you know that after this panel ends, we have a cocktail reception for antitrust associates and young lawyers. It will be at the Sutton Center, which is on this floor.

Let me get started on this last panel. The title is Amateur in Name Only? The Intersection Between Antitrust Law and College Athletics. Our moderator is Steven Tugander of the Department of Justice Antitrust Division in New York. Steve, please take it away. Thank you.

MR. TUGANDER: So as a government lawyer, I also have to do the usual disclaimer. Maybe mine is a little bit different from what we've heard, but any views expressed today are my own and they do not necessarily represent those of the Antitrust Division or the Department of Justice.

Before we get started, I want to thank Dan Anziska and Gerald Stein for being invaluable in helping out putting this panel together behind the scenes.

So sports fans or not, you probably know the Super Bowl will be played this Sunday. And with all the recent controversy surrounding the NFL, you probably also know that the NFL generates huge revenues, billions of dollars that are shared between team owners and the players.

But on the sports calendar, the Super Bowl is sandwiched between two other big revenue-generating events, and that's the college football playoffs in January and the NCAA college basketball tournament in March, which I think most people know is the Final Four Tournament.

But unlike the NFL players, college athletes do not share in the billions of dollars generated by their sports. In college sports, schools collectively enforce what they call amateurism rules that prohibit the players from getting paid.

So with all this money at stake, within the last few years there's been a surge in antitrust litigation challenging these amateurism rules, and that includes the pending class action suit, *Jenkins v. NCAA*.

Now the *Jenkins* suit was filed on behalf of a class of men's college football and basketball players. It alleges that the NCAA's amateurism rules constitute price fixing and a group boycott in violation of Section 1 of the Sherman Act.

If the suit is successful, it may pave the way for college athletes to start getting paid and start sharing in those large revenues generated by their sports, all of which lead us to the following questions.

Are the amateurism rules pro-competitive? In other words, are they necessary and beneficial to the higher educational system? Or are they, as the *Jenkins* suit alleges, the byproduct of an illegal cartel that exploits college athletes and harms American consumers?

So here, to help answer these questions, is our expert panel.

Everyone on this panel has a very impressive resume, but in the interest of time I'm just going to hit some highlights. The full bios can be found in the written materials.

All the way to my left is Professor Marc Edelman. He is an associate professor of law at the Zicklin School of Business at Baruch College. He focuses on sports law and antitrust law, among other things. He's cited by the media on a wide range of sports law topics, including how the Sherman Act applies to professional sports leagues and the legal issues pertaining to NCAA amateurism. And Professor Edelman also writes a column on sports law for *Forbes Sports Money.*

Sitting next to Professor Edelman is Dan Graca. Now, Dan has a job that most sports fans would love to have. He hosts a radio show on Sirius XM's Mad Dog Sports Radio channel, and he's going to give us a non-lawyer's perspective on the amateurism issue and give us a sense as to how fans, sports fans, feel about the possibility of college athletes getting paid.

Dan, if we want to listen to you, where and when can we tune in?

MR. GRACA: Well, every night, 7 to 11 eastern on Sirius XM Mad Dog Radio, Channel 85. And it's a welcome relief. Thanks for having me. I don't want to talk about deflated footballs like I have for the last two weeks.

MR. TUGANDER: That was going to be my first question.

And then sitting next to Dan is David Greenspan, who is a litigation partner in Winston & Strawn's New York office and co-chair of the firm's college sports sub practice group. Mr. Greenspan has represented National Football League players, National Basketball Association players, Major League Baseball players, National Hockey League players and various other sports entities and individuals.

He also serves as the Chairman of the New York City Bar Association's Sports Law Committee, and most importantly for this panel he represents the plaintiffs in the *Jenkins* lawsuit that will be the main focus of our discussion.

And sitting next to David is Professor Scott Hemphill. Scott is a visiting Professor of Law at NYU School of Law, Professor of Law on leave at Columbia Law School. He teaches and writes about antitrust, intellectual property and regulation of industry. I think most of you know for some time he served as the Antitrust Bureau Chief in the New York AG's Office. He also clerked for Judge Posner on the Seventh Circuit and Justice Scalia on the Supreme Court. And Professor Hemphill's antitrust work has been cited by the Supreme Court and he's testified before Congress on various antitrust matters.

And last, but not least, sitting to my immediate left is Dr. Donna Lopiano. Dr. Lopiano is the President and Founder of Sports Management Resources, a consulting firm that assists scholastic and collegiate athletics departments. She is also an adjunct lecturer in sports management at Southern Connecticut State University.

Now, previously Dr. Lopiano served for 18 years as the Director of Women's Athletics at the University of Texas. She's testified about Title IX before Congress, and she's a member of the National Sports Hall of Fame, the National Softball Hall of Fame and the Connecticut and Texas Women's Halls of Fame, and I believe there are some more halls of fame also, but we don't have enough time to mention them all. Dr. Lopiano was named one of the ten most powerful women in sports by Fox Sports.

So thank you, panelists.

And, Dr. Lopiano, why don't we start with you. Could you give us a brief background on the NCAA? For example, who are its members, what is its mission, how does it operate?

DR. LOPIANO: The NCAA was established in 1906 under the threat of the then-President Roosevelt. There were numerous football deaths and the president threatened to ban football unless higher education cleaned up its act.

The NCAA did not enforce rules between 1906 and 1948. It issued guidelines. It didn't really have a regulatory function. It didn't have an enforcement staff. It wasn't until 1952 that enforcement really kicked in.

Between 1952 and 1997, it was one member, one vote, legislative body that passed rules that governed how competition was conducted between member institutions. It is the largest association of 4-year colleges with athletic programs in the United States. It has 1,076 members. It's split into three competitive—I only got to 1997—but I'll come back to 1997—it has 1,076 divisions members. It's split into three competitive divisions. There are 346 members in Division One, its most commercial division, the one you hear the most of. It has 291 members in Division Two, which gives about half the number of scholarships as Division One. It is not as pure as Division Three with 439 members, which gives no scholarships at all.

But most of our attention is on these commercialized athletic programs in Division One.

Division One is split into three subdivisions. The most visible one is FBS, the Football Bowl Subdivision. It has 126 members and 10 conferences and it is, by far, the richest group.

I say that with tongue and cheek in that only 20 of those 126 programs make more money than they spend—20 out of 1,076 member institutions make more money than they spend.

Even the biggest budget, and I say this because I'm from the University of Texas, even the richest institution generating $160 million a year in revenues —the University of Texas—will go into deficit this year. And so, that's the FBS.

Then there's the mid-majors, the Football Championship Subdivision 120 institutions—and then 100 Division I institutions who do not play football

The important point I think is that, and this is what people don't realize, that NCAA Division I college athletics is a $12 billion industry. About $5 billion is generated by television rights, and the remainder of revenues is from sponsorship fees and ticket sales.

The NCAA itself generates about a billion just selling its own national championships —the tickets to and championship media rights .

The NCAA does not own the College Football Playoff. It is the only national championship that it doesn't own.

So I bring you back to 1997. What happened in 1997?

The one institution, one member vote system succumbed to threats from the FBS saying it was going to leave the NCAA if the membership did not give it majority voting power.

The system federated. An Executive Committee and a Legislative Council were formed with conference representation, and the FBS was given 50 percent voting power.

At that same time, in 1997, the FBS made sure it would continue to own the football championship rather

than the NCAA by adopting legislation specifying that if the NCAA started an FBS football national championship, all revenues would go to only FBS institutions.

And I just point this out because when we talk about antitrust lawyers going after big money, there's where it all is—in the FBS.

The NCAA basketball championship annually yields $417 million for the NCAA, and 90% of this money gets redistributed back to all Division I member institutions. Not so with the FBS College Football Playoff where the 126 members of the FBS are reaping the benefits of this four team championship playoff which currently generates $440 million a year. The value of this championship will increase to $1 billion when it expands to eight teams, which is inevitable. What you should know is of that $440 million, 75 percent of that money goes to the top five conferences in the FBS. The bottom five conferences only get 25 percent.

So that's probably the financial picture you need to know.

MR. TUGANDER: Okay. In a nutshell, if we could just focus on the NCAA's amateurism rules. What specific restrictions do they place on college athlete compensation?

DR. LOPIANO: Very quickly, all the NCAA does is say that there must be a demarcation between a professional athlete and a college athlete, and it draws whatever line it wants. So it makes up the definition of college athlete, and you know that as "amateurism."

It says that the professional athlete gets paid for playing a sport, and the amateur college athlete does not and cannot, and that excludes an athletic scholarship being considered as pay.

Athletic scholarships are not considered to be pay for play. They're educational grants. And so there are a series of rules that simply say to college athletes: "You can only get your athletic scholarship, nobody can pay you additional money for playing, and you don't have the rights to sell your name, image or likeness related to the playing of your sport because we will consider that to be pay for play."

The *O'Bannon* case did result in athletes being able to get more scholarship money from their institutions. Instead of the NCAA being able to limit scholarships to tuition, required fees, room, board, and books, institutions now have to increase those scholarships by anywhere from $3,000 to $6,000 to include "cost of attendance."

The *O'Bannon* judge has said to the NCAA that it must set pay limits or maximum scholarship limits to be the same as the Federal Government limit for other student financial aid, which is tuition, required fees, room and board, books, and cost of attendance

MR. TUGANDER: Which is a nice segue into Professor Hemphill.

Professor, as Dr. Lopiano referenced, in 2014, in the highly publicized *O'Bannon* case, Judge Wilken of the Northern District of California ruled in favor of the plaintiff class of college athletes against the NCAA.

Earlier in 2014, college football players at Northwestern won the right to unionize. Both these cases are now on appeal.

Can you give us a brief overview of the two opinions that were issued in those cases and what are your thoughts on how those rulings may impact the *Jenkins* suit that Mr. Greenspan's firm has filed?

MR. HEMPHILL: Sure. So thanks to Steve and the organizers for the invitation to join this panel. It's obviously a fascinating and timely topic.

I want to suggest three points from these opinions that might matter for the *Jenkins* case.

First, a point about college sports as a big business; second, a point about the enduring importance of amateurism; and third, a point—this is an antitrust conference after all—a point about the antitrust's rule of reason and how we might apply it to sports cases.

On the first point, college sports is clearly fully subject to antitrust law. It's economic activity, like any other. Sure, it's a non-profit. Sure, it's dedicated to amateurism. But that doesn't change the basic facts. Not only is this economic activity, it's perfectly ordinary economic activity in a lot of ways.

The *Northweste*rn case illustrates this.

The National Labor Relations Board is considering whether to allow the Northwestern football team to unionize.

Last March [2014], the board's hearing officer found that the players are employees of the university and, therefore, have a right to hold elections to figure out whether they want to unionize.

The team members voted. The votes have not yet, last I checked, been counted. We don't know the result because there's an appeal pending at the Board itself to see whether the hearing officers ruling will be confirmed.

The case shows that players are economic actors. They're conferring a benefit on the school and receiving compensation. At Northwestern, that compensation comes to about $60,000 a year for each of 85 scholarship players. That's a multimillion dollar outlay, depending on how you count a scholarship.

The case also illustrates that college sports are big business.

Beyond the players, Northwestern employs a head coach, three directors, nine full-time assistant coaches, five full-time strength coaches, two video staff, and two administrative assistants, more than 20 full-time employees in all.

The NLRB ruling doesn't state the salary of the head coach; it comes to a little bit less than $2 million.

At the same time, it's unclear how much compensation would go to the players in a fully open and unrestricted market. The ruling suggests that Northwestern clears something like $10 million after costs. If players see half of that we're talking about tens of thousands per player, not hundreds of thousands or millions. These are not NFL-sized numbers.

I think the bottom line for *Jenkins* is good news. Courts are likely to be receptive to the argument that college sports are a business.

Second, at the same time, this is a business for which amateurism matters. People like to watch college teams, whether to root for a particular team or because of how amateurism affects the quality of play.

Amateurism was front and center in the *O'Bannon* case.

This was a case brought by a former basketball player, who filed an antitrust suit against the NCAA challenging the rule that limits compensation to student athletes.

The challenge here was not to the lack of payment to play the sport. That issue is raised squarely by *Jenkins*. It's a narrower issue, the failure to pay players for their likenesses, which are valuable to video game makers and other licensees.

It's worth noting an odd contrast here to the *Northwestern* case. In the *Northwestern* labor case, the teams are in trouble, in part, because the players are being compensated so much.

Here the teams are in trouble because they're not being compensated enough by virtue of this restraint of trade.

The judge's opinion recognizes that amateurism matters.

Paying players a lot of money, she worried, would jeopardize the amateur tradition and it would remove one means by which college sports competes with professional sports and other forms of entertainment.

Now that should ring some bells for this audience. It's a bit like in the vertical restraints context, where we frequently observe intra-brand restraints like territorial restrictions or resale price maintenance being tolerated in the service of inter-brand competition.

So you might even imagine a small loss of competition among teams being tolerated in the service of improving competition between the different sports.

This second point is bad news for *Jenkins*, that courts seem to be at least potentially receptive to the central NCAA argument that inter-brand competition might justify some restraints on payment.

Third, a point about the rule of reason.

In the end the judge condemned the NCAA rule as a violation of Section 1. She did this under the rule of reason, using the usual procedure that's been developed in the lower courts. She said that the NCAA has market power, that the rule restricts price competition, and that there are some pro-competitive justifications here. (I mentioned one, and there is a second which I'm going to ignore for now.)

So she was faced with a classic case of what we might think of as mixed conduct—mixing something we like with something we don't. There's some restriction on price competition, while furthering some kind of justification. This is a common problem that also shows up in mergers, in vertical restraints, and in monopolization.

Courts basically have two choices in a case like that. They can either balance by adding up the bitter and the sweet to see which is bigger. Or they can dodge the question by asking is there a less restrictive alternative. In other words, is there some way that the sweet could have been achieved with less bitter.

Courts don't really like to balance. So this less restrictive alternatives test is attractive. And the court seized on that here.

The alternative embraced by the court was to pay the players, but only a little bit. In other words, don't pay them too much. Allow a little bit of price fixing, but not a lot of price fixing, and also to put some of the payment in escrow so the players will be paid afterwards.

And I think this part of the ruling just raises a number of interesting questions for antitrust.

First, does it count if the alternative is less effective in achieving the defendant's justification, as this alternative probably did? Courts often say that the alternative needs to be equally effective. But is that really right?

Second, is this a legitimate alternative at all, or is it just a payoff to the players? You can't make a restraint pro-competitive simply by making the firm pay out its profits in some way. Not every solution like that would count as a less restrictive alternative.

Third, this is kind of a complicated remedy. Do we want courts to be doing things quite so fancy?

And finally, does a less restrictive alternative of this kind actually avoid balancing? If in fact, the alternative is a bit less effective in serving the justification, isn't the Court actually engaged in balancing? And, if so, don't we need to recognize that for what it is?

For *Jenkins*, the upshot is that the plaintiffs are going to need to think carefully about how the rule of reason should proceed, particularly if the Ninth Circuit has trouble swallowing the less restrictive alternatives analysis.

MR. TUGANDER: Thank you, Professor.

David, let's bring you into the conversation. The *Jenkins* suit alleges that the NCAA amateurism rules have no justifiable pro-competitive effect, and your suit also alleges that because most college athletes will never have a career in the NFL or the NBA, they will not receive any economic benefit from the scholarships they receive.

But doesn't the current system result in a fair bargain for major college athletes? They get a free college education worth hundreds of thousands of dollars and a chance to make millions in the NFL or the NBA in exchange simply for playing a sport?

MR. GREENSPAN: Well, first thanks for having me, for organizing this.

I'm going to give my own disclaimer here, I am here speaking for me, not for plaintiffs or for our class.

I think that the short answer to your question is we don't allege that college athletes get no benefit, but certainly we allege that the bargain is not a fair one.

The issue that *Jenkins* challenges is that, as Donna explained, the compensation for college athletes is the line that the NCAA draws for everyone. In this room we call that price fixing.

There is zero competition on economic terms between colleges and universities to recruit students.

So that's the issue, that absence of competition. For their services, they get a scholarship, and as someone who is still paying off my student loans—I wouldn't be so naive as to suggest there's not a significant economic benefit to that, but that doesn't mean it's a fair bargain.

The antitrust laws don't evaluate what makes a fair bargain subjectively. It's what is produced by competition in the market and there is zero competition among colleges on their own economic terms for athletes.

And I don't think that there is any debate at all that if these NCAA amateurism prohibitions were lifted that colleges would do more and that college players would do better.

You have to think about other students on a college campus which are not prohibited from working and earning money above and beyond their scholarship, from exploiting their talents.

Yale didn't stop Jodi Foster from performing in movies while she was a student. No one objects to a resident advisor making $400 bucks a week above his or her scholarship. No one stops the business manager of a student newspaper from earning money above his or her scholarship.

You have schools like Stanford that have entrepreneurship programs where they can invest, they effectively serve as venture capitalists for students to develop businesses on campus; see, e.g., Google.

But for some reason, when it comes to college players who are part of this massive multi-billion dollar industry, we hear amateurism. But there's nothing amateurism about paying coaches $7 million a year. There's nothing amateur about college stadiums. There's nothing amateur about their TV contracts. There is nothing amateur about the $68 million facility that Oregon just built with a barbershop and a waterwall—I don't know what a waterwall is. You know, this purported principle of amateurism is reserved only for college players.

Just to wrap up, you're right, most of these athletes are never going to have a whiff of the NFL or the NBA. So why isn't it that during their short window of time during which they're risking their bodies, they're distracted from their studies, why shouldn't they—and many of whom come from impoverished backgrounds—why shouldn't they get their fair share, which is simply what colleges choose to do independently on their own, why shouldn't they have the opportunity to share in that?

MR. TUGANDER: Professor Edelman, turning to you.

In the law review article that's contained in the written materials for this program, you take the position that the NCAA's amateurism rules violate Section 1 of the Sherman Act. You also contend that the NCAA has advanced a legal fiction that student athletes are foremost students and not workers.

If the NCAA is not really interested in promoting amateurism, then what do you believe to be the real reason behind its amateurism rules?

MR. EDELMAN: Well, the amateurism rules in the United States were really propagated in the first half of the 20th Century by the Big Ten schools.

Up until 1951, the Big Ten was a dominant conference and the NCAA actually operated out of the back room in the basement of the Big Ten.

Now the Big Ten became very concerned in the late 1940s and early 1950s, they used to have the dominant college football programs. This was the University of

Michigan. This was the University of Illinois. It was Red Grange as the star running back.

And what happened was, all of a sudden, schools in the south became dominant in football for the first time. And part of how the Southeastern Conference schools became dominant was that they were offering better terms to their athletes, and the Big Ten member schools wanted to make this go away, and they cannot control the SEC schools.

So the Big Ten pushed very hard for the creation of a more powerful NCAA. And the leader of the first NCAA, Walter Byers, was actually a former assistant over at the Big Ten.

So this created for the first time, may I use the word in front of antitrust people, a cartel, that before that point in time each of the conferences, at least on a conference level, would compete against each other for college athletes—now if you put in place a unified rule where you will boycott any school that does not follow the system, that ends the price competition.

Now in terms of who benefits from this, if you look at the NCAA colleges today, several of them make more than $100 million in revenue. In fact, the University of Texas' athletic program and the University of Alabama's athletic program each brings in more money per year than any single NHL team. Put in perspective, the University of Texas's total Athletic Department revenues are greater than those of the New York Rangers.

Now with all this money coming in, Dr. Lopiano said that most of these colleges do not turn a profit. And indeed, that's true, because when you have inefficiencies, you have inefficient price outcomes.

What happens is, because you don't pay the college athletes, it leaves a huge sum of money to be allocated to other places.

And if you look at the salaries of college presidents, athletic directors and coaches, they're able to take a benefit of that dead weight loss. Because they're not paying the college athletes, it's a 100 percent share of revenue that goes to those within management.

So today the reason why I believe the rules still exist are those that vote on the rules within the bottom-up organization, the NCAA, have a very strong financial interest in maintaining the status quo.

The reason why Jim Harbaughs of the world are able to make close to $10 million a year in salary is because that money is out there, and that money is out there because when you factor the revenues of college sports, you don't have an expense of college athletes.

As long as the system remains the same where all college athletes' salaries are pegged at zero, it leaves additional funding, which theoretically could go back to the university, theoretically could go into science, education and scholarships, but empirically, if you look at where the numbers have lied, tends to go in a substantial amount to some extraordinarily highly paid coaches, especially in football and in men's basketball.

MR. TUGANDER: So then Dr. Lopiano, turning back to you, do the NCAA's amateurism rules serve any legitimate purpose? Do they provide any benefits to athletes or to the college educational system, and are you in favor of allowing college athletes to get paid?

DR. LOPIANO: I'm in complete agreement with Dr. Edelman, for sure.

The NCAA has made a mess of this. There is no question in my mind that like professional athletes, college athletes should get half of the proceeds from television media revenues and everything else, but they should do so within the context of a non-profit higher education institution with the NCAA mandating that colleges provide greater benefits rather than salaries, like those that are now required because of *O'Bannon*, up to the maximum level allowed of any other student.

People also don't realize that colleges and universities are not paying athletic injury insurance for student athletes. All of these schools are using parent policies or requiring students to buy their own insurance. The NCAA should be mandating that institutions provide this benefit to their athletes. There could be academic trust funds that provide athletes with post-graduate scholarships. There could be educationally defensible forms of compensating athletes with regard to benefits that protect their health and welfare and advance their education.

That's the direction it should have gone, especially since Congress has given incredible tax preferences to enable institutions of higher education like the University of Texas to earn $160 million

If Jim Smith at Texas wasn't given an 80 percent tax break on the $50,000 he just paid for a suite at the football game, then the whole system would be a different system.

So I'm in favor of amateurism rules in the context of increasing educational opportunities for kids and protecting their health and welfare, but not straight pay.

MR. TUGANDER: So, Dan, let's bring you into the discussion.

In the *O'Bannon* case, the NCAA has taken the position that one of the reasons its amateurism rules are necessary is that fans may become less interested in college sports if college athletes are paid.

Do you think fans of college sports will become less interested if the players are paid? Do fans care about the

amateurism issue? And what's your position on whether a college athlete should receive compensation?

MR. GRACA: I'll start with saying thank you for having me, and it's an interesting discussion, it really is.

The subject of whether or not college athletes should be getting paid, believe it or not, is one of what I'd like to call several hot button issues that really resonate with an audience on my programs.

There's several—any time you throw out well, the NCAA—because I think that the majority of fans out there, college football fans, and we're here in New York City where I know it's hard to believe to some people outside of here, but here in New York City college sports, college football is not exactly the most popular thing. New York City is a pro city. But if you go to some other parts of the country, I mean college football, especially, is life, it's religion.

It's from a little bit different perspective, and they are really passionate about this stuff—and so am I, because it's a big part of what I do.

In terms of whether or not these guys should be getting paid, it's a very complicated issue. It's not as cut and dry as, okay, pay these guys. We know that the football program and the basketball program are the revenue generating sports.

There are a lot of student athletes at these universities. I'm not naive enough to realize that you have kids who are on the swim team, kids who are on the volleyball team, tennis team, under scholarship, but that's not what these networks are paying hundreds of millions of dollars to televise.

If you then go ahead and give a little something to the football players, something for the basketball players—what happens if I'm somebody who is on the golf team, student athlete, under scholarship, and I raise my hand and say, well, where's mine?

It's a very complicated issue. And I understand the facts are the facts, that the football program is bringing in tons of money, the basketball program a little less.

As several of you guys have pointed out, and you've all made outstanding points, when you look at the window to earn, it is a capitalist society that we all live in, and everybody is out there looking for theirs.

I consider myself a performer. It's what I do. So I only have a narrow window and I'm going to go out there and make sure I capitalize. It's no different for these college athletes.

If I could take you back to something that happened involving a very prominent player back in the fall, running back from the University of Georgia, Todd Gurley, outstanding, going into the season, he was one of the front runners for the Heisman Trophy for the best player in college football, was off to a great start. Then midway through the season, he got injured.

But prior to that, he was suspended by his school, by the NCAA, because it was found out that he was signing some autographs. Signing your name, that's an innocent thing, right? I mean just signing your name, and he got suspended because of that.

If you went to the University of Georgia's website where they sell a bunch of merchandise pertaining to the football program, on there were jerseys, number 3—or whatever his number was, I can't remember—but a bunch of jerseys, which you assume were Todd Gurley—it didn't say Gurley on the back, but it was physical number 3. People were buying it because of Todd Gurley.

Todd Gurley didn't see any of that money. Just because his name wasn't on it, the school could say, oh no, that's just a generic jersey with just an arbitrary number on it.

Well, wouldn't you know that as soon as Gurley got suspended, the very next day you go back to that Georgia website, those jerseys were off.

So why are you taking the jerseys off, if it's not really that player? You know, so there's the hypocrisy of it.

It really is amazing. Donna threw out just the numbers that are being thrown around and with the television revenue, that's another thing that has really taken off.

We know about the growth of the Big Ten network, which has grown leaps and bounds, maybe better than any other regional sports network that we have in the country. The Pac-12 Network has come about now, the SEC Network launched last year, which is huge. The Longhorn Network down in Texas, they have their own network.

You guys mentioned the college football playoffs this year, and when it was first run it was a huge success, I mean ridiculous television numbers, greater than 40 million people were watching each of these games on New Year's Day.

ESPN wrote a check for more than $475 million a year for the exclusive rights to televise these games.

It's essentially what it amounts to, it's six games a year, $475 million dollars.

Why are they paying that money? They're paying it to watch these athletes, these performers.

If you want to bring it back to academics at the university level, nobody is writing a check for $400 million to watch the Science Department go out there and whip up some lab experiments for 3 hours. They don't do that. They want to see guys perform.

If I could put myself back in those days and I was out on that field. Things have changed, the world has changed, it's evolved—now college sports, it has become not even big business, that doesn't do it justice—the NCAA system, in my opinion, it's an outdated model. It's an antiquated model.

So yeah, I do think that there needs to be some change in order. For sure.

MR. TUGANDER: So let me direct this question for David and Professor Edelman about the *Jenkins* suit and what is in the best interest of college athletes and the educational system.

In the *O'Bannon* case, the NCAA has also defended amateurism rules on the ground that they serve the important function of integrating student athletes into the academic community.

The NCAA argues that academic integration benefits not only the athlete, but also the entire student body.

And recently the media, and very recently, has been reporting on a scandal at the University of North Carolina where athletes took easy classes to stay eligible.

And one month ago, on December 30, 2014, the *New York Times* ran a front page story containing the tweet of Ohio State quarterback Cardale Jones, who wound up winning the college playoff tournament, that stated, "Why should we have to go to class if we came here to play football? We didn't come to play school. Classes are pointless."

Now the *Jenkins* suit alleges that most of its class members do not graduate.

If the *Jenkins* suit is successful, will athletes have any incentive to go to class and get a degree? Will they have any incentive to be part of and contribute to the college community, and will the concept of the student athlete be completely eliminated at schools with major sports programs?

So, David, why don't we start with you?

MR. GREENSPAN: Well, I guess I take issue with any generalization that college athletes aren't interested in their educations or if they get something outside of a scholarship they're going to not take that organic chemistry test and just sit in their dorms staring at their money.

But I think that the right way to look at this issue is, are these amateurism rules promoting the integration of academics and athletics?

And since these two obviously disturbing stories you're talking about occurred in the regime where these amateurism rules exist, maybe they're not doing a very good job in promoting what may be an end with redeeming value. But the question is, are these rules promoting it?

This debacle at UNC, which was not just about students taking easy classes, but a school and coaches and administrators that were complicit in making sure that the students stayed eligible for their teams by any means possible, that scandal dates back before Martin Jenkins was born. I mean this isn't like a problem that could be born out of a win in the *Jenkins* suit. It's something that exists now.

The Ohio State quarterback who tweets that "I'm here to play football," maybe that's because his school has him on, playing prime time games, has him on a practice schedule and a travel schedule that would make it difficult for a Rhodes scholar to succeed academically.

It's clear—I mean if you look at the schools in the NCAA, they're incredibly lax at enforcing their academic requirements. They're incredibly lax about enforcing this ostensible 20-hour a week limit on the amount that college players are supposed to practice. But they're extremely vigilant when it comes to enforcing rules that are designed to make sure that students don't get extra benefits.

So this scandal could go on in North Carolina for decades with all these red flags and no action, and yet Todd Gurley is suspended for signing autographs.

There is this great anecdote that Oklahoma self-reported because a few football players ate too much pasta at a buffet and the school was concerned if they didn't self-report, they could get in trouble for giving these students an extra benefit, i.e., too much spaghetti.

So when the students were fined, they were fined like $4 bucks each to remedy the problem.

So schools have this massive infrastructure to make sure that the college athletes don't get anything extra. But there's no attention to really what would promote their academics.

So again, I think the essential question is do these amateurism rules have anything to do with the integration of academics and athletics? And I think the evidence is no, they don't. It's about not paying students whom they don't want to.

MR. TUGANDER: Professor Edelman, same question. Will the concept of the student-athlete be completely eliminated if the *Jenkins* suit is successful?

MR. EDELMAN: Well, the example that you gave was on University of North Carolina, which is the extreme example of malpractice by a university in terms of education. And people could put that aside as the extreme example.

But even in the mainstream, I'm completely in agreement with David here that even under the current system where the college athletes are denied compensation, the NCAA on its own has moved away from the educational model.

Let's not talk about the extreme University of North Carolina. Let's talk about the mainstream for a minute.

Syracuse University men's basketball team, if you take a look at their schedule last season—and I think Syracuse is fairly standard for a college program—and if you take every night game that they played on the road during a school day, during the week, and called that a missed class day—and then assume that any game they played on the road more than 3 hours away that began at 8 p.m. or later would be a missed class day the following day—because if you tip off at 8 p.m., you finish at 10, by the time you get finished with everything that needs to be done, the locker room, press conferences, before you could leave you're looking at 1 or 2 in the morning—if you take those days, if the men's basketball team made it all the way to the NCAA championship game, they would have missed more than 33 percent of the class days in their semester merely based on NCAA mandate.

The NCAA tournament, Thursday Friday, Thursday Friday, Thursday Friday, and lo and behold a championship game, Monday night—just winning that tournament, you miss at least 10 percent of your class days.

Or the NCAA football championship game. Look at Ohio State for a moment. The students at that school, including the football players, were on break for close to a month. They could have played the game any single day during winter break without requiring athletes to miss class.

The championship game, it was played the night of the first day that Ohio State football players and students began their spring semester.

You want to talk about irony? The Ohio State University president sent a letter to all the students saying it is your obligation to be in class on this day. You should not go to the game, because it's so important you don't miss class.

But when the revenues were factored into the equation, it was not important enough to change the date of the game or change the start of the semester to make sure the athletes were there.

So, factually, will *Jenkins* make things worse? I don't know how it could get worse.

But I also want to make one very quick legal point, and it might be a boring minutia point, but this is an antitrust conference so I do want to talk about antitrust for a moment.

Rule of reason. It's supposed to be balancing the anticompetitive effects of a restraint against the pro-competitive benefits in that same market.

Pro-competitive benefits are not public policy things that we care about. They are things that make the mark the same benefit in the economic sense, as the Supreme Court articulated in *U.S. v. National Society of Professional Engineers*.

Well, what was anti-competitive about the NCAA's rules? It harms labor markets by preventing college athletes the opportunity to compete for pay in a free market.

What is the NCAA alleging as the pro-competitive benefit? They say it improves the educational process by combining the college athletes with the regular students.

Is that the same economic market? I'm doubtful that it is. I think Judge Wilken struggled with that question until she had to address the matter on a factual point of view.

But even if I'm wrong, even if I'm completely wrong and the NCAA really does care about education and does all of this truly to help college education and not to make their coaches wealthy, as a matter of antitrust law, I'm very doubtful that still should matter.

MR. TUGANDER: Dr. Lopiano, let's come back to you.

Assuming the *Jenkins* suit is successful and college athletes are free to receive compensation, what impact do you think that result will have on women's college athletic programs?

DR. LOPIANO: Let me throw this in before I answer that question.

All of our conversations conclude that the NCAA remains broken. These antitrust lawsuits are not going to change that. The NCAA is going to remain broken.

The same thing happened in the mid-1970s when the Amateur Athletic Union (AAU) was screwing up USA national teams. AAU governed all of our national teams. And Congress finally stepped in and said we're going to develop a non-profit federally chartered organization to replace the AAU.

And that could be done today. Congress can give an antitrust exemption, a limited antitrust exemption, to a new non-profit, federally chartered non-profit organization. That would be mandated under a threat of loss of higher education money from the Federal Government to straighten out this crazy mess and to have educational sport conditions be a condition of the antitrust exemption.

That's the direction we should go in instead of arguing whether or not we're going to win antitrust cases.

Now to your point. What will happen if the arms race continues to escalate as paying players will have it do?

The answer is the same thing that happened when the arms race began 20 years ago with the influx of big media money from the NCAA Final Four Basketball

Champion—$770 million, 90 percent of which was returned to the institutions.

What's going to happen is Division One athletic programs are going to drop our so-called Olympic non-revenue sports. Over the last 20 years, the richest institutions in the country are the only institutions eliminating men's and women's sports. Divisions Two and Three, the poorest athletic programs have been adding men's and women's sports during this same period. We know that in Division I, all of the money saved by dropping sports is going into two sports, men's football and men's basketball.

Currently 78 percent of the men's sports operating budgets in athletics goes to two sports—men's football and men's basketball. Seventy-eight percent! So we're going to see a continuation of this trend to drop sports programs.

Some women's teams are going to benefit because OCR still considers higher education extracurricular activities to be covered under Title IX.

So what we are going to see is 87 football players getting treated like kings, 13 men's basketball players getting treated like kings, and an equal number of women athletes getting treated like queens, and the rest of the athletes will go away.

What we haven't seen yet, creeping up behind the arms race, are the costs of antitrust and other lawsuits on court dockets. The concussion lawsuits alone—an estimated $770 million minimum liability for the NFL to settle with 3,500 former professional players—will be replicated at the college level where there are 30,000 football college athletes currently playing. There will be huge costs coming up that aren't yet reflected in the financial picture I just painted where all but 20 schools are operating in the red.

There has to be structural systemic change and it can't include a continuation of the NCAA as we now know it.

And let me say one more thing about the lack of academic integrity of the system. The data is the NCAA uses for its TV public service ads is always presented in the aggregate. It is true that athletes graduated at higher rates than students in the general student body. But we should not be talking about data in the aggregate. We should be talking about the 10 percent of all athletes in Division I and close to 50% of those recruited in basketball and football who are being admitted under waivers of normal admissions standards into colleges and universities woefully unprepared to compete in the classroom against their peers.

They are receiving presidential admissions exceptions in order to get in. They are reading at the 3rd and 4th grade level and being admitted to institutions of higher education. Academic fraud is inevitable when you have that number of kids who cannot compete with their classroom peers..

That is the crime that is going on now that the NCAA isn't addressing, that everyone is trying to push under the rug under the guise of aggregated data. And that's not the worst of it. This academic exploitation has racial overtones. There is no question that the majority of those specially admitted kids are predominantly non-white and they're being absolutely exploited in order to raise money for their institutions.

We have much work to do and I don't particularly think the antitrust lawsuit route is the way to do it. All you're doing is going to pay those exploited athletes. What is that going to do?

MR. TUGANDER: Well, Professor Hemphill, back to you. This will be more of an antitrust question.

The *Jenkins* suit alleges that the NCAA's amateurism rules violate Section 1 of the Sherman Act as a *per se* violation and under the rule of reason.

So which standard has applied in prior similar cases and should the NCAA members be characterized as competitors, a joint venture, or both?

MR. HEMPHILL: I think pursuing this as a per se case is pretty challenging. The famous Supreme Court case was not per se after all—we're talking about *NCAA v. Board of Regents of the University of Oklahoma*, which the court decided back in 1984. That case condemned a restriction on TV appearances that had been imposed by the NCAA. That case emphasizes the amateurism issue that we've been talking about.

The court had said, "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question whether it needs ample latitude to play that role."

I expect you'll hear that quote over and over again.

MR. GREENSPAN: I've heard it.

MR. HEMPHILL: I should say, I agree with Marc's earlier point that the consideration justifications is not an open-ended policy analysis, but I think it's worth noting that Judge Wilken was focused on the amateurism point. Here is the quotation: "the court therefore concludes that the restrictions on compensation do play a limited role in driving consumer demand for football and Division One basketball related products."

So I think it's going to be hard to get around that.

The old Supreme Court case has a couple of things it teaches us. One, the court does have ways of handling mixed conduct. They did a less restrictive alternatives analysis.

The NCAA had offered a justification of competitive balance that is closely related to the amateurism argument.

And the Court said this is not even arguably tailored to serve such an interest. There were lots of other restrictions already in place that were better tailored to serve that.

This connects with a point that David made before in the context of student integration. Are the rules actually promoting the justification? If not, then this is actually pretty easy. You can say this is justification, but it doesn't count if your chosen means isn't doing anything helpful toward that end.

Now I think the old Supreme Court case is relevant for another reason. We already talked about per se, and we talked about rule of reason.

But the case is known for employing a kind of intermediate quick look analysis where a court inspects the justifications and finding them wanting, sometimes, condemns the conduct without further ado.

Judge Wilken's clear reluctance to do that might be a hint that plaintiffs are going to have the full kind of rule of reason slog on their hands.

One final point.

MR. HEMPHILL: It's sometimes said here and in lots of other antitrust contexts that courts should not be in the business of second guessing the judgment of private parties about their conduct.

But the Supreme Court case makes clear that courts can and should second guess the NCAA or anybody else at least in the sense relevant to antitrust. I think the very label, "second guessing," suggests a confusion about the role of the court here.

The point is not to tell private parties how to do their job. To the contrary, the courts are making an independent judgment about whether we should tolerate the loss of competition.

MR. TUGANDER: So I just want to go down the table one by one, real quick, maybe a minute or less.

If we start with the premise that the main goal of antitrust law is to promote and enhance consumer welfare, I want to get a sense from the panelists as to how fans are harmed by the current system.

Is there any legitimate argument to be made that the best athletes are not playing because of the NCAA's restrictions on athlete compensation?

Dr. Lopiano, why don't we start with you and just move down the line?

DR. LOPIANO: Deceptive advertising, that these are not students at colleges and universities who are playing the game, and I think we're deceiving the consumer into believing they are.

MR. TUGANDER: Professor Hemphill?

MR. HEMPHILL: I mean I think it depends on who we think the consumers are.

MR. TUGANDER: Should they be considered the fans or someone else?

MR. HEMPHILL: Here when we say consumer welfare, usually we mean the effect on the players.

As to fans, I think it's a little bit trickier. The games will probably be played in more or less the same way they are right now.

The amateurism argument does suggest there might be a loss to fan's welfare if they do, in fact, care about whether the players are paid. I think we've heard a mix of views about whether that's really true.

MR. TUGANDER: David?

MR. GREENSPAN: So I'll let Scott articulate my quarrel with the premise. But even focusing just on fans and are fans hurt and is there any legitimate argument that the best players aren't out there—I mean there is a very legitimate argument. Yes, fans whose Heisman winning quarterback just decided to leave college and go to the NFL. If these incentives are changed, maybe that player makes a different choice. Maybe he stays in school, gets a degree, and the fans' Heisman winning quarterback is back for his senior year.

And athletes that have no chance of going pro, maybe they are currently making choices not to play basketball and football in college because there's no career for them afterwards and the incentives aren't currently there for them to join.

So I think that things could look very differently even from the perspective of a fan, in a beneficial way, to a fan if these restrictions were eliminated.

MR. TUGANDER: Dan?

MR. GRACA: You know, it's funny. College sports is unique. I think back to when you asked the question about whether or not the fans are going to feel gypped in any sort of way.

Seinfeld had a great joke about when we root for teams nowadays in professional sports, how essentially all you're doing is you're rooting for laundry, because players change teams every so often. You can't even really rule out identity with your favorite team.

To a certain extent, it's true with college sports. You have kids that come in, some for 2 years, some for 3 years, and then they're either going to the pros or their career is over.

As long as that team is going to run out of the tunnel each and every weekend and you're there rooting them on and they're wearing the uniform, I think that fans are about who it is, as long as their team is out there. That's all they care about.

Nowadays, you have guys, whether it's transferring, leaving school early, like David just brought up—the appeal is always going to be there for that next level and, of course, the great perks of those multi-million dollar contracts.

MR. TUGANDER: Professor Edelman, real quick.

MR. EDELMAN: I'm a fan and I'm harmed because I live in New York and I would like to see the best quality football players play on the college level.

In a free market, if we all got together with our buying preferences, we probably could have had Marcus Mariota come to Fordham, or come to Columbia or another program.

But the reality is we are not able to do that because we cannot pay. And by contrast, Oregon is able to build a multi-million dollars fitness facility with all types of incredible locker rooms, sneakers, and free video games.

MR. GREENSPAN: And don't forget the barbershop.

MR. EDELMAN: And the barbershop. And they get Marcus Mariota, not the free market solution which would bring him here to New York where consumers have the most money to spend.

MR. GRACA: They don't have a barbershop at Fordham?

MR. TUGANDER: I want to just ask David one very quick question and then I want to see if we have a couple of minutes for some audience questions. I know we're at about that time.

David, if you could just give us an update on the procedural posture of the *Jenkins* suit.

MR. GREENSPAN: I can give you a quick answer. The defendants moved to dismiss. Their motions were denied from the bench. Our class and the consolidated class, we've both moved to certify injunctive relief classes. In *Jenkins*, we're not seeking damages, we're never going to seek to certify a damages class. The class certification motions will be heard in the spring.

Beyond that, there is not a schedule for the case going forward. But one note, the *Jenkins* case, once pretrial proceedings are exhausted, we will go back to New Jersey and have our trial there.

MR. TUGANDER: Do we have questions from the audience?

Q: Dr. Lopiano, is there some kind of summit that is being convened to try to have this discussion outside of the—I know this is an antitrust day—but these are very real issues about potential exploitations of these young people, and is there some kind of convening that's going on to try to do problem solving?

DR. LOPIANO: There is a move in Congress, a bill, identical to one that was offered during last fall's lame duck session, to establish a Presidential Commission on Collegiate Sports Reform, which would consider all the things I just mentioned: a limited antitrust exemption, a federally chartered organization replacing the NCAA, soup to nuts. A Presidential Commission is exactly what prefaced the action in the 1970s to replace the AAU with the United States Olympic Committee (USOC). So there's precedent for it.

If that can happen, all of these problems are aired with full transparency. We cannot expect the NCAA, which is ruled by the FBS plutocracy, to do other than what it is not doing — only advancing the interests of the wealthy schools. The FBS schools are not going to consider all of these costly athlete benefits that damage their current ability to give athletic directors and men's football and basketball coaches million dollar salaries.

The Presidential Commission is the only way to go, and a bill will be filed in this session again.

MR. TUGANDER: Was there another question?

Q: After Dr. Lopiano's compelling statements, as an antitrust lawyer I'm conceding that I don't see much of a role for antitrust here. Nevertheless—

DR. LOPIANO: Well, I do, because it adds fuel to the fire. It's going to force Congressional action.

Q: I understand. And we have the cases, so they have to be dealt with.

So addressing—I'd love to just ask Mr. Greenspan this, but he probably won't be able to answer me, so I'll ask it of everybody—I'm hearing from a lot of sources and reading a lot of discomfort with the notion of an injunctive remedy that results in a system in which these athletes are just paid, you know, insurance is great, but ultimately I think a lot of participants in the cases, what they want is competition that results in them being paid dollars, and I do hear a lot of discomfort with that.

Thinking about the relationship between remedy and theory of the case, is there any disconnect, is there a problem if the results were to be a system of say trusts or deferred compensation of some sort assuming, you know, on the merits of the cases, go to the athletes?

MR. GREENSPAN: I can answer, I'll answer some, but not all of the question, which I think it's an antitrust case. It's strike down the unlawful restraint, period.

And so, to be clear, I think this is often a misconception about our case. We're not seeking an injunction requiring schools to do anything, not seeking an injunction requiring schools to pay athletes, but simply to stop the NCAA from dictating a one-size-fits-all rule for all schools.

And schools will use their best judgment about what they think, they want to balance academics and athletics and the like, they'll make their own choices.

DR. LOPIANO: That's exactly right. That's what's going to happen. The Big Five Conferences have proposed an academic trust. They want to promise every student athlete that if you don't graduate, you have a lifelong access to an athletic scholarship—to a scholarship. You can finish any time you want.

Think about that for a minute. They're saying to all these athletes, don't worry about studying now, you can study later, just keep eligible. It is an impetus supporting a continuation of academic fraud. So all of these solutions, I think, are fruitless.

Q: I have a non-antitrust question. Did I hear that they don't provide health insurance to the football or basketball players and that they rely on the family's health insurance?

DR. LOPIANO: Yes.

Q: That is the craziest thing I've ever heard. They were banging their heads there for the colleges and they have to pay for their own medical?

MR. GREENSPAN: And, by the way, their athletic scholarships are not guaranteed. So in addition to that prize for getting hurt, they yank their scholarship if you can't play.

DR. LOPIANO: If the NCAA had exclusive right to the College Football Playoffs, and it should have the exclusive right to conduct national championships, the proceeds from that event could pay for a primary athletic injury insurance policy for every single one of the 480,000 NCAA student athletes.

Q: For games and training. You get hurt. You break your knee. You're doing it for them. They should pay.

MR. GRACA: And that's a common risk, to a large degree. They just think, oh, this guy is on scholarship, he has a free ride, whatever. They are not guaranteeing.

And it took me a long time to realize this and to even have it brought to my attention, because I was just like most people. But they can yank that thing any time they want, and then these players are hung out to dry. But you don't hear about those situations often.

MR. KATZ: On that non-antitrust note, we're going to conclude.

I should say, actually, the fact that we've gone to some non-antitrust issues to me demonstrates, in fact, how relevant it all is, because you've got some competition to real life and real business very quickly when you let the discussion flow.

I want to thank the panelists for a superb panel.

I want to also thank the audience for sitting through a long day, but a very engaging and exciting day.

We have cocktails for young associates next door. We have a dinner at 6 p.m. I hope to see you all later.

Thank you very much.

Scenes from the Antitrust Law Section Cocktail Reception

Thursday, January 29, 2015
The University Club • New York City








The 2015 NYSBA Antitrust Law Section Dinner

MS. HART: Good evening, everyone. It's so nice to come together in this beautiful setting after such a successful day.

My name is Barbara Hart and I am now the past Chair of the Antitrust Law Section, and it's my honor to introduce Elai Katz, the current chair of the Antitrust Law Section, who today ran a fantastic day of programs and is going to now venture into an exciting area of substantive discussion for our Section, which is such a collegial and substantive Section, which ultimately came together for high level discussion. Today was the paramount example of that.

So you can all go ahead and start your dinner. Thank you for taking your seats.

We have with us Lisl Dunlop, who is the vice chair of the Antitrust Law Section; William Efron, the Director of the Northeastern Regional Office of the FTC; Nicholas Gaglio, who is the Financial Officer for the Antitrust Law Section; Elai Katz, our new chair; Jeff Martino who is the Chief of the New York field office of the U.S. Department of Justice; Eric Stock, the Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York; and Michael Weiner, the new secretary of the New York State Bar Association Antitrust Law Section.

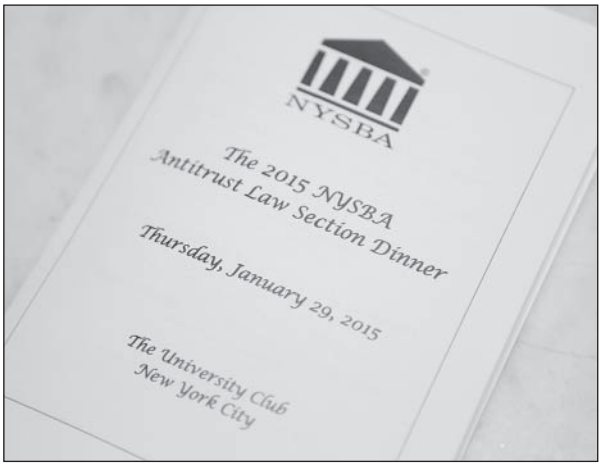
Without Michael's and Ilene's and Hollis' incredible efforts on putting this function together tonight, we would not be having such a lovely evening and what will prove to be a very lovely social and substantive professional gathering and one I look forward to every year.

So thank you Michael, Ilene and Hollis for your efforts on this evening.

Elai will be introducing our keynote speaker and telling you about the way in which the program is going to unfold tonight, and I'm going to introduce Elai Katz. Congratulations, Elai on your new chairpersonship.

MR. KATZ: Thank you, Barbara. I'm so glad to see a nice crowd here.

In addition to thanking Michael, Ilene and Hollis, I want to make sure we thank our sponsor. We have many sponsors at the platinum, gold and silver level. You can see their names in the program. I want to especially call out the platinum sponsors, Analysis Group, Berkeley Research Group, Compass Lexecon, the Garden City Group, and NERA Economic Consulting.



So we're going to do things a little bit out of order tonight. Normally, we have the keynote speaker at the end. We're going to start with our keynote speaker so she can get back to Washington for a very important meeting..

After that, we have the main course. We will resume with regular programming. We'll express gratitude to Barbara Hart for all her great work as the immediate past chair, and then we will present the Lifland Award to Bruce Prager.

First, I'm very pleased and honored to introduce Commissioner Julie Brill.

Keynote Dinner Speaker: FTC Commisssioner Julie Brill

MR. KATZ: Julie Brill has been a Commissioner of the Federal Trade Commission since 2010. She has been deeply committed to protecting consumers both from a competition or antitrust perspective and from a consumer protection perspective. She's been doing both for a very long time, long before she arrived at the FTC. She's one of the rare people who we can say truly knows and understands and has given much of her career to both of these important causes.

Prior to becoming Commissioner, Ms. Brill was Senior Deputy Attorney General and Chief of Consumer Protection and Antitrust for the North Carolina Department of Justice. She served as an Assistant Attorney General for Consumer Protection and Antitrust for the State of Vermont for over 20 years.

On the antitrust side, among her many important opinions and speeches, she wrote the Commission's unanimous decision in *ProMedica*, dissolving the merger of two hospitals in Toledo, Ohio, which was upheld

on appeal by the Sixth Circuit last year. She's also written significant high tech decisions, including *Google* and *Intel*.

On the consumer protection side, she's protected privacy rights, among other things, particularly online and mobile technology settings. And as many of you know, she doesn't just protect consumers in that space, she also understands how these new technologies work. She uses them herself. She was tweeting today about this very event.

She's been named "the Commission's most important voice on internet privacy and data securities issues" and one of the top minds in online privacy.

And although she sometimes describes herself, I think, as a Vermonter in D.C., she also has strong connections to the city, the state and this region.

She's been a lecturer-in-law at Columbia Law School prior to being at the Vermont AG's office. She was an associate at Paul Weiss here in New York. She graduated from Princeton University magna cum laude, and from NYU Law School where she had a Root-Tilden Scholarship for commitment to public service.

She has been a very good friend of our Section. She came up to speak on one of the panels at the Annual Symposium several years ago, and we thank you very much for coming to speak with us yet again tonight.

Please everyone join me in welcoming Commissioner Brill.

MS. BRILL: Thanks so much. That was a very thorough review of my bio. So there won't be a test afterwards, I promise you.

It's really nice to see all of you. I was very glad that the snow did not come once again to New York. That was nice.

So thank you to the New York Bar Association for inviting me. Thank you Elai for having me here, I so appreciate it.

I had a chance to speak with some of you when the ABA had its Fall Forum just a few months ago where you were celebrating the FTC's 100th anniversary.

The contrast between that event and this reminds me of something Pablo Picasso once said: "When art critics get together, they talk about Form and Structure and Meaning. When artists get together, they talk about where you can buy cheap turpentine."

Now, maybe it is because, in November, I addressed a luncheon where the strongest thing served was sweet iced tea and tonight we are making a serious dent in the nation's supply of artisanal whiskey—but I've found that when D.C. antitrust lawyers get together, they talk about mergers, acquisitions, and the latest FTC healthcare competition workshop, and when New York antitrust lawyers get together, they talk about how lousy the Knicks are.

I've been thinking about Picasso as I've been researching what our world looked like in 1914. As most of you know, the FTC celebrated its centennial last September, and it has been fascinating to study the changing times into which our agency was born.

In 1914, the world's first electric red and green traffic lights were installed in Cleveland, Ohio, and the Panama Canal opened in, of all places, Panama. Robert Goddard started building rockets. The first regularly scheduled airline passenger service began between St. Petersburg and Tampa; Charlie Chaplin made his film debut; Babe Ruth began his professional baseball career; green beer was invented in the Bronx; and Europe toppled into the First World War.

1914 was also the apex of the Cubist art movement, and Pablo Picasso was at its center. Cubism revolutionized Western art and set it on a winding and many-branched course that it still travels today.

Jean Metzinger, a painter himself and Cubism's first and leading scholar, described the Cubist artist as approaching his subject from many different viewpoints and placing it in the context of space and time. That retreat from the singular perspective gave the Cubists' work a modern and game-changing complexity and depth. As Picasso said, "I begin with an idea and then it becomes something else." Cubism was born and art was forever changed.

I like to think that the Progressive Era leaders who gave birth to the FTC shared some of the Cubist spirit, for it is certain they, too, believed the most complete understanding of a subject comes from viewing it through many different lenses.

Our founders, men like President Woodrow Wilson and Justice Louis Brandeis, gave us a variety of tools to approach our mission: The authority to suggest and make policy, to research, to educate, to enforce laws related to consumers and competition.

They also defined our role as advocate for not just one set of participants in the marketplace, but for all.

By ensuring fair and efficient competition, we ensure markets works for businesses, the consumers they serve, and the greater economy.

The Progressives constructed the FTC to work by consensus, not on the prevailing partisan winds, but on dispassionate facts and reasoned analysis.

The 1914 Senate report on the FTC Act described an agency "competent to deal with complex antitrust matters

by reason of information, experience, and careful study of the business and economic conditions of the industry affected."

This duality lies at the core of the FTC's very foundation. Yes, devotees of the then-new social sciences that the Progressives were, they wanted us to think and analyze and study—and we do, with our workshops and our reports and our 6(b) research authority.

But they also wanted us to act, which is why they gave us law enforcement powers, policy advocacy responsibilities, and an education mission.

Twenty-four years after its founding, the FTC was also empowered to investigate and prohibit unfair and deceptive acts and practices in commerce.

I believe our founders wanted the FTC to come at competition issues by both thinking and doing, a concept that, in 1914, was as forward looking as Picasso's cardboard and sheet metal guitar sculptures.

Wilson and Brandeis would be pleased that today's FTC is still committed to analysis followed by action based on analysis. It is in that light I would like to look at a few of the issues in competition that occupied the FTC in 2014 and are likely to remain at the top of our agenda in 2015.

In terms of its impact on consumer quality of life and ascendancy in our economy, the healthcare market is to today's FTC what steel and oil were to the original Commission.

According to the OECD, healthcare spending makes up approximately 17 percent of the Gross Domestic Product of the United States.

So, it is no surprise that we devote considerable resources to investigating and, where appropriate, challenging mergers among healthcare providers that would result in higher prices.

Both the FTC Act and the Affordable Care Act share the common goal of promoting high quality and cost-effective healthcare.

While the vast majority of healthcare provider mergers do not attract antitrust scrutiny, the FTC will challenge mergers that would likely result in higher rates and reduced incentives to compete on clinical quality or patient satisfaction.

Despite what many have said, a federal district court made clear in *FTC v. St. Luke's* that the ACA and antitrust are not at cross-purposes. In that case, the Court granted a permanent injunction blocking the hospital and physician network St. Luke's Health System from combining with Saltzer Medical Group, Idaho's largest independent, multi-specialty physician practice group.

Focusing on the horizontal overlaps between the merging parties, the FTC argued that the acquisition would combine the two largest providers of adult primary care physician services in the relevant market.

The federal court agreed, finding it "highly likely" that healthcare costs would rise as the merged organization "obtains a dominant market position," which would allow it to negotiate higher rates from managed care organizations, which in turn would be passed on to consumers.

The Court also noted that improving healthcare quality and lowering costs is not dependent on a merger, or on any specific organizational structure.

The FTC's competition efforts made headlines again in April 2014 when the U.S. Court of Appeals for the Sixth Circuit upheld the Commission's 2012 decision finding that ProMedica Health System violated the U.S. antitrust laws when it acquired its rival in the Toledo, Ohio area, St. Luke's Hospital.

The Court stated, "The Commission had every reason to conclude that, as ProMedica's dominance in the relevant markets increases, so does the need for Managed Care Organizations to include ProMedica in their networks—and, thus, so too does ProMedica's leverage in demanding higher rates."

On the key issue of how to resolve the antitrust injury, the Sixth Circuit also found that the Commission did not abuse its discretion in selecting divestiture as an appropriate remedy. ProMedica has appealed the case to the U.S. Supreme Court, and we all await its response.

About 12 percent of total healthcare spending, or 2 percent of total GDP in the U.S. is devoted to pharmaceuticals, and it is one of the FTC's top priorities to make sure that these markets are working for U.S. consumers.

The states are also active on this front. A group of state Attorneys General have announced they are investigating recent spikes in certain generic drug prices. For our part, the FTC has and will continue to focus on anticompetitive pay-for-delay deals and pharmaceutical mergers.

In June 2013, in *FTC v. Actavis, Inc*., the U.S. Supreme Court held these pay-for-delay deals are subject to antitrust scrutiny, vindication for our longstanding, bipartisan campaign against them.

Since the *Actavis* decision, in September 2014, the FTC filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania charging that several major pharmaceutical companies illegally blocked consumers' access to lower-cost versions of the blockbuster testosterone drug, AndroGel.

As this action reflects, payments do not have to be in the form of cash to qualify for scrutiny as unlawful pay-for-delay deals under *Actavis*.

Not only will we identify agreements raising potential antitrust concerns for our enforcement efforts, we also look for opportunities to advance the principles upheld by the Supreme Court in *Actavis* through amicus briefs or other advocacy.

Last month, the FTC released our annual report summarizing the potential pay-for-delay deals received between October 1, 2012 and September 30, 2013.

These annual reports underscore what various industry observers have noted, that arrangements for compensation to delay generic entry have been more creative in recent years, including the use of "no authorized generic" arrangements.

Amicus briefs, such as the one we recently filed in Third Circuit in the *Lamictal* litigation, provide us with a good opportunity to explain the economics of such commitments to the federal courts and why they can function like the reverse payments the Supreme Court addressed in *Actavis*.

Pharmaceutical mergers are another area in which the FTC combines research, analysis, and enforcement actions to support competition.

We conducted several significant investigations into pharmaceutical company mergers, resulting in eight announced consent orders in calendar year 2014 alone.

One of these enforcement actions is particularly noteworthy because the merging parties were two of only a few likely future competitors, and the Commission required divestitures in two generic markets that did not yet exist. Endo Health Solutions and Boca Life Science Holdings were among a limited number of companies that were in the process of developing generic Bromfed-DM, a drug used to treat respiratory illnesses, and a generic version of Zamicet, which is used to relieve pain.

As originally proposed, the Endo/Boca merger would have substantially increased concentration in these two generic drug markets—neither of which existed yet—by reducing the number of likely future suppliers.

Though our founders would have perhaps been surprised at how healthcare competition concerns crowd our agenda, they would not have blinked at the multi-pronged approach we have taken to address those concerns.

The same, I believe, could be said of our work on patent assertion entities. As most of you know, these are firms that attempt to generate profits by purchasing patents, then either licensing them to companies already using the patented technology or litigating against those businesses.

The FTC first started examining PAE activity in workshops leading up to our 2011 Report on the IP marketplace, and we followed that up with a joint workshop with the Department of Justice Antitrust Division in 2012.

Currently, we are in the midst of an extensive review of PAE activity, a so-called 6(b) study, named after the statutory provision that gives us authority to undertake the project.

All reports indicate that PAE-initiated lawsuits are on the increase, with one study claiming PAEs accounted for 62 percent of all infringement suits in 2012.

Some find this trend a positive one. They argue PAEs make the market for intellectual property more robust by compensating small inventors who might not otherwise have the resources to enforce their patents, by acting as a ready buyer for the patents of failed start-ups, thus reducing the investment risks associated with early stage technologies, and by allowing operating companies to monetize intellectual property.

Others disagree. They contend that PAEs impose unnecessary costs without promoting the dissemination of technological know-how.

Also, because PAEs do not manufacture products, they are not subject to countersuit, and therefore have little or no incentive to cross-license patents. This behavior contrasts with the more traditional scenario of rival producers, each with its own patents, settling competing infringement cases by cross-licensing rather than engaging in expensive legal battles. Moreover, the FTC has found that PAEs also have few of the reputational concerns that might deter a manufacturing company.

While panelists and commenters at our 2012 PAE workshop provided anecdotal evidence of these and other potential costs and benefits of PAE activity, many stressed the lack of more comprehensive empirical evidence needed to better understand what's at stake.

But, up until that point, most data describing the types of patents acquired by PAEs and their assertion strategies as compared to other patent holders has been inaccessible because it is confidential.

Fortunately, the FTC's 6(b) study will allow us to shed light on some of these questions. We've sent information requests to approximately 25 PAEs across a variety of market sectors, and to approximately 15 non-practicing entities and manufacturing firms in the wireless chipset sector.

Our goal is a broad descriptive examination of the PAE business model, including their organization and structure, their economic relationships, and their actions in terms of patent acquisition, assertion, litigation, and licensing.

The data is coming in as we speak. We hope to be able to complete a report relatively quickly—by the end

of 2015—which we are sure policymakers at all levels and branches of government will put to good use.

Some have suggested that enacting legislation that addresses some of the patent issues should wait until our 6(b) study is done, but I disagree. Various provisions in bills proposed in Congress will most certainly help to further discourage frivolous lawsuits and improve patent quality, actions the FTC has long encouraged.

Given the bipartisan efforts to move this issue forward, I am very hopeful that Congress will act to pass a bill implementing these important reforms.

At the same time, I, like many others, am very much looking forward to the findings of the FTC's PAE study, which will surely shed light on the more complex issues at stake here.

Similarly, the fact that we are still in the middle of our study does not present a barrier to appropriate law enforcement action, as we took in a recent case involving MPHJ Technology Investments.

If the law enforcement agencies—the FTC and DOJ, as well as the states—uncover other PAE activity that is in violation of current law, they should act expeditiously to take whatever enforcement actions are warranted to stop inappropriate PAE abuse.

The FTC is shaping and enforcing policy in many 21st Century hotspots—healthcare competition, pharmaceutical prices, patent assertion entities—not to mention advertising, mobile payment systems, data security, data brokers, and the Internet of Things. And, perhaps somewhat remarkably, we are doing so with a playbook penned by 20th Century leaders like Wilson and Brandeis. We study activities and business structures that impact innovation and markets, but we do not just study. We act when we see consumers threatened, when we see competition faltering.

Our founders expected us to use all the tools they gave us to pursue our mission of protecting competition as it shapes the economy and consumers as they navigate the markets. They expected us to think and act. And when it comes to any of the myriad of competition issues under our jurisdiction, this is exactly what you can count on us to do.

Thank you very much.

MR. KATZ: Thank you very much, Julie, for your great speech.

Dig into your salads. We're going to take a break from talking up here, let you guys talk among yourselves, and very shortly we'll address the program.

MR. KATZ: Okay, everyone.

Thank you, everyone. So I want to continue on with our program today. The next part is thanking Barbara. So I want to congratulate Barbara on a terrific year.

But before I do that, I want to take the time to thank all the moderators and the panelists who put on a tremendous program today. I know many of you are seated here. You really covered the gamut. We talked about mergers, about cartels, we sat for a history lesson, which was fascinating—and we talked about sports, which was also very exciting. It was a great program.

I want to make sure we thank those of you from the State Bar Association for all of your help.

I am also grateful to my associate Lauren who did so much work to make this day come together.

And I'd like to thank Michael Weiner, Hollis Salzman, and Ilene Gotts. Ilene couldn't be here tonight. She had to be somewhere else. We've been talking about how it's the 100th anniversary of the FTC, but it tonight is also the 50th anniversary of Wachtell. If it wasn't for that, Ilene surely would be here.

So thank you for putting together this evening.

Now let's get back to Barbara, which is really what I want to talk about.

Under Barbara's leadership, the Section has been brought to new heights. We've all benefited from diversity in terms of viewpoints as well as gender, ethnicity, and all of the other categories that we care about.

Barbara worked tirelessly to bring out an outstanding antitrust program and content for the New York Bar and she has broadened the audience that we reach with our Section's work.

She does it with great humor and passion, which is really infectious and makes everyone around her enjoy what we do so much.

I should also mention that even though Barbara's devoted so much of her time and energy to our Section, she's also done pretty well in her day job. She was recently appointed to be the President and CEO of her firm Lowey Dannenberg Cohen & Hart. So congratulations to that.

Barbara, it is my great honor and privilege to present you with this gift on behalf of the Section and to thank you for your fantastic service this past month.

MS. HART: Thank you so much.

It's wonderful to have such lovely professional friendships as one does when you participate actively in this Section, and I really encourage everyone to step forward and to know that you can find friendship as well as provocative interesting professional growth in a group such as this.

Elai, I just want to say, I know that you may not get to watch *Downton Abbey*, like I do—so I want to say: Remember, we are only custodians of the Abbey, we don't really own it.

So, I'm passing it on to you, and I know it is in good hands, and I know you're going to have tremendous success this year. Enjoy it as much as I have. Best of luck.

MR. KATZ: Thank you.

I suppose that comment about *Downton Abbey* is appropriate in this structure.

Next up, I'm going to call Eric Stock who is going to introduce and describe our very worthy recipient of the Lifland Award.

Antitrust Law Section's William T. Lifland Service Award

MR. STOCK: Thank you, Elai.

My name is Eric Stock. I first have to give a quick disclaimer.

I work at the New York Attorney General's Office, but I'm not speaking on behalf of the office today. I am speaking on behalf of myself and the Antitrust Law Section, and I think we're all speaking from the heart when we honor this great colleague of ours.

Tonight, I have the privilege of presenting an award that means a great deal to the Antitrust Section and all of us in the Bar. The award is the Section's William T. Lifland Service Award.

This award is presented once per year to an antitrust practitioner in recognition of his or her extraordinary accomplishments in the field of antitrust and for his or her contributions to the profession and the community.

Previous awardees have included such alumni of the Antitrust Bar as Milton Handler, and also, of course, Bill Lifland, for whom the award is named.

Ladies and gentlemen, our honoree tonight is Bruce Prager who easily meets the extremely high standards that have been set for receiving this very prestigious award. In fact, he exceeds them.

Through his scholarship as an antitrust lawyer and practitioner, including his pivotal role as co-author of a leading antitrust treatise, Bruce has helped bring guidance and clarity to a very complex carrier of the law. His legal work—spanning both high profile mergers as well as high stakes jury trials and appeals—have not only benefited his clients immensely, but he's helped antitrust law develop sensible practices and good rules.

His service to the Bar, including a leading role in our own Section, his years of mentoring junior attorneys, and his dedicated pro bono work have exceeded anything that could be reasonably expected of a busy law firm partner.

Now, if you will indulge me, I'd like to spend a couple of minutes talking about Bruce's career.

In 1977, Bruce was a junior associate at Skadden Arps. His legal career was born at roughly the same time that the Hart-Scott-Rodino Act was passed—and I'm not convinced that's a coincidence.

In fact, legend has it, and Bruce may confirm or deny it when he comes up, that Bruce actually delivered the very first Hart-Scott-Rodino filing from Skadden to Washington, D.C. on the train. He's nodding...

And just as the HSR Act rose, quickly rose to become a part of the established lexicon of antitrust attorneys, so did the name Bruce Prager.

Bruce quickly established himself in the profession, becoming a co-author of the leading antitrust treatise for the HSR Act, which is now called the Axinn Stoll Fogg and Prager treatise.

In fact, in the decades since, just as antitrust practitioners nationwide have turned to this treatise, many countless clients have learned to depend on Bruce and turned to him as their advisor.

And I should mention that Bruce's treatise is so important in HSR decisions that it is sometimes called the HSR Bible, or even the Good Book.

And this means that the next time somebody asks you, your kids, or something, who wrote the Bible, before giving the answer you think they mean, just be sure they don't mean Bruce.

Now, as we know, for many years Bruce was a partner and co-head of the antitrust practice at Latham. And Bruce's dedication to his firm was matched only by the dedication of his team to him.

In his over 35 years of practice, Bruce left in his wake not only a trail of pleased clients, but also a new generation of antitrust lawyers who he spent years carefully mentoring.

It is well known at Latham that when you get a memo back from Bruce, you get not only a lot of comments, but also a lot of personal attention and a lot of guidance.

Many aspiring antitrust attorneys have benefited from his guidance, and I'm going to add myself to that, too, because although I never personally practiced at

Latham, it was actually through Bruce's advice and support that I joined this Section and strove to meet the standards that Bruce set for dedication and service.

And I should say that anyone who has worked with Bruce knows that he is not only a great lawyer, but he represents the best of what the New York legal profession has to offer. He's an incredibly strong advocate for his clients, but he's also a true gentleman.

In working on an important matter, Bruce manages to focus simultaneously on high level strategy, but also with a level of attention to detail that brings to mind the image of a master craftsman.

When I was in private practice, I worked with Bruce on several antitrust matters, and my experience, which I know is the same as those at Latham and those elsewhere who practiced at Latham, was that Bruce was always a real pleasure to work with and it was always a great way to learn.

And, importantly, in fact just as importantly, if you were on the other side of a matter with Bruce, you were never treated harshly and never treated unfairly. Those from outside New York who come to our fair city to practice and may believe that New York lawyers are nasty or unfair were immediately disavowed of that notion when they worked adverse to Bruce.

Every government enforcer in this country and every adverse litigant that's had the opportunity to work with him knows that when they get something in writing from Bruce, it is serious, it is not exaggerated, and the assertions in it are grounded in a careful review of the facts. Nothing borderline left Latham with Bruce's name on it.

And Bruce can afford to speak the cordial respectable tones because his careful lawyering and attention to detail meant that the points he was advocating for were invariably right.

And whether it was high profile mergers like the Caesars Harrah's deal or an antitrust trial like the *Coalition for a Level Playing Field* jury trial, the points of fact and law that Bruce advocated for always tended to be upheld by whatever agencies or courts had the opportunity to consider them.

Bruce has also been one of the most hard-working and dedicated members of our Section. He's had every title that is available in the Antitrust Law Section and he's had every leadership role. In fact, he's even the first person from our Section to have the role as head of the Section caucus of the entire Antitrust Bar of the New York State Bar Association, and he was the first person from our Section to now serve on the Executive Committee of the New York State Bar Association, and I'm told that that's not just so he could say that he's had every position in the bar.

Finally, I know we're getting close to dessert now, but just before we close, I do want to mention Bruce's great contributions to the legal profession outside the practice of antitrust and to the community.

First, it goes without saying to anyone that knows him that Bruce is a dedicated husband to his wife Mary and a fantastic father to their two children.

Despite the commitments that he has to his family and the great commitments he has to his law practice and clients, Bruce has had enough heart for quite a lot more.

When there was a need at Latham for a lead partner to supervise the firm's work obtaining reparations for Holocaust survivors, Bruce happily stepped up to take on the role. Through Bruce's personal efforts and the efforts of hundreds of associates that he led, countless victims were able to file papers needed to receive reparations.

You know, I certainly don't want to exaggerate things, but it isn't every day that you get to honor someone who wrote the Bible and defended Holocaust victims.

Bruce, for your great contributions to the practice and development of antitrust law, for your unhesitating dedication and service to the antitrust and legal profession, because you've contributed significantly to making it a pleasure for all of us to practice antitrust law in the city, and because every minute of your career you served as an example for all of us to follow, I'm very proud and honored, on behalf of the Antitrust Law Section, to present you with the William T. Lifland Service Award.

MR. PRAGER: Well, I know that I am now the only thing standing between all of us and dessert. So one thing I've learned is be brief.

I thank you so much for your kind words, your flattering remarks. It's hard to compose myself and respond being up here, though I'd also like to congratulate and thank Barbara for the terrific job that she did with the Section this year.

I know that the Section continues to be in great hands with Elai. I know you and the team of new officers will do a terrific job in the year to come.

I'd like to thank my colleagues and partners from Latham who are here with me tonight, many of whom came from California to be here. You've been a great bunch of people to practice law with. It's been my privilege and pleasure to be part of one of the best firms anywhere in the world.

Over the time I was there, we grew from about 900 lawyers to 2,000, from a handful of offices to more than I can count, and it's been a real pleasure to be on that ride.

I want to thank all of you, the members of the Antitrust Section, for this award.

And, most importantly, I want to thank my family, my wife Mary, my daughters Emily and Madison, who are sitting here at the table. Without their support and their love and their understanding of the endless hours, I couldn't possibly have done a small fraction of what I've done over the course of the career.

I just wanted to share some thoughts with you tonight. As I said, I promise I will be brief.

Over the past several weeks, I, along with other members of the Antitrust Section, have been involved in the process of reviewing resumes and interviewing candidates for the fellowships that this Section funds, which are internships for law students to be able to work at one of the New York-based antitrust agencies.

This summer, we will probably be sending three candidates to the FTC's New York regional office. Over the past several years, we've sent candidates to the New York AG's office and also to the DOJ's Antitrust Division Office here in New York.

Now, I mention this for two reasons. One, because it's a great thing that the Section is doing both for the students and for the agencies, and I think you should all know about the good things that your Section does. But, the second reason that I mention it is that the interview process, in particular, led me to think more about what it means to be an antitrust lawyer.

To my surprise, when we asked some of the candidates if they had any questions for us, several of the interviewers asked how and why did you all become antitrust lawyers.

Well, that made us all scratch our heads and try to come up with a concise answer that you would give an applicant.

There seemed to be only two answers. One was a strong interest in economics as well as the law. The other was more or less happenstance, kismet, destiny maybe even.

Yet, as I said to one of the applicants, no matter how you get it, you've been infected with the antitrust bug, and once you contract the disease, you're stuck with it for a lifetime. There's no known cure. Once you have it, all you can do is hope to enjoy it.

Those discussions with the fellowship applicants led me to ask what is it about antitrust that so captivated me and presumably most, if not all, of you.

Very few of you are here primarily for the food. So it has to have something to do with antitrust.

Personally, I found that antitrust is a perfect intersection of law and business. It presents intellectual challenges and opportunities that go well beyond the routine of law.

We need to understand complex business environments and market forces and the inner-workings of many diversion industries in order to represent and counsel our clients.

Time after time, over many years, I've heard from antitrust lawyers how much they enjoy the opportunity to learn in-depth about a broad range of industries.

Over the past four decades, I've had the privilege of studying many dozens of industries, some not too glam-

orous like heavy-duty trucks, smokeless tobacco, bovine pharmaceuticals, retail auto parts—but among my favorites was casinos.

As a brief aside, I've never seen anyone lose so much money so quickly at blackjack as did one of my co-counsel on the Harrah's Caesars acquisition. We made fact-finding stops at casinos across the country.

At one particular Native American casino in California, early in our tour, this lawyer sat down at a blackjack table, as the lone player, in a nearly empty casino. He started to play. The dealer put the cards out so quickly that we could barely follow the movement of her hands. She took his money as fast as he could lay it on the table.

He finally gave up. I don't know whether it was frustration or he ran out of cash. And I'm not really sure what it is that he learned about relevant market definitions from that exercise. I know I learned to keep my hands in my pockets and the money off the table.

Unlike our colleagues in other legal specialties, for antitrust lawyers it's just not enough to have a superficial view of the business we're dealing with. We antitrust lawyers need to develop a fulsome understanding of many aspects of the industry from raw materials through production and distribution and, of course, very importantly, we need a handle on what alternatives customers see as real world competitive choices.

So it really was important in the world of casinos to understand, for example, whether and how the beverage offerings, the food, the entertainment differed between the Native American casinos in California and the commercial casinos in Nevada—though I still believe that losing a bundle at blackjack was not a necessary part of the research, and hence, I avoided it.

Often to the surprise of our own clients, by the time we're done with this kind of inquiry, our education had led us to develop a deep understanding of the business. To me, and I think to many of you, that learning process is a big part of the allure of antitrust.

There's one other aspect of antitrust that particularly has impressed me over a long career, and Barbara alluded to it. It's the real sense of collegiality among members of the bar. There is a collaborative spirit. And at the risk of echoing some of what Eric said, lawyers across the table from me one day will often be your co-counsel on a matter next.

My professional experience with members of the Antitrust Bar, not just in New York, but around the country, has been exactly that, profession, with lawyers on all sides showing respect and courtesy. I'm proud to be able to say that many of my closest and most treasured friends are antitrust lawyers, many of whom are here with us in the room tonight.

So whether you're just starting out in your career, or like me you count your experience in decades rather than in years, many of you have the antitrust disease. I hope that you don't find a cure. Rather, I sincerely wish you a lifetime of fascination with the symptoms and indications that are antitrust.

Thank you, again, so much for the honor of this award.

MR. KATZ: Thank you everyone. Thank you, Bruce, for those great words. Congratulations to Bruce and to his family.

Now it is time to enjoy our dessert. I believe the dessert table is ready in the next room. It is sponsored by many of the firms that are seated here.

Thank you for coming and we will look forward to seeing you throughout the year and also next year.

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