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Cocktail Reception and Dinner
The University Club
1 West 54th Street
New York City

Introduction and Welcome

MR. WEINER: Good morning. So, our chair has just arrived, fresh from Metro-North. So Lisl, please say good morning.

MS. DUNLOP: Thank you. Well, I am late for my last official act as Chair, but I do want to say welcome and Happy Australia Day. I've always wanted to say that at this event which is often held on the 26th of January. A big thanks to Michael for organizing a very wonderful collection of programs and panelists today. I was talking to Judge Scheindlin last night, who said she looked at the program and said there was not one panel that she would not want to be at.

I hope everyone can stay for the entire day, and I look forward to seeing you at the reception afterwards and the Annual Dinner. So without further ado . . .

MR. WEINER: Thanks, Lisl. Welcome, everyone, to the 2017 New York State Bar Association Antitrust Law Symposium. We do have six terrific programs today. We have jammed a lot into the agenda, and there has been a lot of work done by a lot of people.

A brief preview, in a few minutes we will kick things off with a panel on "Judicial Perspectives on Antitrust Trials" that Steve Houck and Ned Cavanagh have organized, featuring our three sitting United States Federal District Court Judges, each of whom had an active antitrust practice before taking the bench.

We then move immediately into our "Antitrust Developments in 2016" program, chaired by Elai Katz. This has been a particularly noteworthy year and arguably a particularly noteworthy week in antitrust law.

After a brief break we continue our program with "Ethical Issues on a Global Scale," moderated by David Park of Bloomberg. This panel will look at some of the key ethical issues that arise in the context of cross-border antitrust issues.

We have a brief Business Meeting, followed by lunch. Then we come back at 1:30 for an action-packed afternoon.

We start with a panel that will address the question: "Has Antitrust Failed?" Led by Ethan Litwin, this panel is going to look at the trend towards concentration in industries across the country if not the world; the consolidation of big data into the hands of few and then asks about the implications of these developments.

We then go into a panel organized by Rachel Brandenburger and Jessica Delbaum, which is an international panel that is looking at the extent to which there is a growing gap between the U.S. and EU in terms of antitrust enforcement and whether dominant U.S. companies can get a fair shake before the European Commission.

Finally, a program on "Topics in Cartels and Criminal Enforcement," moderated by Steve Tugander of the Antitrust Division.

After this torrent of programming we are all going to get a drink. We hope you will stay for the Young Lawyers cocktail party. And I am assured that the Young Lawyers are very inclusive when it comes to defining the term young.

That, of course, is followed by more cocktails at our Annual Dinner at the University Club at 6:00 p.m. So in advance I want to thank everyone who has worked very hard to put this program together, and with that I'll turn things over to Steve and Ned to start our first panel.

Antitrust Developments in 2016: The Year in Review

MR. WEINER: Moving into our next panel, we'll turn it over to Elai Katz. We are all set to start now. We have our panelists ready, so let's turn it over to Elai for our Annual Developments program.

Elai.

MR. KATZ: Hello, everyone. Good morning and welcome.

I want to start by saying it was an excellent panel just now. Thank you very much for that.

As many of you know, we do this program annually, the antitrust developments of the prior year. Many years ago we used to do it in a way where we would try to run through everything, and that was hard. And we had people who were capable of doing that, like Bill Lifland. What we have been doing for the last few years is trying to focus on a narrow set of issues and a group of experts who can share their knowledge.

We have a really great group this year with us, which I would like to introduce. First to my left, to my right from your perspective is Elinor Hoffmann. Many of you know her. She is Deputy Chief of the New York Attorney General's Antitrust Bureau. She focuses on antitrust issues under both state and federal law and many markets, from health care, pharmaceuticals, financial services and other.

Elinor is also an adjunct professor of law at Brooklyn Law School, where she teaches antitrust. She has many other roles, but I'll say that prior to joining the Attorney General's Office she was a partner at Coudert Brothers for 16 years.

Just next to Elinor we have Bill Efron, who is Director of the Federal Trade Commission's Northeast Regional Office. On behalf of the Bureau of Competition he oversees merger and conduct investigations. And on behalf of the other side of the house, the Bureau of Consumer Protection, he oversees investigations and litigation involving unfair, deceptive and fraudulent practices.

Prior to joining the FTC Bill was an associate at Simpson Thatcher, and we are very pleased to have him here with us today.

Last but not least is Bryan Keating, who is Executive Vice President of Compass Lexecon. He's based in Washington. He specializes in industrial organization economics and antitrust economics; he has substantial experience applying complex econometric models in merger cases and litigation matters. He's worked on airlines, transport, health care, cable, and many other areas.

He has a Ph.D. in economics from Stanford. And before his time with Compass, he had been at Acumen and NERA.

So, I want to turn right to our topics. This year we are really quite fortunate that we had a lot of great developments. But one area that stood out as we were preparing for this was mergers. There were—so far as in my memory—and there are those of you who can jump up and down and tell me I am remembering incorrectly—I don't think there have been as many tried and decided merger cases as we had this past year in many, many years. We are very fortunate to have here with us people who are experts in antitrust generally and have a lot of experience in mergers. In fact, each of them has had some direct involvement in at least some of the cases that we are going to be talking about today. So, I think that is certainly a real privilege for us to get to speak with this panel.

Before we get started I want to make sure to thank Margaret Barone from my firm who helped us prepare for this.

And I want to give the regular disclaimer, although each person might want to give their own, but as you all probably know, we are not here speaking on behalf of our firms, agencies or clients, perhaps not even on behalf of ourselves—

[LAUGHTER.]

—but we are going to try to make this entertaining.

So let's get started. Let me turn it over to Bill to start with one of the merger cases that was decided this year and I think made a lot of waves and got lot of attention.

MR. KEATING: Okay, thanks Elai.

I'm really happy to be on this panel today. I'll just issue my own disclaimer that my views are my own and don't necessarily reflect those of the Commission or any individual Commissioner.

With that out of the way, it's true, amongst the most significant antitrust developments in 2016 were the FTC's hospital merger litigations, where both the Third Circuit and the Seventh Circuit issued decisions this fall. In both cases the key issue was geographic market definition. I'll start with and focus more on the *Penn State Hershey/PinnacleHealth*. I'd just like to set this up, so all of us can have a fulsome discussion on a number of issues.

In that case the FTC and the Commonwealth of Pennsylvania sought to enjoin the proposed merger of the two largest health care systems in the Harrisburg, Pennsylvania area, pending the adjudication of the FTC's trial on the merits.

The government alleged that the merger would substantially lessen competition in the market for general acute care, inpatient hospital services sold to commercial insurers in the Harrisburg area, which the government defined as a four-county area in and around Harrisburg. The government further argued that the merged entity would control 76% of the market, and the transaction was presumptively unlawful because it would increase concentration in an already concentrated market. The crux of the government's case with respect to geographic market is evidence showed that payers and insurers need Harrisburg area hospitals in their networks, because area residents overwhelmingly demand local hospital care. Because of this demand, insurers could not successfully market a network of providers to Harrisburg area employees without any Harrisburg area hospitals. And they would pay a price increase to avoid that, and therefore, the hypothetical monopolist test was satisfied.

In fact, the government put forth extensive evidence from insurers who said they could not market a health plan without a combined Hershey and Pinnacle, and they would pay a price increase to avoid that.

For the defendant's part they obviously vigorously disputed the geographic market. They argued that the government's proposed market was too narrow, and they emphasized the fact that 43.5% of Hershey's patients came from outside of the government's four-county area.

A trial ensued in April and in May the District Court denied the government's motion for preliminary injunction, saying that we had failed to properly define a relevant geographic market. The District Court said in its analysis that to analyze the geographic market, at least in the medical setting, it was a market where few patients leave and few patients enter. The court really relied exclusively on this 43.5% number, which indicated to the court that the market was too narrow, or stated another way, it was not a market where few patients entered.

As part of its geographic market analysis, the District Court also said that it found extremely compelling that the hospitals had entered into temporary rate protection agreements with the two largest insurers in the area, and said that it simply could not blind itself to this reality when considering the import of the hypothetical monopolist test advanced by the Merger Guidelines.

So the government appealed this decision. In September we got a decision from the Third Circuit reversing the District Court's denial of the preliminary injunction. And it also remanded the case and directed the District Court to enter the injunction in favor of the government.

Let me go through the three errors that the appeals court found with the District Court's decision. In general, it said that it incorrectly formulated and misapplied the proper standard for determining geographic market, here in the hypothetical monopolist test.

The court explained the first error was that by relying almost exclusively on the number of patients to enter the proposed market, the District Court's analysis more closely aligned with the discredited economic test and not the hypothetical monopolist test. What it was saying there was in relying essentially exclusively on this patient flow data, the court applied the Elzinga-Hogarty test. Although this was once the preferred method for defining geographic markets in hospital cases, subsequent empirical evidence has shown how the test can lead to defining overly broad markets in the hospital context.

The opinion even noted one of the founders of the test, Professor Elzinga, had come to that conclusion. Moreover, 36 health care economists, including Professor Elzinga, submitted an amicus brief on that point.

So, this error really dovetails with the second error, which is by focusing on the likely implications of a price increase, the District Court completely neglected mention of the likely response of insurers. In other words, by using this patient flow data to conclude that the market was too narrow, the District Court failed to improperly account for the likely response of insurers to a price increase. This incorrect focus reflected a misunderstanding of the commercial realities of the health care market, namely that patients are relevant to this analysis to the extent they inform the demand so insurers know how much they need to include a particular hospital in their network. They in large part do not feel the impact of price increases; insurers do, because they are the ones that directly negotiate the rates with the hospitals.

The third error was that the District Court in part grounded its geographic market analysis on these private agreements between the hospitals and insurers, even though those types of agreements have no relevance to the hypothetical monopolist test. There was prior Circuit precedent which basically said private agreements have no relevance to product market, and this holding was essentially extended to geographic market as well.

After determining these errors, the court found that the government did in fact meet its burden to prove that the Harrisburg area was a relevant market, citing this extensive insurer testimony that I mentioned before.

So why don't I stop there, and we can unpack some of those issues.

MR. KATZ: Why don't we start with Elinor.

MS. HOFFMANN: So first of all, anything I say here shouldn't be taken as reflecting the views of the Attorney General of New York, nor any member of his office. I am speaking for myself alone.

One thing I would like to comment on is something that we often miss or read very quickly in Appellate

Court opinions, which is standard of review. That little bit of the first paragraph that says this is the standard of review. Questions of law are de novo. Errors of fact will be tested for clear error, and the final determination for an abuse of discretion.

So in the *Pinnacle* case — and by the way, congratulations to Bill and the entire FTC team. Great job.

In the *Pinnacle* case the Third Circuit said the District Court committed an error of law in not using or misapplying the hypothetical monopolist test. So I was surprised, because I think of market definition as an issue of fact, and here the court said, well, there are errors, and the court calls it errors. The lower court hadn't considered that 43% of patients came from outside Harrisburg, but hadn't considered that 91% of patients from Harrisburg stayed in Harrisburg. So you know, that was one error.

The more serious error of fact, in my view, was that the District Court really didn't analyze the market correctly. As Bill pointed out, insurers and what insurers are willing to pay for is a critical part of this market. So I think of these as errors of the fact, incomplete analysis.

I would have liked the Third Circuit to use the harder test, that is to say, it is a clear error to ignore the fact that insurers are the ones who pay for the product. The Seventh Circuit, in the *Advocate* case, another case lost at the District Court level by the FTC but won at the Appellate Court level, also looked at market definition. And the test was it a clear error; were there errors of fact here? And that's probably in my mind, anyway, the preferable way to go.

The other thing I'll say about this is, for those of us who have been in practice for more than a few years, we have seen the economic test of preference, the preferred economic test change and evolve over the years. So the hypothetical monopolist test is important, it's useful. It's the way we look at market definition in most cases. But it's not necessarily the only way we look at market definition now and not necessarily the way that we'll choose to look at it in the future. So I am worried about using it as a legal standard.

MR. KATZ: Well, that's a good segue to turn to Bryan, our economist. And I know you have several thoughts on this, but I would start with that. It's an interesting point, and we see that in antitrust law more than some other areas of law, where changes in economic thinking leads to changes in law. *Leegin* is one of the strongest examples that comes to my mind where a per se rule stopped being a per se rule, as far as I read it, because economics changed.

With that in mind, Bryan, let us hear your thoughts on this case, or these two cases I think we are talking about really both together, the Seventh and Third Circuit FTC hospital cases.

MR. KEATING: I'll start with the same disclaimers as my colleagues on the panel. I am speaking for myself and not any of our clients.

Maybe the place to start is to just define some terms to make sure we are all on the same page. When we talk about hypothetical monopolist test, I know a lot of you view this every day. What that test is asking is if you defined a candidate set of products or a candidate geographic area, what the hypothetical monopolist test is really asking, it's in some ways an abstract exercise, but it's based on a lot of real-world data. It is doing the conceptual exercise of asking if you had a hypothetical monopolist, a single firm that controlled all of these products or an entire geographic area, would it be able to raise prices by some small amount. There are different thresholds that get used, but price is a typical one.

So the question would be, look, if you have products A, B and C, and you have a firm come along and that firm is now the owner of products A, B and C, would it be able to raise prices by 5%? And if the answer is yes, that's saying there is not enough competition to overcome that 5% price increase. If the answer is no, then there is something else outside of these three products, A, B and C, constraining the price, constraining the ability of this hypothetical monopolist to raise prices by 5%. So maybe we need to consider a broader market.

There are lots of ways, methodologies, or approaches to apply a hypothetical monopolist test. We see it used in many of the antitrust merger cases we'll talk about today.

In my experience the analysis that gets the most weight is the broad analysis, something that looks at documents, statements, participants; looks at prior events in the industry, in entry or exit, or prior mergers, prior changes, and the degree of competition in the industry that can form how firms respond to concentration. That can all form a hypothetical monopolist test.

Then there are a variety of formal economic models, critical loss is one example. Merger simulation models can be used as well to inform this question. Typically, what you'll see is plaintiffs, usually the government, will come in and try to give a broad array of evidence all of which points in the same direction. Tests will dispute the evidence put in their own models. But I think it is important to say the hypothetical monopolist concept is so broad the application of it can be very fact-specific, but it can rely on a lot of different pieces of evidence.

Tying that back to the hospital cases, one thing Elinor mentioned that I think is right, is that economics evolve, economic thinking evolves; the way that the legal system interprets economics and incorporates that economics in a legal decision also evolves.

You know, Bill had mentioned the Elzinga-Hogarty test and the discussion around the Elzinga-Hogarty test, and I think it really came up both in the Third Circuit and

in the Seventh Circuit opinions. And to say that look, this really is a discredited theory, and that's not what the economics is today, I agree with that. I think there is an important distinction to think about.

What is Elzinga-Hogarty? Elzinga-Hogarty is basically saying, if you've got lot of patients, and then a lot of patients are flowing out of the market, that should suggest to you that maybe the market is broader than the narrow market you're looking at.

The pushback on that analysis, including by some of the founders of the test, is that those flows that you're looking at aren't necessarily in response to relative price and quality of service. So the current thinking on market definition from an economic perspective is you really want to look at the merger ratios, how you look at them within the candidate product market. And what diversion is, it's a change in demand, a change in output in response to a relative price increase. So it really goes directly to the hypothetical monopolist test concept. What it's doing is saying, look, if firm A raises its price, some of its customers are going to stay and pay a higher price, some of its customers are going to leave and they are going to flow out to other products. The question that the first ratio answers of that set of product A customers' that leave a product in response to a price increase, where do they go? To product B, to product C, to product D; do they stop entirely? And then those diversion ratios really inform the economic analysis in terms of defining what the relevant set of competitors look at when establishing a hypothetical monopolist test.

So I think where the economics has moved to, conceptually but importantly in terms of the empirical methods, is to really focus on trying to not just look at flows of customers or flows of patients in hospital cases, but to really look at flows in response to particular economic stimuli, particularly relative price changes. So that was a big issue that came up in these hospital cases.

I'll touch very briefly just on a type of bargain and insurer point and move onto the next topic.

The second error that the Third Circuit had identified in the *Hershey* case was this idea of who is the customer. So if you're a hospital, who are you selling to? Are you selling your services to the patients that are coming in the door, because they are sick? Or are you selling your services to the insurer, who ultimately is generally the one paying for the services. Hospital markets are somewhat unique because you have multiple levels of agents making economic decisions. Typically, what you have is you have hospitals and insurers negotiating a contract that will negotiate a menu of prices for all the different services the hospital offers. And the insurer will then go out and attract a set of customers. And once those customers get sick, they will then look at the hospitals or the providers, doctors that are available in their insurer's network, and choose where to go. So you have patients who are choosing which provider to go to among a set of providers that the insurer is offering in network. But then you've got insurers who are actually the ones negotiating the prices. So it's an atypical market. It's a complicated market for a lot of reasons.

There is this debate about who the customer is, whose decision should we look at. Should we look at the decision of a patient as to which hospital to go to? Or should we look at the decision of an insurer in terms of when they are negotiating with a hospital? Can they afford to have that hospital in their network? And that was a big point of distinction, the Third Circuit was saying. For the sake of economics, it's overblown, because those two concepts are closely related.

If you think about why an insurer needs to have a hospital in its network, the reason it wants to have a particular hospital in its network is because customers want to go to that hospital. And so if it has hospital A in its network, and it has a bunch of customers who want to use hospital A, that makes the insurer's plan more attractive. So to the degree to which the insurer wants to have a hospital in its network, and therefore its willingness to pay to have it in its network, is closely related to how attractive that hospital is to consumers.

There is a flip side as well, bilateral negotiations between hospitals and insurers. The hospitals also need to have the insurers. They want to have insurers sending patients to them. So on both sides of the negotiation you've got these threat points: what does my business look like if I am the hospital and what does my hospital look like if insurer A is not sending any patients? If I am the insurer, what does my network look like, how attractive is my plan without hospital A in my network?

So you can't just look at one side of it is the point I'd leave you with. You can't just look at it from the insurer's perspective of what happens if I don't have the hospital in my network. You have to think about the flip side of that, which is from the hospital's perspective, what if I don't have the insurer?

So let me stop there and turn it over to Elai.

MR. KATZ: Anything more we'd like to say on this before we turn it to some of the other mergers?

MR. EFRON: Yes, two really quick follow-ups.

One just on the standard of review, and I do think it was an interesting issue in the case. This was based on what the Third Circuit did. It was based on other precedents in the Third Circuit that we had cited. This did come up in the briefs and in oral argument. We also argued that we also met the clearly erroneous standard as well.

I want to read a quote from the Third Circuit, because I think this goes beyond hospital merger cases. The Third Circuit held that where a District Court applies an

incomplete economic analysis or erroneous economic theory to the facts that make up the relevant geographic market, it has committed legal error subject to plenary review.

So we have this concept of basically equating economic theory to legal standard. I think that's just an important and interesting thing to keep in mind. Obviously, that goes beyond just the standard of review, and it is what everybody is talking about here. It goes to the substance of the case, and why the error was made using a discredited economic theory, which people now understand led to the wrong result.

Then just in terms of the bargaining model and what Bryan was talking about, I think it is important to note that in these cases the focus is in the change in bargaining leverage that's going to occur from the merger. The insurers have whatever leverage they have, and the hospitals have whatever leverage they have. And then what changes as a result of the merger is the hospital's bargaining leverage increases in a situation like this. So that's one of the main focuses to keep in mind, and that's something that the Third Circuit noted in its analysis.

MR. KATZ: I think the judges from the prior panel are no longer in the audience. Don't see them. But I would think—

AUDIENCE MEMBER: Why, what are you going to say?

MR. KATZ: What I was going to say, to me I would have thought it a bit strange for a judge to think that, typically when we look to the law as either a statute or prior case, and the notion that economists—and we have here in the room several various esteemed economists, but they disagree sometimes. And for a judge to say we have a new economic rule, now I am going to apply it—if you apply it wrong, District Judge, you're going to be reversed. That's to me quite a thing to say, and when judges typically face two different very smart economists, often telling them different things, I think it's worth mentioning here—and if you guys want to comment further, you certainly can—that in these cases we had amicus briefs by economists, including Professor Elzinga himself, that made it perhaps more apparent to the judges or made it easier for the Appellate Panel to consider, well, here is indeed a rule that is outdated or at least not properly applicable here.

MS. HOFFMANN: Yeah, so I think the fact that Professor Elzinga has said that we have to think about things constantly in an evolutionary manner as we have a better understanding of what economic theory should apply to particular markets, I think that indicates that we need not enshrine particular tests as legal standards.

And I'll just say one thing about hospital markets and health care markets generally. They really are, I think, the most difficult. Because the people who use the service aren't the people who choose the service and aren't the people who pay for the service.

So I think Bryan stated, they pose among the most thorny issues in market definition. Geographic markets for sure, maybe even product markets for all of us who practice in the area.

MR. KATZ: Let's turn from hospitals to another aspect of the health care business to health insurance. And we don't have up here any representatives from the Department of Justice, but we have several in the audience. I want to especially note Patty Brink out there, who was part of the big team that succeeded, just as the FTC was very successful. DOJ was also very successful in an opinion that came down very recently, and we decided we could include it in our 2016 review, because the trial took place and I think by order had to be completed before the clock struck 12:00 on December 31. So it counts as a 2016 development.

We got an interesting opinion in the *Aetna/Humana* health insurance merger. And I am going to turn it over to Bryan to introduce that important decision.

MR. KEATING: Sure. So I think when we were talking about the hospital mergers, the focus was very much on geographic market definition. In the *Aetna/Humana* decision the focus was much more on product market definition.

So *Aetna/Humana*, I'm sure a lot of you have perhaps read the opinion and seen news articles about it. I think a lot of play in the press after the decision has been about the ACA, Obamacare Exchanges. I am actually not going to talk about those today.

The big overlaps were not in the exchanges. They were in the Medicare space. So a big question, many of you know this, but the way Medicare insurance is offered is that there are basically two sets of options. There is something called original Medicare, which is a government-run program, and you have the option to get supplemental prescription drug coverage and supplemental insurance coverage, called the Medigap plan. But the primary program, the insurance program that pays for doctors and hospital visits and everything else is paid for and run by the federal government—that's called original Medicare.

There has been for many years a program that's currently called Medicare Advantage, used to be called Medicare Choice or Medicare Part C, which is an option to get your Medicare coverage from a private insurer. Aetna, Humana offer Medicare Advantage plans. And those plans operate much like regular commercial health care plans. They are the ones that are paying the bills for doctor visits and hospitals and everything else. But the ultimate payer is still the federal government for the most part.

The way it works is there is a subsidy. The CMS, the Center for Medicare and Medicaid Services, pays to each plan for each beneficiary they enroll. The plans bid against that benchmark. So if they bid above the benchmark, that gap is covered by a premium that the customer pays. If they bid below the subsidy benchmark, then there is a somewhat complicated rebate scheme that affects the quality of the plan. But basically you can think about a set of private insurers competing to attract customers, and those customers are choosing both between the private options and between Original Medicare.

So not surprisingly, in a merger that involves two insurers that both offer private Medicare plans, often in the same geographic market, a big question is product market definition. In particular, how should we think about competition between private Medicare Advantage plans and the government-run Original Medicare program?

And that was a big point in the arguments and the economic work and ultimately in the decision that Judge Bates issued last week.

Consistent with what I had mentioned before, I think there are a variety of ways to approach it. Certainly the decision, the documents, the views of the industry participants played a big role in his thinking on market definition. But there was a variety of economic market analyses that went into it as well. Both the government, DOJ and parties had economists that developed fairly complex economic models. So you estimate conversion ratios to the degree to which people would substitute to Original Medicare if a Medicare Advantage plan were to raise its premium.

The judge in his ruling was interesting, maybe not surprising when you have these dueling economic models, the judge ultimately did not try to rule on whose economic model was better. He basically said in this set of economic models, there are very technical disputes about what the right way to specify these models is. But ultimately if you look at the weight of the evidence, including the documents, including the views of the industry participants, he said the weight of the evidence pointed to there being a Medicare Advantage-only product market.

The one thing I'd say that's interesting is that you might think of this case as being a textbook case in which market definition would be downplayed. It's a case where there really wasn't any dispute that there was this other option that competed with Medicare Advantage plans, or a dispute about the magnitude of that competition. There was no dispute that option existed and that some people would substitute to Original Medicare in response to price increases. And you had a variety of models pointing in different directions.

If you look at the Horizontal Merger Guidelines, there is a paragraph that says, look, particularly in cases where you have potentially an unclear market definition, and the definition of the market really matters for the ultimate decision, those are the types of cases in which you might want to go straight to evaluating competitive effects.

And so you might think this is sort of a textbook case in which competitive effect would really be front and center. And there was a lot of discussion in the case, including the briefings and the economic analysis about the competitive effects and the decision. But if you liked the decision, ultimately I think what the judge said was once you get to the Medicare Advantage-only product market, you have extremely high shares, you have extremely high concentration ratios in many, many counties. Something like 70 counties in which Aetna and Humana are the only Medicare Advantage insurers. So within a Medicare Advantage-only market, basically a 2:1. Once you're in the world in which you define the market to be Medicare Advantage only, you have extremely strong presumptions against the merger. And it is very difficult to overcome those presumptions.

So while the opinion does talk competitive effects, my read of it at least was it relied heavily on those calculations, the share calculations, the concentration measures within the product market that the court decided upon. So even though you might think this is a case where competitive effects analysis that doesn't necessarily rely on market definition might be front and center, the trend we've seen in this case and other cases we'll discuss today is that market definition still matters a lot. And it can in some cases decide the outcome of the case.

So let me stop there and turn it over to my colleagues.

MR. KATZ: Yeah, because that does seem to be a big theme that we are seeing market definition matters quite a lot.

Do you want to comment?

MS. HOFFMANN: Sure, a couple of things.

New York was not a party to the *Aetna/Humana* case, so when I looked at the information about the trial I was looking at public information and what I know about Medicare from teaching, and I was actually a little concerned about market definition issue. Because the statute that sets up the Medicare Advantage program offers a binary, choose Medicare Advantage and then you can choose among plans in Medicare Advantage.

I was impressed by the way Judge Bates went through the evidence, both the economic evidence, and the what I'll call qualitative evidence, in a great deal of detail. The decision highlighted for me the importance of the party's evidence. I think we all know this. When we try the case the true experts in the market are the parties.

And what they say about who they face as competition in the marketplace in contemporaneous documents really matters.

I think in this case when the judge was trying to weigh the economic tests, and I think he used in several places the idea that there was kind of a war between the economists, and said I don't really need to referee this dispute here, because I've got qualitative evidence that guides me and helps me understand what the parties were really thinking and what the market really is like. So I found that to be an interesting aspect of the decision.

Another interesting aspect was anticompetitive effects. I totally agree with Bryan. There is this huge increase in the Herfindahl, because he found the market for Medicare Advantage was separate from the market for Original Medicare. He did look at anticompetitive effects.

The really interesting aspect of that in this case is government regulation. So in the Medicare market the government is the payer; ultimately it's the government that gets hit or the taxpayers that get hit. Because Medicare Advantage, while it's run by private insurers, it's ultimately paid for by the government. So what he found in this case is that government regulation actually did not have a constraining effect on prices in this market section; that there was essentially an increase in price. I think he said 80%—am I right?

MR. KEATING: I don't remember specifically, but there is a cap.

MS. HOFFMANN: —before government regulation really came into play. So I thought that was an interesting aspect of the decision.

MR. KATZ: I want to dwell just another few minutes on that, because you raise an interesting point. When the Revised Merger Guidelines came out, a lot of people, and I was included among them, were jumping up and down saying wait, what do you mean the government, doesn't have to define the relevant market anymore. And I think a lot of people on the defense side thought that it is useful to force the plaintiff to have to define a relevant market. That's a helpful thing in defense. We are seeing here several cases where the government won, and on the basis of defining the market and what to me reads like a fairly traditional structural way to go about litigating a merger case.

So several observations come from that. Number one, it seems that it's quite possible, indeed, to win by having to define the relative market, but it doesn't mean the plaintiff will lose. It also suggests to me that it can be advantageous, depending on which side, depending on the facts, not to dwell on relevant market definition. But obviously the statute doesn't ask us to define the market. The statute asks us if there is going to be a likely effect on competition.

So my question, and maybe I'll start right back to you, Elinor: Does it matter that much which goes first? Can you try to address the case where either a judge or litigants go right to the effect question, or is there some good reason to go to the relevant market question first, and does it depend on the situation?

MS. HOFFMANN: So I think in a merger case, which usually deals with prospective effects on competition, it would be really hard to try the case without defining market, because you have to define a market so you can ascertain what the market power will be once the merger is consummated and then predict an effect on competition.

I think in a conduct case, where market power is really just a surrogate for anticompetitive effects, if you have actual anticompetitive effects, certainly that's a possibility. You look at the anticompetitive effects, maybe you don't need a surrogate.

MR. KEATING: The interesting thing from my perspective in terms of the economic analysis is the inputs into the market definition exercise and the competitive effects analysis are very similar. So in both cases you want to look at patterns of substitution between products or geography, or you want to look at the margins the firms are earning, the prices they are charging, how firms respond to changes in structure of the markets or the degree of competition that they are facing. You want to look at the views of the industry participants. All those analyses inform both the market definition exercise and the competitive effects analysis. So in some sense this is a question of which goes first. You know, in some cases it is semantics. From an economic perspective, from the legal perspective and strategy perspective it matters a lot. But from the perspective of the economic analysis, it's all part of one large analysis.

The interesting thing about the *Aetna/Humana* case is the government's expert economist actually put in a merger simulation model. That's a class of model that is really about competitive effects. And it's a model, and he said this explicitly and argued explicitly, it is a model that did not rely on market definition. It takes into account estimated substitution across all possible markets, including Original Medicare. And it says what's the effect of combining these two companies on prices.

The government put forward that model for two purposes. One was just directly to assess competitive effects, agnostic as to what the relevant market is. But it also used that same model to perform a version of a hypothetical monopolist test. That said you could use this model to simulate what would happen if you had a hypothetical monopolist test over all hypothetical Medicare plans, and would they be able to raise prices by 5%, 10% or whatever threshold you want. So they used the same economic model, which does not necessarily rely on market definition, to perform a hypothetical

monopolist test for the purpose of defining relevant market.

If you look at the court's decision, Judge Bates talked about the merger simulation model both in the context of market definition, but also in the context of competitive effects. At least my reading of the decision on competitive effects, he did not say we can just look at this model, and we don't care about market definition. What he said was you start with market definition, you get these very high shares. You get these presumptions. You get these 70 counties where it's a 2:1 merger. That alone is probably enough to find the merger to be anticompetitive. And this merger simulation model, which estimates competitive effects, estimates price increases from the merger is confirmatory. It's another piece of evidence that's consistent with a more structural case, but it's confirmatory. He didn't really, at least in my read, he didn't really put forward that we don't need to worry about market definition anymore, because we have this model. It's more a secondary piece of analysis.

MR. KATZ: As I said when we started, we have so many merger decisions, and there is one still yet to come, *Anthem/Cigna*. But we are going to skip that one and turn to yet another government win in 2016.

Bill can you tell us just a little bit about *FTC v. Staples*?

MR. EFRON: Sure. This is another case where product market was one of the really key issues. No dispute over geographic market here. The parties agreed the geographic market was the United States, but product market was vigorously contested.

Just by way of very brief background, in December 2015 the Commission unanimously voted to challenge Staples' proposed $6.3 billion acquisition of Office Depot. The FTC and co-plaintiffs, the Commonwealth of Pennsylvania and District of Columbia, sought to preliminarily enjoin the merger.

So let me just talk a little about what the market was here. The plaintiffs alleged that the proposed acquisition would significantly reduce competition in the market for the sale and distribution of core consumable office supplies and paper sold to large business-to-business customers for their own use. And the complaint further alleged that in competing for these contracts, both Staples and Office Depot could provide lower prices on nationwide next-day delivery, distribution and a combination of services and features that these large customers required.

So a PI hearing took place. The judge issued a lengthy decision granting the PI. And as the Judge explained, the decision really hit on two issues, product market and market share analysis, and then the likelihood that Amazon and others could enter in a timely and efficient manner. Of course, we will focus on product market here. Critical to the product market definition in this case were two concepts, both in the Guidelines, are cluster markets and target markets. Let me briefly say what both of those are. A cluster market allows items, which are not substitutes for each other, to be clustered together in one market for analytical convenience. Taking this outside the office supply context for a second, the best example that a lot of us in this room are familiar with is general acute care inpatient hospital services. The reason for that is basically an appendectomy is not a substitute for tonsillectomy. You don't pick one or the other in response to a price increase, but nevertheless we put them in the same basket of goods for analytical convenience. You'll hear experts in the case law say they have to be subject to similar competitive conditions and market shares. That's an issue I'll talk about in a minute in *Staples*. And so while product market was not an issue in *Hershey* or *Advocate*, the Seventh Circuit decision in *Advocate* does discuss the concept of a cluster market and the inpatient services context.

So then there is target market, and defining a target market when there is the targeted consumer. This requires finding that sellers could profitably impose or target a subset of customers for a price increase.

In its analysis the court looked at these two concepts. It relied on the practical indicia set forth by the Supreme Court in *Brown Shoe*, as well as the testimony of the plaintiff's expert to support the conclusion that this alleged market of consumable office supplies the cluster sold and distributed to defendants, large B2B customers, the targeted market, was relevant for antitrust purposes.

A couple of key factors the court highlighted. I'll go through three of those. One, there is industry or public recognition of the market as a separate entity. Two, the B2B customers here demanded distinct prices and demonstrated a high sensitivity to price changes. And then the third was the B2B customers required specialized vendors that offer value-added services.

Once again, you also saw that the court in this case relied on the testimony of the plaintiff's expert, Dr. Shapiro. He did perform the hypothetical monopolist test with respect to product market, but in doing so again highlighted the record evidence that demonstrated that the defendants really competed fiercely for B2B business.

So I'll stop there, and maybe we should unpack a couple of those concepts I do think are interesting.

MR. KATZ: Do you want to jump in?

MR. KEATING: Sure I can say a few words.

MR. KATZ: Yeah, and I know we are running a bit behind time, so we wanted to try to speed it up if we can.

MR. KEATING: I'll say a few brief words about cluster market.

As Bill said, it really is an analytical convenience. If you look at the hospital mergers, you can have up to 500 different diagnostic codes and doing the same market analysis, share analysis for separate DRGs is not a good use for anybody's time and resources. As long as the competitive conditions are similar, one thing you see in hospital mergers, in some cases but not all cases, is that you'll define a general acute care product market, but you'll exclude from that something like labor and delivery, because often you have a different set of hospitals offering labor and delivery services than are offering a broader set of general acute care services. So cluster markets can make sense as analytical convenience as long as the conditions are the same. But you do need to think carefully about whether that condition really holds. If it doesn't hold, then you need to think about whether to define different sets of cluster markets or exclusive products from that cluster market.

With respect to *Staples* I think one issue — and I agree cluster markets came up, and it was this idea that you're selling pens, selling staples, you're selling paper, etcetera. And if the same group of firms is selling all those things, then sure, why not group them together, evaluate them together.

I think one question that came up in *Staples* was whether it's really a cluster market you're defining or whether the product itself is something different than individual pencils, pens and paper. But whether the products that Office Depot and Staples are selling were in fact a bundle of all these things. So you can think about them selling distribution services or a set of office products. You call up Staples and say I need my monthly delivery of office products. and they send you a box with all these different types of products in there. So the product itself might be a bundle. That's a slightly different concept than saying they are a bunch of individual products that we are going to analyze together for convenience. So thinking carefully about whether you're clustering individual products versus having a product that is a bundle of multiple sub-products can be important to the analysis.

MR. KATZ: We could say a lot more about *Staples*, including discussing national markets and the influence of online sellers, but in the interests of time we are going to jump ahead.

Before we continue just for a bit more with mergers, I want to take the opportunity during our discussion of relevant markets to mention just briefly the *American Express* case that the Second Circuit decided earlier this year.

Bryan, can you give us just a short review because that case is complicated —

[LAUGHTER]

—of what relevant market issues were addressed by the Second Circuit there.

MR. KEATING: The *American Express* case was extremely complicated, so I'm sure a short summary will be a challenge. I'll say just a couple things briefly.

American Express is a case where American Express, Visa, MasterCard and Discover are platforms that offer services. So they offer basically the ability for customers to pay for services and goods and products via card, via electronic transactions. So those platforms are sitting in the middle of what economists refer to as a two-sided market. On the one side you have Visa, MasterCard, American Express and all the banks that issue those cards competing with each other to attract cardholders to use their card to pay for things. On the other side you've got merchants, and Visa, MasterCard, Discover and AMEX are going out there and signing up merchants to accept their card. And they have to do both of those things to have a viable business. If you're AMEX you need to have a set of cardholders, and you need to be able to go to business and say hey, you should accept my card because I have millions of cardholders that want to use my card at your store.

At the same time you have the flip side when AMEX is telling cardholders they want to be able to say you should use our card, because you can use it at millions of merchants worldwide. This is referred to in the economics literature as a two-sided market.

A big issue in the AMEX case and the AMEX appeal, and one of the reasons that the District Court decision got overturned, was this question of how do you think about market definition in a two-sided market. So is the relevant market just selling their network services to merchants, or do you need to think about market definition in the context of those merchants and cardholders. And you know, the Second Circuit in its appeal decision said, given the facts of this case, you need to take a more holistic view of market definition and think about the two-sided market aspects of the industry when you're thinking about market definition. It caused the Circuit to reach a different decision than the District Court.

MR. KATZ: That was very impressive. You made that very fast.

I would love to talk a lot more about *American Express*. I won't. I'll just say one thing about it, and that's this. I think at the end of the day that case was a hard case. After the settlement they got with Visa and MasterCard, the government ended up with a vertical restraint case against a company that has somewhere around 26% or so of the market, and that's just a hard thing to do. I think it would have been a hard precedent to live with for those of us who counsel clients to have to think that a company with that kind of market share has to think of non-price vertical restraints as potentially unlawful. And that was

not what the court said, but I think that it had some relevance.

Let's briefly come back to mergers, because I think we all know mergers aren't only about relevant markets but also about efficiencies. There are a lot of different sorts of efficiencies considered in merger cases, but there is a very particular and unique type discussed in some of the recent cases that I think is worth touching upon briefly before we turn to talking about some other non-merger matters.

Let me say a word or two more about that. In some cases the merging parties say that one of the efficiencies that they are going to bring once they are combined is that they are going to be able to lower their costs by lowering the prices they pay to their suppliers. But that can be seen both as an efficiency, because if you can lower cost and lower prices, presumably you can pass along a lower price to your own customer. On the other hand, that can also be seen as buyer power as a monopsony type of effect that in and of itself is an anticompetitive harm. And that issue is getting explored in some of the cases. We should touch on that just a little bit before we turn to the others.

MS. HOFFMANN: Can I comment about that? That is in fact an issue in the *Anthem/Cigna* merger case. And we are a party, so I am not going to comment on anything other than frame the issue.

In that case the plaintiff, the government and states, allege that Anthem and Cigna will combine, and one of the harms will be they will push down the rates of providers, which could result in a reduction of output and a reduction of quality.

The defendants argue that pushing down the rates that insurance companies pay providers is an efficiency. It's a cost savings. And the government responds I think that, well, you can't really regard it as a cognizable efficiency if what you're talking about is the result of reduction of competition.

Another argument the government made is Anthem already has huge market power and is already pushing down rates, and so it's certainly not a merger-specific efficiency.

I think this is an interesting question. I don't know whether the court will reach it, but it certainly was front and center.

Another aspect of it, and the court actually had some briefing on this issue, and the decision was that Anthem argued that the government needed to prove an actual reduction in output in order to make its case on this point. The government argued no, what we need to prove is an increase in competition—sorry, an increase in concentration and reduction in competition—that would enable the defendant to have this power effect. And the court ruled in favor of the government on that issue.

MR. KATZ: So let's continue with looking at the world from the perspective of buyers and the potential harms to competition away from mergers. We got antitrust guidance for human resource professionals from the Department of Justice and Federal Trade Commission late last year.

There are several important points, and it is definitely worthwhile reviewing here for those of you who haven't yet. But one of the points notable to me is that we are talking about human resource professionals. Employers are buyers of services. And if they conspire with one another or if they improperly exchange information about salaries, what they might accomplish is lowering a cost. And yet I think it's rare for what the government described as potentially criminal, to give rise to procompetitive efficiencies. Although in other contexts and cases that I won't review here, but we are familiar with, there are situations where the idea that buyers can join forces and reduce costs is indeed considered to be potentially a good thing.

Elinor, do you want to say a thing or two further?

MS. HOFFMANN: One point that struck me is that these Guidelines are really directed at professionals, so they are not—and the government didn't mention—labor.

MR. KATZ: It did not, that was interesting.

MS. HOFFMANN: That's a whole other issue. I am actually curious about that.

But another thing I'll mention is in this connection, Renata Hesse made a speech last October, which I found very interesting. I think it was somewhat controversial, but I commend it to all of you. Because even though one might say that was the administration that was, I think antitrust enforcement will continue and both under a Republican administration as it did under a Democrat administration. But one of the points she made in the speech, here, and I think this ties no monopsony-type arguments, is that you don't necessarily need to prove harm to consumers in litigating an antitrust case, at least as far as the government is concerned. She made that point with respect to mergers, where I think it's an easy thing to see, because it's all prospective. But also with regard to conduct cases, both under Section 1 and Section 2. And so the speech was,I think, in October. I can't remember what the forum was, but I do recommend that it's good reading.

MR. KATZ: So as we are winding down, we have about ten minutes left. I do want to leave some time for questions, but before we do so, there is one last decision that again is really not fair to try to address it quickly, but also it wouldn't be right to go through a review of 2016 without at least mentioning it, especially here in New

York, the *Libor* decision that the Second Circuit handed down in 2016. Although I would say for those of you who were here last year, this topic has been discussed quite a lot in this forum. But the Second Circuit reversed Judge Buchwald's decision where she had decided that there was no antitrust injury based on the pleadings in the complaints alleging that banks conspired to manipulate Libor rates.

As I said it is too complex to really go through the facts or the procedural history, because this case has already been up to the Supreme Court twice. But I do think we should talk just a little bit about the collaborative — whether it is a collaborative process, as well as allegations of a conspiracy. I think that's really the issue the courts are trying to unpack.

I don't know if, Elinor or Bill, you want to say a word or two, or should we move onto other points?

MS. HOFFMANN: I'll just comment to this extent. *Libor* was set through a collaborative process, and the court said, well, yes, but here the allegations are that the defendants abused that process using this conduct. Remember there was a Motion to Dismiss, it came up on a Motion to Dismiss, and I think it is important to understand that. The court said if the plaintiffs proved their allegations of abusing that collaborative process, using collusion could be an antitrust violation.

I don't know whether Bryan wants to talk about that?

MR. KATZ: So I think as we wind down, I'd say probably one last matter I'd want to bring up, and I am coming back to you, Elinor, and I think the reason I want to bring it up is this is a case brought by states, price-fixing amongst generics. And as we only touched on very briefly the change in administration, but as we well know, antitrust enforcement is both federal, state and private. So if you can just tell us what's the headline of this case that was brought involving generics?

MS. HOFFMANN: Sure. So a number of states filed a civil action alleging allocation of markets and price-fixing with regard to two generic drugs, glyburide and doxycycline.

The case I think you will recognize, the allegations will feel familiar. The allegations are basically that some people sat in a room and agreed on prices and allocation of markets. In fact, the government has filed something criminal on this with regard to two individuals.

But I think what's interesting to me anyway in this case is that it deals with generic drugs. So we have looked at generic drugs for a long time as the lower cost type of pharmaceutical on the market. We litigated cases where the defendants have conspired or paid or in some way tried to delay access to generic drugs, delay the launch of generic drugs, because that introduces important price competition into the marketplace. But this case is about price fixing by generic drug manufacturers to raise the price of generic drugs. As what we have seen in the market in the last couple of years are dramatic spikes. So I think from a market perspective certainly the allegations won't look novel or complicated. This is not the *AMEX* case.

MR. KATZ: So let me see now if we have any questions from the audience? If not, we have plenty more to say, as you can tell. But you guys might have some things to ask or say. Yes.

AUDIENCE MEMBER: So a question for Director Efron. In the *Staples* case I guess the defense did not put on a defense, and what do you think of that?

MR. EFRON: Well, obviously the plaintiffs won, but I don't want to say that that was the effect. The judge obviously noted numerous times in his decision that he could not evaluate certain things because the defendants did not put on a defense. But at the same time that also doesn't mean that had they put one on, the same result would not have happened. Clearly, when you read the decision there are numerous times in footnotes and otherwise where the judge clearly said, well, I didn't get the opportunity to evaluate that argument, because I heard from plaintiff's expert, but defendants didn't respond to that. So you certainly saw it play out in the decision, at least without saying whether it was outcome determinative, which I am not saying.

MR. KATZ: Yes.

BARBARA HART: Do you think there will one day be a resolution on this generic drug case, just hypothetically, or any case; it's interesting to me that in the *Provigil* litigation there was this pool of money, recovery money that private entities also were to claim against. And do you think that that's kind of the next iteration state-of-the-art in terms of resolution, both penalty and then damages, that's made available for a period of time, and then I believe in *Provigil* it reverts to the government after a certain period of time?

MS. HOFFMANN: Well, if I remember correctly, and Bob Hubbard of my office is here and he's going to correct me if I am wrong. In *Provigil* the recovery the FTC got was a disgorgement.

MR. HUBBARD: Right, and you could claim against it, but if you didn't spend the $1.2 billion it went back to the general fund. But the state settlement, the money gets distributed to the consumers. It doesn't go back to the states.

MR. KATZ: There is a difference between the federal and state.

MR. HUBBARD: The FTC has often chosen not to be the distributor of the money to the victims. And particularly given the pending direct cases and the indirect cases and the state investigations, that's how they

chose to structure it. And, when you see a billion out there and you're trying to get relief to a lot of people, I don't know how much is left of that $1.2 billion.

MR. KATZ: Yes, Eric.

AUDIENCE MEMBER: So with all the trials there are a number of issues where there were warring economists. In Bill's case, which I understand you personally tried by the way—congratulations—but also in several of the other litigated cases this year, in Judge Bates's decision that just came down. Are there any lessons you think this pattern of decisions revealed about the best use of economists or how to win that battle of the economists in a trial?

MR. EFRON: Well, it's an interesting question. Because obviously we have talked about a bunch of cases that come down to market definition. I mean we had two, the hospital cases, both geographic market, and these two other cases. I mean expert evidence is one source of information. Even though in *Hershey*, for example, all throughout the opinion you have this discussion of a shifting economic theory, one that's been discredited and now what's the appropriate way to look at this. At the end of the day, there were not dueling models in the opinion. You don't see that. What that turns on at the end of the day was insurer testimony, and insurer evidence saying they couldn't market a plan without the combined entity, and they pay more to avoid that result.

You also see again in *Staples*, obviously Dr. Shapiro's testimony is certainly an analysis and is certainly in there. But at the same time you have a reliance on contemporaneous business documents, so you really do see the views of market participants and the business documents really playing a large role as well. So I would say that it's one source of evidence, the way I look at it.

MR. KATZ: I would say a strategy that's very helpful is if you can get the professor after which the test is named to come in and say that it doesn't apply.

[LAUGHTER]

That's a good strategy.

Thank you very much everyone. Thank you to this great panel.

[APPLAUSE]

MR. WEINER: So we are on break now. Please come back at 11:15.

Judicial Perspectives on Antitrust Trials

MR. HOUCK: Thank you, Michael.

The panel today is going to be a round table discussion among the three judges about litigating antitrust and other complex cases, including discovery and trial. This is a very knowledgeable and distinguished group and those two qualifications don't always go together, but they certainly do in this case.

We have Chief Judge Colleen McMahon to my left, then Judge Paul Crotty and finally Judge P. Kevin Castel.

All three of these judges are very experienced litigators, having litigated antitrust and other complex cases in the trenches. Judge McMahon at Paul Weiss; Judge Crotty at my old firm, Donovan Leisure, and Judge Castel at Cahill Gordon. All those firms are especially noted for their litigation practices. So we have three very experienced trial lawyers, who then ascended to the bench and in that capacity have presided over numerous complex cases, including antitrust cases. And by my count, I think we have 40 years of collective wisdom on the bench between the three judges. So we have a very knowledgeable and distinguished panel.

I want to just take a minute and thank the judges for helping us out this morning at such an early hour. I think we as lawyers sometimes forget how busy these judges are and how tight their schedules are. And to be a good judge—and these are all very good judges—you have to work very hard. In fact, the reason we are starting so early in the day is to accommodate Judge Castel, who originally had a jury trial planned for later today.

Of course, I know that Chief Judge McMahon, in addition to her docket, has many administrative responsibilities.

And Judge Crotty is now a Senior Judge, but I know that he continues to work very hard, and he, of course, is our Distinguished Service Award winner. So I hope all of you will come out for dinner tonight to see that award presented to Judge Crotty.

The way we are going to do the panel between Professor Cavanagh and myself is to split it up into two basic segments. The first segment will focus on issues relating to discovery and case management, which Ned will handle, and then the second segment will be focused on trials. To the extent we get through that we have some additional questions for the judges that Ned wants to ask. Then finally, we are going to try to leave some time for audience questions.

So that's the plan. But you know, like trials, you plan trials and they never go like you think they will, so we'll see if this is any better. But essentially what we want to do is just have informal discussion among the judges to get their insights into some of these issues that are important issues for all of us litigating antitrust cases.

I am going to ask the very first question, which is an introductory question, and then I'll turn it over to Ned for discovery and case management.

The first question has to do with the fact that antitrust cases often present complex legal and factual issues. And the question for the judges is whether they think antitrust cases are unique in any way from other complex cases; and then more generally, what are the challenges that complex litigation presents both for judges on the bench and for lawyers trying them.

I'll start with Chief Judge McMahon, if that's okay.

CHIEF JUDGE McMAHON: Good morning.

The part answer to Part A of the question, from my perspective, is no. Antitrust cases are no different than any other kind of complex case. All complex litigation presents multifaceted issues, and large numbers of them require a certain intellectual prowess. They tend to be complicated factually. Securities cases probably less so than antitrust cases. Patent cases possibly as or more so than antitrust cases.

They all tend to lend themselves to careful planning and serial attack on the various issues, both legal and factual that come up. And that to me is, from a judge's perspective, the challenge is to get the lawyers on board, or to get on board with the lawyers, depending on how proactive you are, with a case management plan that tackles issues often serially, rather than everything at one time, in order to take the wide-mouth funnel that we are presented on the day that you file the case and narrow it down to something that is either triable or disposable on a dispositive motion, on a summary judgment motion at the end of all the hard work that you do.

JUDGE CROTTY: Well, I agree with much of what the Chief Judge says. That's not a surprise.

Right now I am trying a case involving HMG-CoA Reductase inhibitors, which are compounds useful in the treatment of cholesterol. I am an English major.

[LAUGHTER]

And this is very complex litigation. There are eight defendants, and each of them has their own arguments about obviousness and whether the patent is valid, if the patent is valid, whether or not it's infringed. So I try to follow a process where I take the issues one at a time and in sequence. I find that in my experience by the inch it's a cinch, by the yard it's hard. It's tough to do if you try to knock off everything at one time.

Now the other thing in terms of case management, I've always found the principles of case management are useful but very difficult to apply, simply because you are one judge with two or three very skilled and hard-working clerks. But you're facing a sea of adversaries, who are much better armed, much more capable of filing tons of papers. And it's difficult to parse through all of these cases. So you have not only the case that you're working on, the patent case—and I agree some patent cases can be far more complex than antitrust cases. So while you're working on a patent case, you're also working on a Fair Labor Standards Act, Americans With Disability Act, 1983 cases, the whole run of cases. It's difficult to say I am going to work on this one particular case at the expense of all the other cases I have, including the criminal document where there is an urgency to that imposed by the Speedy Trial Act.

So I think the best way to approach these complex issues is one at a time, and the case management order at the earliest possible time, and then adhere to it. If it's not working, the parties will tell you that, and you can readjust.

JUDGE CASTEL: I have the easy part here. I think Judge McMahon and Judge Crotty pretty well said it. I do have a couple of observations though.

We do encounter securities fraud cases with great frequency. The case law can be learned. It doesn't change overnight, so the issues are thoroughly familiar to you and, with some good fortune, maybe even to your law clerks.

CHIEF JUDGE McMAHON: That's why I love litigating securities frauds.

[LAUGHTER]

JUDGE CASTEL: Yes.

Same way in the patent arena, you get complex areas of science that are difficult for the lay judge to grasp. But even doctrines relating to the validity of a patent and infringement are pretty well plowed. The case law is pretty clear.

When we get into the antitrust arena and we're dealing with abstractions like antitrust standing, antitrust injury, efficient enforcer, these are things that we do not encounter day in, day out. There are so many differences between a horizontal conspiracy and some kind of a vertical restraint, and the application of a Rule of Reason doctrine that your head really can spin. You're going to be very early on into the economic theory and applying it in the case.

So you know, non-law cases are the same. There can be easy antitrust cases, but I think that there is more complexity on the law side in an antitrust case than you'll ever see in your typical securities fraud case. So that's for starters.

MR. HOUCK: I think all three judges keyed up the issues that we are going to explore in the next 50 minutes. I am going to throw it to Ned, who will talk about the issues relating to case management and discovery.

Ned.

PROFESSOR CAVANAGH: First, just by way of introductions, back in the '70s, when we were conducting discovery it was a little bit like being in the wild west. Which is to say the rules were pretty much what you could get away with. There was a lot of hubris around, and there wasn't a whole lot of respect for rules.

Since then, notably in 1983, there have been significant changes to discovery. Among other things, changes to Rule 16 to encourage hands-on judicial management. And then specific changes to discovery, numerical limitations on interrogatories and depositions, time limits on depositions. And encouragement, if these rules are violated, mandatory sanctions for obstructionism on discovery and encouraging essentially a lot more judicial control.

Now I want to start, and Judge Crotty, if I could just follow up with you. You talked a little bit about management. Hands-on management. Do you agree with the notion with the drafters of the Federal Rules that there should be more management? Is it different in antitrust cases than it is in Fair Labor Standards Act cases?

JUDGE CROTTY: Well, Fair Labors Standard Act cases are relatively simple. When you're dealing with the cooks at the Chinese restaurant or the delivery people at a bodega, that is something I think all of us can understand. Are they getting the $7 or $7.50, and are they being paid time and a half for overtime. You can deal with that.

The problem with an antitrust case is that you'll still have 10 or 15 Fair Labor Standards Act cases, 10 or 15 ADA cases and one or two antitrust cases. Then the question becomes how do you allocate your time?

The cases I work on—Ned and I worked on the *Kodak* case and the *Westinghouse Uranium Price-Fixing* case, MDL 342. Some of the things you encounter, like in Chicago—you have to again understand how big the country is and how different people are. You go into a deposition in Chicago and you say what's your name. Objection. What's the objection? Lack of foundation, you haven't established that he has a name.

[LAUGHTER]

So you go to see Judge Prentice Marshall and Judge Prentice Marshall would see all the lawyers tromping in. We had every uranium producer in the world; must have been 35 defendants. And Judge Prentice Marshall would call this the Lawyers Full Employment Act. So how he managed the case, I really don't know. Except that I know this: He got it done. In the *Kodak* case we had tried before Judge Frankel. Our Magistrate Judge was Saul Schreiber,

who is a hard-working guy, but he never resolved anything. Because regardless of what he said, people would always take an appeal to Judge Frankel, who had different views than Saul Schreiber did as to what ought to be done. So it was a very difficult case to manage.

The nub of it is, the case was tried. It was started in trial in July, on a very hot day. We ended in a snowstorm in February the following year. And *Kodak* was held to be a monopolist for introduction of new and different products. Get up to the Second Circuit and effectively they granted summary judgment. So it didn't take very long to get a result that was favorable to Kodak.

But the point is case management had hardly anything to do with it. The difficulties with case management rules are—they are not difficult to apply. They are an easy application if you have the time and the resources to do it. The fact of the matter is that federal court judges, as Steve and Ned have already suggested, are pretty busy doing a lot of other things. It's difficult to get the focus, the attention on the important issues in a complex case. It's not impossible to do. It's just difficult to do from a time management standpoint.

PROFESSOR CAVANAGH: Chief Judge McMahon?

CHIEF JUDGE McMAHON: Ditto.

[LAUGHTER]

No, case management rules, whether legislated by the court system and the Rules Enabling Act, the committee, or the Congress in the case of securities cases, where they think they know better than we do how to run them, is always well intentioned. And it works in the main. The rules work in the main.

The problem with the kind of cases that you all tend to bring is that they are not in the main. They are the outliers. And the amount of case management, it would need a hands-on case manager who is required just to be on top of the issues, to be able to respond in a timely way when the lawyers have an issue, have a question, have a dispute that needs to be resolved. It would really almost preclude you from doing almost anything else, which is why my case management style is to assign a magistrate judge to oversee discovery. Somebody who, because of a lesser case load, because of no criminal docket, because of a lesser trial docket—I wish that were not true, and I hope I can encourage more people to go to trial before magistrate judges—but a lesser civil trial docket, because of all those things, can take on the burden. And it's a tremendous burden of overseeing the minutia of discovery in a very, very complicated case.

It's impossible to do it, if you get a letter from a lawyer raising an issue and you're starting from ground zero because you've been working on 55,000 other things and you have no memory of this. I tell people I have a triage brain. I have a triage brain. If I need to know it today, it's here. If you sent me a letter, saying "as Your Honor will recall," I won't.

[LAUGHTER]

I won't have a clue.

So the best case management tool from my perspective are lawyers who get along, who act professionally and who don't pull my chain. And I see that in some cases. I see it particularly in patent cases, the patent bar is a cohesive bar, —and in admiralty cases, which are few and far between. But the admiralty bar is a cohesive bar.

I haven't had to do a lot of antitrust work on the bench, very little of it, and all motion practice. I've never had a case go to trial. I am not sure why I am on this panel.

[LAUGHTER.]

But it's not clear to me whether the antitrust bar has that kind of cohesion. If you know you're going to see the same people over and over and over again, in the end you have to learn to get along.

Sanctions are a cudgel, and they are—it is an unhappy situation when a judge is asked to apply sanctions. It's an unhappy situation when a judge does apply sanctions. The fact of the matter is that we know that an appellate court, which is far removed from the heat of a sanctions battle, will frequently not understand the need for sanctions. So I view sanctions as a not particularly useful remedy.

What I hope and cross my fingers for every time people come in for a Rule 16 conference on an antitrust case or a RICO case or patent case is that I have before me a group of highly professional, highly skilled lawyers who are going to behave in the highest and best traditions of the profession. It's the only case management tool that works.

JUDGE CASTEL: I think what's really interesting is to see difficult styles that all get the job done.

My style is probably quite different than Judge McMahon's, as she laid it out. I do not refer discovery to the magistrate judge. And I find sitting down up front at that initial conference and hammering out either the sequencing of discovery or the number of depositions, not as an abstract number, but making people identify who they plan to take and in what sequence gets us further down the path.

Not an antitrust case, but a securities MDL, the *Bank of America* litigation went on for years. In the course of discovery, I had one discovery dispute. It was over the timing and length of Ben Bernanke's deposition. That was it. It was submitted on letters. I decided it in 15 minutes, and I was done.

It's quite correct that it takes good lawyers and professional lawyers. But it sometimes helps that people know that the person who is supervising discovery is the same person who is going to be setting the trial date, going to be deciding the summary judgment motion and a smart lawyer, even a contentious lawyer or a would-be contentious lawyer is not so foolish and stupid to engage in collateral battles on things that are not important before the judge who is going to be making important decisions in their case.

So the maddening thing for those of you who are antitrust litigators is you have to contend with different styles just on the Southern District bench, let alone Chicago or the Eastern District. But that's the way it is. And certainly I think we all agree the wild west days are over. Certainly in the ordinary case you just don't see interrogatories. I don't see interrogatories anymore. In most cases you're going to say why can't you get that through a deposition.

Now it's possible in an antitrust case that there may be categories of information that can be more efficiently covered in an interrogatory, but certainly the days we fondly remember of 362 interrogatories each with 14 subparts have long passed.

PROFESSOR CAVANAGH: Judge, if I can follow up quickly with what's going on with discovery. And Judge Crotty referenced the uranium litigation. My recollection was that we had a lot of discovery disputes, vexatiousness, all sorts of things, nothing is getting done, all sorts of disputes. You're almost paralyzed.

You're telling me now you're not seeing lot of discovery disputes. Is that because of the rule changes?

JUDGE CASTEL: I think what I would say is it's because Judges, the state-of-the-art in 2017 is judges are more active case managers. Whether they do it directly or through a magistrate judge, I think there has been a change on the part of the judiciary. The rules changes help, but it is more the notion that if you want to have this spat, you may be winding up in front of the judge, and it may get pretty ugly. You have a dispute as to who said what to whom. You may find the judge saying, well, I have a great idea, let me get a court reporter, and you both can take the witness stand, and we'll find out who is telling the truth.

CHIEF JUDGE McMAHON: Or if it gets contentious enough and goes on long enough, I have said, fine, I'll solve this. Discovery is over. Your pretrial order is due in 30 days, and we are going to trial in six weeks.

JUDGE CROTTY: Well, I would like to think that the antitrust lawyers are better and more in charge of their own destiny.

The worst thing that can happen to a judge—and I don't want to speak for Chief Judge McMahon or Judge Castel—but when you have two bad lawyers in front of you, you're really at sea. When you have good lawyers who know what they are doing it makes life a lot simpler.

Like Judge Castel, I don't refer my cases to a magistrate. I think by hearing the discovery disputes, hearing and seeing what the problems are I am better prepared to try the case or handle the ultimate motion for disposition.

There is nothing like having two good lawyers in front of you. They make the world a lot simpler for themselves and for the judge as well.

CHIEF JUDGE McMAHON: They make it a lot more fun.

I would say one thing, I think firm deadlines, and I set the deadlines, when I say that I refer discovery disputes to a magistrate, he said/she said is not what I get involved in in the first instance. But it's all against the backdrop of a schedule that I've worked out with the parties at a Rule 16 conference which has a firm deadline for the end of discovery. And if you know that the deadline is firm, and it's not going to be changed, I find people are more inclined to behave.

PROFESSOR CAVANAGH: I am encouraged to hear that discovery disputes are not such a problem in the Southern District, but nationwide, they are much more of a problem.

Let me reference the *Twombly* decision which, as we all know, talks about the high cost of discovery and the need to rein in discovery.

JUDGE CASTEL: Excuse me, Ned, we didn't say discovery wasn't expensive. You know—

CHIEF JUDGE McMAHON: And we didn't say there were no disputes.

JUDGE CASTEL: But electronic discovery, you all can tell us, can be enormously expensive to the parties.

JUDGE CROTTY: Not only is it enormously expensive in a particular case, but, for example, you mentioned representing a major company you're going to have multiple lawsuits and serving documents from one lawsuit, maybe you can live with that, but two, three, four—by the time you get up to ten, fifteen cases with similar subject matters those retention orders become terribly, terribly burdensome.

JUDGE CASTEL: I had a complex civil matter go to trial this spring where the trial exhibits—now these are paper exhibits, or they used to be paper exhibits; now they are all digitized—the trial exhibits were two terabytes. That was the trial exhibits.

I asked at one point for someone to hand up one of the exhibits, and counsel stood up and said, I can't, Your Honor, it's 25,000 pages long.

PROFESSOR CAVANAGH: Well, let's get back to the cost of discovery. Because in *Twombly* the Supreme Court—

CHIEF JUDGE McMAHON: A bunch of great trial lawyers.

[LAUGHTER]

PROFESSOR CAVANAGH: —citing then Professor Easterbrook, now Judge Easterbrook, said that district judges cannot control the cost of discovery, because discovery is in the hands of the litigants, and District Courts cannot control what's in the pleadings, because pleadings are in the hands of the litigants. So the best way to deal with questionable litigation is to cut it off at the beginning, which is at the Motion to Dismiss stage.

Do you agree with that premise and that solution, Chief Judge McMahon?

CHIEF JUDGE McMAHON: Do I agree with *Twombly*?

[LAUGHTER]

I agree with Paul. The District Court got it right. *Twombly* is a very ideological decision. It had to go some to overcome a case that we all learned in law school, *Conley v. Gibson*, which had been on the books since, I don't know, since I was a pup.

PROFESSOR CAVANAGH: 1957.

CHIEF JUDGE McMAHON: 1957. I was a pup.

There is no question that frivolous litigation gets filed, and that the cost of frivolous litigation to corporate America and to individuals is very great.

This Supreme Court, as opposed to the Supreme Court in 1957, doing a cost/benefit analysis, for which Judge Easterbrook is famous, made a decision that was completely at odds with the decision made 50 years earlier. Fifty years earlier the cost/benefit analysis was, we'll let everybody get into court on a very low level of pleading. And if we can do that, it will get sorted out. That was a time when it was much less complicated to litigate even complicated cases.

Now the world has changed, and it's changed dramatically, particularly with the internet and the advent of e-discovery. There does need to be some reining in of litigation. I happen to think it's better reined in at the discovery phase than by having judges draw inferences. Because quite frankly, that's what *Twombly* puts on our shoulders. We act almost as triers of fact, drawing inferences at the outset of a case.

Now that said, that's not what I see when I see an antitrust complaint. I don't see a complaint that's dismissible on *Twombly* grounds. I see a complaint that's dismissible because relevant market isn't alleged, and I may see a complaint that's dismissible because antitrust injury is not alleged. But I don't see *Twombly* cases in the antitrust context, or really in any of the complex litigation.

JUDGE CROTTY: I worked at Verizon after I was corporation counsel for seven years, and I am intimately familiar with *Twombly*. *Twombly* as a pleading made absolutely no sense.

The telephone industry was divided into seven regional operating companies, the RBOCs, and they were assigned the territories in which they were monopolists. Why a company on the west coast, like Pacific Bell or Southwest Bell, would want to come to the northeast to ride on the network of NYNEX or Bell Atlantic made no economic sense. They were not going to lay out a duplicate network, because that's too expensive. And they were not going to ride on the incumbent's network, because you can't make any money that way. But to suggest the companies didn't want to compete was all wrong. What the telephone companies were doing back in the mid- 80s, into the 90s, was developing wireless technology. Wireless technology has absolutely supplanted the wireline business. The wireline business is no longer a monopoly. What you have is massive competition in the wireless industry. So the RBOCs no longer exist. As a matter of fact, AT&T is really Southwest Bell. Southwest Bell acquired BellSouth and then acquired AT&T. Southwest Bell, now called AT&T, and Verizon, which is Bell Atlantic and NYNEX and GTE, compete nationwide along with Sprint and Nextel and a lot of other companies. So you do have the national competition. And the idea one company didn't want to compete with the other and Mr. Twombly was somehow disadvantaged by that, it was a crazy reason. I think the District Court did come to the right decision. The Second Circuit was wrong, and the Supreme Court was right, although not for the reason given.

JUDGE CASTEL: Listen, we can talk about what we think of the plausibility standard in *Twombly*, and we can acknowledge that there has been something of a cutback. Take a look at the Second Circuit's decision in the *Libor* antitrust case, where the court reversed the District Court's dismissal on an application of *Twombly*, saying that all you need to do is allege a plausible inference. If there were two inferences, then you pass the pleading standard of *Twombly* if one of them is plausible.

The reality is in the antitrust arena, particularly where you're dealing with abstractions like market power, market definition, product and geographic and antitrust injury and efficient enforcement, you should have a gatekeeping mechanism to ensure that cases are weeded out or properly pled. Whether we like or don't like the specifics of *Twombly*, the job is still there. You still need to roll up your judicial sleeves and get it done.

I personally have no problem with the application of *Twombly*.

CHIEF JUDGE McMAHON: I just don't know that the job has changed. I really don't. A Motion to Dismiss in an antitrust case doesn't look any different today except for the fact that you all now add a paragraph about *Twombly*. The Motion to Dismiss in an antitrust case—the ones I've seen—don't look any different than they looked 15 years ago.

PROFESSOR CAVANAGH: Shifting gears a little bit, antitrust courts were once reluctant, in the words of Justice Marshall, to ramble through the wilds of economic theory. I think in the late 70s, *Sylvania* and *Brunswick* changed all of that when the court suddenly embraced economic theory. Then subsequently in the early 90s you had the *Daubert* case that made District Court judges gatekeepers to ensure that expert economic testimony was both relevant and reliable.

My question in the antitrust case, has the economics shed light or just more confusion and cost in antitrust litigation?

Justice Castel, if I could start with you?

JUDGE CASTEL: Yes, I don't know whether it's confusion or light. But it's there, and the job has to be done. If you're talking about a jury case, and there is a summary judgment motion made, the *Daubert* component is going to be important in the decision on the summary judgment motion. So my colleague, our colleague Paul Oetken, had a two-day *Daubert* hearing in an antitrust case on whether or not the regression analysis done by one of the economists was valid or flawed, and he concluded it was flawed. And that was critical to his decision in granting summary judgment. So it certainly is in the wheelhouse.

First of all it's quite appropriate that economic theory play a central role in antitrust enforcement for some of the reasons that Paul was pointing out with the Baby Bells. It's true in terms of global markets, service industries. It's easy enough maybe in a per se case, but in a Rule of Reason case, how else are you going to as a judge apply standards if you don't have some economic foundation for what you're doing? But I do think that *Daubert* plays a big role in the jury case.

In the nonjury case—and I'd be curious to hear from my colleagues, summary judgment isn't a common device in my courtroom. That's because we can try the case faster, more easily with direct testimony by affidavit, put on the case. The *Daubert* motion takes place in the context of the bench trial, and it can be done quickly and efficiently. And you have a final judgment that's appealable, rather than the metaphysical debate on whether there was a material issue of fact in dispute. So it's quite different in the bench trial.

JUDGE CROTTY: I am very suspicious of the *Daubert* motion, because I think that too often the expert is given documents that have been selected by his proponent or her proponent, and the expert then whips up an opinion based on what he or she has been told about certain documents or certain cases. And there is a strong suggestion that the opinion ought to be along the following lines. That's not very helpful to me.

So in patent cases and in antitrust cases I address these *Daubert* motions with a considerable degree of skepticism. Like Kevin, I believe that rather than wading through these matters on summary judgment, I prefer nonjury cases. It's simpler, more direct, easier. It's very difficult to write a decision in a summary judgment case. It's far easier to just try the case and come to a conclusion.

CHIEF JUDGE McMAHON: I am delighted to hear Paul say he views *Daubert* motions with skepticism. I am not familiar with the Federal Rule of Civil Procedure that requires you to make a *Daubert* motion simply because your opponent proffers expert testimony. But there must be such a rule.

[LAUGHTER]

And if you don't think that after doing this job for 18 years it's possible for a judge to become skeptical the minute a *Daubert* motion walks in the door, let me assure you that it is. I have seen so many ridiculous *Daubert* motions, where obviously qualified experts were being challenged on their expertise. So unfortunately all the litigants in the future have a very high hurdle to overcome to make me conclude that this is not just a knee-jerk reaction:. There is an expert; we are going to make a *Daubert* motion.

I have granted *Daubert* motions, but I've granted very few compared to the number that are made. And if you want me to take them seriously, you'll only make them when the challenge is serious, and not simply because it's a tool in the toolkit that's available to you.

MR. HOUCK: Due to the exigencies of time, there are more questions we can ask about discovery and case management, but we are going to shift over to trials.

I am going to ask the question, the answer to which may be of most practical interest to the audience here. It's the good, bad and ugly of antitrust trials and litigation.

The questions are: Based on your observations, what are the biggest mistakes lawyers make in getting complex cases ready for trial and trying them?

And on the other side of the coin, what are some of the positive things that lawyers can do to enhance their success in trying cases like this?

JUDGE CROTTY: Well, I am not really a good one to answer this, because I've been on the bench now eleven and a half years, and I've yet to have an antitrust case go to trial. I don't know what the Chief Judge's experience is.

CHIEF JUDGE McMAHON: Same. 18.

JUDGE CASTEL: Same. 13.

[LAUGHTER]

CHIEF JUDGE McMAHON: What is an antitrust trial?

MR. HOUCK: That's an interesting observation. But let's talk about complex cases in general, you know, which share properties with antitrust cases.

JUDGE CROTTY: Well, complex cases, it gets back into discovery, case management, Motions to Dismiss. It's difficult to grant a motion to dismiss. I am always more comfortable if there is a little bit of discovery. When somebody comes in with a motion to dismiss in an antitrust case, I'll say let's identify what the primary areas of concern are. See if we can't take a little bit of discovery on this and then try some partial motions for summary judgment. It might make the case a little bit more manageable.

But one case—it's up on appeal now in the Second Circuit—I granted a motion to dismiss. I was reversed because of the theory—which I thought was crazy—which was set by the Second Circuit to be plausible. We took a little bit of targeted discovery. The parties then moved for summary judgment and I granted a motion for summary judgment. It's up on appeal, so—

CHIEF JUDGE McMAHON: Because the theory is crazy, right?

JUDGE CROTTY: Right. I am an expert on crazy antitrust.

[LAUGHTER]

JUDGE CASTEL: Well, a couple of comments about trials. I think in this day and age, with the number of zeros associated with an antitrust trial—or any major complex litigation that's going to a jury—you should be thinking about engaging a jury research consultant. Not for the purposes of jury selection but to go through the exercise of presenting your arguments to mock jurors and seeing how they play. See what your jurors—jurors who agree with your point of view, what arguments they'd use to persuade the other jurors.

This is absolutely invaluable, and I think the argument can be made in the major case going to trial that failure to do it is arguably malpractice. As a result of working with jury research consultants and mock jurors, you will find that you will reshape your arguments. We think as lawyers we need to present our arguments so they are understandable to the lay jurors.

Some of the points I would make are incredibly obvious, I hope. But I can say not obvious to every trial lawyer.

[LAUGHTER]

That is, knock it off with the deadly deposition reads in a jury trial. It's just you're losing the jury. They don't want to hear it. If you can't crystallize it down to three Q and As, forget it. If you have to do it, you should have videotaped depositions, and play the videotaped depositions. That's not quite as deadly to the jury.

And you have to be a great in the visual arts. If you don't know how to graphically present your case and present your exhibits to hold the attention of a lay audience, you're going to get slaughtered by somebody who does.

CHIEF JUDGE McMAHON: Let me hark back to Kevin's trial with the exhibit that he couldn't be handed because it was terabytes. Do you really think that the jury—I assume it was a jury trial.

JUDGE CASTEL: Bench trial.

CHIEF JUDGE McMAHON: Oh, bench trial. The rules are off.

JUDGE CASTEL: The rules are off, yeah.

CHIEF JUDGE McMAHON: The single biggest mistake that I see in complex litigation—and I rule on almost all objections to exhibits before the trial; that's why we have a pretrial conference—the single biggest mistake that I see is lawyers coming in with mountains of exhibits, because you've gotten lost and can't see the forest for the trees. And you've gotten lost in all of these exhibits that you had turned over to you or that you found during the course of discovery.

The fact of the matter is you're going to try the case on the basis of a hundred exhibits. And I force people to cull it down. They bring in all those things, and I say we're not doing that. We're not doing that. I won't let you do that. You find me the 100 or the 150 exhibits that you really need to show at trial. This is what I do in jury trials. In bench trials, you know—

Actually, by the way, I absolutely agree with both of these fine gentlemen that summary judgment is an overused tool, in particular when you are going to have a bench trial. And I wish more people would have them; the fastest, cheapest from your client's perspective, and the easiest way to get the matter resolved at the close of discovery is to have a bench trial. Forget the Summary Judgment Motion.

JUDGE CROTTY: Can I say something about trials. Kind of like the elephant in the room. We had a meeting of the board of judges a couple weeks ago, and the US Attorney came over, and he disclosed this year, 2016 in the Southern District of New York, the biggest and busiest district in the United States of America, we had 36 criminal trials. The year before it was 55.

Trials are getting very, very scarce. And there is a real concern, the ability to try cases is like pitching a baseball

game or being a quarterback, you have to do it in order to be good at it. You can't just read about it; you have to do it. If you're not getting trials, you forget how to do trials and make effective presentations.

So we're in danger of having a mechanism for resolving disputes which no longer works, because it is not available and it's not within the experience of some very skilled lawyers.

CHIEF JUDGE McMAHON: My beloved late partner, Arthur Liman, always said to young lawyers about the trial that the courtroom is a theater, and you're putting on a show. And meaning that in the best of all possible senses. You absolutely have to be able to distill your case, to distill the complexities of your case into some that either a Luddite or 12 people who have absolutely no educational background in your field are going to be able to comprehend. You have to make it comprehensible and you have to make it manageable. You have to pare it down. That's the value of summary judgment motions in jury cases, to allow you to pare down issues. Once you get beyond that and you're going to trial, you need to distill your case into something that can be presented in a way that a person ignorant of your field can be made to comprehend it.

MR. HOUCK: You're talking about bench trials. I've been involved in bench trials and complicated antitrust cases where the lawyers on the other side—this isn't me who used this tactic—they just dumped reams and reams of documents and deposition testimony into the record. And it seems totally impossible that any district judge could possibly read all that stuff.

CHIEF JUDGE McMAHON: We don't! Surprise.

[LAUGHTER]

MR. HOUCK: Yeah, and presumably they are doing it for a record on appeal.

So how do you handle something like that, apart from not reading it?

JUDGE CROTTY: You say I am not going to take it in, no.

The case I have on trial now they want to introduce the patent file record to address an issue whether the word "the" or "a" should have been used in describing a particular claim. You're going to give me a patent file which is six inches high to help me decide whether the word "the" or "a" should be used. This is ridiculous. No, I'm not going to do it. I mean, that's case management. You have to say no. You can't say yes just because the lawyer wants to put it into the evidence.

CHIEF JUDGE McMAHON: People show up at pretrial conferences with 1,200 exhibits. I say 125 will be admitted. You figure out which ones they are going to be. We can and we do say no.

MR. HOUCK: Judge Castel, do you want to add anything?

JUDGE CASTEL: Yes, we say no, and we resist efforts to sandbag. If you're not going to refer to the exhibit in either your trial brief or your closing statement in a bench trial, then forget it. It's going to be stricken. Even if I let it in, it's going to be stricken.

Now, there are cases, and how did I get stuck with two terabytes? Well, there were 9,662 individual loan files at issue in the case. It was pretty much inevitable.

MR. HOUCK: I worked on the *Microsoft* trial on behalf of the plaintiff states, and the district judge in Washington, even without talking with the lawyers, in his pretrial order ruling, number one, limited each side to twelve witnesses and required that all direct testimony be in writing.

Have you employed techniques, those techniques or techniques like that to help manage and shape the trial?

CHIEF JUDGE McMAHON: Oh, yeah. In a bench trial all direct testimony of any witness that you control obviously, not your opponent, comes in by affidavit. I am familiar with the affidavits when they get to court. The witness adopts the affidavit in his direct testimony on the stand, and we turn him over for cross.

JUDGE CROTTY: I don't do that. I make the direct testimony be put on live. I think it helps to make a credibility finding between the way the witness acts on direct and how he or she acts on cross.

I see the merit in taking the direct testimony by paper.

CHIEF JUDGE McMAHON: No, obviously that's only in a bench trial.

JUDGE CASTEL: I follow the same practice as Judge McMahon.

But there is another part to your question about limitations. Even in jury trials I will impose a limitation, typically a time limitation, on the length of presentations. In order to do this I a) have to know and understand the case, b) I have to hear from the lawyers and get their input on the time limits, and c) I have to be prepared to be flexible if somebody runs out of time and there would be a grave injustice in having them stop mid-sentence, you have to apply some common sense.

But I find invariably—and I have not yet had an exception to this rule—that where you set a time limit up front, invariably the parties return time at the end of the case.

CHIEF JUDGE McMAHON: Yes.

JUDGE CASTEL: They don't even come close to the limitation. That's very effective. They know what they have, whether it's 25 hours or 20 hours or 35 hours to

put on their case. The clock starts when they open their mouth. If they are up cross examining, that goes against their limit. If they are doing a direct examination, it goes against it. If they are opening or closing to the jury, likewise. And it's very effective in keeping the trial under control.

JUDGE CROTTY: My favorite story about time limits is there was a fellow arguing a case before Judge McLaughlin in the Second Circuit. Judge McLaughlin was picking up his papers leaving the bench, and the lawyer said, Your Honor, can I say one more word? And the judge said, yes, so long as it's adios. Time limits.

[LAUGHTER]

MR. HOUCK: So one final question. And then we are going to have about five minutes for audience questions.

We have talked about *Twombly* and *Daubert* and the expense of motion practice and developing expert testimony and all the hurdles in getting to a trial. And I know plaintiffs lawyers often lament they have to win a case two or three times over before they even get to the trial stages. Is that a fair point, and if it is, how do you counter that or get rid of it?

JUDGE CROTTY: Which rule do you want to get rid of—Rule 56, Rule 23, the *Daubert* motions. They are there and the plaintiff has to make his or her case. So I don't have much sympathy for that.

JUDGE CASTEL: Ditto.

CHIEF JUDGE McMAHON: Ditto.

MR. HOUCK: Well, that leaves an extra minute for audience questions.

[LAUGHTER]

Do we have some questions from the audience? If not, Ned and I have more questions to ask, but I wanted to give you a chance.

CHIEF JUDGE McMAHON: It's early in the morning.

MR. HOUCK: None at all.

Ned, do you want to go?

PROFESSOR CAVANAGH: Yes.

In the late 70s and early 80s there were a slew of motions mostly made by IBM to strike jury demands because the antitrust issues were beyond the ken of jurors. Outside the Third Circuit those have been largely rejected and the Supreme Court hasn't looked at it.

More recently there is a similar argument that's come from the academic community, Hovenkamp, Donald Turner, suggesting that jury trials are not a good idea, and that perhaps these issues are beyond the ken of a jury. Then in *Trinko* the court talks about the difficulties that generalist judges have in deciding antitrust issues.

I want to get your reaction—I am afraid to ask this question, but do you think antitrust issues are beyond the ken of generalist jurists, number one?

Number two, would it be a good idea to try to create a panel of judges just to hear complex cases, like groups that could be assigned by the JPML to hear complex cases?

CHIEF JUDGE McMAHON: Well, I don't think it much matters whether those issues are beyond the ken of jurors or not. I think if you want a clue as to where the Supreme Court would go in the antitrust context, we have already crossed that bridge in the patent context very recently when the late Justice Scalia educated us all about the nature of patent claims, which as you know are statutory claims. They are not really claims at common law in the United States, except they were claims at common law in 1789, which is why we have to let juries decide all the issues about the validity of patents.

So I don't think there is a whole lot to be gained from ruminating about whether jury trials are the best vehicle or whether jurors can understand issues. I think you take the jury as a given. And the Constitution says what the Constitution says, and the statutes say what the statutes say, and you make the case comprehensible. You make the case comprehensible for someone who is not familiar with your science or situation, really because you have no choice.

JUDGE CASTEL: Ned, there is almost a little bit of tension between your first question and your second question. We have these built-in protections. We have the gatekeeping role. You have the judiciary on the scene, both at the District Court level and at the appellate level. So yeah, I mean juries are here to stay. I don't think that argument has legs that it is so complex a jury can't understand it.

And the fact of the matter is, while I haven't tried any antitrust cases to verdict, I've certainly tried patent cases to verdict, and jurors rise to the occasion. Lawyers rise to the occasion in their ability to explain the subject matter. And I think we as a people lose something by taking jurors out of it.

I am not a particular fan of having specialized courts. Now we do have a patent pilot project in our district where a judge can refer a patent case that he or she prefers not to have to judges who are open to taking patent cases. Something like that seems fine. And of course, a lot of antitrust cases wind up being MDLs, and the MDL panel does assign or refer to a particular judge in a particular district. So there is a little bit of that already.

But be wary of the specialized court, because then you're going to have ideology really seeping in. It's better to have disparate results from different judges

that get sorted out through the appellate process than having shifts that are generated by the composition of a specialized court.

JUDGE CROTTY: Under the Seventh Amendment I think we are going to be dealing with juries for long time.

With regard to specialized courts, if you look at the Supreme Court's recent jurisprudence on the federal circuit with regard to patent cases, you notice the federal circuit is being treated now like the Ninth Circuit. If it goes to appeal, it will be reversed.

My own experience, I found the juries in the summertime have a higher level of education. That's because teachers and people who are academics don't like to take jury duty during the school year and volunteer for jury for the summertime. So I've had a couple of jury trials where you had four or five Ph.Ds and a couple of masters, and they have a very good understanding of quite complex issues.

CHIEF JUDGE McMAHON: When I was a judge in state court we called them summer juries. We really did.

MR. HOUCK: Speaking for Ned, he's very pleased to have those comments about academics.

[LAUGHTER]

Now I think we are going to close this out. We are out of time. But I do want to thank you very much for what was a very informative and lively discussion, especially at this hour of the morning. Thank you very much.

[APPLAUSE]

MR. WEINER: That was in a word ,great. I think we could have listened to this for another hour or two. But thank you. We are going to move right into our next panel. So Elai and group, please come up.

Ethical Issues on a Global Scale

MR. WEINER: Our next panel is going to explore ethics issues in the global context. We have a great panel assembled here. I'll turn things over to David Park, who put the program together.

David.

MR. PARK: Thanks, Michael.

Good morning, everybody. Welcome to the last panel before lunch.

I want to make sure you know what the topic is: ethical issues on a global scale. There is some inherent difficulty in addressing the global scale in 55 minutes, but hopefully we will be able to do that for you.

Before I explain how we are going to run the panel, maybe I'll mention first we are going to focus on using a hypothetical. The hypothetical was in the materials, but we have also brought hard copies, and on the aisle seats going up and back there should be copies of the hypothetical. So if you don't have one, maybe you can ask your neighbor for one and there are some extras in the back.

First let me introduce the panel. We have an excellent panel that I think is going to be well fit for today's purpose.

Professor Gillers is here. He is a professor at NYU; many of you probably know him. He's an author of the leading case book on legal ethics in the U.S. We are happy to have him here today.

Elaine Johnston is here. She's the head of the U.S. Antitrust Practice at Allen & Overy, and she's also co-head of their global antitrust practice.

Wendy Waszmer is here; litigation partner at King & Spalding. She's a former federal prosecutor and DOJ official. She had been Assistant Chief of the New York Field Office of DOJ, among other positions. And she focuses on cartel and other matters, as we will see.

And then two away from me is Marc Brotman, whose title is Vice President and Assistant General Counsel at Pfizer. He has led the global antitrust function at Pfizer since 2008, and is a former colleague of mine from some years ago.

If you don't know me, I am David Park. I am the global competition counsel at Bloomberg, and I am in charge of the antitrust function at Bloomberg, also on a global basis.

So the format for today is as follows: I am going to give a very brief introduction to the topic in the form of answering three questions. We are then going to focus on a hypothetical discussion, and the way we're doing this is with some role play. So part one of it is merger facts. And Elaine and Marc are going to take the lead, with Elaine playing the role of outside lawyer and Marc Brotman playing the role of Marc Baxter, in-house lawyer. No relation to Marc Brotman. He's going to stretch himself.

In the second part we will deal with the internal investigation. Wendy Waszmer will play the external lawyer, and I will play David Perry, again a stretch, the internal lawyer.

This is all a mythical company, and it has nothing to do with any company on Earth today.

Hopefully, we will have time for closing thoughts. What we are going to do is ask Professor Gillers a couple of specific questions at the end of each of those two sections, and also ask for audience questions.

So if you're in the audience and thinking of a question, at the end of the merger section I am going to ask for audience questions, and then we will ask again at the end of the investigation section.

Hopefully, the way we have structured this will generate a fair amount of questions. And so last, before I get into the introduction, I should note the written materials that are available online for this are worth finding.

Elaine Johnston put together a very helpful substantive outline. It covers a lot of the high level issues that come up in these instances for U.S., EU and China. And if you're not that familiar with the topic, I think you'll find it very helpful. And even if you are, you may find it a helpful reference. There is also a bibliography in there. Again if you find these topics interesting, it's probably worth looking at.

I should say also, in fairness to everybody here, as a group disclaimer to kick off what is essentially role play, nothing that's said up here is meant to represent the individual views of anyone standing here, their employer, their spouse, people they know. Nothing like that.

So my introduction is that I had three questions myself in preparing for this panel, and I thought this might give some context for people in the audience.

Question one: Why would a U.S. lawyer care about ethical issues in other jurisdictions? I mean, what exactly—why should I care? There are two reasons I think. One, some lawyers potentially are licensed in a second jurisdiction, and under the New York law, the Ethics Law 8.5 in your materials, more than one jurisdiction can govern your personal conduct.

The second point, which I think is more pertinent for people here is—it's become a dirty word, but globalization. There are just more legal matters involving more jurisdictions all the time. So the idea of even

teaching ethics, for example, in U.S. law schools, ethics is still taught as a U.S.-specific topic. But I think most people who have practiced over the last 25 years have realized that's a little shortsighted.

So if you think about a global matter, a cross-border matter, there is an initial threshold issue if you're a U.S. lawyer, competence. Rule 1.1 in New York limits what you can actually advise on. So realistically, if you have something that's actually cross-border, you're going to wind up dealing with lawyers in other jurisdictions.

Examples can be anything. Today we are going to talk about mergers, internal investigations and cartels. Other things could happen obviously, but there is this component of a global matter where the lawyers involved all want to comply with their ethical obligations. But you also don't want to unduly compromise your client's interests. As we will see today, it's not always so easy to meet both of those objectives.

The second question is why does it matter; even if there is more than one jurisdiction involved, so what? Well, it matters because, not always, but in some instances the rules, the ethical rules vary substantially. The one many people know about at least to some degree is legal privilege. We will talk about that here today, but you couldn't have a broader span of rules when you talk about what's legally privileged or not, depending on the jurisdiction you're in.

The third and last question, I had some sense of some of the differences before this, and in preparing for the panel I kept asking myself why—why do the rules vary so much between U.S. and continental Europe and China and places like this? I won't say that I have an answer, but I have identified two themes that have come out of some reading.

One, the role of the lawyer is different in different places. Maybe that's obvious. I didn't think about it so intuitively myself, but if you look at the U.S., you have a very client-centric model. The lawyer is an agent for the client. The client controls the relationship. In continental Europe the lawyer has a duty to the client but they also have a duty to the bar. And there is this concept that the lawyer has his own independent duty or existence, that's like a dual—almost like two reporting lines. That sort of changes the expectations for what a lawyer is and what they can do.

Quick example, in some of the continental countries, if you want to go in house, you have to resign from the bar. You're not allowed to be a member of the bar, because you're viewed as inherently compromised.

And then another example is China. Historically, the lawyers in China, their duty was primarily to the state. So it doesn't matter if you're a client or not, the state comes first.

The second theme is the difference between common law countries and civil law countries. The role is different in the following sense. In common law we have case by case. You have a lawyer on one side marshaling the evidence, facts, presenting a legal case, the entire thing to the fact finder, who is neutral. In Europe the judge is playing more of an inquisitive role. The judge is directing the fact finding and asking the questions. And the lawyers, although they are still advocating for the client, are also facilitating fact finding for the judge.

So the expectations can be different depending on where you are, and hopefully that will come to light here as we go into role play.

Please start.

MS. JOHNSTON: Well, we have had the Golden Globes, we are about to have the Oscars, and now we are going to have the ethics role play.

Well, Marc, it's great to see you. It seems like no time at all since I was dealing with you and your colleagues over at the Department of Justice. Remind me, when did you leave?

MR. BROTMAN: About two years now. Can you imagine. Been quite a transition, but it's all been very good.

I have had an interesting change of mindset. I had to overcome some Stockholm Syndrome I guess, but now I am through it.

But that leads me to why I am asking you to meet with me. We are considering a global merger, and while I'm on top of a lot of issues, I do need to make sure I understand the privilege and ethical considerations around a global deal.

MS. JOHNSTON: Well, sounds interesting. Tell me more.

MR. BROTMAN: Well, it's a merger of equals between our company, ChemCorp, which as you know is based here in the U.S. in upstate New York, and PolyCorp, which is based in Stuttgart, Germany. We are both global companies. We figured out we probably need to file in the EU, U.S., China, probably a few other countries as well. And maybe, you know, who knows where else.

I am fortunate that my counterpart at PolyCorp, Elaine, was a partner at a large global law firm before joining the company. So we have been able to figure out a lot in advance.

MS. JOHNSTON: Okay. How does it look to you substantively?

MR. BROTMAN: Well, the activities of ChemCorp and PolyCorp are primarily complementary. ChemCorp is focused on bulk commodity products, and PolyCorp's

focused on specialized custom products. That said, there is an overlap in a particular polymer, PXP223 where we have substantial combined market shares of about 70%. We are 36% and they are 34% globally. And 60% in the U.S., 45/15 split and 80% in the EU, 30/50.

MS. JOHNSTON: Sounds like you've done quite lot of internal analysis. Where have you come out on that?

MR. BROTMAN: Before we got you guys involved we prepared board papers analyzing the deal. We needed to advise our directors.

I'm sure PolyCorp probably did the same thing. Our papers discussed a possible need to divest one of our overlap businesses. I based some of that analysis on conversations with your EU colleagues. They were speaking at a panel on current enforcement trends, and I floated some broad hypos with them based on this deal, although I didn't disclose the nature of the deal itself.

There are good arguments that the deal should not require a remedy, based in part on the ease of customers to backward integrate. I've talked to Elaine, and she's on the same page. Bottom line is we think we may be able to avoid a remedy, so neither of us want to go in with a "fix-it-first" remedy. However, the parties are aligned in thinking that, if necessary to obtain antitrust clearance, they would be prepared to divest ChemCorp's PXP223 business.

MS. JOHNSTON: So there are a few things we need to talk about. What's top of your list?

MR. BROTMAN: Well, you are now on board. And PolyCorp also has their antitrust counsel in the loop. We want to enter into a joint defense agreement to discuss and protect some of those discussions.

Elaine and I are also wondering if we can put the agreement in principle to divest the PXP223 business in the JDA and keep it confidential from the regulators and withhold it from our merger filings based on privilege, since it relates to the antitrust strategy. What do you think about that?

MS. JOHNSTON: Well, you bring up some interesting issues.

Let's talk a little bit first about these board papers which reflects the work that you and your counterpart at PolyCorp have done. We need to think a little bit about what your current situation is on those. You know, it is clear in the US, assuming those documents are 4(c), and it sounds like they would be. It's clear that you're going to be able to redact the sections that reflect your advice, and Elaine's advice in the case of PolyCorp documents. But the situation in Europe is really not as favorable, as I think you're aware, and I think we may have talked about this before; in-house communications between in-house counsel and the company are generally not recognized as privileged by the EU authority. So there is a risk we won't get to redact that. We can think a little bit about it when you said it reflected some hypotheticals you floated with my colleagues. I think maybe we could stretch that one a little bit to the extent it reflects advice you received in a prior deal, which is close enough. Maybe we could stretch it there, too.

I think to the extent it reflects something you heard from one of our guys speaking on a panel that's a little more of a stretch. I think my view is let's kick this around a little bit. Let's maybe try to assert privilege, but just be aware we could get pushback from the Commission on that one. It's not clear to me that we preserve the privilege the way we can in the U.S.

The issue in China is an interesting one. I talked to my colleague in Beijing recently, and I said to him tell me about attorney-client privilege in China. And he said attorney-client what? So I think that's sort of what we are dealing with there. So, I can't say that that's not going to come back to haunt us as well.

Your JDA issue is an interesting one. I have to say years ago I saw people do it all the time. As one of my former colleagues used to say, some lawyers think they are cuter than Bambi, and they would put these provisions into a joint defense agreement and say this isn't an agreement on the side; this is an agreement on our antitrust strategy, therefore we can claim privilege. But I think partly because of the revolving door in the U.S., people are in the agency, outside of the agency, and they kind of know what's going on in each arena. So we have seen some pretty clear push from the authorities in the U.S. that if it's a binding agreement it's not privileged and don't think you can hide it in a joint defense agreement. Based on my discussions with my European partners I think the same holds true there as well. So we will have to think about whether there is another way to deal with that risk or manage that in some different way in the merger agreement, or whether you're prepared to have it out there to be seen. But personally, I wouldn't advise trying to claim this is a privileged agreement. So I think that's where we are on those preliminary issues.

So now, like a good Shakespeare play, we are going to jump forward a few months. And Marc and I are going to pick up our discussion.

MR. BROTMAN: I wanted to revisit the discussion we had a few months ago about privilege and other ethical issues on our PolyCorp merger.

As you know, as expected, the deal is in the middle of an FTC second request in the U.S. It's in phase II in the EU and phase II in China.

We are dealing with the usual document productions and interrogatories, particularly in the U.S. and the EU. The FTC has requested broad categories of documents from EU custodians as well.

As you also know, the FTC, EU and MOFCOM have all asked for waivers to talk with one another. And I assume that means they will be exchanging information and probably documents as well. So that's where we stand right now.

MS. JOHNSTON: All right, well, we have a whole bunch of other issues we need to think about right now, now that you're into an in-depth document production. We talked before about the in-house privilege situation or lack of privilege situation in Europe. So we could have an interesting situation there where you're going to withhold documents on the basis of privilege in your FTC production, but you may have to produce the same documents to the EU regulators. Nowadays the EU regulators are pursuing a lot of documents, so while they are not quite as bad as a second request, they're heading in the same direction. So the waiver does contemplate the possibility there could be a document produced in the EU that the EU may provide to the FTC that the FTC actually would view as privileged. So the standard form waiver that we have entered into does contemplate that. But it is just something to be aware, that documents that we have withheld in the U.S. may find their way through the back door to the FTC, and we have to rely on the FTC following their internal Guidelines to view those as privileged.

One other thing I want to mention too is economic analysis. We have a pretty good claim in the U.S. that our economic analysis is privileged. We have seen situations where the EU authorities have gone after this. So that's another thing to think about.

One other issue I want to mention because it is something people don't have top of mind, particularly antitrust lawyers, and that is data privacy. When you're producing documents from EU custodians, you have to think of those data privacy issues. I think the Europeans view the US as basically having little or no regard for data privacy at all and that we tend to regard the Europeans as going overboard. And there is probably a little bit of truth to those statements, but it's something we can't ignore if we are producing documents from European custodians.

Hang on, Marc. I have to look at an email, but while I am digesting the contents of this rather disturbing email, I want to pass over to our esteemed professor and get his thoughts.

Professor Gillers, if I can ask you, how far does the common interest privilege extend in antitrust investigations of mergers; your thoughts on that one?

PROFESSOR GILLERS: Are we still on the Shakespeare play? I always wanted to be in a Shakespeare play.

Well, there is no such thing as the common interest privilege, believe it or not. There is a common interest doctrine. The reason there is no such thing as the joint defense privilege, because the doctrine can protect plaintiffs, and depending on the jurisdiction, it can protect non-litigants outside litigation.

The doctrine essentially says that if the elements of a privilege are there to begin with, the doctrine prevents loss of the privilege that is already there, because a stranger is present at the communication between the lawyer and client. Essentially, the doctrine says that parties to the common interest arrangement are not strangers. So lawyer one and lawyer two in a common interest arrangement can have a communication that is privileged.

Now, lawyer one and client one of course can have a privileged communication. But lawyer one and client two, not that lawyer's client, can have a privileged communication.

What surprises some people is that client one and client two cannot communicate outside the presence of their lawyers and enjoy privilege. So one obligation, of course, is to instruct the clients of the two different law firms not to talk about the matter between themselves outside the presence of at least one of the lawyers, otherwise you'll lose the privilege. You will not have the privilege for that communication.

Now as we know, the Court of Appeals decided in a 4-2 opinion last year, Chief Judge DiFiore not participating since she had just taken the bench, that New York will not recognize the common interest doctrine unless the discussion is in connection with a pending or anticipated litigation. The Second Circuit takes a different view. The Second Circuit does recognize the common interest doctrine outside anticipated or pending litigation. So does the restatement of law governing lawyers. So do many states.

The Appellate Division, First Department, was really good at recognizing the doctrine outside litigation, but it was reversed by Judge Pigott's opinion.

Now there is a real roulette quality to this, because it was, as I say, a 4-2 opinion. If Judge DiFiore sat, maybe she would have sided with the minority, with the dissenters, with Judge Rivera's dissent. Judge Pigott is now gone, and he's replaced. So if the issue arose today might we have a 4-3 opinion in the other direction. Right? But now we have to live with this, because the Court is not going to revisit the question perhaps for another decade or so.

You know, the Pigott opinion could be criticized in many, many ways. The Rivera opinion is much stronger. But in New York, if you're going to be in state court, you'll have to recognize that the doctrine doesn't apply outside litigation. It's critically important when you hope to preserve the doctrine to paper the agreement, the common interest agreement, very carefully. The rule doesn't require that, but it would be foolish not to have

something in writing. And if you want a great example of the importance of that and how failure to do it hurt a client who was ultimately convicted in federal court because in certain conversations it was not within the privilege, and the other party to the conversation was allowed to reveal what the client said. *United States v. Weissman* in the Second Circuit in 1999. Very cautionary opinion. I urge anyone thinking about this to read *Weissman*.

MS. JOHNSTON: So make sure the joint defense agreement is in writing. Make sure it contemplates the litigation and given the situation in Europe, make sure the outside counsel sign it.

I guess a further question for Professor Gillers, what about a communication between a non-U.S. legal advisor and the client? Would the U.S. view that as privileged if that in-house lawyer's jurisdiction did not view it as privileged?

PROFESSOR GILLERS: It might. All the cases in the Southern District, there is this, quote, "touch base" concept. Essentially it is where the court asks, well, where was the relationship formed, and where is the relationship centered? Which could be different from where it was formed in deciding whose jurisdiction's law applies. So it's possible that an American court would privilege a communication formed in a jurisdiction that does not recognize the privilege. Or would not privilege a communication formed in a jurisdiction that does privilege the communication. The first question is whose rule applies, and the second question is whose rule applies, and the third question is, what does that jurisdiction's rule say?

MS. JOHNSTON: So I guess we have time for some questions.

MR. PARK: Yeah, I was just going to say, if anyone in the audience has a question on this section we just covered, the merger question section that Professor Gillers covered just now, you have an opportunity to ask a question.

MS. JOHNSTON: Or at the end.

MR. PARK: Or we can ask at the end. No immediate hands.

All right, we're going to move onto Act Three, I guess.

MS. JOHNSTON: Well, I've now spent some 15 minutes digesting this extremely disturbing email.

And Marc, you're not going to want to hear this, but one of my colleagues just emailed me with some disturbing news. In the course of a document search we found a document that suggests there may have been improper exchanges of information between ChemCorp and PolyCorp, and of course it's with respect to that product, PXP223.

There's another company in the industry, I guess they are the other main player, which I believe is called PlastiX. And they apparently may have been implicated in this as well.

Now the curious situation we have here is that the document was produced to the EU authorities, but it was not produced to the FTC—because I can't imagine how we managed to do this, but that custodian was not on the agreed search list with the FTC. But we do think the EU has probably given the document to the FTC, and now we are wondering if we are heading for a grand jury investigation.

I can tell you Marc, I am not a cartel expert, so I am going to bring in my partner, Wendy, who is going to have the dubious pleasure of guiding you through this part of the morass.

MR. BROTMAN: Well, sounds like a bad situation, but it's the right thing to do. But I am not a cartel expert either, so have her call my colleague, David Perry, instead of me. He's not a true cartel expert, but he is in our government investigations group in ChemCorp's legal department.

MR. PARK: Wendy, thank you for being available to help us in what is our first potential cartel matter at ChemCorp.

As I think you understand from your colleague, a document was found that was very troubling. It suggests that some people at ChemCorp had some improper contacts with competitors in a very concentrated market. So let me tell you what I've done so far.

We have identified the people we think are involved in the communications. We are preserving all their documents. We have done an initial look to try and figure out which countries are involved. It seems to be the US, some countries in Europe, China, at least. But the immediate issue we have is this particular document was already provided to the Europeans. The Europeans we think gave it to the FTC and we think the FTC gave it to the DOJ. We know that's allowed under the waivers that we signed, but we are not really sure what to do next.

MS. HUANG WASZMER: So first, we are all going to take a collective deep breath. And then it's really great you've taken a lot of first steps that are going to put us in a good position to hit the ground running. You're totally right, we are in a circumstance where we are going to have to collectively plan and start internal investigations to get further facts to figure out how significant the conduct is and how we need to be positioned to see what the next steps are.

One of the things that this picks up on—I know what my colleague Elaine has said to you. There are privilege issues and other ethical points we should pause and think about now, because when we get hopefully in the

fury of the investigation, these things get mixed. To manage expectations, in cross-border investigations it is very common for us to need to revisit privilege issues at various stages. So we will make some calls at the moment. We will give some advice at the outset, but we have to be disciplined in repeating and going back to see, particularly with regard to specific work product, how this works out.

So a question for you. We obviously need to think about interviews. You need to do diligence on documents to see if there is more than the horrendous one.

Tell me, has your team done investigative interviews in other matters so far?

MR. PARK: Yes. So not antitrust, but last year in the same division of ChemCorp we had an international trade matter, and we had in-house counsel do all the interviews. We have settled the case, but it's not final. We have a settlement pending. So the in-house lawyers know about *Upjohn*. They know to advise the employees that we are not representing them. We are representing the company.

And I guess what I am wondering is, if there are a bunch of jurisdictions, and this is a cartel case, not an international trade case, what particular things do I need to be thinking about?

MS. HUANG WASZMER: So it's terrific that your team is familiar with *Upjohn*. Well, the *Upjohn* warning about not representing the individuals specifically, but representing the company is really a U.S. legal requirement.

In our experience it does cover some of the due process related issues that you have in other jurisdictions. So having that as a foundation is a great start. As you have spotted, it's really common that a company won't have a legal team member in every single country where they have an issue. It is important for us to think about whether we get a qualified lawyer in some of the key jurisdictions, particularly the EU. That will help maintain privilege, in particular in the EU if a qualified outside lawyer is substantively involved. There is some dynamic where you really don't want someone sitting there like a potted plant taking notes and not really being involved.

Brazil is another jurisdiction in which we should get an outside lawyer in there to participate. As I think you all heard previously from Elaine and our team, China is an area where we really may not be covered with this kind of interview or investigation. It is something for sure we should not wing. This is not something where a U.S.-certified lawyer should be giving advice on China.

What I would say, even in jurisdictions where we don't have attorney-client privilege or work product coverage, there are ways that we can create work product, do interviews, do the investigation with an eye toward the fact that the ultimate work product is more limited, is factual in some ways. We would not be okay, but we would be more comfortable with that work product.

MR. PARK: Okay. But let me ask one more question. In this trade matter I don't really know yet whether those facts are going to overlap with this case, but we have memos prepared by in-house lawyers in Europe and China. Would those be subject to discovery in this case?

MS. HUANG WASZMER: So if there was not a qualified outside lawyer in those interviews, it is possible as a technical matter that those would not be covered by privilege. However, what we have experienced, and you just spotted this, is that it's possible there won't be an overlap and as a practical matter they won't be requested, in which case there was a leniency applicant or affirmative cooperation status.

MR. PARK: Okay. I have another question for you. As you know there is this third company, PlastiX. And I read in the paper that they were raided. They had a dawn raid there and apparently they had a one-page summary of a report their IT forensics company had done. The company no longer had the actual report, which apparently looked at some competition law issues. The paper says the Dutch authority is requesting that the IT company, the forensics company, produce all of the underlying materials in the report. Is it possible that they could get access to those?

MS. HUANG WASZMER: Unfortunately, you don't know all the facts behind the news article. But let's just say the facts we understand are the IT consultant or outside firm did an investigation and generated work product without a lawyer. The likelihood is that that actually could be subject to disclosure of the underlying material. In fact, there was a 2012 Dutch case in which there was no privilege over a report like that because there was no counsel involvement. What I would say is this commonly occurs in the U.S., as many companies like yours are dealing with. There is a cost to internal investigation by lawyers and frequently there are sometimes forensic officials and other consultant firms that can do internal investigations and help look at matters, particularly when they're not under investigation. That is great in certain circumstances, especially for resources. But folks should be aware that where there is no counsel involved, it actually may be very difficult to assert privilege over the materials, including the underlying materials. And one of the most difficult issues is where you have a one-page report that says there is significant misconduct, and it hasn't been vetted with the thought that it actually could be disclosed.

The other issue I'll raise, it's great to have seen the news article, because it's possible in a raid that there is no leniency issue, and one or more of the entities that are competitors in the market are cooperating. So that's something we have to think about when we need to get before the regulators.

MR. PARK: Okay. One more question just in terms of the employees. I am thinking it's conceivable that one of these employees could be charged with criminal conduct. Are there special cautions I have to consider in that regard?

MS. HUANG WASZMER: Well, I am very glad we are talking about this question before you've already interviewed people. This is one of the touchiest areas. Just for you to know, we often think of criminal as a U.S.-only issue, but increasingly there are other jurisdictions that are really thinking about criminal enforcement or have exercised it. Some include Germany, Brazil, Canada, as well as the U.S.

So there are a couple of different protocols. The place that will put you in a better position in terms to think about, as we start to think about interviews and dealing with employees. One, was maybe you've dealt with these people before. What I find interesting about this is in the US it is very common to be spin off employees, having them represented by separate counsel. And in other countries, for example, Brazil, sometimes there is corporate counsel and individual counsel in the same room.

So as an in-house counsel one of the things that will be helpful for you to do is watch as the matter develops, in particular, where you have a high-level employee who could have culpability. It's time to pull back and figure out whether the representational strategy should be different. So private counsel is something you have to think about.

There is obviously a tension in terms of having separate lawyers and losing control in terms of information flow. But in my view you're always best served by being careful on that and not interacting with a CEO or someone at that level who has issues.

As I think my colleague Elaine talked about, privacy issues are very significant in cartel matters, in particular, where you're starting to pull email files for people who you think are involved. So we should get an overview evaluation at the outset to figure out whether we actually need employee consent to pull some of those files, especially where there may be individual exposure, where there is criminal potential, criminal individual exposure.

One thing just to pause on, we are in this stage but we are not in the middle of a cartel investigation. That may have implications for data privacy and other due process right for employees where you have compulsory process, where you've been subpoenaed. Sometimes you're more covered. Se we are in this kind of hinterland.

And then finally, hopefully we will not get there, but there may be a circumstance in which you have a leadership individual who could be involved. And that's an ethical issue at some point in terms of us deciding whether those people should be involved in the decision making. I previewed that, but hopefully we don't get there. Hopefully, this will be an isolated circumstance and we don't have to evaluate whether leadership is involved.

Next question?

MR. PARK: No. But do you have a question of the professor?

MS. HUANG WASZMER: I do.

Professor Gillers, we are taking a deep breath. We are on top of this.

What are the most common ethical issues that you've seen in an internal investigation when there are individuals at companies that have civil or criminal exposure?

PROFESSOR GILLERS: Right. Well, we call them *Upjohn* warnings, because we didn't like what they were previously called, corporate Miranda warnings. Actually, the *Miranda* warning model fits where the *Upjohn* model does not. *Miranda* was a warning, you know, what you say could hurt you, and that's what we're really talking about.

Upjohn was not about internal warnings at all. It was about internal privilege in communications between the lawyer and mid-level Upjohn personnel. But *Upjohn* feels better than using the word *Miranda*.

The good news is that it rarely happens—not never, but it rarely happens that a constituent's claim that the lawyer represented me too, and so he or she cannot reveal the contents of our communication because I can assert the privilege for that communication. That claim almost always fails. That's the good news.

However, you don't want to get to the point where you win, right. You don't want to have the contest. You don't want the litigation to center on whether or not your warning was adequate, even if you ultimately prevail in that litigation. So, for example, on what not to do. There is a case in the Fourth Circuit called *In re: Grand Jury*, *in 2005*, which involved an internal investigation at AOL where the lawyers' warning included the sentence: "We could represent you too. We represent the company, but we could represent you as well to the constituent." And the constituent claimed that that formed an attorney-client relationship.

Now the circuit rejected that, but there was some very severe language from the Circuit opinion about how sloppy it was to even use the "could" as opposed to the "do" verb.

So what should you do? Well, first, you have a script so you don't rely on your memory about what to say. You have a script, and you read from it, and then you date it and file it. You don't have to ask the constituents to sign it, but you've done that, and that becomes a business record. And it becomes admissible as an exception to the rule against hearsay. You've now created the document that

can help establish, should the issue arise at all, that you gave the *Upjohn* warnings.

What should the script say? Well, obviously, we don't represent you. We represent only the company. The company owns the privilege. Anything you tell us we are free to tell anyone in the company. The company controls our duty of confidentiality, which by the way, of course, is different from privilege. You don't. And etcetera, etcetera.

Now the constituent might say at the end, well, do I need a lawyer? And the safest answer to that is, it seems to me, is it's not for me to say. If you want a lawyer, we'll suspend this interview, and you can get a lawyer, and then we'll continue with your lawyer. So it's not for me to say whether or not you need a lawyer. And you certainly, certainly, certainly never give advice.

The idea behind the *Upjohn* warning is that the constituent may misunderstand your role, or the interest of the client and the constituent may be potentially in conflict. It's a fairness warning. If the constituent either misunderstands the role as you reasonably should know, or if there is a conflict between the constituent and the company, you're alerting the constituent to that. And that's because of fairness.

If you want to get the maximum information, of course, you would not give any warning at all. But both Rule 1.13 and Rule 4.3 say that when you're talking to an unrepresented person who may misunderstand your role or be in conflict with your client, you have to do that as a matter of fairness.

But if you do that, and you read from that script and you file it, there should not even be an opportunity for a contest over whether or not the constituent was also a client.

MS. HUANG WASZMER: One other point to add to our scenario, and that picks up on Professor Gillers' point, is that joint defenses between the company and the individual also should not be so fluid. Because there are circumstances, which is why they have separate counsel, where the strategic alignment may change. And so as the company, we will refer people out and then figure out really if counsel needs to represent their individuals to the best of their interests. And so we just have to watch out if you could have a joint defense, it needs to be formalized, and they could strengthen it.

So Professor Gillers, just one other question for you. So your choice of law provision, 8.5, how does that differ from the ABA Model Rule in a way that could matter?

PROFESSOR GILLERS: Well, this is a problem. Because in the last two or three decades the profession has moved from local to regional to national to international practice. Even small firms can have national and international practices. And yet within the United States no two American jurisdictions—just think about this, you have a national legal economy, but no two jurisdictions have identical rules of professional conduct. And some are quite different from the average. New York is quite different, and California is off the charts. So you may be a New York lawyer, but you have to think about what the rules in other jurisdictions may say.

Now, one of the problems with this disparity is that it extends to the choice of rule. It is not only the rules that differ, but the rule about what rule governs you is different in New York than it is in the ABA Model Rules. In New York, as in the ABA Model Rules, if you're before a tribunal, the tribunal's rules govern. Some tribunals have no rules outside the United States, and that can be a problem. That may mean that different lawyers before that tribunal are governed by their home state rules because the tribunal has no rules.

But if you're before a tribunal with a rule, everyone agrees the tribunal's rules govern. It doesn't mean the local rules of the tribunal govern, because the tribunal's choice of rule might lead the neutral to pick a rule from another jurisdiction.

But what if you're not before a tribunal? Well, that's where the New York rule and the ABA rule differ. The New York rule says it's always going to be a jurisdiction in which you're admitted. You may have to figure out which jurisdiction that is, but it must be a jurisdiction in which you're admitted. If you're admitted in two jurisdictions, you predominantly practice in one, it is the jurisdiction in which you predominantly practice.

If the effect of the conduct governed by the rule is in the other jurisdiction, then it may be the other jurisdiction's. So a New York lawyer not admitted in Ohio could never be governed by the Ohio rule. So far so good. But Ohio disagrees. Having adopted the ABA model rule which says that even if you're not admitted in Ohio, the predominant effect of your conduct is in Ohio, as you reasonably should know, the Ohio rule governs. So from Ohio's point of view you could have done something for which the Ohio rule governs, but from New York's perspective the New York rule governs, because you cannot be governed by a rule in a jurisdiction in which you are not admitted if it's not before a tribunal. And those two rules may conflict, and they sometimes do conflict in situations where the rules are quite different, or in confidentiality situations where rules are also quite different.

Now which rule do you follow? Who knows? You can follow the Ohio rule, and then find yourself disciplined in New York. You can follow the New York rule, but the Ohio court might say, look, you're subject to our disciplinary process through our long-arm disciplinary rule, and we say the Ohio rule governs. This is a problem.

We should have a uniform set of rules nationwide. It will not happen for decades. The courts are too jealous of

their prerogative of developing their own rules and being better than the court next door. So it will not happen. It's a problem for lawyers who practice across borders.

Final point, and that is if Ohio disciplines you for violating the Ohio rule for work that predominantly impacted Ohio, all right, under its choice of rule law, New York might say, well, you didn't violate our rule, but you were disciplined in Ohio, so we are going to impose a reciprocal discipline in New York for violating the Ohio rule, even though it didn't violate our rule. You cannot assume that compliance with New York rule is a shield against discipline in New York in that situation.

MR. PARK: So at this point I think everyone here has perfect information about the ethical standards of each of our states and each country on Earth. Or, perhaps someone out there doesn't have perfect information and has a question? We have time built into the program for questions, so I invite questions.

Yes.

AUDIENCE MEMBER: I just have an oddball question. I think I know the answer to it, but I am going to ask it anyhow.

Suppose you talk to an employee and you give him the *Upjohn* warnings, and the employee says, I don't know, I don't know antitrust law, and I am not really sure. I don't think I did anything wrong, but let me tell you what I know. And you listen to it, and you say, oh, my God, we are in trouble. We have got to see one of these folks in your field office, run in and get some leniency.

Do you have any obligation or ethical or moral fairness to give the employee a heads up, and let him have the opportunity to go in with you, or three days after you talk to this guy there is going to be an FBI agent ringing his doorbell at 6:00 in the morning to clue him in about what might happen to him.

PROFESSOR GILLERS: The question is the constituent, in this case an employee, believes she is safe and she starts talking and you realize that she's singled herself into the risk of criminal prosecution. But you've given all the *Upjohn* warnings, so from your client's point of view, the entity, this may be good, that is getting that information in a negotiation with the prosecutor, the regulator.

But the more the constituent talks, the worse it is for him or her. And your loyalty is only to the entity, and you've crossed all the *Upjohn* bridges. So you are perfectly within your right to let the employee continue to talk and later perhaps to pass that along to the grand jury.

Now, the moral dimension—

AUDIENCE MEMBER: That's why I said I think I already know the answer to that. I mean I know that. But do you feel any obligation to tell this poor schmuck?

PROFESSOR GILLERS: No, there is no poor schmuck warning.

AUDIENCE MEMBER: That's what I thought.

PROFESSOR GILLERS: You have no ethical or legal obligation.

MS. HUANG WASZMER: In response to this question, I am not deft or subtle to do it correctly, but I worked with a counsel in Brazil who handled that exact issue in a way that I thought was really terrific. This was a high-level executive who seemed to be wanting to go pro se in front of CADE, and it was not good for the company that he was going to do that. But it seemed like he needed to cross a little bit of the line to give some advice about the fact that if our counsel had represented an individual in that circumstance, he might not want to be doing that and gave a little bit more procedural information than I typically would have as to what would happen. In that scenario I think it actually was in the company's interest for the corporate counsel to do so. But I will say it took a lot of subtlety and, you know, deftness to do it.

AUDIENCE MEMBER: My question was going to be the same. This poor person, especially we have the Yates memo and everything, they don't know this stuff. We know what could happen to them, what's probably likely to happen to them. I mean they say do I need a lawyer? And you say that's not for me to say. And they say, well, could I go to jail for this? And we know the answer is yes, but you can't say anything?

PROFESSOR GILLERS: You say I can't give you advice.

AUDIENCE MEMBER: So hypothetically, and I'm sure it's obvious to everyone else, but what would be the fact pattern that would present itself where you would make the decision on the joint defense or non-joint defense; like what is it that gives you that fork in the road?

MS. HUANG WASZMER: With an employee?

AUDIENCE MEMBER: Yes.

MS. HUANG WASZMER: So, the real obvious one is where you are not a leniency applicant, and where the company is under subpoena, and has been told by DOJ or EC or others there are specific employees who could have exposure. And then you refer the employee out for separate counsel or he or she has hired her own. Then the question is whether if you're cooperating with DOJ and you're defending the company at the same time, how much information you're going to share with independent counsel for each employee, particularly, for example, if DOJ would like a proffer of that employee. You probably want to talk a little bit about making sure that that

person has documents. So there is a level of day-to-day discussion that may be necessary if you can determine that it's within the company's interests to talk to the employee.

It's more difficult with former employees where it's possible that that former employee actually could be culpable, in which case you're assessing how much information you can give, as well as DOJ and folks in the room. DOJ may not want you to be telling employees about the scope of the investigation, and in particular with former employees or people who could have a lot of culpability. So the Joint Defense Agreement usually works where it is in the joint interest of everyone to cooperate and make sure that the DOJ has accurate facts from everybody. But I'll say sometimes the DOJ is within its rights to say I would really like you not to be sharing everything with individuals whom we may prosecute. By the way, you're cooperating against those individuals and frankly giving information about them, which is the Yates memo. But as many of you know that predates the Yates memo. The Antitrust Division has been practicing this for a very long time, which is basically the Yates memo.

AUDIENCE MEMBER: So I love this idea of the poor schmuck, but I would like to raise another hypothetical of the reluctant witness.

So hypothetically, there has been a raid in Europe. You're scrambling in the US to figure out if you have a problem. You interview the key guy. He wants to hire his brother-in-law who is a lawyer in Tennessee, and you need this information now. How far can you go ethically to threaten his job etcetera?

PROFESSOR GILLERS: It is really an employment law question whether you can threaten his job. I mean is it legitimate to say, well, look, you have this information, you have fiduciary duty to us. You gathered this information as an employee with a fiduciary duty. And if you will not now tell us what is really our information which you possess and we do not, then there may be job consequences. I don't think there is anything wrong with that.

AUDIENCE MEMBER: Just to push back a little, having hypothetically given that speech in the past. If somebody—if the purpose of the *Upjohn* warning or the corporate *Miranda* warning is to afford the employee an opportunity to get their counsel, doesn't there have to be a real opportunity to get counsel?

PROFESSOR GILLERS: Absolutely. First of all, the main purpose is not to give the employee an opportunity to get counsel. It is to put the employee on notice of what your role is in the interview, so that he or she is not under an incorrect illusion about what that role is. Concomitant with that you may ask, do you want to talk to a lawyer, but I wouldn't even do that. If they ask should I speak to a lawyer, as I said, you say it's up to you. I don't think you have to caution them when you realize they may be saying something harmful to them that you want to stop now and get a lawyer. I don't think you have an obligation to do that.

AUDIENCE MEMBER: No, I get that. I am more concerned about the situation where you ask the question, well, they ask you a question, should I get counsel, and you say I can't advise you on this. And they say, well, it sounds like a serious legal problem, I do want to get counsel.

PROFESSOR GILLERS: All right, then you suspend the interview. That's easy.

AUDIENCE MEMBER: Except there is a race to the DOJ, and time is really of the essence.

PROFESSOR GILLERS: I would not want to be in a situation in which I am interviewing an employee who says, look, I need a lawyer. I don't want to talk to you without my lawyer, and I did not suspend the interview. I might say, well, is there anything we can talk about, other than what you think you need a lawyer for if I felt particularly courageous.

[LAUGHTER]

But I would not want to continue the interview.

MR. PARK: Okay, thank you for the questions, and I am going to move on now. We have a couple minutes left, so I will let each of the panelists, to extent they have a thought—and they need not, but if they do, I would like to hear from them.

So start let's start with Wendy and go down to the Professor.

MS. HUANG WASZMER: I had a different closing thought, and that would be it's very difficult to take action against employees if there is not an existing culture of compliance. I think if you have employment agreements, it's already obvious that employees have to cooperate with you; you're in a much better situation than starting at square one and saying we will fire you if you don't talk to us.

So it's worthwhile for companies to think about having the code of conduct updated. I've had a circumstance where we can fire someone immediately upon not cooperating, because it was obvious that the company expected that in the course of investigation. But without that code of conduct, the company basically would face a gigantic lawsuit by that employee that would basically expose the company in a DOJ investigation.

MR. BROTMAN: I would just throw out the data if the company is based in France.

[LAUGHTER]

MS. HUANG WASZMER: Two years plus a vacation.

MR. BROTMAN: And then they get to come back.

[LAUGHTER]

MR. BROTMAN: I think in our hypothetical, too, since you've got two companies who are competitors and now merging in a merger of equals, one other thing I'll just throw out, there is also going to be a desire probably by some of the executives who are working on this to—or in the know—they are probably going to want to talk to PolyCorp, right? Because they are going to be one company hopefully shortly, and it's the product that's at issue in the merger investigation. So you're probably going to end up with having to deal with something like that as well. Obviously, you have a JDA in place, but that's around the merger. It's not around this investigation where your interests may not be aligned.

MS. JOHNSTON: I think back to the merger where we started before it all went horribly wrong. I think it is important to think about privilege issues, because it is possible to think through the issues. I mean, I know this sounds a bit like a pitch for employment of outside counsel, but I do think from a privilege standpoint it does make sense in a global deal for the outside counsel to be involved when those early deal-related documents are created.

The other concluding thought, do not forget about data privacy.

PROFESSOR GILLERS: Well, only that we will use the word ethics, but what I deal in is not ethics or morality. I have no background in morality.

[LAUGHTER]

Remember, the 1908 document was called the Canons of Professional Ethics. The next document was called the Code of Professional Responsibility. The current document is called the Rules of Professional Conduct. The word responsibility is gone. The word ethics is gone. This is all about law. By law we would mean rules that carry a sanction if you violated them. It's just another form of law. Some of it comes from professional conduct rules, and some of it comes from substantive law, case law, the Constitution, statute, but it's law.

And one of those—picking up on some of the questions—areas of law is your duty of competence and your fiduciary obligation to your client, notwithstanding that it may harm somebody else, so long as you stay within the four corners of the law and the rules.

MR. PARK: Thank you. Our time is up. Please join me in thanking the panel.

[APPLAUSE]

MR. WEINER: That was great. Thank you for bringing that dramatic interpretation to our little panel in New York.

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

MR. WEINER: We now have a business meeting. Just pay attention for about three minutes while Stacey comes up.

Our first order of business is approval of minutes from last year's meeting. Can I have a motion?

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MR. WEINER: All in favor, say aye.

[AYES VOTE]

MR. WEINER: All opposed?

[NONE]

Second order of business, report from the Nominating Committee. Stacey.

MS. MAHONEY: Thank you.

How are you all? Okay, so I am going to do as I usually do, I will forgo reading the people who are returning for one more year on the Executive Committee, and I will give you the list of people who have been nominated for a two-year term to conclude at the Annual Meeting in 2019.

Daniel Anziska, Rachel Brandenburger, Barry Brett, Ned Cavanagh, Karin E. Coughlin, Jessica Delbaum, Steve Edwards, Bill Efron, David Emanuelson, Harry First, Larry Fox, Nick Gaglio, Ilene Gotts, George Hay, Adam Hemlock, Steven Houck, Bob Hubbard, Pat Jannaco, Elaine Johnston, Elai Katz, Scott Lent, moi, Jeff Martino, Joel Mitnick, Saul Morgenstern, Wes Powell, Bruce Prager, Pat Rao, Abby Rudzin, Hollis Salzman, Aidan Synnott, Steve Tugander, Robin van der Meulen, Wendy Waszmer and Michael Weiner.

In addition, the Nominating Committee would like to recommend four new members to the Executive Committee: Deirdre McEvoy, Will Reiss, Gerald Stein, Chris White.

And for our proposed slate for officers: Michael Weiner as Chair; Wes Powell as Vice Chair, Nick Gaglio as Secretary. Each of those would be for one-year terms, and Elaine Johnston as Finance Chair for a three-year term. And yes, she does know the length of her term.

Do I have a motion?

AUDIENCE MEMBER: So moved.

MS. MAHONEY: Second?

AUDIENCE MEMBER: Second.

MS. MAHONEY: All in favor say aye.

[AYES VOTE]

MS. MAHONEY: Opposed?

[NONE]

We are all very good. The motion passes. Thank you very much.

[APPLAUSE]

MR. WEINER: That's it for business. Motion to adjourn?

AUDIENCE MEMBER: So moved.

MR. WEINER: It is lunchtime. Please be back at 1:30. Executive Committee, Sutton North.

We'll start back up again promptly at 1:30 p.m. Thank you.

Has Antitrust Failed?

MR. WEINER: If we could come inside and sit down and get started. This is a great panel, and I don't want to take any time away from them at all.

This afternoon's panels are one right after the other. We are going to take a stretch break in between them, just standing up and stretching. We have three great panels.

I am going to turn it over to Ethan to start this panel, which asks the question: Has antitrust failed?

MR. LITWIN: Thank you, Michael.

Welcome, everyone. We present this panel in a significant moment in history, and I'm not just talking about the history of antitrust law.

While I won't be so bold as to predict how the new Trump administration will approach antitrust enforcement, I think it's fair to say that business over the next few years will not be business as usual. As the new administration's policies and priorities come into focus, I thought it would be a useful time to exercise a bit of self-reflection. I can see in our audience today representatives of the antitrust agencies, plaintiff and defense bars, economists and in-house counselors. We naturally disagree with many of the nuances of antitrust law, but I feel fairly safe saying that we don't disagree about its larger policy objectives. I would wager that we all believe that there should be vigorous competition in all the markets. That competition is the best driver of dynamic innovation and wealth creation, and that our society works best when markets aren't distorted by anticompetitive conduct.

The effectiveness of antitrust enforcement was implicitly questioned in the September 17th issue of *The Economist*, which reported some surprising statistics on the American economy. Among other things, *The Economist* reported that the shared GDP generated by the top 100 U.S. companies rose from about 33% in 1994 to nearly 50% today. The five largest banks now account for approximately 45% of banking assets, up from 25% in 2000. These are merely facts. Today we are concerned with their interpretation implications.

Today we ask: Has antitrust failed? Joining me is a very distinguished panel. To my immediate left is Dr. Jason Furman, who until last week was the 28th Chairman of the Counsel of Economic Advisors and a member of President Obama's cabinet.

To his left is Maurice Stucke, who is counsel at the Konkurrenz Group and a tenured law professor at the University of Tennessee. He's just published some very interesting books on the big data issues that we'll be discussing today. *Big Data and Competition Policy* and *Virtual Competition*, I heartily recommend those to everybody.

To his left is professor Tim Wu from Columbia University Law School. He has also published in this area, *The Master Switch* and *The Attention Merchants*.

And to his left is recently my new partner at Dechert, Alec Burnside, who practices EU competition law out of Brussels. And I commend to everyone his article, *No Such Thing as a Free Search: Antitrust and the Pursuit of Privacy Goals*, of particular relevance to what we'll be discussing today.

To begin with, I've asked Dr. Furman to present to us some of the background economics that inform our discussion today.

Jason.

DR. FURMAN: Great. Thank you very much for organizing this. Thank you for inviting me.

I should give you all several disclaimers in advance. One, this is the first time I've not spoken on behalf of President Obama for the last eight and a half years. So if I slip into things like the President is a highly thoughtful person who likes to sit down and spend lots of time reading and discussing memos, you just need to adjust what was meant by that.

[LAUGHTER]

The second is I thought I'd go really crazy and full bulwark, and I looked back at the last time I talked about this, and I began my remarks with, you know, I am in the White House, but we have nothing whatsoever to do with antitrust enforcement, and even if we did, none of the enforcers would care what we had to say. And I realize this statement is just as applicable now as it was a week ago. So I won't use this to tell you my views about AT&T, Time Warner and any other big topics.

My last caveat in all of this is I am not only not a lawyer but in economics I don't specialize in IO. I came at this topic less from a micro-up perspective and more from a macro down perspective. And just to start with the very biggest part of that macro, and then I'll eventually get to the micro issues, is two issues that have really seized the minds of a lot of the economics profession to understand is, number one, why productivity growth has slowed down so much. That is, a ten-year trailing moving average of productivity growth, has been a little bit over 1% for the last decade, as opposed to the little bit over 2% that had been the average in the period prior to that. So this is something that's keeping a lot of people up in a lot of different settings trying to understand why it's happened.

Then the second really big trend that's gone on in the economy is the rise in inequality. You can look at it in a lot of different ways. This shows the share of income going to the top 1% more than doubling from the 1970s

through today. And the combination of these two, the pie is growing more slowly without productivity, and the pie is being divided more unequally, is behind a lot of the slower growth of incomes for the middle class that have driven so much of the concern in our political system and society. So that's what's motivating us.

So the question then is does the state of competition have anything to do with this? There are several pieces of macroeconomic data that would suggest that it does. The first of them is that there is a lot of evidence that a really important source of productivity growth in the economy isn't small businesses, but it is young businesses. It is startups. It's firms that are bringing new ideas into the economy and being formed, or firms that are challenging existing firms and forcing them to innovate more. Since as far back as we have been collecting data, the share of the total small new firms in the economy has gone down, and their share of employment has gone down.

At the same time another way of seeing the same issue is that we've seen a decrease in firm dynamism. The firm entry rate has consistently fallen. The firm exit rate has fallen somewhat as well, and now you have almost as many firms entering as exiting, which is a big difference from the situation you saw decades before. Again, that's really important potentially for the productivity growth story, because a lot of productivity growth is not a business figuring out how to be more productive. It's weeding out unproductive businesses and replacing them with more productive businesses. So the same things that mean young firms are contributing to productivity says this churn is really important to the healthy process of innovation in the economy.

We don't just see this at the firm level. We see this at the worker level. And economists have looked at this a lot of different ways. They have looked at workers moving from job to job; businesses adding and subtracting jobs; workers moving between states; workers changing industries; workers changing occupations. And all of those have been declining since as far back as we can measure. And each one of those measures go back to a different date. So this is something we're also seeing in the labor market.

Now, of course, these two could be related. If you have five different hospitals in an area, and you go down to one or two hospitals in the area, you'll see fewer people moving between different employers than what you saw before.

The evidence for declining competition, macroeconomic evidence also encompasses this. The blue line here is the rate of return to all private capital. So this is what you get investing in a business or investing in real estate. That's been about the same or rising slightly. At the same time the safe rate of return has fallen over time; that's the red line, what you would get on a one-year treasury. So the difference between them says you're getting a higher rate of return on capital relative to the safe rate of return. There are a lot of potential explanations for that. But one of the ones would be more market power leading to larger markups, leading to a higher rate of return.

There are two sets of evidence that are consistent with that interpretation of these macro data. The first evidence is if this indicated that firms were more productive and had better investment opportunities, you'd expect them actually to be investing more, because their rate of return is going up. Instead, if anything, investments since the early 1980s have been trending down as a share of GDP. So you have businesses that have a higher rate of return than they had before, and they are investing less than they were investing before. That is often indicative of monopoly power, where you get a higher rate of return, and you don't take advantage of it by increasing quantity. In fact, you get that higher rate of return by restricting quantity.

The other piece of evidence is if you look across industries, the ones that have seen the largest increase in concentration have seen the largest increase in their rate of return relative to the safe rate of return. I don't have a slide to show you. And this is important too, because about half of productivity growth comes from business investments. So when businesses are investing less, you have less productivity growth.

To shift to the second half, which is inequality, some of the evidence is, first of all, a decline in the share of income that goes to labor, so this divides everything up. And income either goes to capital and land, or it goes to labor, and the labor share has been declining consistently. Again, that's consistent with workers having less bargaining power, either because there are fewer employers. If you can't move from hospital to hospital, you can't negotiate your wages up in the same way that you could have before, for example.

This increase in the profit share, which is the flip side of this chart, is not something that's been distributed equally across firms. An analysis that McKinsey did for a friend of mine, Peter Orszag and me, for a paper we did shows the rate of return on invested capital, and you can do it including or excluding goodwill. I am showing it excluding goodwill. It used to be about a ratio from the top firms to the medium firms; now it's about a 5:1 ratio. There has been a big increase in the skewness of rates of return as some businesses have been highly successful, and they tend to be the same businesses year after year. So it doesn't appear to be a return for greater risks.

That has translated into inequality, and this shows some other research a set of researchers have done, which is that the big rise in wage inequality has been not been within firms. It's not that a manager is paid more than a line worker. What you see on the left-hand side is between firms, which is to say, everyone at Google, Pfizer

or Goldman Sachs gets paid a lot more than everyone at a less successful firm. So you've seen that big dispersion in inequality between firms, which matches up with the big increase in dispersion of rates of return to those firms. So some firms have faced less competition, been highly successful, have high rates of return and are able to share some of that with their workers, and a lot of it goes into the profit share as well.

If the micro evidence is difficult, it's because there are thousands and thousands of different measurements, and you all know from any case how much time you can spend arguing about what the relevant market is. So this is hardly definitive proof by any stretch. It's neither necessary nor sufficient, but if you look at a high level, virtually every industry has seen an increase in concentration. You can drill down to about two or three digit industries, and you can see the same type of pattern that most of them see, an increased concentration of the top firms in those industries. And there have been a range of case studies published in economics and financial services, agriculture, hospitals, wireless, and railroads being some of the examples, all of which have found large increases in concentration.

I should end by saying we can take some of this up on the panel. None of this says for any particular case what the answers should be. But what it does say, at least to me, somebody coming at it from a macro perspective, is that there is potentially something going on that's about more than just prices. It's about innovation; it's about the division of rents that could have potentially large effects on the economy as a whole. So, it's an area worth both paying attention to, worth thinking about in a broader manner. And it has policy implications not just for antitrust, but for a range of other issues, like land use restrictions, occupational licensing, intellectual property and the like.

So that's some of the context for discussion. Thank you.

MR. LITWIN: Thank you.

So the balance of the panel will be an informal roundtable where we'll start with questions about merger control policy, Section 2 enforcement and Section 1 enforcement. If we had till the 6:00 dinner, we might be able to get through that. So we'll see how far we can get. There is certainly a lot to say.

But we'd like to keep this very informal. If anyone in the audience has questions as we go on, please put your hand up, and I'll do my best to weave you into our discussion.

To kick things off, Maurice, I'll direct the first question to you initially.

Robert Bork advocated that antitrust law should be indifferent to whether companies grow internally or externally. Given the historic levels of market concentration within the U.S. economy over the last 20 years, should antitrust law continue to be agnostic about whether growth results from out-performing rivals versus acquiring them?

PROFESSOR STUCKE: Yes. Thank you very much for inviting me.

I remember Steve Salop explaining the fallacy of Bork's logic. Bork believed firms were rational profit maximizers. So they merge for one or two reasons: market power and efficiencies. If the agency can't show how the merger will necessarily increase market power, then the merger must promote efficiency. So false positives, Type I errors were of great concern. We shouldn't really care whether the firm grows internally or through mergers. If the merger does not increase market power, then the merger, like internal growth, must be efficient.

One thing we'll touch on later is whether the empirical literature actually supports the belief that these mega-mergers are efficiency enhancing.

Another thing that hasn't cropped up until recently in the 2010 Merger Guidelines is the incipiency standard. The agencies and courts once factored a trend toward concentration in their merger analysis. Moreover, under the Clayton Act the agency doesn't have to predict perfectly. The agency only has to show a reasonable probability of anticompetitive effects. The aim for economic and political reasons was to prevent concentrated industries in their incipiency.

I think we have gotten away from that. Instead over the past 30 to 35 years we have had "light touch" antitrust. So what Jason is identifying on a macro level is very interesting. Can we show from the macro and micro-economic evidence that our antitrust policies are working? Some of the things that Jason has identified draw that into question. The concerns increase when you also look at John Kwoka's research on post-merger retrospectives. Granted, as John admits, there are problems and limitations of the merger retrospectives given the limited number of studies. But the steady wave of economic literature suggests that our antitrust merger policies may not necessarily be working.

Given this body of evidence, we should first reconsider the risk of Type I errors, namely the assumption that mergers are efficiency enhancing if we can't prove market power. Second, we should put more emphasis on the Clayton Act's incipiency standard.

MR. LITWIN: Thank you.

PROFESSOR WU: Just one thing. What you said in the introduction isn't exactly right in the sense of antitrust law. I don't mean to make a correction. I think it was said more rhetorically. But it is still the case that we still treat merger and monopoly slightly different than a firm that

grows to monopoly. So actually, the standard is not yet Bork. So I just want to say that.

It is interesting to think there is a good reason for that. You know, why, if a firm grows to, full size, and I am assuming they didn't do so through a process of illegal monopolization, why do we still treat that differently than a merger to monopoly. I guess the idea there, just thinking about it during that answer, is that there is at least the possibility with an organically grown monopoly that really was acumen, competence and so forth, so they really did have a better product, in fact that can be often the case. While you have no such sense in a merger to monopoly. It is a maneuver. In fact, under Section 2, before the passage of the Clayton Act, mergers were considered conduct under Section 2. So I just want to make that very simple point that there remain good reasons not to take Bork's idea seriously.

MR. LITWIN: Alec, from the European perspective?

MR. BURNSIDE: From the European perspective, levels of concentration in Europe would be looked at differently, because one of the imperatives of European Union antitrust law is to achieve an integration of national economies. And to that extent there may be a certain, not a presumption in any legal sense, but a certain willingness to look at cross-border deals in a more favorable way, which if the relevant geographical market can be defined increasingly widely across Europe is not likely to produce a higher level of consolidation. But increasingly we are seeing deals which affect Europe across the whole continent and further. Whether the considerations would be the same, with my humble practitioner background, I don't attempt to come into the issues of the high learning. From a practitioner background I would doubt the intuition that mergers are only motivated by one of the two reasons that Maurice cited. What are often called social issues, in other words, personal aggrandizement and ambition-seeking executives are also significantly a driver in these things. And if it's not accounted for in the economic theorizing, then I suggest someone might like to write about that.

And lastly, the introductory slides—I may have missed it, but is there a punch line that explains the necessary causality between the increasing levels of concentration and the various economic indicators which built up to the last slide?

DR. FURMAN: The answer is some of it may be changes in policy over time.

You referred to results also looked at the FTC, and I am going to overly stylize this, but it used to be if there was a 6:5 they had to scrutinize it. If it was a 3:2 you wouldn't try. If it's a 6:5, now, you get approval; a 3:2 you have a decent shot of getting approval. That's changing antitrust enforcement over time. That's a policy change, a shift in court, a shift in practices, and that's affected the landscape. Some of it may be from natural causes. Some of that could even be the acumen that Tim was referring to. Certainly in technology and networked economies there are some returns to scale built into all of that and benefits to that scale. And to some degree what you want is to not have the reduction in competition for the bad reasons, but it's fine to have increased size and older businesses for the good reasons. And to the degree you can make policy changes to your weeding out the ones that are done for market power and you're allowing the ones that were done otherwise, then you could let the chips fall where they may.

Some of what I was pointing to also probably may have causes outside of what this room is concerned about. So for example, you need a license to be florist. You know, in 1950s, 5% of people needed licenses for their businesses; now about 25% do. And that's probably caused fewer people to move between jobs. So those types of policies have changed over time and reduced some of the dynamism as well.

MR. LITWIN: So Alec, building on your comments that many of the economic assumptions for why firms engage in mergers may not be perfect at the outset. Do the limitations inherent in pre-merger competitive effects analysis suggest that the balance should shift more to post-merger review, particularly where concerns are about non-price competition?

MR. BURNSIDE: I'm hesitant on this. I guess the first thing to lay out is the difference in the U.S. and the European system in terms of law and jurisdiction. As I understand here the Hart-Scott-Rodino is no more than a procedural mechanism but not a substantive standard. And even without Hart-Scott-Rodino, there is still jurisdiction to apply the substantive law.

That's not the way in the European Union where the merger regulation both creates the power to review mergers and it sets down the timetable. And it's relatively shocking from a European perspective to think that mergers would be investigated after they have been implemented, some kind of injury to legitimate expectation and property rights. If a case could be made sufficiently for upsetting those rights because of harm to competition, then maybe.

The balance is struck on this in the British system, which I grew up in before we even had European merger control, where there is no obligation to notify. You can notify. And if you don't notify, they can come after you after the event but for a limited period. Which was six months after implementation or at least from public knowledge of the implementation, and that was then shortened to four months. Actually, it's quite an intelligent system, because it allows companies to assess whether their deal is likely to be controversial and just get on with it and handle the investigation after the event, if there is one.

I am doubtful myself about a routine post-implementation review.

PROFESSOR WU: Do you have an economic reason to be doubtful?

MR. BURNSIDE: No. I can very well understand it from an economic perspective. It might be exactly the intelligent thing to do. I'm sure my hesitation is the lawyer's hesitation as to legal certainty.

MR. LITWIN: Tim.

PROFESSOR WU: So I take a view on this. I think there is a good case for increased retroactive use of Clayton Act Section 7. In other words, challenging mergers after they are done. For one thing, this is the way it was done originally in American antitrust law. This is more recent, the idea of looking at things prospective as opposed to retroactive. The main reason I take this view has to do with essentially something I've heard in this room, I think I would agree with, the variability of economics and projections and trying to figure out what's going to happen in the future.

So if you take that for granted government looking at these things and private parties, the system is quite valuable. It leads to two possible directions. One is you have to have strong structural presumptions, which are going to be inaccurate. You're doing them because you know you can't have a final answer, so something like preventing say 6:5 is obviously wrong. Any rule is going to have its errors. But you're having that rule because you know your projections are going to be wrong, too. Either that, if you want to have a system like we have now, which is based on projections that are a much more sensitive nonstructural approach, then you can have the best data possible. The best data possible isn't available until after the merger is done and maybe a couple of years down the road. That's when you know what the prices are, and then you have a very straightforward answer. Did this merger raise prices, yes or no? And if it didn't, there you go. But when you think about it, it acts as a certain kind of obvious disincentive antitrust doesn't like, which is merging for the sake of raising prices.

I'll add some sudden subtle expectations people wouldn't like, but this country has broken up a lot of companies over its history. It hasn't done so in recent history, but that doesn't mean it shouldn't go back. It's an aberration of the last 20 years or so. But there was a period for most of the 20th century where breakups were common. It's not personal. These are corporations; they can handle it.

MR. LITWIN: Maurice, what about in the big data sphere?

MR. BURNSIDE: Forgive me, sorry, Maurice. My apologies.

By what legal standard can you review after the event, when companies integrate businesses and have a coordinated pricing strategy, Section 1 or Section 2?

PROFESSOR WU: Section 7 of the Clayton Act.

MR. BURNSIDE: And is that a clear standard that's not going to be unfair on companies as they integrate activities?

PROFESSOR WU: I don't think the companies will like it if they are broken up. But it was the practice from 1893, through the passing of Hart-Scott-Rodino. So this was the practice of antitrust law for the first half of its practice, going back to some of the very first formative cases, where they would do it under Section 2. So I am saying there is a half century of practice that did this.

I should also add to my case that there is a strong case—I don't know if I've made it, but anecdotal examples of breaking up a company that was dominant was the best thing for that industry. If you take the example of the AT&T breakup, which is the last big breakup I can think of, other than the attempt of breaking up Microsoft. The examples are clear. First of all, the prices went down and that's obvious. But more profoundly, the telecom sector became the most vibrant, including the entire internet economy, and launched various sub-markets that didn't exist before because of the removal of AT&T.

So there is a strong case that it is not going to be true for every single breakup, but the right number of breakups certainly is not zero. And right now we are at zero for a very long time. That's inconsistent with American history, and it is inconsistent with antitrust enforcement. And I think it's time to return to the usual practice.

MR. LITWIN: Thank you.

So Maurice, as a subset of this topic I was thinking about the other day mergers involving big data issues. This is part of the European Commission's new consultation on merger review and whether or not there are important mergers that affect the European Union generally that are escaping European-wide review because for one reason or another they fall under their merger thresholds, and as Alec pointed out, the Commission is powerless to investigate the competitive effects of a merger after it closes.

And then I compared that to the quick rise of big data firms, that these gigantic companies have grown over a remarkably fast period of time. How do you balance the need to do pre-merger review to prevent the erection of barriers to entry as well as intervene when necessary to allow for competition in that particular space?

PROFESSOR STUCKE: Right. Big data poses several problems for the competition authority. One problem is that antitrust has become very price centric over the last 30, 35 years. Friedrich Hayek made an interesting observation when he received his Nobel

Prize in economics. Often in the physical sciences what is measurable is what's important. But, as Hayek noted, that does not apply to economics. What's measurable, as Jason also pointed out, may not necessarily be what's important.

This is particularly true in data-driven economies with multi-sided platforms, where one side is ostensibly free. Looking back over the past 35 years, it seems from John Kwoka's assessment of the available post-merger retrospectives that our price-centric antitrust tools may not be accurately predicting many significant mergers' price effects. Going forward, it's very questionable that these price-centric tools will somehow get it right in predicting data-driven mergers' impact on non-price competition, particularly quality, innovation and privacy protection.

A second problem that these data-driven industries raise are network effects. We are familiar with network effects from the DOJ's *Microsoft* case. But big data amplifies the two traditional network effects. Big data, as Allen Grunes and I discuss in *Big Data and Competition Policy*, also creates two new network effects. So, one risk a competition agency faces in challenging completed mergers is that it might be too late. With these data-driven network effects, the big can become bigger, until they dominate the industry. By the time the competition authority successfully challenges the completed merger, the company might already be dominant, and there is no easy fix in unscrambling the merger.

Now, I am sympathetic to Tim's point. But from my experience at the DOJ, it can be very hard to get meaningful relief in challenging consummated mergers. Granted, we have the legal power to challenge these mergers. But trying to unscramble the eggs is difficult. Employees are being fired, plants are shut down. So you're racing against the clock. And one or two years out might be too late, especially with these data-driven network effects.

One implication is that the competition authority must assess whether its current price-centric tools are adequate. Second, the agency must take into account these data-driven network effects. To be clear, network effects are not inherently bad. But they can increase entry barriers, customer lock-in and the incentives to engage in anticompetitive behavior.

Finally, a third problem involves the rise of the super-platforms Google, Apple, Facebook, and Amazon. Historically with these super-platforms, we have focused on their downstream effect, namely the prices consumers pay. Very little attention has been paid on their effect upstream on sellers. So one important issue involves e-monopsonies. The Council of Economic Advisors, under Jason's leadership, published an excellent paper on monopsony in the labor market. This has been an antitrust blind spot. Our agencies rarely examine a merger's impact on workers and upstream sellers. Abuses by these e-monopolies can harm not only consumers downstream, but also journalists, photographers, authors and the like upstream. Even though little attention has been paid on sellers and workers upstream, this historically was an important antitrust consideration.

MR. LITWIN: Turning to our last topic in merger reviews, critics of the current merger control policy argue that the antitrust laws have gravitated toward testing competitive effects of mergers econometrically. We have therefore confused what is measurable with what is important. How can the agencies effectively enforce the antitrust laws where, for example, and just to give a few things, the concern is about future or potential competition, particularly the future innovation rather than current price competition, or the parties compete in multi-sided markets where the consumer-facing side is free, or protection of privacy is an important component of non-price competition, or short-term price benefits to consumers are potentially outweighed by reduced consumer choice, quality, service or incentives to innovate or transactions that create or strengthen monopsony power.

Alec, do you want to start with any of those topics?

MR. BURNSIDE: Ah—

MR. LITWIN: Yes, it's a mouthful.

MR. BURNSIDE: Yes, I am glad to take the easy questions.

I absolutely agree with the thought that price is not the answer to everything. We've become beholden to price. Lawyers have allowed economists to take over the process of merger control. It is an old debate in Europe at least. And if it can't be proven through an econometric model, it doesn't exist. I think, frankly, that's a trend that needs to be reversed, because quality is an enormously important consideration, and sometimes price simply isn't the issue.

How can we do it effectively is your question. I don't have a ready answer to that. I simply know that it's a challenge that we ought to face up to.

MR. LITWIN: Well, we have certainly lived with structural presumptions, and that's proven imperfect as well. So either there is a third way that we haven't thought of—

PROFESSOR WU: Or you have to accept that you're not going to reach perfection. These are hard to measure. That's what I said before. When you start to accept there are limits to what can be measured and therefore can be determined through a measured system, you either have to be more structural or more retroactive, where you can actually see what's happened.

How many people in this room have made a bad decision and later on realized it was so much clearer after a while? I think we are kidding ourselves in merger review to think that we know what's going on at the time of the merger.

MR. BURNSIDE: Tell me about the long history of retroactive intervention. Is that in a finite period of time, specifically reversing the merger, or might it be five or ten or fifteen years later as the company has just come to dominate its market and you break it up regardless of there having been a merger?

PROFESSOR WU: The interesting question is when it becomes a Section 2 issue. Especially the earlier practice, before Clayton Act, this would be a Section 2 issue, so it just came any time they felt like it.

I mean, under the statute we should consider a statute of limitations. I think my general idea is we should start to open this conversation. Obviously it will be a little strange 30 years later to suddenly break up the company. There needs to be some boundary between Section 2 and Clayton 7. But we should certainly not have written it off altogether, as it's very close to being right now.

DR. FURMAN: To jump in, I certainly wouldn't suggest that anyone would go into any particular case bringing the type of macro data to bear that I showed you. On the other hand, when you're designing a set of guidelines, a set of rules to have in the back of your head, that all of that probably dominates and is much larger and more important than these measurable price effects, whether it's innovation, effect on growth, whether it is the effect on labor markets division between profits and wages, and the like.

There is a long-standing view that one of the biggest returns to monopoly is the ability to have a quieter and lazier life and not need to innovate as much. That gets to what Alec was saying, a lot of these motivations have to be understood not even in terms of profit maximization, but what does the CEO want? Part of what the CEO wants is to have large empires, but also to some degree less accountability and less pressure.

I don't know whether it is more post-merger reviews. It's not just that we have made mistakes. It is that we have systematically made one type of mistake which is we felt more efficiency and less price effect. In fact, it's the exact opposite that has occurred. So we have made a systematic-type error that says maybe you need more post-merger review, or maybe you need to tighten it up at the outset and take into account there is this broader economy-wide spillover and maybe tighten it a little more. So if you're making errors you're making them more on one side, as opposed to the last couple of decades where all of our errors have fallen. It's probably a tradeoff. The less post-merger review, the more tough you should be at the outset in terms of structural conditions that you put in place to allow a merger to go forward.

PROFESSOR WU: That's what I was trying to say. Accepting our limits, accepting that for a lot of non-price effects or price effects we are often wrong about. Leads you to rules, where you're admitting this is going to be error prone. I think we have been overly ambitious in our ability to try to get it all right. That's where the macro data, to my mind, becomes important. Because you set up a system, the current Merger Guidelines let's say, and once in a while we have to sit up and say as you just said, they have to be more structural. It will block a few good mergers, but we have been going too far the other way for too long.

MR. LITWIN: That's a good point.

I was out with a friend of mine about a month ago who is in the private equity world. I explained I was moderating this panel *Has Antitrust Failed*? He said I can answer that very easily. Yes. Wrong.

DR. FURMAN: And he was happy about it.

MR. LITWIN: Well, he wasn't happy about it, because there is not a lot of predictability built in. When they are trying to figure out how to structure business, a lot of times they prefer clearer rules, even if it would prevent them from doing something that they ordinarily would like to do.

Maurice.

PROFESSOR STUCKE: Two points on this.

First, what can the agencies do? It's a valid point. As Alec pointed out, we are in a bind. We are relying on price-centric tools, which may not be working well in the brick-and-mortar economy, and will fare even worse in the data-driven economy. One thing the agencies can do is more post-merger reviews. That's what the ABA transition report recommends. The FTC's retrospectives of hospital mergers are a good example. The findings have helped inform the agency's analysis. As a result of the retrospectives' findings, courts are also increasingly skeptical of the Elzinga-Hogarty test to accurately define the geographic market.

A second point, as Tim mentioned, is whether the expert economic analysis should primarily drive the agency's and court's decision or instead inform their legal analysis. That is an important distinction. Take, for example, the recent *Aetna/Humana* decision. To define the market, the judge primarily relied on the traditional *Brown Shoe* factors and internal business records. The court rejected a purely econometric approach to market definition, which he noted was inconsistent with the case law. While econometric evidence can be powerful evidence, the court noted that it wasn't the only evidence.

[AUDIO INTERRUPTION]

PROFESSOR STUCKE: So one thing we can agree upon is more post-merger reviews. That can help the agencies develop tools to assess data-driven mergers' impact on non-price competition.

Second, the agencies can further develop legal standards, such as *Philadelphia National Bank*'s presumption in the merger context. This can benefit lawyers in advising their clients exactly what is and isn't off limits.

MR. BURNSIDE: The post-merger reviews you're talking about, Maurice, were not with a view toward breaking up the company, but simply a reflection whether the right decision had been taken at the time?

PROFESSOR STUCKE: Exactly.

MR. LITWIN: The FTC remedy study is forthcoming, and I think we are all very interested in what that has to say.

Let's start with monopolization, because we have hit on Section 2 a few times already. Maybe we should attack it more directly.

In thinking about this topic there at least to me seems to be an inconsistency in the law. Section 1 prohibits coordinated conduct that is either per se anticompetitive or on balance anticompetitive. Section 7 prohibits mergers and acquisitions that on balance will result in a substantial lessening of competition.

But Section 2, increasingly as interpreted by the courts, turns a blind eye to anticompetitive effects in many areas, such as denial of access and predatory pricing. Should antitrust policy be more concerned with single firm conduct?

PROFESSOR STUCKE: I can take the lead on this one. Absolutely.

In a data-driven economy—and I'll do a shameless plug for *Virtual Competition*.

Ariel Ezrachi and I examine the rise of the super-platforms. As one analyst aptly observed, apps are worth millions, but platforms are worth billions.

Where has the power gravitated? It gravitated to what we call the four super-platforms: Apple, Amazon, Google and Facebook. And the power that they exert not only affects consumers downstream, but it can also adversely affect those upstream. The abuses of these powerful gatekeepers can profoundly affect our economy and democracy. But our agencies have sat on the sidelines. Since 1999, the DOJ has challenged a monopoly under section 2 of the Sherman Act only once. The case involved a private hospital in Wichita Falls, which is the twenty-ninth largest city in Texas.

The intellectual leadership on monopolization has shifted to Europe. They are much more active. The FTC, for example, took a pass on Google. This was surprising, especially when the FTC legal staff's report was accidentally released. The legal staff applied a highly deferential standard in examining the monopoly's conduct. Even with this weak standard, the staff recommended challenging Google's anticompetitive conduct. But the FTC Commissioners ultimately disagreed.

So Section 2 enforcement has atrophied. Monopolization in the U.S. pays. In order to have some deterrence, you've got to start bringing cases. It's not as if the agency is willing to bring cases, but no violations exist. There have been recommendations to bring monopolization cases. The Europeans are pursuing Google for abusing its dominant position. Some may question the European agencies' reasoning. But at least a factual basis exists. I would hope the incoming Trump administration deviates from the prior two administrations in actually enforcing Section 2.

MR. LITWIN: Anyone else?

MR. BURNSIDE: Yes. You know, on behalf of Europe, if that's not presumptuous—you know, I was born in Manhattan.

[LAUGHTER]

MR. LITWIN: The accent betrays that.

MR. BURNSIDE: Yes, the accent betrays that.

It is nice to think that we are leading the way on monopolization, but it's very much the poor relations within Brussels. People criticize the European Commission for not doing more cases under Article 102. Mergers serve themselves up. There is a steady feed of leniency, amnesty in cartels. Article 102 is the poor relation in that there is some flagship work being done, but if the intuition is that more needs to be done, I'm sure more needs to be done in Europe as well as here.

PROFESSOR WU: Well, I'll jump in here as well.

I was part of the staff during the FTC investigation of Google. And the whole thing wasn't leaked, only every other page was leaked of the staff report. Just to make that clear.

So I join the consensus of the panel that suggests there is too little Section 2 enforcement.

I want to give little shout-out to the New York Attorney General's Antitrust Bureau, which has brought some good Section 2 cases.

There seems to be a dynamic, however, towards smaller Section 2 cases based on a patent or something like that, away from the industry clearing cases. The Google investigation was about the industry. The Microsoft case was obviously that way too. Where you're thinking of Section 2 is in the original kind of trust busting sense, a behemoth who is dominating the industry, AT&T,

IBM. You're thinking about trying to change conditions of competition in the industry as opposed to trying to get a smaller Section 2 violation. And I think it's those cases in particular that are missing.

The one thing I will say, and it relates to these sort of the ideas that antitrust sometimes has a big macro role in industry, where it can completely change its conditions. And that doesn't happen through small Section 2; it happens through big Section 2.

That all being said, I have strong views about the timing of Section 2 enforcement. I think that if there is one flaw with the FTC's Google case, it might have been a little bit early. This is my view. I think that monopolists have a somewhat predictable life pattern. They often lifecycle. They usually manage to achieve their monopoly position due to better technology, a great product, something like that. Now some of them get there illegally, and some of them get there with a great product and they have a mild golden age. I think that's a bad time to do an antitrust investigation.

On the other hand, every new company gets older. Not unlike an incumbent Congress person, their interests become less about improving things and more about staying in power. So I think after a certain period in power you'll probably generally tend to see, if you look at the history of monopoly, it tends to be more and more effort to divert resources toward defense as opposed to improved innovation. I think that's the point at which the monopoly reward in a sense has earned out. If you think of it like patent. And that is when antitrust should get more involved.

I am interested in enforcement policy-wise targeting the more stagnant, highly defensive industry monopolies than I am in the newly arrived ones.

MR. BURNSIDE: Doesn't that run counter to the notion in these data-driven IT days intervention needs to be prompt?

PROFESSOR WU: It does run counter to that view. So it means I disagree with that view in other words.

MR. LITWIN: Is that practical or theoretical?

PROFESSOR WU: I think it's practical because I don't think you'll have much of a Section 2 case, at least until there has been some conduct, right. And the new guy on block like Google, circa 2010 or something like that, got there by being better. There is not necessarily going to be a lot of conduct to pick up.

An investigation like the AT&T investigation—now look, I don't suggest usually waiting for 70 years, so that was a little overdoing it. But obviously, not only were there skeletons in a closet, there were graveyards full of companies that had been destroyed and innovations that had been sent to an early death, including the Internet and other things. So, that's an extreme case, but a good enforcer will think a lot about the timing and lifecycle of the monopolist in its investigation.

MR. LITWIN: Well, thinking about the digital revolution, and if you think back to the halcyon days of the dot-com boom in the late 90s, the digital revolution was hailed as a democratizing force for markets that had run stagnant over the years. Is that observation still valid today, or have things gone back to the way they were?

DR. FURMAN: I think a certain amount of that increased concentration that we're looking at is in part because of the type of network effects that you have in digital markets, the type of winner takes all. You know, things change. They change quickly, unpredictably. But it's been a while now that we have had pretty much the same companies dominating in a variety of different areas.

Now you've seen them increasingly compete with each other, whether it's email or social networking or other types of platforms. But you haven't seen other entrants competing there. And I think technology is tricky, and it vexes me, because of what Tim said, a lot of these companies are there by virtue of their success, and you don't want to mess that up. But that success becomes very entrenched and very self-reproducing and something you can easily leverage into neighboring areas. Just look at the innovation in browsers when it was just Internet Explorer and you went two years with no new features added until they started to unbundle and face competition, and all sorts of good things happened as a result of that.

PROFESSOR WU: Yes, I firmly agree with that.

Maybe one comment about the digital platforms. It might be important to talk about merger policy. I am not exactly sure why we have allowed Facebook to buy most of its major competitors in this space, Instagram being the most major example. If you've got conduct, Section 2 case, fine. But you had a question about Amazon. It has always been a challenge, like a litmus test, because Amazon saves people a lot of money. Now that's changing a little bit, maybe bearing out my dynamic approach. But in the short-term the reason you couldn't get antitrust enforcement interested in taking action against Amazon was the basic idea that they are more efficient, saving people a lot of money.

So the starting point is merger policy. Amazon, Facebook and Google have all been allowed to buy too many of their potential rivals, too many of their potential challengers. It's transformed the culture of innovation in Silicon Valley from thinking I am going to be the company that defeats Google and takes all their money, to the point I am going to be the company that gets bought by Google and get money. It's an interesting dynamic.

MR. LITWIN: You know, when Google started right then was the battle for the monopoly position; but if the monopolists can defend by just buying the adversary, that doesn't work.

PROFESSOR WU: But Google did not start with I want to get bought by Yahoo. There was an offer actually, and they turned it down. Facebook didn't start to get bought by My Space. But this generation is mostly like, okay, that's the only route out. I think antitrust needs to stop that.

PROFESSOR STUCKE: Yes. To follow up on Tim's point. One issue is how do these super- platforms differ from Microsoft's monopoly in the 1990s. One way is what we call a "now-casting radar." By controlling the digital platform, firms can identify and respond to trends well before the government. For example, Google can predict through search queries flus well before the government can through its statistics. By controlling the platform, they can also see what products and services users are downloading. They can identify any nascent competitive threat, and either acquire the firm or find ways to marginalize it.

That was one of the complaints in a recent report.[1] Amazon acquires a lot of data both on users and manufacturers. Amazon, unlike any individual seller on its platform, can see what products are trending upward. Amazon can then introduce a knock-off version, which it favors on its own platform. The rivals can't really compete. To survive, they need to be on Amazon's platform. But once Amazon enters their market, they are at a significant disadvantage. Amazon can give greater prominence to its own products, and marginalize its rival's products. Plus, Amazon alone has the personal data on its shoppers. So Amazon can better target these customers with its own products. Because Amazon, using this now-casting radar, can more easily pick off its rivals' customers and squelch competitive threats, their power increases significantly.

This now-casting radar gives some monopolies today an advantage over earlier monopolies. It also gives these data-opolies an advantage over the competition officials in identifying nascent competitive threats.

One example is Google's acquisition of Waze. Waze was one of the few competitors to challenge Google's turn-by-turn navigation app. Ultimately, no competition agency challenged the merger. The reasoning of the UK competition agency was illustrative. The evidence did not indicate that Waze acted as a strong competitive constraint on Google Maps in the UK. But through its control of the Android platform, search engine, email, and the like, Google could see how Waze grew in different markets, and the extent to which it could become a competitive threat in markets like the U.K. So Google could have clearer picture of the competitive landscape than the agency.

The other thing is that our focus has been largely downstream on consumers. Again, we haven't really focused upstream, namely what impact these mergers have on workers as well as the creative class that's supplying the inputs for these digital platforms. How long do you have to wait before you say, for example, Facebook is too important a gatekeeper in our economy, particularly with news dissemination and fake news and the like?

PROFESSOR WU: Right.

MR. BURNSIDE: Yes, Tim, forgive me, your notion that you should wait until the monopolist gets old and flabby before you should attack it doesn't hold here. Because a company like Google continues to innovate and to do wonderful things, but its innovation is at the price of killing other companies' innovation. And that is under investigation in various of the European cases. And other companies—Maurice's examples on Amazon—point in the same direction, which goes to our difference of opinion on the timing of intervention.

MR. LITWIN: So let's talk about Amazon for a little bit. I pulled out some facts on Amazon, and I'm sure there are some alternatives out there. Two-thirds of books are purchased online, and Amazon has 70% of those sales. Yet these sales now only account for less than 7% of Amazon's total revenues. Amazon is much more than a book seller these days. Amazon is on track this year to become the number one retailer for apparel and for consumer electronics. And as everyone here probably knows, they are entering the grocery business in a really big way that I think is going to be very disruptive to grocers across the country.

Amazon sells as many toys as Target and Toys 'R Us do. Amazon web services, which provides cloud services to everyone from Netflix to the CIA, Dow Jones, Comcast, is larger than the competing services from Microsoft, Google, and IBM combined. And Amazon is now powering its way into manufacturing, with its Amazon basics line and the logistics of delivering its product.

Now all this activity has resulted in a plethora of pro-competitive benefits that we have all experienced. I love Amazon. They have low consumer pricing. They have a wonderful high level of service. They open up new markets for manufacturers.

But as we have been talking about, is this coming at a cost? To throw out a few things, Amazon's e-books pricing. Obviously, the publishers did not handle that situation well.

[LAUGHTER]

Now Amazon's has new policies regarding music streaming. Amazon's use of algorithms and search tools to promote Amazon-manufactured products, and to punish those manufacturers who bridle at their price demands. And, of course, Amazon's access to consumer data to determine which products can be successfully knocked off through their Amazon basics line.

So it is one of those questions. How can you make Amazon into a pro-competitive company without losing all those wonderful benefits?

AUDIENCE MEMBER: So I just have a couple questions, comments.

MR. LITWIN: Why don't we take the question.

AUDIENCE MEMBER: One of the issues with Section 2 enforcement, at least in a way that is being articulated, a lot of the times you have competitors who don't like what another rival is doing. So they use the antitrust laws to harm that competitor. Mr. Burnside was very nice to disclose the fact that he has certain clients, as we all do in this case. Professor Wu obviously represents the elephant in the room.

PROFESSOR WU: Wu does not represent Yelp, that's not true. So let's just make that clear.

AUDIENCE MEMBER: Fine.

But a company like Yelp, which you have written articles on behalf of, clearly has an interest in preventing companies like Google from doing things that may improve the quality of Google's products compared to the quality of Yelp products.

Now my question is this. I have a hard time understanding the argument that there is less dynamic entry into the space. You look at companies like Facebook, who I don't represent, is a company that if you ask kids, what's Facebook, they say it is something old people use. They use Snapchat. You look at something like Tinder, another thing that I absolutely do not use, you'll see that I think they are getting like a million new users a week, notwithstanding the fact there was Match.Com beforehand. You look at whether it is Twitter, Instagram, you know, Airbnb, LinkedIn, Yelp, Pinterest—there's tons of new competition. Airbnb, etcetera. When these companies are coming in and disrupting incumbents, there is a real danger of rent-seeking.

So my question is how does an antitrust regulator go and look at, especially when you're looking at things like behavioral remedies, you can't do this, you can't do that, and determine whether what they are doing is actually designed to hobble competition or is designed to promote competition. Where is the actual standard for doing that?

PROFESSOR WU: That's one reason I prefer structural remedies. I think they are preferable in general. But that's just a quick answer.

Are you just saying that the Internet is actually more competitive than they are saying?

AUDIENCE MEMBER: No, no, no.

PROFESSOR WU: I mean, I don't understand. All the companies that you've named that entered are not entering—I haven't seen a sustainable challenge to Google's search engine. We are not talking about the core markets when we are talking about market power. You're talking about the internet generally has a lot of—

MR. LITWIN: Well, I think the issue is, if I can paraphrase somewhat superciliously, is how do you get rid of the bath water and keep the baby.

PROFESSOR WU: Right.

MR. LITWIN: Because all the companies you listed provide wonderful things that didn't exist even a few years ago. Facebook went from nothing to everything to something that could very well disappear overnight. But that doesn't change the fact that they have accumulated a huge amount of data and have created a platform that is very easy to get into and perhaps not so easy to get out of. And is that an issue that the antitrust laws should tackle?

DR. FURMAN: I mean when I talk about, outside of this context, those productivity growth numbers, some people will rattle off the same list of companies and talk about how great the productivity is and why you didn't see it in the data. Part of this is that is actually a relatively small part of our economy.

If you look at travel budgets for example, 15 times more is spent on airlines than is spent on taxi, limousine, Uber, etcetera. So even if you have disruption in that one thing, you have that other part, and that other part by the way has a lot more concentration than it used to. So thinking about economy-wide productivity, economy-wide concentration, you don't want to be distracted by things that are still a relatively small percentage of our GDP.

Thinking about within the tech sector itself, I think what Tim said there, that you still haven't seen anything close to unseating the big players is important and relevant.

PROFESSOR STUCKE: To address your point in particular about entry, one of the myths we hear is that because this is a dynamic industry entry barriers must be low. Entry barriers may be low in some tech industries, but not necessarily in every online industry. A case in point are search engines. Microsoft was reported to have spent over 4.5 billion dollars on Bing. It then entered into its joint venture with Yahoo precisely because of these data-driven network effects. And regardless of how much Microsoft invested in Bing, it was unable to topple Google. Now you can say, that by itself isn't an antitrust problem. I think everyone agrees with that. The problem is when Google starts to engage in anticompetitive behavior above and beyond that to maintain its monopoly. That is a question the antitrust authorities can and should raise.

Now who is going to be the best person to raise that concern? Ideally, you would want to hear from consumers; you would want to hear from upstream suppliers. They are the ones adversely affected, but they may not

necessarily know. At times, it might be the rivals. In that case you do have to take into account their concern. Now is there rent-seeking? Yes. But there is also rent-seeking when a dominant firm intellectually and financially captures antitrust enforcement. So the question then is why is one jurisdiction doing something and another isn't. And to what extent is that monopolist financing research to support its position? To what extent is it actively lobbying? And then once you consider these platforms' gatekeeping function, to what extent do they even need to engage in such lobbying when they control newsfeeds, when they control information that's provided to—

AUDIENCE MEMBER: Right, but the opposite is also true. I mean the opponents of Google are financing, you know, tons of opposition and tons of regulatory intervention. We even looked at Oracle, who has access to $1.3 trillion worth of business transactions, is complaining to the European Union about Google with respect to big data.

My only point is that there is a little hyperbole coming from the panel with respect to justify very broad strong statements that, for example, you just said that a company had intellectually captured the regulatory environment in the United States. That's a very strong statement to make. It's also equally plausible that you might have regulators that reach the right conclusion. I mean those are strong statements to make.

MR. LITWIN: Well, we could get the FTC to come up and we can litigate this, but as we are out of time, that will have to wait for the actual agency.

MR. WEINER: So I really think this panel was just getting started. We just could continue until 6:00. Maybe we will continue at dinner and during cocktails. Thank you very much for that.

[APPLAUSE]

The good news is that some of the issues about whether Europe is the intellectual force behind dominance will continue in the next panel. We are going right, without a break, into the next panel which looks at whether there is an enforcement gap between the US and the EU.

So I think at this point I am going to ask everyone not to leave the room, but please stand up. Everyone please stand up and stretch.

Endnote

1 Olivia LaVecchia and Stacy Mitchell, The Institute for Local Self-Reliance, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities* (November 2016), https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf.

EU/U.S. Antitrust Enforcement Gap?

MR. WEINER: Okay, stretch time is over. We have another great panel coming up.

We are going to get started now with our next panel. Our next panel is a fascinating panel of cross-border experts from both the United States and Europe.

Our moderators are from the United States and Europe. I am going to turn this over to Rachel and Jessica to begin the panel. Thank you.

MS. BRANDENBURGER: Ladies and gentlemen, thank you so very much. It's a great pleasure to be moderating this panel together with Jessica Delbaum this afternoon.

And I want to congratulate Michael, who I think, with the previous panel, has set up a very good backdrop for us to talk about more specific trans-Atlantic enforcement.

So this program is going to compare and contrast, (and we'll work out which is the comparison and which is the contrast) in European and U.S. antitrust AND competition enforcement.

We have ambitiously set ourselves the task of trying to do the entire gamut of enforcement areas. We won't succeed, so I forecast we will actually not cover all of the areas. And our fantastic set of panelists, whom I will introduce in a second, are going to try and talk not only about substantive and procedural issues, but also, building on the previous panel, to talk about some of the underlying policy objectives and drivers that influence some of these similarities and differences.

So it's Jessica's and my pleasure to introduce Patty Brink, the Director of Civil Enforcement at the Department of Justice's Antitrust Division in Washington, D.C.

Henri Piffaut, next to Patty, who is currently a visiting Fellow at Harvard University, on leave from the European Commission, DG Competition.

Next to Henri, Ingrid Vandenborre, a partner at the Skadden firm in Brussels.

And last, but absolutely not least, David Emanuelson, who is a senior corporate counsel focusing on antitrust for Novartis here in New York. David will bring an in house perspective to the enforcer and private bar perspectives that we also have represented on this panel.

So without more ado, because we want to get onto the panelists, let me hand over to Jessica.

MS. DELBAUM: Thanks very much.

And thank you all for being here.

We have an ambitious agenda. We will start with merger control. If anyone has been checking their email, it's a hot topic, the international aspect of it. And Lexis just published, less than an hour ago, an article about the antitrust bar being uneasy about international merger coordination as President Trump declares America First.

Knowing you can't comment on the new administration, but currently from a substantive perspective, do you think there are still key differences in merger controls, depending on which side of the Atlantic you're on?

MS. BRINK: First of all, let me say I am very happy to be here. I find this topic very interesting because so much of my work involves cooperating with agencies around the world, particularly on mergers.

Let me first give my usual disclaimer, that I am speaking on behalf of myself and not the Department of Justice. I certainly would never speak on behalf of the Federal Trade Commission, and I also can't speak in any way on behalf of or about the future administration. So I am really talking on my own here.

[LAUGHTER]

Let me just start with the key question I think this panel is talking about: Are there enforcement gaps particularly between the EC and U.S. agencies? Starting with mergers I think it should be clear to everyone that on a substantive level there is no daylight between the merger analysis being done between European Commission and the U.S. agencies. I could say that because I work very closely with all of our teams, and particularly it's part of my job to track the international cooperation. I get reports on all the conversations between our teams and agencies around the world. In the last three years we cooperated on 17 mergers with the European Commission. And I can tell you at no point has there been any kind of substantive divergence on the actual analysis of the merger.

Also, I think one thing that's increasingly important is there is also no gap in the way that we're looking at merger remedies. We really worked closely with Henri's team on the Haliburton-Baker Hughes merger, which involved a close look at the remedies that were being offered by the parties. We are really looking at exactly the same kind of analysis and the same kind of substance both on whether the merger is likely to have anticompetitive effects as well as whether there is any kind of remedy that is satisfactory.

Do you agree, Henri?

MR. PIFFAUT: This will be an easy one. I agree. I even agree on the 17 mergers.

[LAUGHTER]

MS. DELBAUM: How about from a process perspective? Do you think the notification itself is very different from where you are?

MS. BRINK: And that is something, obviously the notification of an HSR in the U.S. is very different from the form in the EC. The timing of when an HSR can be filed is also different from when their Form CO can be filed.

So that is a procedural difference, that in years much past, I would say more than five to ten years ago, often resulted in timing problems that one agency or the other would be further along. But I think that the timing comes out of the notification process. With the increased cooperation, there is a lot more aligning that's being done as to timing. And a lot of that is frankly due to the merging party's willingness and desire to actually make that happen. Because I think of the old days of you getting your HSR in, you force it through the U.S. agencies, according to the U.S. clock, and then you walk that around the world, including the EC, and use it to not force the merger through but be persuasive with the U.S. clearance or remedies. Those days are over. And that's important increasingly because agencies are talking to each other a lot more. As well as it's also in the parties' interest to avoid conflicting outcomes.

So the timing, the problems that used to be between the Form CO and the HSR, have gone away. I think part of that is there used to be a myth that U.S. timing was flexible and EC timing is not so flexible, which to some extent is true. But there does seem to be more flexibility in your system.

MR. PIFFAUT: Yeah, to an extent with the EC process is very much front-loaded. So-called Form CO normally is automatically effective and can get very thick indeed before the Commission when they can give a notification. Once it has been notified, then there are strict limits. It is very much in the hands of when they are notified and when they want to interact with the Commission on the content of the Form CO. But, once notified, there are time limits which can be extended if at any point there is a need for information the parties are not able to provide in the time frame requested, or at the instigation of the process, as well for specific circumstances.

At the end of the day when you come in the pre-notification process and the notification process, there is a lot of flexibility as well in our process.

Obviously, what needs to be stressed and I think of the US and the EU system difference is that our system is a written one. It starts with a written Form CO, and most of the time it ends with a written decision. We always have a written decision as to why the merger had issues that needed a remedy or the issues are not remedied and the merger should be prohibited, or why the merger doesn't raise an issue, and should be cleared. There is always a decision, and a decision which could be challenged by the parties or that is before the courts. So that process to investigate also is very much in a written fashion, which provides for the parties to be able to resolve fully.

How do we do it? We take the parties and the Form CO and then we address issues one by one. We say they have confirmed or we have proved by investigation. In the old days we used to do that via long written questionnaires sent to the whole earth, which seems a bit counter- productive. So we have evolved, and actually we have engaged in the U.S. practice, having many more calls or interviews with the parties. We may then disagree or agree with the parties in question. So, at the end of the day the processes are quite different. And we have written decisions for each and every case. I really want to stress that point.

MS. BRANDENBURGER: I am thinking, as well as converging on the interview process, of the convergence going on the extent to which you are relying on documents from the parties.

MR. PIFFAUT: So, I don't know whether it's welcome by them.

MS. BRANDENBURGER: I am just putting it out there.

MR. PIFFAUT: But it's true that we have been questioning the parties more and more extensively. It's true even in today's economy where everything has been digitized and exists in digital fashion. We tend more and more to ask for documents from third parties when they come with complaints or issues. We ask them to provide the documents which would go along with what we are considering. It's true, now we tend to be quite heavy requesting documents.

MS. BRINK: Can I jump in? I do think one of the themes that I felt running through the *Aetna/Humana* decision was the value of the contemporaneous documents over and over again. The other panel talked about this. So it's something that we keep together by having the same base of the documents that say what the executives were thinking at the time, instead of what they are writing about post-merger.

MS. DELBAUM: Going to mergers more generally than actual ones, although I think in the past agencies didn't take into account innovation in mergers, there have been a large number of innovation mergers lately. Ingrid, could you tell us about the key takeaways?

MS. VANDENBORRE: The title of the panel includes the enforcement gap. Something for the Commission enforcement gap was innovation, the pipeline acquisition, or acquisitions of big data companies. The Commission is looking for a potentially new threshold notification based

on the value of the transaction. That highlights where the Commission thinks there may be a gap.

But I think in substantive enforcement this is not really a gap in terms of the Commission being able to enforce in innovation markets or transactions that involve innovation competition.

So there was a competition policy brief put out by the Commission in April 2016 where they said we have looked at a great number of transactions that involve innovation competition. We think that analysis is supported by what we have already said in our Horizontal Merger Guidelines, mainly that reductions of innovation are to be assessed in the same way as reductions of output or reductions of choice or effects on price. It is all to be similarly assessed; so we are similarly interested in assessing that based on the tools the Horizontal Merger Guidelines give us. And the tools that they set out in that policy brief, as we look at the level of concentration in the market, the barriers to entry that exist, and then the kind of constraint exercised by the merging parties on the pipeline or the innovation or the innovative piece that is relative to the analysis.

When you read through the cases that are in that policy brief they fall into what we could call the enforcement gap. So there are three pharmaceutical cases, that talked about pipeline pharmaceuticals, and there are two others broadly in the innovation area. I won't talk about all of them, but I'll briefly mention they highlight that the Commission has really been focused very much, at least in Europe, on trying to tackle innovation competition and really feeling that they need to put out something and tell the world they are looking at these innovation markets and innovation competition.

When you look through them it is really clear that they assess incentives to innovate and whether post-merger the company will have the same incentive to innovate as it had before. For example, by merging pipeline portfolios, by merging different lines of pipeline products will the merger still develop both pipeline products? That was the case, for example, in the *Novartis/GlaxoSmithKline* case. For those two pipeline pharmaceuticals, they said one of the companies will not continue the clinical trials, because there is already an improved product with the same sort of action, so a clinical trial will be irrelevant. They probably won't pursue it, and there was speculation as to what the incentive of the companies will be. There is similarly also a pipeline product.

So there is really a focus on dealing well with innovation competition. There is also another struggle. Increasingly much is being written about how do we find evidence of innovation competition. And to bring the circle back, it talks about internal documents, to what extent are internal documents sufficient to really assess incentives; do the merging parties have the full information when they prepare those documents. Do they really know, can they really know about things that will happen in the future?

The second big area which has been viewed as having somewhat of an enforcement gap, although I think the EC is catching up quickly, is the big data field. The use of big data, the availability of data, that's something of value and potentially a competitive advantage to a company.

Two of the main transactions that were reviewed was one at Microsoft and the other Facebook. Basically what value would the social network and the advertising bring to a large provider like Microsoft or to a large provider like Facebook? What's the value, what were the possible constraints that operator could exercise based on that data? Again, very much focused on what the incentives will be, going forward. And even not necessarily looking at market share in that context, because a lot of those networks do not have an attributed share. If you look at the *Facebook* decision, they give a number of competitors, but shares typically are very limited. The competition, Google, Twitter, My Space, Pinterest, there are a lot of other data networks out there and shares are not really available. But there is a view that a large player like Microsoft would have an interest in potentially denying them access. And so here there is some struggle, but clearly some action being taken as well.

MS. DELBAUM: David, from the U.S. perspective?

MR. EMANUELSON: Sure. And you know, being part of the *Novartis* case decision in Europe and in the U.S., I have a little more than the U.S. perspective, and certainly can agree with Patty and Henri about the importance of aligning timing and the collaboration. That's certainly what we experienced in our deal.

Just to follow up with what Ingrid said, when it comes to notification, the potential for pure pipeline transactions to be notifiable in Europe as well as the U.S. is something that the industry is certainly taking note of, and our experience as well with a lot of other industries. It is important from an in-house perspective to see objective factors applied to whatever guidelines come out, and there is a paper in the merger streamlining group that was submitted in response to commentary on those guidelines. Because if you don't have some objective factor like turnover or book value of assets, and you solely say this is the value of the transaction, and that is a certain threshold, that is something that is challenging to say what is the threshold. Certainly in the U.S. with the HSR Guidelines, it's a constant struggle to try to determine whether the value of the deal as applied to the U.S. is notifiable.

But on the substance, pharma is typically used as the example of innovation competition. You know, one of the reasons is that our innovation is so transparent. It's easy to see. You can go out and go on clinicaltrials.gov or any

other public source and see what is in the company's pipelines.

But from my perspective it is really important to distinguish between innovation competition on the one hand and potential competition on the other, which is actually tied to a product market. And the recent transactions in Europe, those have been used as examples of remedies that address innovation competition. But those really were, those were remedies to address potential competition about a late-stage development that was about to go on the market and compete with other products that were on the market. And that was the harm that was identified. There is all this research out there that when you get to a certain phase in development, about phase 3, it's about a 50% chance that you'll actually get a product to market. So there is a clear tie towards harm to a defined product market.

When talking about innovation competition just generally, I was fascinated by the conversation that was on the last panel about applying the technology, because to me that really is the true application of innovation competition analysis. But in pharmaceuticals, you know, anything below a phase 3 trial is highly speculative. There is an over 80% risk that the product will even get to market, because there is so much competition out there from biotechs and other pharmaceutical companies to create the next big thing.

If you're going to base a remedy on harm to innovation competition, there, in my view, would have to be some pretty extreme circumstances. I think the best example of one that was at least controversial but wasn't even a remedy was the *Genzyme/Novazyme* transaction that the FTC cleared in the early 2000s, when Chairman Muris wrote this 20-page explanation of why they cleared it, even though it was essentially a 2:1 in preclinical development. That just goes to show that when you're talking about innovation in pharma, I think there is a lot more competition out there than I think people realize. Now if you're going to talk about potential late-stage competition, getting to an actual market, that should be a different conversation.

MS. BRANDENBURGER: So I think we need to move onto our next topic of abuse of dominance and unilateral conduct.

Just before I do, I think we should give the agency officials an opportunity to comment if they would like to briefly, or move on. Your choice, Henri and Patty, on what your two neighbors have just said?

MS. BRINK: I bet we are about to say the same thing.

MR. PIFFAUT: Then go ahead.

MS. BRINK: Okay, I'll go ahead.

You know, it is very funny, because the discussion of innovation on this panel and the last is in some ways reflected every day in the merger work of the agencies. DOJ doesn't do pharmaceuticals, so it doesn't have the obvious pipeline innovation problems that are particular to the pharmaceutical industry. But every single other industry, even if it's an old world industry, has some nature of innovation and R&D that's happening at which we are taking a hard look.

I have to say it's a constant discussion. Is there possibly a product market for innovation and R&D that's being affected by the merger? Is this reflected in particular product markets? I think Haliburton was one example where within each of the 21 product markets that in the U.S. we alleged a loss of competition, that there was a loss of R&D that was going to be an effect of the merger.

MR. PIFFAUT: I was going to say the same thing.

MS. BRANDENBURGER: I'm sure you were.

MR. PIFFAUT: Just one thing on that. We see more and more innovation emerging because more and more industries are getting very concentrated, so therefore the ability to compete is being restrained for the few people. So whenever you see a strong number of people who may innovate there is a dynamic solution.

MS. BRANDENBURGER: So let's move onto abusive dominance or unilateral conduct and talk a bit about the status in Europe and the U.S., whether they are similar or different and the key differences and similarities.

And I'll ask Ingrid and Patty to try and work together—I don't mean necessarily say the same thing, but take this topic together maybe.

MS. VANDENBORRE: Well, I think there is a difference. If you look at Section 2, and you don't look at Section 5, that's a big key distinction. So I think that already puts in where there is enforcement. And the EU is limited to 102 for any unilateral type of conduct. That shows 102 has to capture all of those elements.

There is a lot of debate and discussion within the EC on how enforcement should go under 102, much more so and much less so under rules like 101 or merger control. There is much more debate on judgments that have come out. There is much more criticism on courts remaining too traditional, too stationary, not looking at dynamic competition and what has changed, and how technology markets, for example, should be assessed in the same way as consumer goods product markets or chemicals or basic metals. There is a difference in how markets should be analyzed.

Because of the lack of a clear tool, the guidance paper on dominance came out a number of years ago. That in itself has been a basis for a lot of debate in Europe. To what extent the guidance paper should or should not be followed? The guidance paper has set out basically an

economic paper for enforcement under different types of abuse, and exclusionary abuses, predatory prices. It basically set up what the economic analysis should be. There was a benchmark case, the *Intel* decision, that was brought forward by the Commission under the feeling that they don't need to follow the guidance paper. The Commission could go back to *LaRoche* saying we don't need to do an economic analysis in very large terms if there is a potential for foreclosure. We don't need to use economic tools to analyze what that would mean. We could take the view there is potential, and as a dominant company, you have a special duty to make sure there is competition in your sector of the market.

In the most recent judgments there was much more discussion by the court and they have all focused on discounting, and there has been a lot more discussion about whether the guidance should be followed and whether there should be some more effects-driven approach, economic-based analysis. So that's from a very high level where Europe is sitting at the moment, very much waiting for what the *Intel* judgment by the Court of Justice is going to bring. Are we doing economic analysis? Are we doing historical *LaRoche*, potential is enough, and we don't need to analyze it. That's where we are currently sitting on the specific practices. There is a difference, but maybe I'll throw that back to you, and I can comment on the practice.

MS. BRINK: I am probably stating the obvious here, but there are quite a number of the differences of the applications of Section 2 and 102. And I think it all has to start with the idea that it's not illegal to obtain a monopoly. It is only illegal to maintain or extend that monopoly through exclusionary methods. We can talk about why, and I think we are going to.

But just to frame that out a little bit, there is no special duty by a monopolist. It's really the duty not to exclude competitors through exclusionary acts. But there is nothing wrong with competing their way into a monopoly position.

There are clear ways that then filter down into the application of the law here. In Europe the market share presumptions are very different. The abuse of dominance is essentially a much stricter standard. And the notion under U.S. law that exclusionary conduct can be prohibited under Section 2, but not necessarily conduct that is exploiting your monopoly position, and I would put under that excessive pricing or margin squeeze.

And it's also going back to the *Microsoft* case, the duty to aid competitors is also a very different position in the U.S. and in the EC, what I see as the basic framework of the differences.

MS. VANDENBORRE: If you look at specific practices, we were looking side by side at what predatory pricing means in Europe versus in the U.S., or what bundling means in Europe versus the U.S. Very different thresholds. There is case law developed in Europe on what predatory pricing means. It can be below total cost, and it can even be below average cost in some respects. Then there is a focus on is there really a strategy of excluding your competitors through the pricing policies that you apply, and it really depends on what cost level you apply. For bundling as well, there is precedent on how bundling practices are assessed. You look at is there a market position of dominance in the tying products. Are the tying products and the tied separate product markets? Are they being conditionally put together? Do they result in a potential for foreclosure? There are all these steps, which I think is much less the case under the U.S. case law, where the predatory pricing conduct can be different. You can be below average variable cost without automatically triggering that view. You can put products together as bundled without automatically falling within what the EC would call an abusive practice. Those are the two that to me are most clear.

On exploitive abuses, we have talked that those are going to be history in Europe as well. There was a recent U.K. case on excessive pricing in the pharma space, which we are following closely that frankly is a little shocking to see what thresholds and criteria were going to be used for excessive pricing. It's a very specific case, and I think the facts are very different than would be in most scenarios, and it is not a traditional excessive pricing case. It is a regulated industry and there's also corollaries to it. But there is clearly a different approach to it, and there is different bases and jurisprudence to support enforcement against excessive pricing.

MS. BRINK: So if we step back a bit, making lists of similarities and differences, we have no commonness.

MS. BRANDENBURGER: I was going to say, let's step back and also ask ourselves or think back to the previous panel as well as to why some of these differences come from an underlying philosophical difference, what are the drivers of the U.S. approach to business innovation and growth, the EU single market objective approach?

Henri and Patty, if you'd like to pick this up.

MR. PIFFAUT: Under 102 we first need to prove dominance. And then secondly we prove that there is abuse. So that has to explain the difference that you see from the two.

So let's take a step back, and maybe we get a little bit off script. It is very topical these days. But at the roots of European infrastructure are the memories of the protectionist and populist, vicious cycles which took place at the time and the belief that the more the European economies will be intertwined and intermingled the less likely they will be able to support those cycles. So it was key in the thinking of the Treaty of Rome and before that

to make sure that neither states nor private companies could erect barriers of trade within the EU.

And so also based on the older liberal philosophy of Rome and economics, the practice of the Commission developed to ensure that any barriers that existed to trade would be brought down. As far as companies are concerned, the idea is not to replace the old state walls with your own private barriers. And so when you look at the parties in terms of the Commission, what you find is mostly state-owned monopolies, like telecoms, like energy. I had a look last night at cases which took place during the last 10 years, 30 of them; something like three-quarters of these cases were in energy sectors. Why? Because many of these cases took place in the eastern part of the European Union because these countries were the last ones to join the European Union.

MS. BRINK: And I think in the U.S. we never had a history of these types of barriers, and had to some extent the opposite, which is a different sense of the role of the government in regulating the economy. That is borne out in the way the Section 2 jurisprudence has come about, and our unwillingness to embrace things like excessive pricing, where price controls are important to us, except in dire situations. But this is also a general more social and moral and philosophical belief in the role of competition in the U.S., and the belief that market forces can and do act to erode monopolies over time. And it was funny we were talking about Facebook, and I'm not taking any kind of position about Facebook and the market power that it has, but there is a valid question, putting data aside, about which of these technologies will really survive. And that's something that is built into our economic system. The U.S. has tremendous, and always has for a long time, had access to capital, lower barriers to entries, very limited history of public ownership, very limited history of government regulation of the economy. All of those things are things that feed into the different systems as part of the way that we both look at unilateral conduct.

MR. EMANUELSON: Can I pose one additional maybe source of the difference, and not to discount everything that has been said, because I think it's extremely important. But I don't think you can ignore the role of process in the U.S. versus the rest in that for a competition agency if you bring a case, a dominance case, monopolization case, you have to win it in court. The other side may litigate against you. You'll have discovery and you will argue in front of a court system.

Just look at the *Qualcomm* example. The FTC issued a complaint in federal court. The FTC and China's authority issued a decision, and then yeah, you can appeal the decision. But there is such a difference when it comes to that initial decision, whether it is by a court or whether it's by a competition agency. I think over time a competition agency is always going to want to establish presumptions. Then we can presume an economic effect. I think that we're seeing that with the debate over loyalty discounts. If you have to prove that case in court, the court may push back on that and say no, you need to prove an adverse economic effect, which can over time influence the development of the substantive law.

MS. BRANDENBURGER: And another point also. The discussion we have been having up to this point is about agency examples, so we haven't touched on private litigation in the U.S. The story is different too?

MS. BRINK: Right. And it certainly will be interesting to see how with that starting to become more of a factor in Europe, whether that will change, that enforcement.

MR. PIFFAUT: One thing I should mention as far as Europe is concerned is that to bring complaints to the Commission, the Commission has to take a stance on these complaints under Regulation 1. You cannot ignore them and say I am not interested in that. So they have to look at them, and if it finds it has no merit, it has to prove it. And so you may hear the news about a lot of cases, investigations and a number of companies in Europe. It doesn't mean the Commission has anything fundamentally different. It just means that people may have brought complaints, and we have to deal with them.

MS. BRANDENBURGER: So let's go to another dimension of an abuse of dominance in particular and tackle the perception or reality that there seem to be a lot of cases brought by the European Commission under Article 102 that relate to U.S. companies.

Am I right in my perception? And are there reasons for this? The U.S. companies seem to find themselves entangled with the European Commission when maybe there is no equivalent case this side of the Atlantic. I am trying to put this very neutrally.

Ingrid?

MR. PIFFAUT: I want to jump in. I was saying that I had a look last night at the Article 102 cases, decisions over the past 10 years. There were 30 of them. Five of them actually were addressed to U.S. companies. All of the other ones were mostly European or non-US non-European. So that's just for perspective.

Ingrid, I'll let you continue.

MS. VANDENBORRE: So I raised this question with another Commission official in another program, and their response was that the Commission is not after U.S. companies.

You can correct me if you want to, but he said the Commission is not after U.S. companies, but often the complainants in those cases are also U.S. companies. So the Commission is typically a forum that gets sought out by companies, whether European or U.S. companies, because we tend to be much more enforcement driven.

Maybe Asia is a little unpredictable. We don't know what's going to happen. Europe is a solid authority, so we tend to be an authority in great demand from that perspective. That's a comment that one official gave, which is probably right. Because if you think about all of these larger cases, there are complainants that are behind that, that are often U.S. companies. And the *Intel* case, there is probably an Apple presence behind it, so there it's not the European Commission in those cases who are complaining against U.S. companies. So that gives a little bit of a different flavor than saying this is Europe vs. U.S.

MR. PIFFAUT: If I may add something like that. It's obvious that these American companies are American. They may be based in the U.S., but they have a lot of activity in Europe, so it has an impact in Europe. Europe is not just a place where they can have their disputes and go back to the U.S. It has an impact in Europe.

MR. EMANUELSON: I work for a Swiss company, so I am going to abstain.

[LAUGHTER]

MS. BRANDENBURGER: You're neutral.

MR. EMANUELSON: That's right.

MS. BRANDENBURGER: So what about the future in terms of abuse of dominance? Similarly, we have a lot of differences, substantively. I am not going to say still, because that suggests there may not be in the future.

We have also heard some of the procedural differences which have an influence on which cases are brought. So there is a clear division between substance and procedure.

Would any of the panelists like to comment on the near or further horizon that they'd like to bring to the attention of the audience?

MS. VANDENBORRE: I have a very general comment. I think there is likely to be a continued stringent enforcement on the Commission side. I think for a number of reasons. That may be just because of the background of the Commissioner and some of the speeches are very much focused on fairness and fairness of the economy, which are not typically concepts you hear in antitrust enforcement in the U.S. They are driven more toward where is the outcome. Do we think there is a right balance found in generating or in managing all these principles? A little bit different from focusing on the criteria and economic analysis.

The second is that maybe the Brexit development, whatever may happen, may also result in some development of enforcement in the EU. There has been speculation that the U.K. has always been more of an economic force in decision making. It was very much the U.K. and U.K. officials behind some of the guidelines that the Commission has put out, especially those that were economically focused. Guidelines were U.K. oriented or U.K. generated. And so there is speculation that if that force dissipates or becomes less prevailing in the Commission, then that will drive enforcement in a direction as well.

I think with the current U.S. administration the view may also be do we have enough power as enforcers. Do we want to make sure the agencies look at questions if it's not being acted in our jurisdiction or in that jurisdiction? Do we need to take it up in our jurisdiction? We see it a little bit in Europe between the member states and the Commission. Sometimes where member states are reluctant to take on a cartel, the Commission will say, well, if you don't take it, we will. Someone has to take it here. That's probably less obvious with the different jurisdictions, like the U.S. and EU, but I could see that develop as well. That may be a good place to start.

MS. BRINK: Well, it's hard to say. I certainly would say that neither of the U.S. agencies typically defers to other agencies on doing pretty much anything. That's a joke.

[LAUGHTER]

But again, I think this goes back to the crystal ball. And it's also so much of the jurisprudence that's being developed in the U.S. isn't private enforcement right now on dominance issues, and so certainly I don't have a crystal ball and would never use it to say what the next administration will be doing.

MR. EMANUELSON: I would just add, for me the substantive area of law that presents the most difficulty in predicting is the duty of a dominant firm to assist rivals. Even if you just look at the U.S., there is such a divergence of viewpoint, of opinions. We now have the pharmaceutical sector now using the *Microsoft* balancing test in some of these product cases. I am looking at Eric out there helping develop the law.

So there it is—and that's just in the U.S. Obviously other countries want to get into this, particularly these high technology industries, which really do need to assist rivals. You are a platform and other companies are relying on you for interoperability for objective searching. And where is that going to go? What is the standard? And how from an in-house perspective or private practice perspective do you advise on that? It's just maddening to conduct those balancing tests.

MS. DELBAUM: Changing topics a little bit, but staying on pharmaceuticals, pay for delay is an area we see a lot of activity on both sides of the Atlantic. I think again it may be a misperception, but a perception there is actually another area of convergence between the U.S. and EU.

Perhaps given your position you might comment on that?

MR. EMANUELSON: Yes, without getting into the substance of any cases or strategies I thought I'd focus on a very theoretical area of the law here. I thought I'd throw out contrarian viewpoint here, because I am on a panel here, food for thought. At the high level, the standard applied to these agreements are different. In Europe a restriction of competition goes along the lines of the presumption of anti-competitiveness that you have that makes it easier to win cases.

In the U.S. we have the *Actavis* decision, and that's the Rule of Reason approach, and that, you know, you can take one class of antitrust and those are different standards.

But what I thought I'd maybe talk about a bit is the movement that's flying a little bit below the radar by the FTC to essentially try to get the application of *Actavis* as it applies to their cases as distinguished from private cases to essentially align and converge with the European standard. And the way that they have done this, and it's rather clever, is through the submission of amicus briefs in a number of private cases that say that we are not party to this case. We know that for a private plaintiff you need to show delayed entry to show damages, to show harm to consumers and the class you're representing. But a competition agency, like the FTC doesn't need to do that. If you read the *Actavis* decision, *Actavis* said a large and unjustified reverse payment that prevents the risk of competition is antitrust injury in and of itself, and the damages question is down the road for private plaintiffs to decide, to prove.

The recent *Nexium* case that came out in the First Circuit discussed what the private plaintiffs failed to prove. The court actually cited and talked about the differential standards by the FTC. My point is that really will create convergence with the EC. But it will create divergence in the U.S. between the standard that a private case is required to show versus a Commission case.

What is preventing the risk of competition in certain contexts, a naked restraint on trade using a market allocation theory? There is the *Palmer v. Georgia* case that I think the FTC has based their arguments on. Yeah, that is a harm unto itself. But in a patent settlement context, and as the *Actavis* decision shows, it's extremely complicated. There are a lot of factors that go on in a patent settlement. The object of the parties is not to prevent the risk of competition, it's to manage litigation risk. I mean courts order mediation so that parties can settle cases, and yet competition is certainly a byproduct of the settlement. But fundamentally the risk that a company is trying to manage is of the litigation. And as the *Actavis* decision talks about, there is a sliding scale; there are a number of factors that need to be shown to prove an anticompetitive effect. And fundamentally part of the Rule of Reason is proving this. Is the onus on the plaintiff, whether it's the FTC or a private party showing an anticompetitive effect?

So I just pulled this out. Is it a better Rule of Reason standard for FTC cases to be satisfying this large and unjustified standard? Who knows what that means. Who knows what large and justified means. It's vague; it allows you to presume an anticompetitive effect. Or should we treat the FTC cases just like the private cases under a sliding scale that the reverse payments is an element of the anticompetitive effect, or as an element to be determined? But ultimately the FTC coined the term pay for delay. If you just show the pay and you don't show the form of delay, are you really satisfying that fundamental prong of the Rule of Reason test?

MS. DELBAUM: So we just got flashed our ten-minute warning. But Henri, particularly given your expertise and European perspective, if you want to say a couple words on this.

MR. PIFFAUT: Okay. So I don't want to get into specifics either. But just within the context I was in a case in Europe. I just want to add something, and I'm sure some will disagree because this involved some of them as well. I just use one fact to illustrate that. A real fact. We have a decision which is 466 pages. Do you think we need 466 pages just to prove a past jurisdiction? No, there is a lot of discussion to that decision. And so do you think that we need so much length and so much paper to do that? No, because we review actually all the elements, the elements of transfer of value, the element of postponing any potential injury, whether it is potential competitor or not. There is a really lengthy analysis into a decision of all events, and there is even some analysis showing ex post facto the effects of the agreements between them. There were two analyses, so a full-blown effect analysis and the object analysis.

MS. BRANDENBURGER: So Ingrid, if you would forgive me, so we don't slip into re-litigating cases, and given the time I just want to open this up to the room and see if we have questions on anything that we have covered so far, or indeed anything we haven't yet covered in our last few minutes? And then we'll come back to the panel if there is time.

AUDIENCE MEMBER: I'll ask a question. I don't want to put the government people on the spot. So let me direct it to the nongovernment people on the panel.

Is it appropriate for an enforcement agency of the U.S., say to lobby on behalf of a domestic corporation against enforcement action in Europe or vice versa, and what weight if that happens should the remaining enforcement agency give to that kind of input?

MR. EMANUELSON: I guess what I'll say is, it is appropriate if a case that involves either a global deal or a global conduct investigation where the conduct is global to have, you know, a healthy exchange of ideas on views of the substance of antitrust. There is a lot that you can do that we have talked about today around the substance

of duty to assist a rival or innovation competition or potential competition that you can have that healthy debate. And maybe you've convinced your U.S. authority of the validity of your arguments, and certainly when time is ticking on a deal, the collaboration between the agencies can work to your benefit. You may seek that out.

MS. VANDENBORRE: It may be very effective. From a private practice perspective, we have seen that happen, for example, at the agency where the Commission has gone through most of the review. Asia hadn't. They will communicate with the Asian counterparts, because they have a history of decisions coming out differently. There is that interest because it creates differences on remedies and implementation, if there are differences, so not only during the case, but to make sure the outcome is similar. So you would not call it lobbying. It is not lobbying, because of the position or effect on the economy, because it's the standard and criteria and having it applied.

And there is increasing cooperation, from what we can see, between the FTC and the EC to make sure that at each point the issues are aligned. On the hearing that took place in Brussels ten days ago we had U.S. officials sitting in the hearing as well to hear what the discussion was and what the implications were, because they had resolved that issue.

MR. WEINER: So yes, to the Antitrust Division, but perhaps no to the U.S. trade rep.

MS. BRINK: I would of course object to the characterization of this as lobbying. But I do think there is no point at which cooperation is more important than when people are coming to different viewpoints, either based on the same facts, or you have the same facts and different theories about what you're doing. That's when it is really important to hash it out and figure out is this market differences; is this actually theoretical differences; is this application of our laws differences? And that's when cooperation is really where the rubber hits the road.

MS. BRANDENBURGER: I am going to use the moderator's position and make a comment from my experience as Special Advisor International to DOJ, because I've sat on both sides the table here.

I know there is a concern on the private sector that international cooperation is basically one agency egging on another one or competing with another one. I really have to say that's not how it works. And it's much easier for me to say this than a current agency official. What cooperation is, is trying to understand a dialogue not to diverge for no good reason; there may be good reasons. And so going back to a much earlier point, the approach of let's get it sorted here in our home jurisdiction, the U.S., get the investigation closed and then ask other jurisdictions around the world to please follow this actually doesn't assist the lobbying if you want to call it. I would call it dialogue. It can be very productive for the agencies as well as the parties.

Is there another question to close this?

AUDIENCE MEMBER: I was actually looking for a little bit of a clarification, because I think at the beginning the panel was saying that agencies don't come to substantively different decisions. But once you add in market differences, theoretical differences, application of law differences, what is the substantive commonality that's left, if those are all acceptable differences to have?

MS. VANDENBORRE: On the merger front?

MS. BRINK: This point was being made on the merger.

MS. VANDENBORRE: On the merger front I think there are little differences. Ultimately there have been cases where there have been different outcomes. But I would say that is less and less the case now. I think there is increased cooperation, and that there is really much more convergence.

MS. DELBAUM: But is there harm to competition versus where it used to be? That used to be convergence and the perception in Europe and the U.S.

MS. VANDENBORRE: Still third parties have much more input into the EC process than they would potentially in the U.S. process. That continues to be the case. I think it's more of a dialogue between the two agencies than there may have been before. Historically the dialogue may have been less, so the issues were isolated with one agency or the other, and maybe now with those complaints coming they get voiced in the dialogue, and they don't result in differences as much as they would have in the past. That's speculating. I think there is so much dialogue going on.

MS. DELBAUM: To Rachel's point, there may be divergence but for good reasons.

MS. BRINK: The markets.

MS. BRANDENBURGER: So we have one minute left. Do you want to give the panel one more question?

Yes, please.

AUDIENCE MEMBER: Rachel, trying to relate this discussion with things we had in the previous panel, the innovation discussion. I think the *Dow-DuPont* case is somehow levitating above product market level into innovation and somehow above in the sector generally. That starts to feel like a bit of a qualitative issue, and the question is how do you measure it? Is there a way actually of measuring innovation once you detach it from product markets?

MS. BRANDENBURGER: Who would like to take that question?

MS. BRINK: Not me.

MR. PIFFAUT: I give you answer based on past experience, and I don't comment at all about the case or even on your qualification of the case.

So how do we look at the innovation and how do we quantify that. We look at internal documents, internal database. Very often firms which are innovative centric have their own processes on whether to push a project or not to push a project or to stop a project or not to stop a project. To judge that, some of them may be projects by their competitors. All of that is stored into databases and documents. If it is well done and if it is accessible and you can prepare it and compare it to other databases, there is a way to quantify the potential impact of innovation.

MS. BRANDENBURGER: So we are out of time. We have not touched on cartels, but with that we can go into the next panel. Please join me in thanking the panel.

[APPLAUSE]

MR. WEINER: So Lisl didn't warn me that this job entails just cutting off good conversations all day long.

We want to move right into the last panel. I would ask the panelists on the cartel panel to come up now.

Topics in Cartels and Criminal Enforcement

MR. WEINER: Okay, I want to introduce Steve to kick off the last panel, which is looking at variety of current topics in cartels and cartel enforcement around the world.

Steve.

MR. TUGANDER: Thank you, Michael.

So another disclaimer. Any views I express today are my own and do not necessarily represent those of the Antitrust Division or Department of Justice.

In preparing for this panel I did a little research and pulled up the transcript of the 2005 Annual Meeting Dinner. The dinner speaker that night was Judge Lawrence Kaplan of the Southern District, and he chose as his topic that night the *Booker* decision, which transformed sentencing overnight. And what was amazing was the decision had been decided only two weeks earlier, so it was two weeks old at the time. It transformed the federal sentencing guidelines from being mandatory to being advisory.

So today we are almost exactly a dozen years since the *Booker* opinion was issued. In the last 12 years antitrust sentencing practices have gone through a number of changes. Some related to *Booker* and some just because of the changing antitrust landscape.

So that brings us to our very distinguished panel here today. We are going to discuss the most current topics in the criminal antitrust sentencing.

With us are Marvin Price, the Director of the Antitrust Division's Criminal Enforcement Program. And Marvin previously served as the Chief of the Chicago office. Marvin is filling in for us today. We want to thank him because Brent Snyder became the acting head of the Antitrust Division just a couple of days ago, and unfortunately could not be here today. I think that's understandable.

We are also honored to be joined by Judge Shira Scheindlin. As many of you are aware, Judge Scheindlin served on the bench in the Southern District of New York from 1994 to 2016. She's currently of counsel at Stroock, Stroock & Lavan, where she's a member of the litigation practice group. And she also is an arbitrator and mediator under the auspices of JAMS. Sitting next to the Judge is Seth Farber, a partner at Winston & Strawn. Seth co-chairs the white collar regulatory defense and investigations practice. Seth was part of the group that was awarded the team of the year in cartel defense by the Legal 500 group.

Last and certainly not least, is Rita Glavin, a partner at Seward & Kissel, where she co-heads the government enforcement and internal investigations practice. Rita previously worked for almost 12 years as a federal prosecutor, having served as the head of the DOJ's Criminal Division in 2009, and before that as an AUSA in the Southern District and in the DOJ's Public Integrity Section.

Welcome, everybody.

The first topic we want to discuss is compliance programs. So we'll spend a few minutes on that, before we move onto some other topics.

So Marvin, let me start with you. Chapter 8 of the Sentencing Guidelines provides incentives for corporations to establish effective antitrust compliance programs. Brent Snyder has given a number of recent speeches, some of which are contained in the program materials. The speeches also encourage corporations to develop and implement very strong compliance programs.

As the Division's Director of Criminal Enforcement can you briefly explain why the Division encourages corporations to develop such programs, and what are the specific benefits that corporations will receive if they make the effort to do so?

MR. PRICE: Thanks, Steve. I'd be glad to do that.

First, I want to assert the same federal government disclaimer that everyone else is.

In terms of the question about compliance programs, there are a number of reasons why we encourage corporations to develop strong compliance programs. The most important one is that a truly effective compliance program should prevent the company from committing antitrust crimes, should prevent the company from engaging in price fixing, bid rigging, and market allocation.

Of course, we strongly feel that for the company to never be the subject of a criminal antitrust investigation is the best outcome for everyone. It's the best outcome for the company and its shareholders, and it's the best outcome certainly for its customers.

So an effective compliance program should prevent crime from beginning, and/or at a minimum detect it and stop it shortly after it starts.

From a prosecutor's perspective this is a great result, because as prosecutors we basically rely on sending a strong deterrent message. The way we do that is we try to get significant jail time for executives and large criminal fines for corporations.

Unfortunately, we are very rarely in a position to stop a crime from occurring. But compliance programs can do that. Compliance programs can prevent a crime from occurring, and that's a really good thing.

But sometimes, of course, the compliance program doesn't do that. It doesn't prevent collusion. But even in that situation the compliance program can be a major benefit for the company. And that's because it allows the company to self-report its conduct to the Division under the Corporate Leniency Program.

And I have a feeling that a lot of you, maybe not every single one of you, are familiar with the Division's leniency program, so I'll briefly touch on what it is in case you're not familiar with it.

Basically the Division thinks the program allows companies to self-report their participation in illegal cartels. And in exchange for reporting the illegal conduct and for complete cooperation with the resulting investigation, a corporate leniency applicant will not be prosecuted by the Division. Now the Division typically takes a similar approach to the corporate applicant's current employees, if they admit to the knowledge and participation in the conspiracy and they cooperate completely with the investigation.

Leniency may also help a company to obtain a reduction in treble damages in civil lawsuits that typically follow our criminal investigations.

To obtain leniency under our program a company must be the first to report the illegal conspiracy. It must promptly stop their participation in the conspiracy and must fully disclose its crimes. So the compliance program can help a company do that, help a company get that done, because it enables the company to discover the cartel early, so it has a chance to seek the leniency and cooperate with the investigation before its co-conspirators do.

Furthermore, the Division also understands the importance of recognizing efforts by pleading companies to improve compliance and the importance of incentivizing these companies to improve or adopt effective compliance programs. The Division has often noted that these compliance efforts cannot be recognized through the use of the citizen guidelines, because given the characteristics of antitrust crimes, companies don't qualify for compliance credit.

With respect to sentencing for most companies, an informed compliance program will benefit them, because it will enable them to avoid the use of a compliance monitor, and it will lessen the need for corporate probation.

However, as I'll discuss in more detail later in the program, the Division is also willing to consider compliance efforts in determining a fine recommendation where a company makes extraordinary efforts to transform the corporate culture that allowed the cartel offense to occur. And I want to emphasize this benefit will only be available in situations where the company takes truly extraordinary steps to institute an effective compliance regime and culture of compliance.

So in that situation a small number of companies who adopt a transformative compliance program will be recognized in our recommendation to the court on the corporate fines. The percentage reduction in that situation is likely to be low. But for companies with significant exposure, the monetary amount can still be quite significant.

MR. TUGANDER: Okay, thank you, Marvin.

I want to turn it over to Rita, and then to Seth to get their comments.

Having heard Marvin's pitch for strong corporate compliance programs, I want to find out if you see any downside to a corporation in doing so. And do you ever get resistance from corporations to develop strong compliance programs, and if they do resist, what are the reasons?

So Rita let's start with you.

MS. GLAVIN: To be blunt, I've never heard a client say hey, I don't want to have a good compliance program. Everybody wants to have a good compliance program. I mean there is no downside to it.

Where the question comes in, and I thought it was interesting there that you used this word, is when the company gets into trouble. Because let's all just be blunt. When they get into trouble, you are not going to agree that their compliance program was good.

MR. PRICE: That's true.

MS. GLAVIN: And you're going to get credit if it was transformative. And so for a company going into this, everybody wants to have a compliance program where they want it to be a living, breathing thing. Where they want a compliance officer that's going to report to the CEO. Where they want to do due diligence on their employees. And they want to have good training. And they want to have people do the right thing. But there is a balance to doing that, and you have all those policies written down. But if something happens, okay, and there is an investigation, there will be some loophole that is spotted in your compliance program, and that loophole will be pointed out to you over and over and over again. And why was it there, and why wasn't this done?

When I talk to clients about a compliance program, you're looking at are they a public company? Because then it's a different standard. Are they a private company? How small a company? How often is the turnaround? Where are they doing business in the world? Are they doing business in the world where it's more likely they are going to get into trouble? How much money do they have that they can legitimately spend on having the best most transformative compliance program?

So I think everyone will agree that you should have a compliance program for the simple fact that employers know they make money by doing good business. They also know they lose money if somebody points the finger at them and says they are not doing good business, and they have to go through a two-to three-year investigation that could end up with no charges being filed, but they have incurred millions of dollars of legal fees, a cloud over their head.

So everybody wants to have the compliance program. I haven't seen pushback on that at all. Where the pushback comes is do we have to do that? How far do we have to go? Because if something goes wrong realistically, Rita, isn't there going to be a long investigation? Aren't we just going to get hit anyway? So yes, I think we're all in agreement on that.

for criminal, the Antitrust Division ignored compliance programs. And there was the Antitrust Division, contrary to caring whether you kept wrongdoers in positions at companies, you go back and look at some of the old speeches and policy papers, some of which I think are still on the Antitrust Division website, they touted the fact that if you came in as a cooperating company, one of the benefits is you could limit the number of carve-outs and people could continue in their jobs and travel internationally, etcetera, etcetera. That's all changed. That change has been a big adjustment to get used to for companies that deal with the Antitrust Division.

The Antitrust Division was an outlier, and I think Rita used to head the Criminal Division, and they had a completely different policy. Now the two are in sync. But for companies now dealing with the Antitrust Division,

"What you have to do when advising clients is tailor it to what your business is. And I want always to be in a position where if something does go wrong, it's defensible."

Then the question is how realistic it is. What you have to do when advising clients is tailor it to what your business is. And I want always to be in a position where if something does go wrong, it's defensible. What your program was, how many personnel you had for the size of your agency, what your training was, how often it was done.

I can only think of one instance in the last several years where a company didn't get whacked when an employee did something wrong, employee goes off the reservation. The *Morgan Stanley CPA* case, the DOJ came out and said you had the most wonderful compliance program. It was transformative, so they didn't get hit, they didn't get fined, although they did have to withstand an investigation.

So yes, everybody wants a compliance program. It is can they afford the transformative one, and what is transformative depends on the circumstances.

MR. FARBER: So let me add a few comments.

First, I agree with Rita. Nobody in principle is going to take issue with the idea it is a good thing for companies to have compliance programs, but the issue is the details.

In focusing on what the Division's position is now, I think there are a couple of things that are important to realize. First, the policies that you've heard articulated are a sea change and a relatively new sea change. Because until Bill Baer became the Assistant Attorney General and Brent Snyder became the Deputy Assistant General this is a new thing that the Antitrust Division cares about your compliance program. And where I think the adjustment is particularly hard and where some of the issues come up, at least that I've found, is with foreign companies. Because again, the issue is the details, what exactly does it mean to have an effective compliance program? How far should it go? What are the standards that it should be judged by? When you have the Antitrust Division in the United States establishing or setting standards for what a compliance program should be for a globally operating company that's headquartered in Germany or Japan or China or whatever, those are the situations I think where clients have the most questions, not about the principle, but just about the details of what's expected.

MR. TUGANDER: Marvin do you want to respond to anything that was just said?

MR. PRICE: I think the answer to your next question will be explanatory.

MR. TUGANDER: Now, you mentioned before this culture of compliance, and Brent Snyder in recent speeches has also talked about the culture of compliance being very important to the Division right now. Can you explain what exactly you mean by the culture of compliance, and why does the Division think that it is essential for a program to be effective?

MR. PRICE: Right. This does get into some of what has already been discussed.

What do we mean by the culture of compliance? First, I would say that I want to emphasize that we do not have specific guidance about what the compliance program should be. We definitely don't have a checklist that you would use in constructing your compliance program. We think that this is a scenario where it's not the case where one size fits all.

We do agree with what was said a few minutes ago, that the compliance program needs to be tailored to the specific attributes of the company and the culture of that company. So that's one thing I wanted to emphasize. The ultimate goal is for the compliance program to be a good fit for the company's specific circumstances, and most importantly of course for it to be effective. That's really the ultimate goal.

Senior executives in company management should know best about how to tailor the compliance program to that particular company.

With respect to a culture of compliance, the key characteristic with respect to a culture of compliance is that the company's compliance efforts must be supported by the company's senior executives and its board of directors. That's really what it comes down to. It takes more than a paper compliance program to bring about this transformative culture change. The tone is set from the top senior executives who lead by example and hold themselves and others accountable to bring about this transformative culture change that I've been talking about. And frankly, if the senior executives don't take compliance seriously, then their subordinates won't take it seriously.

It's not a matter of how comprehensive a compliance program is if the senior management doesn't make it a foundation of the company's corporate culture. So what that means is that the senior management must be fully knowledgeable about the company's compliance efforts, must provide the necessary resources, must assign the right people to oversee the compliance program. They must ensure that the compliance program is successfully implemented.

And we also think that companies must make responsible personnel decisions about culpable employees, and those are the employees that are carved out of the company's plea agreement in order to bring about transformative culture change. What that means is a company should be willing to discipline employees who either commit antitrust crimes or fail to take reasonable steps necessary to stop the criminal conduct in the first place.

To put some more specificity onto what we're talking about, I have some examples of where we have felt that that occurred and that the company did go further than normal and did take steps to reach the goal of a transformative culture change. And one example is an investigation with respect to foreign currency exchange, where the department prosecuted four financial institutions for their roles in collusive conspiracy to manipulate the foreign exchange rates in violation of the Sherman Act.

A lot of people in the audience know a good bit about that investigation, because it was handled by the New York office. And I can see quite a few members of the New York office here who were responsible for this investigation.

We gave a modest reduction in the fine to one of the banks that was involved in that matter, and that was Barclays. And we gave them a modest reduction in fines because of its compliance efforts. And so why did we do that? We did it because we were persuaded that there were demonstrable differences the way Barclay's substantiated what it did to improve its compliance in corporate culture as compared to the other banks that were charged with violating the Sherman Act. This was definitely an effort that was led by the head of the company in a very high-profile way. Barclays' efforts in that situation were not merely prospective; they already made some of these efforts in the aftermath of a prior investigation with respect to Libor. And we saw the results of those efforts during the course of the foreign exchange investigation.

Another example is that in one of our auto parts investigations we agreed to a reduction in the fine for a manufacturer of shock absorbers for automobiles for extraordinary forward-looking changes to the corporate culture that were again led by the company's president.

Another example of the type of change that indicates to us that a company is seeking to make a transformative culture change was a company conducted individualized training for hundreds of executives particularly at risk of violating the antitrust laws. And actually as a result of that training they uncovered other illegal conduct that was brought to our attention.

Still another example was requiring employees who want to be high-level executives to first spend time serving in a compliance position before they are promoted to that level. So when we see similar efforts that result in real remediation and transformative changes in a company's compliance culture, we will consider taking recognition of them in our recommendation. But as I've said, the credit is going to require innovation, action and most definitely results, not mere promises of future action.

MR. TUGANDER: Marvin, is it fair to say the Division today is distinguishing between preexisting and forward-looking compliance programs?

MR. PRICE: Right. That's definitely the case.

We use the phrase, I think, backward-looking and forward-looking. And definitely we are not giving credit for backward-looking compliance programs which failed to prevent the conduct from occurring. What we're focused on is forward-looking compliance programs where steps have been taken to show us that the corporate culture is going to be changed. That's what we're looking for.

MR. TUGANDER: So Seth, let me turn to you. Do you think the Division's position is fair to in essence not credit preexisting or backward-looking programs?

MR. FARBER: Well, let me address that a little differently. It's always struck me as strange, because the Division, more than any other component of the Justice Department, in plea negotiations typically adheres slavishly to the Sentencing Guidelines. And the Sentencing Guidelines specifically provide for a reduction for preexisting compliance programs that are reasonably designed to prevent and detect conduct. It's not the standard that was just articulated that a truly effective program is going to prevent an antitrust violation. And the Guidelines contain a sentence that expressly says that the failure to prevent or detect the conduct in question does not necessarily mean that the program is not generally effective in preventing or detecting criminal conduct.

In fact, there would be no point for having a Guidelines reduction for compliance programs if it only applied in situations where there was no criminal conduct. You're not going to be in a situation talking about a sentence unless someone has broken the law.

So this is a concept that the Division historically gave no credit either for backward-looking or forward-looking compliance programs. Now, in recent years they've started to give credit in some extraordinary situations as described for forward-looking ones. But there is an inconsistency there with what the Guidelines provide.

The other problem that's come up, and Marvin touched on this a little in his remarks, the way that this gets applied to company's decisions about individual employees; and the assessment of whether or not the company has an effective compliance program and a culture of compliance going forward, is often tied to whether or not the company will retain in certain positions people who have been the subject of the Antitrust Division's investigation. And there are a couple of problems with that. One, it puts the Antitrust Division in the business of passing on whether a particular employee should have jobs or continue to have jobs or continue to have the same job or not, which is a position that has gotten the Justice Department into problems before, most notably in the KPMG case, which I think Rita had some experience with.

MS. GLAVIN: As did you.

MR. FARBER: Yes, but from a different perspective.

And the second point is the department's policy and views on this are not limited to individuals who are deemed to have engaged in culpable conduct. Because the department is not taking the position that people who should not be retained in positions are just those who have been indicted and charged. The position, as Marvin articulated, applies to people who have been carved out.

What's very interesting is I noticed that when Marvin was describing the Division's position on this is that there was a conflation of carve-outs with culpable individuals. Well, the department takes the position being carved out is tied directly to culpability. But the problem is there is no adjudication of that. There is no opportunity for anybody to challenge that. All that means if you're carved out is that the government is still investigating you, but as an executive you face the permanent loss of your job. And companies feel great pressure to go along with the Division's wishes in this, because if they don't, then they face the consequences of not getting this forward-looking compliance credit.

MR. TUGANDER: Seth, not to belabor the point, but I think one aspect of the Guidelines that you may have left out is a self-reporting aspect that applies to compliance programs. In other words, the compliance program allows self-reporting before the imminent threat of prosecution.

MR. FARBER: Well, you can self-report, but if somebody else is the amnesty applicant, you get cooperation credit, but you're not going to get a compliance reduction. The Division is going to take the position that you're not entitled to a compliance reduction.

MR. PRICE: May I respond to a couple of things he said?

First of all, we have always maintained that the 3-point credit in the Sentencing Guidelines for a compliance program is not applicable to antitrust crimes, at least the ones we have seen. That gets into the weeds a little in terms of looking at the Guidelines and what they say.

Because basically, if you have high-level or substantial authority personnel who are involved, participated in, condoned or are willfully ignorant of the offense, then the credit is not applicable.

Now to make it more complicated there is an exception to that exception, which says that basically if the compliance and ethics program detected the offense before the discovery outside the organization or before such discovery was reasonably likely and then reported it to the appropriate government officials, that the high-level personnel and substantial authority exception does not apply. Which puts you back in the category of being able to get the credit.

Do you agree with that?

MR. FARBER: Yeah, I mean I agree, but—

MR. PRICE: Let me finish. I wanted to see if you agree with that part.

So I think we agree with that analysis. And our point is that because of the specific facts of antitrust crimes, because of the type of crimes they are, that second exception doesn't apply.

We don't have situations where companies are able to qualify under that exception. One reason is we have conspiracies that typically last many, many years. We have conspiracies that last decades or more. And these are not crimes that are committed by rogue employees. And so the characteristics of the crime make it such that we don't see a fact pattern that this exception applies to antitrust crimes. Furthermore, companies in this situation are coming in for leniency. Because we have a leniency program, companies come in for that. And instead of getting a 3-point reduction in your sentence, if you come in and get leniency, for example, before anyone knows about it, and you qualify for leniency, then you are not prosecuted, you get a complete pass. So that's the best reward. That's the best benefit for a compliance program you could get.

So basically that's our analysis of the situation.

MR. FARBER: Just to respond briefly. It depends on the facts of the particular case, and the problem I think is that the Division doesn't make that analysis.

There are certainly plenty of cases where you've got lower-level salesmen engaging in price fixing. There can be a debate over whether they are fairly characterized as rogue employees or not. But at least in my experience that's not a dialogue that ever gets anywhere with the Division.

MR. TUGANDER: Thanks.

So let's turn it over now to Judge Scheindlin. Having heard this debate back and forth, Judge, basically Marvin has expressed the Division's position that the Division will not give credit for a preexisting compliance program. Seth made some arguments why maybe that's not exactly the way a court should look at it.

How would you look at it? Could you envision a scenario where the court, despite the government's objection, would nonetheless credit the corporation's compliance and reduce the fine?

JUDGE SCHEINDLIN: I promise to answer your question, but maybe not at first.

Let me start off by saying, it is rather important that you know that I am not a person who has any experience in antitrust. I am not an expert in antitrust. So it's very intimidating to sit on the panel and look out at all of you who actually practice antitrust law. But I suspect I am the only person here who has imposed more than 1,000 sentences, and I think this is a very important perspective. That makes me an expert in what a judge thinks about imposing a sentence, whether it's a fine in an antitrust case or any other kind of sentence.

So I am going to tell you the truth—I didn't know we had a court reporter, but I am going to tell you the truth anyway of what goes through a judge's mind.

So most judges will have had no experience, never having sentenced anybody in an antitrust violation. We have federal district judges. I suspect 30 of them have had an antitrust sentence. I was on the bench 22 years and never, never had a criminal antitrust sentence. So you have to know that. The judge is doing it for the first time.

So to prepare you have to know that Steve Tugander is a task master. He gave us questions, homework. I worked like a dog to learn the Guidelines in this area. I have way too much material, because I studied the Guidelines, but that's exactly what a judge would do in real life. So I want to share with you what a judge thinks.

First of all, twelve years ago *Booker* held that we are not bound by the Guidelines. So I am listening to all of you with 3-point reductions and 5-point reductions and one point up. I remember all the times I said, well, that's good, that's the Guideline. I could care less. I am now going to figure out the sentence I think is right. All this talk about the 3 and the 2 and the 5 is quite academic and is really is only interesting in this room.

[LAUGHTER]

Really. In real life the first thing you do is calculate the Guidelines because you have to. And then you do what you think is right, because you're free to.

So what are the ways the judges do it now? Okay, you get your Guideline calculation, which is all very tricky and that's where I spent my hours. But then you go to what's called the 18 U.S.C. factors. That's what a judge does next nowadays under *Booker*. And it starts with the parsimony provision. A sentence must be sufficient, but not greater than necessary to comply with the purpose of sentencing. Most of us happen to take that parsimony provision quite seriously. And that sets forth the relevant factors. I'll bore you for a minute. Those factors are the nature and circumstances of the offense, the history and characteristics of the Defendant. The sentence must reflect the seriousness of the offense, promote respect for the law, provide just punishment. Most of us do believe in justice. We have to afford adequate deterrence to criminal conduct, protect the public from further crimes, avoid unwarranted sentencing disparity and provide restitution to victims. That's 3553(a).

But that's a general section, but in fines for corporations there is a specific section that controls

anyway, and that's 8C2.a. I guess you all know this. I apologize. 8C2.a sets forth 11 factors that tell a court these are the 11 factors you have to consider in setting a fine within the designated range.

And of course, we may or may not stick to the designated range anyway, because that's based on the Guidelines. But we take those eleven factors, and I think you need to hear those again, maybe. So they give a lot of the same ones I read you in 3553. The first ones are the same, deterrence and protecting the public, those are all the same. But then you get some different ones that are specific to this conduct—this context. They are the offense, collateral consequences to the organization, nonpecuniary loss resulting from the offense, whether the victim was particularly vulnerable, what's the chance of recidivism.

Now is there a particularly high or low culpability score less than zero or more than 10? What if you got partial credit but not full credit for aggravating or mitigating factors? And then of course the compliance program, whether it was or wasn't effective. And then it says any factor found in 18 U.S.C. § 3572(a). So I turned to 3572(a)(8) which applies only to organizations. And then I am supposed to consider the size of the organization, the measures taken to discipline the responsible persons, which you mentioned, and to prevent a recurrence of the offense.

So that's what's going to go through a judge's mind. Section 3553 and the specific factors. And in preparation for this panel I tried to see if I have any sentencing tips for you from a judge's perspective. In a moment I will get to providing you with some tips with respect to setting the fine.

Now this is important. When you get this base fine under § 8C2.4, the court has to pick the greatest of the following three: the amount that corresponds to the offense level found on the table; the pecuniary gain; or the pecuniary loss. Then there was a great override that spoke to my heart. It said if calculating the gain or loss would delay the proceedings, well, then don't bother. And of course the judge doesn't really want to put in the time.

So if you're allowed to not bother, then you go back to choice A, which is the offense table, which is just a table based on the offense level. Of course, that has a proximate loss in it anyway.

Now for my only two arguments that I thought might be helpful, because if 8C2.5 says you calculate the culpability score, and in doing this you give this three-level reduction (which you mentioned earlier), if the entity had an effective compliance and ethics program in place. But there is a rebuttable presumption that you don't get the three points if a high-level person in the organization participated in the conduct. Well, it seems to me it's a fairly good argument to say that an antitrust violation could be pretty hard to detect. If the guy on top is a bad guy, he's supposed to be doing the investigation, and he won't investigate. So I might accept an argument that you shouldn't be denied those points anyway.

And another one was this whole business of how many points you get off for reporting when you report fast or less fast and all of that. And it may be that the court tires of that and just says everybody gets the highest one, since I can't be bothered to figure out who won the race to the courthouse.

So those are just some of my thoughts. Thank you for putting up with the non-expert.

[LAUGHTER]

MR. TUGANDER: Thank you, Judge.

Well, I think what I would like to do now is move to a different topic, and that's the ability to pay, which the Guidelines recognize in Section 8C3.3 for a corporation. The Guidelines say the corporate fine should be reduced if it impairs the ability of a corporation to pay restitution, or if the corporation does not have the financial resources to pay the fine.

Now, included in the program materials that we can't go over in great detail, are some materials that Seth put together, which I think is an excellent resource for defense counsel if they are looking to make a presentation to the Antitrust Division about why a company has the inability to pay a fine. So I would recommend to everybody in your spare time to read that.

But Seth, would you just walk us through the steps quickly right now?

MR. FARBER: Sure. And this is an area that was new to me until I had to confront it the first time. And it's new to me, and I think it is probably new to a lot of people. The situation of representing a corporation that can't pay a fine is generally pretty unusual. But due to the size and scope of some of the conspiracies that the Antitrust Division has prosecuted in recent years, and the magnitude of the fines that the Guidelines would generate, there would be even significantly sized companies that now find themselves facing the prospect of paying a fine that, if you apply the guidelines would be more than they could afford to do.

The Division, to its credit I think, recognizes that, and it's actually one of the components of the Justice Department that's in the forefront of having procedures for dealing with this and addressing it and for being open to these arguments and for engaging with defense counsel on this. It's actually, I guess at some level, not that surprising that the Antitrust Division should be at the forefront, because if you think that they are in the business of trying to promote competition, it's not really going to be in the Division's interest to drive a competitor out of

business. So perhaps for that reason these arguments find a particularly receptive audience there.

But what I found when I started to look into this is there is not a documented way of proceeding the way there is for applying for leniency program, when you go onto the Division's website and the FAQs and their model for this and model for that. But if you do go and poke around, there is a track record what the Division has done that you can back into what the procedures are. And having been through this, as Steve said, we put together a guide based on our experience of how to do this.

Essentially, what you do is you have an open kimono process with them and engage with them about what your company's financial situation is. And you provide them with financials over a period of time, and detailed information about your company's competitive situation. And the key to doing this and doing it well is to get a good financial analyst, and preferably someone who has done this before and has credibility with the Division. Because there will be very substantive discussions about your presentation to them and back and forth.

And the Division engages their own financial expert. They use—I don't know that this is a formal matter of policy, but at least historically they seem to use the same person, a guy named Dale Zuehls, all the time. I've been opposite the table with him. He's got an accounting background. He's very technically strong. And it's a very forthright and open process.

But you go through this process of providing information. The DOJ will come with up with their own analysis. They will engage in dialogue with you at the staff level. They'll respond to your counter arguments. And ultimately you'll come to a number, and the number is the maximum amount that the company can afford to pay over a period of time. I mean it's not just a case of what you've got in the bank today, but it's looked at over a five-year period. This reflects what's there by statute and what the Guidelines provide on an advisory basis as well. So if it has to be done on an installment basis, that's how it will be done. You come up with a number. So let's say if you started with the fine that would otherwise have been the process of your negotiation with the Antitrust Division of $200 million. And let's say you had a company that cooperated, and the Division decides well, you deserve a 25% discount for your cooperation, that's a $150 million fine. The company says I can't pay $150 million. We only have this amount of cash. We have capital needs, etcetera, etcetera. And at the end of the day if the government agrees, and the resulting number is $50 million, let's say, that will be the number.

But what they also have done more recently is they have realized there is a certain inherent unfairness about saying to cooperating companies that the amount that you'll have to pay is the maximum amount that you can afford to pay. Because if you think about it, if you have a regime where companies that are faced with massive fines are going to be forced to pay the maximum they can afford to pay, there is not going to be any incentive to cooperate.

What they have started to do recently, and there was a recent example, a public example of this just yesterday, the *Rubicon* sentencing before Judge Donato in the Northern District of California, they will agree as part of their joint recommendation to a discount, a cooperation discount beneath that maximum amount. So taking my example of if it's agreed upon that the maximum the company can afford to pay is $50 million, what the Division is now doing is agreeing that you should get some discount off of that. So you're not really paying the maximum you can afford to pay.

Now, in my experience before if you were getting 25%, maybe you'll get 10% off, so you're paying $45 million, but you're still better off. And that continues to provide an incentive even for companies who are looking at massive, massive fines to cooperate.

MR. TUGANDER: Marvin, I want to quickly just turn back to you.

Would you agree that's pretty much the way it works in the Division, and what does the Division do to verify that a company has a particular ability or inability to pay a particular fine?

MR. PRICE: I pretty much would totally agree with what he said. That's exactly what we do in terms of we get the financial documents, other financial information from counsel for the company. We give that information to an expert. It is true, Dale Zuehls is the person that we primarily use. We have other experts that we use, but he's the primary person that we use. He's very good at analyzing that information. He has a lot of experience at inability to pay claims.

Once he comes to a conclusion—and he may ask for additional information after the initial submission—but once he comes to a conclusion and he has an opinion, then we have no problem at all with our expert usually talking to the company expert, and they can sit down together and discuss what is the basis for their opinions. And we want to make sure that he has the opportunity to hear what counsel for the company and the company expert thinks what should be done and why.

So it's all a very open and above-board dialogue and discussion. He may revise his opinion and may not, but ultimately he comes to an opinion, and he tells the lawyers his opinion. And that's what we use. So that's I think the process that you described, and I totally agree with that.

I would describe what we're doing with the more recent decision to give credit for cooperation. As you discussed, I think, slightly different from how you

described it, in the sense what used to happen is we would say that you were supposed to pay under the Guidelines say $100 million. And because you can only pay $50 million, that's what you have to pay, and you're not getting any cooperation credit. You're not getting the credit we would give companies for cooperation, which would result in that fine usually being lower.

Basically, the thought there was, well, the cooperation credit was a lowering by the fact that now you're not paying $100 million, you're paying $50 million. But thinking about it some more, we decided that the company should get cooperation credit if they cooperated. If they have done a good job cooperating, they should get it. It's only fair they get it.

Furthermore, it's in our best interest to incentivize companies to cooperate. So, therefore, we're willing to give companies cooperation credit even though they were supposed to pay $100 million, now they are only paying $50 million; we still are willing to give cooperation credit off of that $50 million so they wind up paying less than $50 million.

MR. TUGANDER: Judge, Scheindlin, just going back to you.

So suppose Seth and Marvin have worked out a great deal on inability to pay a corporate fine, and they approach the court and make a joint recommendation. Two questions: What steps is the court going to take to independently verify that that recommendation should be followed?

And two, from a curiosity point of view, how much assistance do you get from the probation office; how helpful are they to you in a situation where you have a large complicated fine?

JUDGE SCHEINDLIN: I'll take the last question first, because it's the easiest case. The answer is none.

[LAUGHTER]

So we can move on directly from there. They have no expertise in this kind of case at all. I've dealt with them on financial cases, and they are utterly lost. It's really a problem for myself and my chambers. Forget the probation department. That's just true.

The next point I would make is nothing would please me more than a joint recommendation. Because this is too hard.

I looked at Seth's slides and my eyes glazed over, and I said there are other areas of the law. Thank God I don't have to understand these difficult slides.

So if the lawyers really do reach a joint recommendation, I think it is likely that that will be the number. That will be accepted by the court.

I know you mentioned, Seth, when we prepared there was one case in which one judge didn't accept a joint recommendation. It was not an antitrust case. It was a securities case and that judge had a lot of experience in securities.

I think antitrust is so rare that anybody from the bench side will be thrilled to have the joint recommendation.

Now, the real question is what if it's litigated? What is the poor judge to do now? If you have an expert and they don't agree, we are in a tough spot, because this is foreign language, akin to Greek. So then the court has options. The court can retain a neutral expert. There is funding and law that allows us to have a neutral expert, and I might as well do that. Have a court-appointed expert look at both sides and figure it out for me.

I might try to figure out if there are comparable sentences, because you worry about sentencing disparity. I realize these cases are so sui generis there may not be a comparable.

Maybe one side or another can make an argument based on what was done in this other case. You know, out west they were really quite reasonable and took it. Here they are not, we don't know why, and that would lead to disparity.

I think there are arguments to be made, but I think I would need a neutral expert. So I guess the end of this answer is: You should agree.

[LAUGHTER]

MR. FARBER: And if I could just make a quick comment, we generally do.

JUDGE SCHEINDLIN: Yes, I know that. Because you take pity upon the judge.

MR. FARBER: Well, yes. But also, you know, you're always assessing are we going to do better if we litigate this in front of you.

And frankly, in my experience in these cases, however harsh the department's position appears, we usually think it's a better result that we'll get than if we are going to have to wind up litigating on the corporate side.

Individuals can be a different story, but in these situations that's been my experience.

MR. PRICE: Yeah, I agree. It's very rare.

When I was Chief of the Chicago office of the Antitrust Division we had a couple of matters that were litigated, but that was very unusual. And in terms of what I know about the Antitrust Division over the years, I think it's very unusual.

MR. TUGANDER: So I want to switch topics. We have been talking a lot about corporations. I want to talk

a little about individual sentencing practices in antitrust cases, and I want to turn to Rita and bring you back into the conversation.

Judge Scheindlin spent a good amount of time a few minutes ago talking about the discretionary nature of the Guidelines. And we started off going to Judge Kaplan's speech in 2005 right after *Booker*. So in antitrust and other sophisticated white-collar cases the Guidelines sentences can be fairly harsh when loss amounts are substantial. And defendants are usually first-time offenders or otherwise have led decent lives and contributed to society. In these types of cases what should be the focus when trying to persuade the court to sentence an individual below the Guideline range; in other words, pursuant to Section 3553, what types of arguments would you make and what types of arguments would you avoid?

amounts are, the foreseeable loss. So if it's a big Ponzi scheme, like Bernie Madoff, and you have hundreds and hundreds of victims and billions of dollars of loss, you're not having the best time at that sentencing. You prepare the client. You know it is going to be a long time.

It may be somebody who is in an antitrust case, who is not getting the benefits of the scheme, and the Sentencing Guidelines are volumes of commerce. You can have a low-level employee who might be working in the automobile parts industry; who maybe got together in an agreement with another automobile parts company, an agreement that had predated them by ten years. And they just came into it, and now they're going to be sentenced for a decision that was made by the company that they may or may not have thought was a crime at the time that they were doing it.

"In antitrust and other sophisticated white-collar cases the Guidelines sentences can be fairly harsh when loss amounts are substantial."

MS. GLAVIN: Well, the first thing you have to figure out when you're going to sentence, is it somebody that pled guilty or was convicted after a trial. If it was somebody that pled guilty, then you have all the arguments about acceptance of responsibility, they saved the government all these resources. If it's someone who has cooperated, you get all of those benefits.

If it's somebody who went to trial and has still asserted their innocence, it's more complicated at sentencing. And on those particular clients I generally want to use the 3553(a) factors. One, to get the money amounts down you want to get a fuller picture of the client that perhaps you didn't get during the trial. Two, you want to get a lot of letters. It's been interesting how *Booker* changed everything, because when I was an AUSA and the Guidelines were mandatory, you'd almost get nothing from the defense. There would be very little in your submission, unless you were arguing about the Guidelines and their application. That was what you got.

Now there is so much, you spend so much time on the 3553 factors and getting in as many letters as you possibly can to talk about who this person is, how they ended up in this particular situation, what their financial means are. You're looking at what other people have been sentenced to across the United States.

You want tell the judge how much deterrence is there going to be really for this person who is a non-violent person, a lot of times a first-time offender, and then the general deterrence. Putting somebody away in a white-collar crime, the Guidelines get driven by what the dollar

You're in a really great place and you hope you get somebody like Judge Scheindlin, who is going to be looking at this and say, my goodness, does this person deserve this? So, I think the factors give you a great opportunity to do a submission about the full circumstances of the person's life, where they fit into the whole chain of the crime.

It's really great on those sentences if you can get the prosecutor to agree with you ahead of time. One of the things I like to do on my sentencing submissions now is to send a draft over to the prosecutor before I submit it. I like to say, look, I want to send this over to you, if you're going to have a significant issue with any of the facts that I have in here, please let me know, because I don't want to get into a fight with you at sentencing. You want to make it as easy as possible.

I think the 3553(a) factors are just fabulous, even putting aside white-collar crimes. I'm more on the street crimes sentencing issue, because I am on the CJ panel for the Southern District. The majority of my sentences now have been below Guidelines. It has been quite incredible.

MR. TUGANDER: Judge, I wanted to ask you something specifically Rita mentioned about the letters. Rita talked about the importance of letters.

Your former colleague on the bench, the late Judge Baer, had some Antitrust Division cases in front of him, and he commented that in white-collar cases, defendants are typically able to submit an enormous amount of

letters, but some street criminals cannot do the same, so he wasn't necessarily overly impressed with letters.

I was curious if you had a take on that, Judge?

After you answer that question, can you talk about the tips you have for prosecutors and defense counsel?

JUDGE SCHEINDLIN: Good. I am glad I am allowed to talk about sentencing and not antitrust. I am happy to do that.

I do agree with what Judge Baer said. Because we realize, first of all, street crime people can't get the same kind of letters. But you'd be amazed now how many letters we get in street crime cases. It is touching. They get the children, grandchildren, neighbors, he took the garbage up the stairs, so we are getting letters on all kinds of sentencing. So I think letters do matter, and in a white-collar type of case, I think judges are pretty sophisticated at reading letters. It's not enough to say he's good. Tell me the specifics.

And I remember reading about people who really gave their time, gave their money, started a charity, started a program. You can read between the lines. You can find things that truly are exceptional. So I think letters count.

The other things that are in the letters sometimes are medical conditions and psychiatric conditions, and that has a great impact. If you think the person is impaired in some way that will make the person particularly vulnerable in jail, I think judges take that pretty seriously. So the letters do talk about the individual's medical and psychiatric problems.

The letters talk about impact on family. Pretty important. I mean we realize the person that did the crime, they have to go away. But are there children who are disabled; is there a spouse who is disabled, taking care of an elderly person? So I think that's another thing that we find in letters.

Then there is often a letter from the defendant. I think that's smart. The defendant writes a letter now and explains feelings of remorse or his acceptance. And that can be powerful depending if it is well done. So those are the letters.

Now, the government always submits a letter, at least in the Southern District of New York. The AUSA always submits a letter, and so what do I think is the point they should stress? I think they need to stress deterrence, to counteract the sympathy the judge has. You've got to say, but judge, if everybody who looks like you doesn't go to jail, then these white-collar people are never going to jail. So you have to have a deterrent. I think that is a strong argument. The government has to talk about recidivism, this person, people in his position have done it before. There is a great risk of doing it again.

They have to talk about cooperation or the lack of it, which you brought out when you said pleading or trial. And then has the person already been disciplined in some very major way, like they are never going to practice law again, or they are not going to be certified to be a broker again? So that you realize there is another kind of ancillary punishment which is pretty serious, so you take that seriously.

Some common mistakes for the fun of it. Quick tips. From the defendant, I find tears are painful. Please don't cry. It's counter-productive. I think it's an act. It never did move me, and you should counsel your client not to cry. It's not good. Telling me they really didn't think they did it but they pled guilty is not effective. They do say that. I didn't understand it was wrong. You even allude to that; I don't think that that's a very good tactic.

If you pled guilty or you've been convicted, leave out minimizing your role, when it is obvious that your role was serious. And you're saying, well, I am just a lowly guy, and the boss made me do it. I don't want to hear about it. It's no good. That is not a good defense.

From the government's point of view what not to do. Government should stop asking for the absolute top of the Guidelines. It is tiresome. Every government letter, particularly white-collar cases, asks for the absolute maximum, and you lose credibility. And it must be in the Guidelines and it must be at the top. I think the judges began to discount those letters when they always ask for the highest possible sentence.

The last thing, you have to demystify those calculations. You have to present them in a way that the average human being who is not an expert in antitrust understands if you're making an ability to pay argument. Don't do it as a mathematical formula, but just try to put that into English.

The other question you had asked at one point: Does the judge come on the bench with a pre-determined sentence in her mind? And the answer is yes, but... So you prepare, the same way I prepared to answer all of Seth's hard questions. I was prepared for sentencing. I knew exactly what I intended to give. I will tell you that I never really went up after the sentencing hearing, but I often went down. So the sentencing hearing can make an impact on the judge.

I doubt that most judges are going to get aggravated enough to raise what they predetermined because they thought very hard about it. Probably spent hours in chambers thinking it over. But they may go down if it is effective enough.

So those are my tips.

MR. TUGANDER: Thank you, Judge. That's extremely helpful.

JUDGE SCHEINDLIN: I bet it is.

MR. TUGANDER: Rita, going back to you, and hearing what Judge Scheindlin had to say, let's assume that you have a client who was convicted at trial, and he claims he didn't do it, but he's got to express remorse in front of the judge. How do you handle that situation?

MS. GLAVIN: Look, if somebody is convicted after trial, they are likely going to appeal. So anything they say at their sentencing can be used against them later on. So I am not going to advise them to be expressing remorse or to be making any admissions.

What I am going to do is focus on all the other factors that Judge Scheindlin mentioned, because they don't want those to be used against them later on, so you just deal with it by all the reasons Judge Scheindlin mentioned.

JUDGE SCHEINDLIN: Given the paucity of trials, I would say most of the sentences are on pleadings, the vast majority are on a plea, not a trial.

MR. TUGANDER: We had another panel this morning of judges, and there was a stat quoted in the Southern District there were 36 trials, criminal trials last year.

JUDGE SCHEINDLIN: Oh, total criminal trials, including narcotics? That's exactly the point; 35 of those were narcotics, I'm sure.

[LAUGHTER]

MR. TUGANDER: So I would like to turn it over to the audience to see if you have any questions at this point?

MR. WEINER: Okay, before we wrap up, I just wanted to make a plug that this program is an outgrowth of the Criminal Cartel Practice Sub-Committee that was newly formed. And the current Chair and Vice Chair are Deirdre McEvoy and Stephen McCahey. Seth is also a member of the sub-committee, and will be moving up to Vice Chair. I am a member of the sub-committee. If anybody is interested in joining the sub-committee, we would love to have you. Please contact any of us. Thank you.

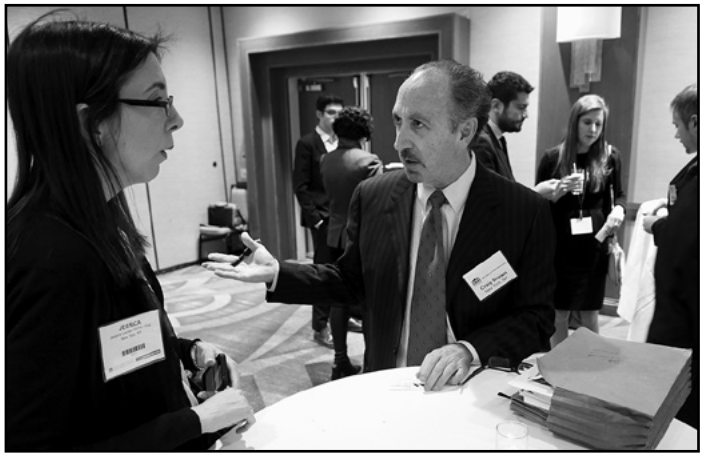
The panel is a terrific lead-in to our dinner tonight, because the dinner speaker is someone that Marvin prosecuted, who was a corroborating witness in the Archer Daniels Midland lysine cartel.

Marvin was the Assistant Chief in Chicago at the time. He came from a culture of noncompliance and had some interesting lessons to teach those of us who advise clients in this area. I think he has a very interesting perspective.

So logistics, please remember to turn in your CLE forms.

Next door, Sutton Center for the young-at-heart lawyers cocktail reception. Then we will change venue to the University Club at 6:00 for cocktails and dinner at 7:00. Thank you.

(Proceedings adjourned.)



Scenes from the 2017 Antitrust Section Program, YLS Reception

NYSBA Annual Meeting
New York Hilton Midtown
January 26, 2017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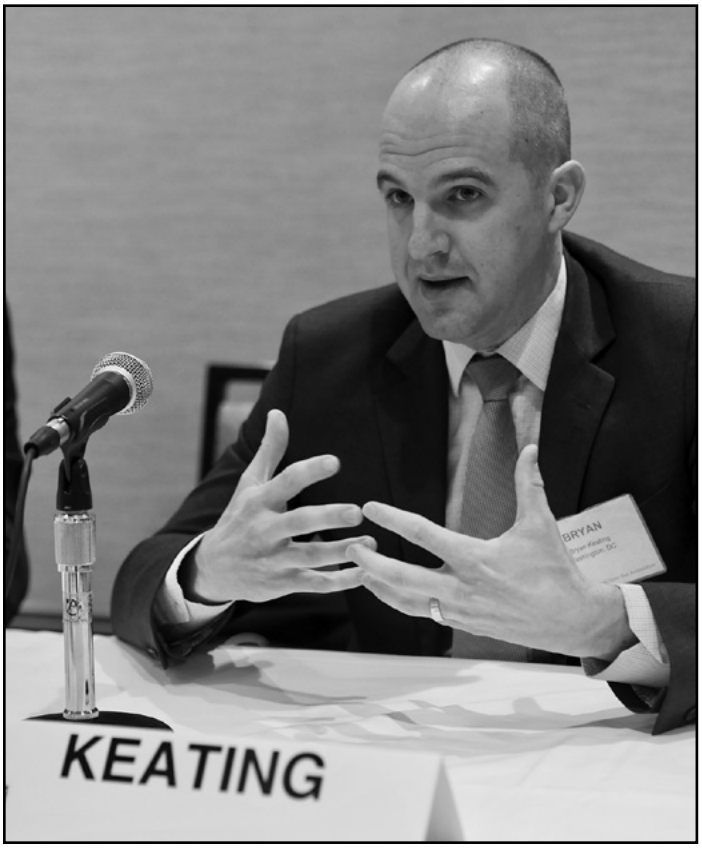
KEATING

Antitrust Law Section Dinner

MS. LISL DUNLOP: Good evening, everybody. Would you all please take your seats.

And happy Australia Day!

[APPLAUSE]

I've been dying to say that as long as I've been a member of this section, because the annual meeting invariably falls on January the 26th, which is Australia Day. As you can probably tell from listening to me, I do have a somewhat special affinity for Australia.

I am Lisl Dunlop. I am the past Chair of the Antitrust Section. I very happily passed the baton to Michael Weiner earlier today. And it's my job, my last official act as past Chair, to welcome you to this event, this dinner.

I just want to say a couple of words before I pass it over to Michael. First of all, what a fabulous day of programs for everyone who was there. It was a truly exceptional group of panels, of speakers, of topics from start to end. The first panel was judges and it was really fabulous for us to hear from the bench. I hope you all enjoyed it as much as I did.

As my swan song here, before I rip off my Chair label, I want to say a quick thank you to all the people who have been so helpful through this year in making this job such a fun one. Tiffany Bardwell and Lori Nicoll from the New York State Bar Association, our administrative support. They were wonderful. Thank you very much and especially Tiffany, who was by my side all year.

And all of the officers of the section who are sitting here at the head table, as well as all of the committee leaders and other members of the Executive Committee who have stepped up and taken charge of various events.

One of my jobs is to thank our sponsors. You may not know, but we have several levels of sponsorship of the section, and our sponsors' support makes it possible for us not only to have this dinner and do the CLE day, but also all of our activities throughout the year. We hold several symposia, many, many CLE programs and various social events. So I'd just like to recognize our Platinum sponsors, Analysis Group.

[APPLAUSE]

Thank you. Compass Lexecon.

[APPLAUSE]

Thank you. And NERA.

[APPLAUSE]

Thank you. We have several distinguished guests with us, their names are in your program. We have the leaders of the three antitrust agencies in New York here sitting at Table 5.

And at Table 6 we have Judge Crotty, who is going to be our honoree for the Service Award, Professor Harry First and several other very important people are here. Thank you all for being here.

Finally, a big thank you to all of the firms who support our event and you for coming. Without you, of course, it wouldn't be so much fun. So thank you all.

Enjoy your salads, and I'll pass over the mic.

[APPLAUSE]

MR. WEINER: Thanks, Lisl. I am going to talk a little more after dinner, but what I wanted to do now is just give you a very few words about Mark Whitacre, because you really want to hear Mark Whitacre's story in his own words.

Mark Whitacre is an Ivy league Ph.D. biochemist and a whistleblower. He was responsible for uncovering the global lysine cartel in the early 1990s, while he was working as a divisional president at Archer Daniels Midland. He went undercover for the FBI wearing a wire for three years. Many of you are not aware of the videotapes. I think lawyers my age have all seen these videotapes, but my scientific sampling shows that many younger lawyers are not aware of these videotapes and some really good TV.

What I am going to show you is a videotape that was released by the Antitrust Division in response to a FOIA request, to just show you one clip. There are more clips available on YouTube. The film quality is a little grainy. We have put subtitles in so you can actually read what the people are saying. Let me just roll the tape.

[VIDEO PLAYED]

MR. WEINER: Mark's undercover work was inspiration for the 2009 film "The Informant" and which was the subject of at least three books. The book *The Informant* is a terrific book. I think Mark's story is a compelling one for all of us to advise clients and counsel clients in the antitrust field. I am very eager to hear Mark Whitacre tell his own story.

Mark.

MR. MARK WHITACRE: Thank you very much for having me. And I've been very fortunate to be at several events with the government for the last several years over the last decade. And as a matter of fact, a few years ago I was on a stage with the prosecutor, Scott Lassar, the U.S. Attorney at that time, who basically prosecuted me. And he and I were sitting together before the Illinois Bar Association.

And I've been at several events with the FBI over the last several years, including the FBI Academy, about how to work with informants and things of that sort. When I look at that video—I haven't seen that video for quite awhile, but when I look at that video, I was in my 30s back then, and I am 59 years old now. I was 32 years old when I joined ADM.

When I look at that tape, the thing I remember the most is the customer is the enemy and the competitor is our friend. I don't know if you picked that up in that tape, but boy I heard that dozens of times. The competitor is our friend, and the customer is the enemy, and that's the culture I worked with.

I was 32 years old when I joined ADM and started hearing that. Our CEO was 75 years old, and our President was 69 years old, and I reported right to the vice chairman of the company. They were about 40 years my senior, and I got caught up in that. I looked up to them, and I thought that's what this program was all about. I got to that fork in the road, and I made a bad choice. I put my family through hell by making that decision 25 years ago. Through a living hell.

And my wife, we are married for 37 years, and it is a miracle that my wife has stayed with me after everything I put my family through. A miracle.

So I look forward to sharing with you what happened during this journey and to share some of the decisions I made and some of the decisions the company made and what we wished we would have done differently, both from a corporate standpoint and a personal standpoint. I look forward to sharing that with you. In the end, I think there are some things we could have done a lot differently to prevent what happened.

I would like to start off with this. Just imagine for a minute that you go back to work tomorrow. That you have a tape recorder attached to your body with an athletic band around your waist. That you have another tape recorder in a notebook, and you have a third tape recorder in a briefcase. And you go to work just like you would any other day, and you're taping your co-workers, your supervisors and in some cases your friends. Now imagine doing that every day, Monday through Friday, 8-9 hours a day for three years. That's what I did, and I was then in my early 30s.

I met four FBI agents whom I worked for. They would have two meet with me at a time, and they would meet me in the morning. They would shave my chest and attach microphones to my chest. They checked the batteries of the other two tape recorders. I always had three tape recorders. I met with them again 6:00, in the evening to go over the tape recorders and debriefings.

They told me it would be a six-week exercise. It was three years. Every Monday through Friday for three years, 8-9 hours a day. I could tell you firsthand as an informant that prison was a cakewalk compared to wearing a wire for the three years.

My first day in prison was in 1998; I was age 41 then. As I said, I am 59 now. That was probably my first night of good sleep that I had, which was after going to federal prison, compared to wearing a wire for those three years.

The company I was wearing a wire against—many of you know this—was Archer-Daniels-Midland, one of the largest companies in the world. I think today ADM is number 41 on the Fortune 500 today. Back when I joined them, in 1989, we were number 56 on the Fortune 500. So it was a Fortune 100 company, one of the largest companies the world. Our CEO, as I said, was 75 years old. He just passed away shortly before Christmas. He passed away at age 98. He was 75 when I joined the company. Our president was 69, and I was 32.

I was divisional president of a biotech division. ADM had 30,000 employees in total. Our fastest growing division was the biotech division. I was divisional president, and basically the number four ranked executive. I reported right to the vice chairman of the company. So I was number four at ADM out of 30,000 employees, and boy, I thought I was a rock star back then.

I can remember my first week of work. The CEO came back to my office, the one that passed away recently. He introduced me to two pilots in October of '89. I was 32 years old and full of myself. I remember he came back to my office and introduced me to the two pilots. He said, Mark, these are the two pilots that will be working for you, reporting to you. We have seven corporate jets for our top executives. You're rated number four, so these are the two pilots that will fly you around. So that was my first week at work.

I remember having my Justin Bieber, Charlie Sheen, and Brittany Spears moment all in one month. I thought I was a rock star.

I remember the second week of work. The CEO came back, our 75-year old CEO, and he said, Mark, did you move your family yet to Decatur, Illinois? We were living in New York, and I worked for a company in Frankfurt, Germany for four years, and they moved us to New York. I was doing a joint venture, and that's how I got to know the ADM executives. They made an offer I couldn't refuse.

Back then I was all about the money, the compensation. When they made me an offer, I said where do I sign? They moved us to Decatur, Illinois from New York. I worked in Teterboro at the time. And I remember he asked me that second week of work, he said, have you found a home yet? Have you moved your family yet? I said I've only been here a week. We are looking at homes, talking to realtors.

He said to me why don't I buy his home, the home he lived in. I said why would you sell your home? He said, well, he lived in it for 30 years, he's 75 years old. I said, okay, tell me about your home. He said, well, it's 13,000 square feet, 15 acres, 8-car garage, and it was the original house of John Daniels who had founded Archer-Daniels-Midland 150 years earlier.

That was my second week of work. I said I think that's a little bit much house for me. He said, nonsense. I'll give you a huge six-figure start-up bonus, and you'll have your down payment your second week of work. He said I know all the banks in Decatur, Illinois. He said we have about 80,000 people in Decatur and about 30,000 are employed. So he said I know all of the banks. You just buy my home. So I bought his him home the second week.

So what does a guy do with an 8-car garage that's full of himself? He fills it with eight cars. Within a couple years' time I had a Ferrari, two BMWs, two Mercedes. So again, my Justin Bieber moment at age 32. I thought I was Bon Jovi at that time.

So then you can easily ask, Mark, you're 32 years old; you're at the 56th largest company in America. Why in the heck—and your CEOs are 30 to 40 years older than you, the CEO and president—why would you blow the whistle on your own company? Well, the reason why I blew the whistle on ADM is because I didn't. My wife did. Without my wife—at that time, which was the largest price-fixing case in U.S. history—I know there have been larger ones since, but that was the largest price-fixing case in U.S. history at the time. Without my wife Ginger that case would have never happened. I am going to describe to you a little bit about how that happened.

But I first want to mention my wife. I've known Ginger almost my whole life. I met her when she was in seventh grade and I was in eighth grade. We were the homecoming king and queen. I was the senior class president. She was one year behind me in high school. And as I mentioned, we are 38 years married in June this year, which is a miracle after wearing a wire for three years and going to prison for nine. So I don't take it lightly that my wife stayed with me through this journey.

But here's how my wife got engaged with this and how she made the decision to turn me into the FBI. I was three years with the company. It was April of '92. The vice chairman came back to my office and gave me a $100,000 bonus check. He promoted me from divisional president to corporate vice president and an officer of the company, which really put me in line to be the next president when the president retired. Like I said, they were all in their 70s. And he gave me 25,000 shares of stock option, which was about a million dollars back then in 1992. And I thought it was kind of odd to gain all of this, a million dollars in stock, $100,000 check, corporate vice president title. So he came back to my office an hour later, and then I knew what it was all about.

He came back to my office an hour later. He said, Mark, you're three years here now—this is the vice chairman who I reported to. He said you're three years in the company now; we trust you, and we want to start telling you and showing you how ADM does business. I said, what do you mean? I've been here three years; I already know how you do business. No, he said, there is something we haven't been telling you, and I want to share it with you.

He said, I am going to assign a mentor to you, Terry Wilson. And this mentor is going to show you how to do price-fixing and fix the prices of the ingredients in your division where you will even earn more profits than you're currently making. I remember asking the vice chairman, I said, that's illegal, we can't do that. He said, Mark, we have been doing it for 12 years. And he said, I'll tell you, in the commodity business you can't survive without price-fixing. You have to do it in this business, in the commodity business. He said, these politicians that put these antitrust laws know nothing about business. They shouldn't even be involved in making laws. But in business you have to do what you got to do. This is a commodity business, high fructose corn syrup, soy flour, products like lysine, citric acid. It would be difficult to go to the grocery store and find a processed food or beverage that doesn't have something from ADM in it. We have one of the largest companies in the world.

You know, this was an hour after he gave me 25,000 shares of stock options and a $100,000 check, which was worth about a million dollars. It was all about the money for me at that time of my life and all about the compensation. They were 30 to 40 years my senior, and I thought, well, this must be the way business is done. Maybe I am young and naive, but this is the way business is done. So I was all in: hook, line and sinker.

Now let's fast forward seven months, to November 1992. This is seven months into it. I am going to show you the transition. I went from being a price-fixer to where I became an informant. I want to share with you what happened.

Basically, when I first started at ADM the FBI was already at ADM. There was a Chicago Board of Trade case, and one of the FBI agents was actually training to be one of our traders, unrelated to the price-fixing case. They were already there when I joined ADM. The Decatur FBI office did a lot with ADM. Because with ADM employees being out of 80,000 people population, the FBI was assisting a lot of wrongdoings going on at ADM. So it was amazing I saw the FBI solving crimes and $200,000 crimes, and here we were doing price-fixing right around them on hundreds of millions of dollars of crime. I thought the CEO liked working with the FBI. It kept them friends

and close to him. But right around their backs we were involved in a lot larger crime.

So seven months into it, the FBI, after my CEO came to my office and said, Mark, we have lots of problems at the lysine plants. One of our biggest plants, one of our biggest products in the biotech division, an amino acid that's used by poultry companies such as Tyson Foods, Purdue Farms. It's a billion dollar market. And he said, boy, I think we need to close it down for a while and take it back to the lab. We had been in production about four or five months at that point. But being a divisional president, that would have been pretty embarrassing to close down a $300 million plant that you're responsible for.

So I told the chairman at that time—this would have been November of '92, seven months after being involved in the price-fixing—I told him I think the reason why we are having problems is I think one of our competitors is contaminating our fermenters. It was a fermentation process, and it is pretty easy to contaminate the fermentation. I said I think one of our competitors might be doing that to us.

What I was doing was trying to buy some time, because I was hiring consultants that specialized in preventing and solving contamination problems. And I thought in a couple months' time I could solve it. So I was trying to buy some time, and I told him that lie for that reason.

Well, that CEO had his nephew who was president of ADM in Europe, knew someone in the CIA in London. So his nephew called the CIA friend of his in London and said, hey, listen, we think, at our headquarters in Decatur, Illinois, we think maybe our competitor is contaminating one of our plants. What would you do about that?

Well, I've announced to anybody at ADM that CIA agent—who really deals with international affairs—called the FBI. So the FBI was involved. So the FBI showed up uninvited in this case. Now I was really nervous, because here I am involved seven months in price-fixing, and now the FBI is sitting at our back door trying to solve this issue, which was really a normal production contamination problem.

So my wife saw I was getting really nervous. She knew something was up. Like I said, I've known her since she was in seventh grade and I was in eighth grade. She said, Mark, what are you so nervous about? What's going on? She said, in the last seven months something has changed with you. You're on the phone three or four hours every night after dinner. She said something is going on here in the last seven months, since your three years at ADM.

I said I'll tell you, Ginger, what's going on here. Like I said, I started sharing with her. I said the reason why I am on the phone at night is because at 8:00 at night in Decatur, Illinois it's 8:00 in the morning in Singapore and South Korea and southeast Asia. They are 12 hours ahead of us, and we are involved in price-fixing. She said price-fixing, what is that? She was a stay-at-home mom with three young children. She had never heard of price-fixing. She said, what is that? And I told her, well, we get together with our competitors. We have an international cartel, and we fix the prices with our cooking ingredients. Things like high-fructose corn syrup, things like citric acid, things like lysine. I said we are fixing the prices of about half a dozen products, and we are earning hundreds of millions of dollars a year extra in profits by doing that.

She goes, boy, Mark is that legal? I said, Ginger, here's what they told me seven months ago. It is not legal, and I started telling her the same story that the vice chairman told me. I said the politicians put these laws together. These politicians don't know what they are doing. These antitrust laws shouldn't be on the books. They are from the 1800s. If we are going to be in the commodity business, this is what we have got to do to survive. If I want to move up in this company—they have been doing it for 12 years, so I either have to be a part of it or I can't stay in this company.

By the way, my base salary when I joined the company, to give you a flavor, Decatur, Illinois is pretty low-cost of living. It was a $350,000 base salary, but with the stock options and bonus, I earned seven figures for every year I was there. So this was a seven-figure job in an area where there was a low cost of living, and this was 27 years ago, in 1989 when I joined. I said, Ginger, where am I going to get a job like that?

Then she said something, knowing Ginger, that I never wanted to hear. She said she was going back to her study and pray about it. We talked about an hour later. She came back about an hour later, and she said God gave her a decision. She said, Mark, you've got to turn yourself into the FBI, or I am turning you in. We have got to do it today. I said, Ginger, if I turn myself into the FBI I could go to jail for price-fixing for an international cartel. The president of ADM, he picks up the phone and talks to President Clinton, our CEO does, and he went to President Nixon's funeral on the plane with President Clinton. These guys are connected. They are billionaires. The CEO and the vice chairman were father and son, and I reported to the son, the vice chairman. I said they'd come after us with everything they have. She said, you know what, Mark, God will protect us. This is what we've got to do. She said I'd rather be homeless than living at home where illegal activities are going on.

She started picking up the phone after a couple hours' discussion, and the next thing, we were sitting for four hours with the FBI. I don't know how many of you ever went to the FBI after stealing a billion dollars a year, but it was an interesting reaction. I mean this case, as you know, became one of the largest price-fixing cases in U.S. history

at that time. And it all started by me telling our chairman that we've got a contamination problem in our plant. His nephew called a CIA agent, and then the FBI agent got involved. Me getting nervous and telling my wife, and my wife said either turn yourself in or I am going to do it. And that's how this case began.

Now, after sharing with the FBI agent for four hours, I had a choice. The only two choices I had were this, after I shared with the FBI what was going on. My wife stayed with us for about an hour, and then I spent the last three hours with the FBI by myself.

After sharing all of this with an FBI agent, I now had two choices: Go to jail, get arrested that day on a hundreds of millions dollar crime, a price-fixing case that I've only been involved with for seven months that's been going on for 12 years, or start wearing a wire the next day. They told me it would be about six weeks to wear a wire to expose the case. And again, as I mentioned to you, it wasn't six weeks. It was almost three years of wearing a wire each and every day from 1992 to 1995.

I don't have a normal resume for a white-collar criminal. I had a significant scholarship, went to Ohio State University for bachelor's and master's degrees. I got a Ph.D. in biochemistry, full scholarship to Cornell University of New York. I was 22 years old and a Ph.D. student. I graduated at age 25, in January of 1983.

I remember sharing this slide at an event I did for the mayor in Michigan a couple of years ago. It was the called the Annual Mayor's Prayer Breakfast in Michigan. Historically they always bring in a speaker to talk about redemption and second chances. I said I don't have the normal resume of a white-collar criminal from Michigan, and someone stood in the back and said if you went to Ohio State University, you are a white-collar criminal. So I know I can't show that Ohio State logo in Michigan territory.

So wearing a wire for three years was an interesting experience. Again, I would meet the FBI at 6:00 in the morning. They'd wire me up, shave my chest. I became very good friends with those four FBI agents. I'd be with them again at or 7:00 p.m. in the evening and turn over the tapes and have the debriefings.

Now, these meetings were all over the world. ADM felt safer to have the meetings outside of the country, because some countries were not enforcing price-fixing laws nearly as much as the U.S. We had seven corporate jets, so we could fly anywhere. They felt safer in Hong Kong, Switzerland and Mexico City and so on.

The FBI kept saying try to get a meeting in the US. Get them to meet in the U.S. This was after several months of wearing a wire. So I used the excuse, I said, well, why—the executives at our company that were teaching me how to do the price-fixing. And then I told the Japanese and South Korean competitors, I said, well, Hawaii is not like the United States. It's like a different country. Let's meet in Hawaii. So they all agreed. We all played golf, and that's when the FBI started getting the first tapes of the competitors on U.S. soil during this time.

I will never forget this green lamp that I am showing in this slide. The FBI prosecutors want to be able show the jury something, not just for the jury to hear the audio tapes that I was making. So the video cam was in this green lamp. That video camera, by the way, was at the Four Seasons hotel in Chicago, taping the same 11 guys. It was at the Irvine Marriott hotel in Orange County. That same green lamp was at several meetings during the three years with the same guys sitting five feet from them. All I can say now, 25 years later, thank God we didn't have a woman criminal among us. Because I am convinced if we had a woman criminal among us, that lamp was five feet from them, and a woman criminal would have said, you know, that green lamp is following us around the world.

[LAUGHTER]

But one thing I saw firsthand is that greed blinds you. Everyone involved could see dollar signs in their heads, and they didn't even see what was five feet from them, which was that green lamp following us around the world.

One of the meetings I mentioned, the Irvine Marriott, California, that was in 1993. The tape recorder in my briefcase—by the way, the FBI, as you know and can imagine, has a lot more sophisticated equipment 25 years later than they had then. The briefcase started clicking. They are in the next room, and they've got a monitor, so they can see me. I am actually opening my briefcase, and started tapping on it with my finger—because someone may hear the clicking sound. I am sitting as close as you are to each other, and yet not one person saw it.

Here's the green lamp. My tape recorder in my briefcase is clicking, and I am opening the briefcase and fixing it. All while they are looking at this flip chart in the corner, and somebody is talking about the new price increase, and how we are going to make hundreds of millions of dollars with that price increase. They just focused, focused, focused, and they didn't focus right under their nose. Like I said, I saw firsthand greed blinds you.

We are in a price-fixing meeting, three of them happened in Japan. The FBI agents didn't feel comfortable taking this sophisticated equipment across the borders when we went through customs, when we landed in Japan, because they were not enforcing the price-fixing laws in Japan.

One of the companies that was involved in the case was Ajinomoto. They were very, very close with the government. So they thought if we had sophisticated equipment, like the briefcase that I had, like the lamp and things of that sort, that the government would basically

let Ajinomoto know that they are under investigation. Because they did not enforce price-fixing laws in Japan at this time.

So this is the tape recorder they had me go out with. This is in the FBI museum in the FBI headquarters today. That tape recorder is along with others. That's the tape recorder they actually had me use in Japan. It's like the little tape recorders you buy in Radio Shack of the 45-minute duration. The challenge was that the meetings were three hours long, at least, and my tape was 45 minutes. So every 45 minutes—I'd constantly look at my watch like a hawk, and every 45 minutes I ran into the restroom in Tokyo and changed the tape over to a new tape. And I did that for a few meetings that we had in Japan.

This gives you a glimpse of the life of an informant. Like I said, I don't recommend it. I don't recommend it to anybody. It was a very difficult life. The prosecutors were so appreciative in Illinois of me wearing a wire and all the evidence that was coming in, a couple months after wearing a wire they signed an agreement giving me full immunity. Full immunity. Never to be charged in this case. I had never hired a lawyer in this case until the undercover work was over. It was just my wife and I in front of the FBI agents and the prosecutor. I didn't hire a lawyer until after the undercover work was done, until basically the case was ready to be prosecuted. I never had an attorney. Just my wife and I, doing this on our own in our mid-30s. Very naïve.

I had full immunity, never to be charged. All I had to do is a little statement at the end of that immunity agreement that as long as you don't break any law that they know about, you had full immunity. I just had to stay out of my own way. How difficult can that be? Boy, did I get in my own way.

After two years wearing a wire—and there is a 2010 Discovery channel documentary on my website, markwhitacre.com. I highly recommend for you to see it. It came out six months after the movie. It includes the four real FBI agents and the author, Kurt Eichenwald, who wrote the book *The Informant*. It also includes my wife and I. Basically all the real people involved in this case are in this documentary. One of the longest scenes in this documentary is this. And I am going to describe it.

I am out on the driveway. They have actors reenacting this. I am out on the driveway, after wearing a wire for two years, in Decatur, Illinois, blowing leaves off the driveway at 3:00 in the morning during a thunderstorm. With my microphone taped to my chest and the tape recorder attached to my back with an athletic band, my shirt and tie on, blowing leaves off at 3:00 in the morning.

I remember my wife heard the gasoline leaf blower, which they showed in the documentary. She heard the loud leaf blower from the bedroom and came running out, an umbrella over her head. She said, Mark, it's 3:00 a.m. in the morning. You've got to see the FBI at 6:00 in the morning, three hours. I said, Ginger, I know I've got to meet the FBI at 6:00. I've been meeting them every day at 6:00 for two years now. I know what I got to do. I said it's all your fault. You're the one that turned me in. It's your fault. She said, look, Mark, you need to get back to the family. You need God in your life. I said, Ginger, it was just announced two months ago when our president retires in the 70s I am taking his place. I am going from divisional president to company president. I am going from number four in the company to number two. Why would I need God, I told her. She said, Mark, you've got to be delusional. You think when this is over you think you're going to work like nothing happened? You think they are all going to go to jail, and you're going to go to work like nothing happened? Those 17 board members are all friends and family of the CEO. This was all before the Sarbanes-Oxley law. Ginger said when they go to jail they are going after you with everything they have when you go to court to testify against them. Surely you know you're going to get fired when this is all ended.

She went back into the house, and I started thinking, I am delusional. There is no way I am going to keep this job. And then I started thinking, well, who is going to hire somebody in their mid-30s who wore a wire against their own company for three years. Nobody. I've only been out of college for ten years from Cornell. I had a Ph.D. from there, I thought who is going to hire me after being a whistleblower, even with the education and experience that I have? Then I thought, well, if they gave me a golden parachute—this was in 1994 in that driveway, you look at the *Wall Street Journal, New York Times* you see the golden parachutes in the tens of millions of dollars that the executives would get. I said I am not going to be getting that golden parachute when I get fired. I am going to be testifying against the three top executives above me. They are going to hate me and come after me with everything they have.

Then I had the thought maybe I should write my own golden parachute. I thought how would I do that? Well, about a year before I met the FBI, myself and three other executives, two vice presidents and the president of ADM Mexico and two vice presidents in the company lost lots of money on a Nigerian scam. I am in the driveway thinking about this. When we lost that — we already knew that ADM was price-fixing, and therefore how could they go after us when they are stealing hundreds of millions of dollars a year. Therefore, we reimbursed ourselves for that loss a year before I met the FBI with company money. How can the company come after me? They were involved with a much bigger fraud. So I knew how to do it. I knew how to do it, and I knew I was protected, because they are involved with such a big crime. So then I thought, all right, I know how to do it, but it now needs to be bigger than a $640,000 split among four executives. It is going to take me years to

get a similar job. So I made the decision I would steal $9 million, which was about three or four years of my salary with compensation and stock options, bonuses and salary. That would give me a chance to get back on my feet. $9 million. I knew how to do it, because I already stole $640,000 a couple years earlier.

So I went in and wrote a $3.5 million check the next day. I wrote five checks in total, writing my own golden parachute, my own severance package. To know when I get kicked out, I have $9 million to get back on my feet. I thought thank God I went to Cornell. Thank God I am the smartest guy in the room. When these guys go to jail and I get fired, I've got a $9 million severance package. I thought boy I am smart. Only to learn the day that ADM learned that I was the informant, that very day they called the FBI, they called the media. They said Mark Whitacre is no white knight informant. He stole $9 million the same time he's working for the FBI. He's no white knight informant.

They made the decision that I put them in flames on price-fixing; they were going to put me in flames for the $9 million fraud. They ended up going to prison for the price-fixing, and I ended up going to prison for the $9 million fraud. Basically, I told on them, and they told on me and we all went to prison for different things.

The amazing thing is the FBI agents came to my home, met with my wife and they said, Mark, we are going to do everything we can to help you. Your immunity is gone for sure with the $9 million fraud. For sure it's gone. But we are going to do everything that we can do to get you the best plea we can get for you.

They went with me to meet with the prosecutors in Chicago, and by that time there were some prosecutors for fraud involved in Washington, D.C., and they had a friend, one of the prosecutors had a friend who was a defense lawyer named Jim Epstein, who is a judge now in Chicago. And they said this is the lawyer who is going to help us fight your case, and the FBI agents will help support to get you a good plea agreement. You were under pressure, wearing a wire, you made a poor decision, we'll get you a good plea deal.

They had those discussions for about two months. My lawyer in Chicago, Jim Epstein, called me in his office. Ginger and I drove from Decatur, Illinois, a couple-hour drive to Chicago. He said, Mark, the lawyer and the FBI agents just got me a deal of a lifetime. The deal of a lifetime for a $9 million fraud. Three years in federal prison, the lawyer said, Jim Epstein said, but they are going to allow a mitigating sentencing hearing. And with this hearing in front of the judge, they are going to let the four FBI agents march up front and talk about how you risked your life wearing a wire on a lot larger crime, a crime that was hundreds of millions of dollars in price-fixing. He said, Mark, in the end I think I can get you a six-months sentence, he told Ginger and I. He said I think with the three-year plea agreement, and a mitigating sentencing hearing, I think I can get you six months. He said, Mark, that's a deal of a lifetime.

I took that plea, and I threw it in the trash can. Ginger begged me to sign it. I said, Ginger, you're the one that got me in this mess in the first place. I am going to do the opposite of what you want me to do. I threw it in the trash can, and I fired that lawyer on the spot. I hired another lawyer and fought that case for three and a half years to get a 10 1/2 year sentence instead. And I had a six-month sentence three years back right in my hand. I was my own worst enemy every step of the way.

And by the way, Ginger has done a lot of Q and A events with me. She's interviewed on CBS and national TV back when the movie came out. They asked Ginger, how did you do it? The divorce rate for white-collar crime when guys go to prison is 78 percent. If you serve five years or longer it is a 99% divorce rate; 99% if you serve five years or longer. They said, Ginger, how did you do it? Even on national TV, Ginger said, you know what, divorce was never an option. Her faith would never allow a divorce. But she said I'll tell you, murder was on option, and she considered it twice. Right on national TV. And the $9 million and then me throwing the 6-month deal in the trash can, I'll tell you, murder was on the table both of those times.

If the FBI agents weren't with me when they were sharing about the $9 million fraud, I think Ginger would have murdered me that day. She was mad, and I am telling you, she had every right to be. I had full immunity, and I threw it all away.

So now I have a nine-year sentence. As you know, in the federal system there is no parole. So I do eight years and eight months, almost nine years, on a 10 1/2 year sentence. And I went from like Martha Stewart, just like Enron executives, just like Worldcom executives, from a corporate jet to jail. Not for six months, but for eight years and eight months, almost a decade. Biggest mistake I ever made in my life.

To think back in that driveway, I was the smartest guy in the room, and thank God I went to Cornell. I started realizing how stupid I was. In federal prison nine years is a long time. I wasn't even willing to go six months when I threw that plea into the trash can.

I'll tell you, nine years, I pulled my car in one of those garages and tried to kill myself. I couldn't imagine going to jail for nine years. I wrote a long letter to Ginger. I wrote letters to my three kids and tried to kill myself. I didn't want to live. How was I going to go to prison from age 41 to age 49?

Well, that's what the *ADM* case is about. These are the three books. Michael mentioned *The Informant* was written by a New York Times reporter. That was the first book that came out. *Rats in the Grain* was a book written by a lawyer,

James Lieber. *Against All Odds* came out which was really about my wife, how she held our family together during turbulent times. The movie "The Informant" was based on the book *The Informant*. Except the book is very serious drama, and Hollywood tried to do a *Get Smart* or a *Keystone Kops* flavor.

The FBI agents didn't like that it was a comedy, so the documentary came out six months after the movie. See Markwhitacre.com, and it's called "Undercover." It is all on my website. That documentary came out in 2010, with the four FBI agents in the case. It clearly showed the seriousness of what was going on.

That's Ginger and I with my twin, Matt Damon. I think you can see why they chose him, because we look just alike. I am the one on the right, by the way.

All joking aside, I am going to tell you and tell you firsthand, if I had anything to do over in life—I've been out of prison for over a decade. I got out in 2006 at age 49, and there has not been a day since I got out that I don't think of what I put my wife and my kids through.

Prison doesn't end when you walk out the door. It doesn't end. I regret every day what I put my family through. I would do anything to have that chance to do it over again and do it right. And I can tell you that firsthand, because I live it every day.

In my case that happened in my 30s. At age 59 I still live it. You don't get a do-over in life, but what I was fortunate and very blessed to get is a second chance.

When I started my 10 ½ year prison sentence in 1998, my first prison was in Yazoo, Mississippi. My wife and kids moved to Yazoo, Mississippi to be next to me. Every Friday and Saturday evening and all day Sunday they allow your families to come into the visiting room with a guard in the corner. My family came every weekend, 20 hours a weekend when I was in Yazoo, Mississippi.

With good behavior, I got to move to a better place, Edgefield, South Carolina. My family moved next to the prison in South Carolina. With good behavior, the FBI agent wrote a letter on my behalf and got me to Pensacola, Florida naval base. You know they rank federal prisons just like they do universities. Pensacola is ranked the number one prison in the federal prison system. I went to Cornell for my Ph.D. and Pensacola prison for my prison time. My wife and children moved to Pensacola, Florida, and came 20 hours a weekend for nine years.

They added in the book *Against All Odds* the prison records, they added it up to three years and eight months that my wife and kids spent eight hours a day with me in federal prison. Three years and eight months when they added it up. It's a miracle that they stayed with me. Out of about 700 inmates there were five wives that showed up, and my wife was one of them. I don't take it lightly.

That's my wife and kids today, our three kids and our daughter-in-law, stronger and closer than ever. And I don't take it lightly. Thirty-eight years married in June. It is a miracle. It is an absolute miracle that she stayed with me. She turned me into the FBI, and then she stayed with me when I went to prison, and that's a miracle.

The FBI agents and prosecutors, first of off, I want to mention there was a lawyer named Ken Adams from a law firm Dickstein Shapiro & Morin, they were the class action attorneys handling the class action lawsuits with the clients that were basically defrauded on the price-fixing.

Coca-Cola alone won $400 million. And Pepsi, Tyson Foods and other food processors won tens of millions. ADM and the other co-defendants paid hundreds of millions of dollars in these class action suits.

Ginger got a call in August of 1998. She was about ready to move back home along with our three children with her mom, because we had run out of money. I had a $9 million fine, and I had to pay the money back. That got me on the lowest end of the Guidelines. I would have received 15-year sentence if I had not paid the $9 million back, and then I had $2 million restitution for the interest payment on the $9 million fraud. In addition, I had hefty legal fees because I fought the case for three years. I had lost everything we had. I had to sell the home and cars to pay the restitution and fines, and we were running out of money. She was about ready to move home with her mom. At that point she got a call from Dickstein Shapiro, a lawyer that we never heard of, a firm we never heard of. They told Ginger that their clients, his clients that he represented said, "that if it wasn't for you, price-fixing would still be going on today at ADM, and for that reason we want to take care of your family for nine years while your husband is in jail."

They put a trust fund together. The clients got together, Tyson Foods, Coca-Cola, Pepsi got together, and they put a trust fund together and funded my family for nine years. They put my daughter through East Carolina and Duke University, and my youngest son for an MBA at Georgia Southern. They put my kids through college, paid for a small house payment that we had, paid my wife's car payment for nine years. The people I stole from took care of my family for nine years. And I don't take that lightly. And I appreciate that greatly. That all was put together by a lawyer named Ken Adams at Dickstein Shapiro in Washington, D.C. who represented those clients who were the victims of the ADM price fixing.

You would think that the FBI agents and prosecutors would hate me and throw away the key and forget about me. Some of those very FBI agents started visiting me in prison. I've done seven events with those FBI agents since I've been released. They are all retired from the FBI now, and I've done seven events including one at the FBI Academy with those four agents. And one of those

prosecutors, James Munchnick, (some of you may know him), and the four agents that I worked with, all wrote letters on my behalf for a Presidential pardon. They forgave me. And you'd think they'd throw away the key and forget about me after what I did to them.

I thought I'd never get hired again. Another reason I tried to take my own life. Who is going to hire somebody at age 49, a convicted felon coming out of prison. Cornell University started lobbying for a job. They started visiting me, and began lobbying for a job. They had four job offers waiting for me the day I got out of prison, December 2006, in biotech and pharmaceuticals.

You don't start out as the head of finance when you have stolen $9 million, but they had a job for me. And I chose one of those four companies. I had to start at the bottom, and I've had several promotions in that company, a cancer research company involved with prostate cancer, a biotech company. I am COO today at that company, basically the number two executive. It's a miracle.

I stand here on this stage today as living proof that second chances do exist. When people tell me second chances don't exist in America, I tell them they are wrong, because I am living proof of it, that I've got a second chance. My family stayed with me. I got reemployed. I got a great job that I love doing. I get to come out and share at events like this, and share with you about the mistakes I made and what I wish I would have done differently. And I feel very fortunate and very blessed that I have received this second chance.

I am going to share a short video. It's a 2010 video. It's a news clip interviewing the FBI in 2010 to give you an example of the second chance that they gave me. The person whom they are interviewing was the FBI supervisor of the case; his name is Dean Paisley. I am going to share this video.

[VIDEO PLAYED]

Again, I am living proof that second chances do exist.

I am going to leave you with these two takeaway messages:

A compliance program is a must. And it has to be a living, breathing document. We had a compliance program the size of the yellow pages back then. But you know what, I was seven years in the company and I never saw it. It was something sent to board members, something they sent to shareholders. But employees never heard of that compliance program.

As matter of fact, on one of the tapes in the book *The Informant* you can see that the general counsel of the company was getting off the plane from a different meeting than I was going to with the vice chairman, a price-fixing meeting, when we flew to Chicago. That general counsel was on tape saying, "make sure you pat those guys down for wires when you go into that meeting," and everybody laughed. That was on tape.

We had a compliance program, and the general counsel knew price-fixing was going on and never said anything about it.

The other message I'll leave you with is this. I have been at a lot of corporate events around the country. One of the messages I leave you with is this. Live your life like that green lamp is always with you. I did all the right things when that green lamp was with me. But when that green lamp was off, I wrote five checks for $9 million and went to prison for that huge mistake. Biggest mistake I ever made in my life.

So I tell folks around the country to live your life like that green lamp is always with you. You're going to be safe. You're going to do okay if you do that.

Thanks a lot for letting me share. Thanks a lot for having me.

[APPLAUSE]

MR. WEINER: Please enjoy your dinner. We will have some important stuff right after the dinner. Enjoy.

[DINNER WAS SERVED]

MR. WEINER: If I could ask you, ladies and gentlemen, for your attention. I just wanted to do the final part of the program. I want to thank a few people. First, I wanted to thank my dinner co-chairs, Hollis Salzman, who is here.

[APPLAUSE]

Most importantly I would like to express my thanks and gratitude of the entire Section and to Lisl Dunlop on an extraordinary year as Chair of the Section.

[APPLAUSE]

Just very briefly, under Lisl's leadership the Section has set the standard for the bar in a number of different ways, in terms of diversity.

In terms of mentoring, Lisl has piloted a new mentoring program that matches younger lawyers with more experienced lawyers.

She has set the standard for more fellowships and more participants in our writing competition.

Lisl has set the standard in the bar in terms of engagement of younger lawyers.

And last but not least, the outstanding programming, which is really second to none. We have had stimulating presentations from law professors, practicing lawyers, judges, antitrust enforcement personnel from around world. We have had great programs, from cartels to mergers.

And under Lisl's leadership we also have had fun. So Lisl, thank you very much for your energy and your enthusiasm.

[APPLAUSE]

MS. DUNLOP: Thank you.

MR. WEINER: Now I would like to call on Professor Eleanor Fox to award the Antitrust Law Section William T. Lifland Service Award.

[APPLAUSE]

PROFESSOR ELEANOR FOX: Thank you so much.

Good evening, everybody. My wonderful task is to present the Lifland Award to my dear colleague Harry First.

[APPLAUSE]

I would like to say a few words about Harry, although there are many more to be said.

Harry is the Charles Denison Professor of Law at NYU Law School. He came to NYU Law School in 1976, and I did too. And we were very close colleagues ever after.

Harry is a great contributor to our profession and to this Section. He has been and is a leading thinker in antitrust; always loves cutting-edge issues and their intellectual interplay.

He is a leader of the bar, a member of the Executive Committee of this Section, a contributing editor of the ABA *Antitrust Law Journal*, foreign antitrust editor of the *Antitrust Bulletin* and a member of the Advisory Board and Senior Fellow of the American Antitrust Institute.

He is a great teacher, and a great institutional leader at our law school, NYU, where he is the head of the antitrust program and co-director of our Competition, Innovation, and Information Law Program.

He has written award-winning books and articles, and notably, a wonderful book on the Microsoft case, which is a great anatomy of the Microsoft litigations and their importance to current law and policy.

Harry has and had international credentials before international antitrust became popular. He was a Fulbright scholar in Japan on two occasions.

Harry was Chief of New York State Attorney General's Antitrust Bureau from 1999 to 2001 and did much to pull the oar of the states in the government's actions against Microsoft.

I want to say a few words about his personal qualities. He has a streak of witty iconoclasm. And he is a punster of Shakespearean proportions. He loves facts. He loves the lore of the law as well as the law itself. For new, creative insights, count on Harry.

I will give one example. Harry is an expert on, among other things, the *Philadelphia National Bank* case. When *Philadelphia National Bank* was about to become 50 years old, Harry said: Let's have a program to celebrate the birthday.

And I want to cite two contributions of Harry's at this great birthday celebration. As you would guess, most of the colleagues gathered at the event worked on the *Philadelphia National Bank* presumption. But not Harry.

The first contribution is to the lore of the law. Harry had heard that the *Philadelphia National Bank* opinion, which, as you know, is under the authorship of Justice Brennan, was actually written by Judge Richard Posner when Dick Posner was Brennan's clerk. So Harry wrote a letter to Judge Posner inviting him to participate in the program, and Judge Posner wrote back and said, I'm very interested. I wrote the opinion. Harry enlisted our colleague Scott Hemphill to be the interlocutor of keynoter Posner, and the truth was revealed to the world. Judge Posner said yes, I wrote the decision. I did all of it. No word was changed. It's a great story and you can find it all in *Philadelphia National Bank at 50: An Interview with Judge Richard Posner*, 80 Antitrust L.J. 205 (2015).

Now, the second contribution that Harry made is in a small corner of *Philadelphia National Bank*. You know the line that says: There can be mergers with some benefits in other areas, but no anticompetitive merger is saved "on some ultimate reckoning of social or economic debits and credits . . . ." So Harry went back to the record—very typical of Harry; he read the whole trial record and discovered or rediscovered that a claimed benefit of the Philadelphia National Bank merger was saving jobs in Philadelphia. The mayor testified, and the head of the Development Corporation of Philadelphia testified that 30,000 jobs had just left Philadelphia because there wasn't a big enough bank to draw industry to the city. So Harry wrote an article, of which I am a co-author. The first words of the article are: "Jobs, jobs, jobs—nothing seems to be of higher priority for economic policy today." (80 Antitrust L.J. 307) That was written in 2014. So among his other qualities, Harry is prescient.

And just in case you are wondering, does Harry support *Philadelphia National Bank*? Of course he does. Harry was born in Philadelphia. And his mentor Professor Louis Schwartz taught him antitrust there.

So Harry, if you will come forward, we would like to give you this gift to celebrate all of your many, many, many contributions to the Section and to the profession.

[APPLAUSE]

PROFESSOR HARRY FIRST: So thank you very much, Eleanor.

This looks like it's going to be a beautiful gift, so thanks.

And in the *Philadelphia National Bank* case the mayor was a Democrat, so it just shows that an interest in jobs is nonpartisan.

But in any event, I do want to give my thanks—this is a very large room and a wonderful turnout.-- I want to thank the Executive Committee of the Antitrust Section and the Selection Committee for what is really a great honor to me. And I am indeed honored by this and I am a little bit humbled.

When Michael told me about this, he said I'd get a chance to speak for a few minutes. As you know, professors rarely speak for just a few minutes.

[LAUGHTER]

You may know this. But I'll try. Just kidding. I'll try to keep it brief.

So I decided to look and see who the previous recipients were of the William T. Lifland Service Award, and I find that I am the 20th recipient of this award, and that I stand in truly great company--people who I know and who I respect greatly for their achievements in our field and people who have provided far greater service to the field of antitrust than have I.

So I started, of course, with Bill Lifland, for whom the prize is now named and who was the first awardee. When I first came to New York some years ago, I started coming to the Annual Meeting really to hear Bill give his summary. Many of you in the room—at least some of you will remember this—his summary of antitrust for the year, which was masterful. And I did it, because as a junior professor I wanted to make sure I hadn't missed anything. In the days before social media you actually had to read things, and Bill had read everything. But more importantly, he was the consummate editor, so he could distill what was important and not give us what wasn't. And it was truly masterful. And so it is wonderful to be awarded this award in his name.

I'm sure I am not the first person to note that it now takes three people to do what Bill did by himself. And it's still a daunting task. I've been on those panels from time to time. So again, to receive this award in his name is truly an honor.

I also looked and noticed that five of the past recipients have served in the New York Attorney General's Antitrust Bureau. I am honored to have done so even for a relatively short period of time. That office demonstrates the importance of New York lawyers, you all—mostly New York lawyers—the importance of New York lawyers to antitrust enforcement, not only in New York State of course, but for the entire country. The New York Antitrust Bureau has been a leading antitrust enforcement agency in the United States, one that achieves great things with relatively modest resources. And one that I expect will continue to lead in the coming and perhaps challenging years ahead in antitrust.

I am also the third full-time academic to have received this award. So I don't compare myself to the others. The first was Milton Handler, a true giant of our field. And the second was Eleanor, my wonderful colleague whose worldwide reputation is truly extraordinary.

Of course, the question I had was how does an academic receive an award that's given for being a distinguished antitrust practitioner? So I'll put aside the distinguished for the moment and just think about the practitioner side. I think the answer to that is a reflection of the field in which we all work. Antitrust really is a wonderful field of law. It's an intellectually stimulating field, and it's an important field. I think it's because antitrust is practiced. Antitrust is engaged with important issues, whether it's for private clients who need problems to be solved or because public policy problems need to be attended to. And those problems, I think, are quite central for all of us, dealing with concentrated economic power in our society, making sure that markets are open so that there is economic opportunity for citizens to start businesses and succeed on their merits, and to make certain that markets are competitive so they operate for the benefit of consumers.

I feel lucky to be able to work in this field, as I think most antitrust lawyers do, as I suspect most of you do. And I also feel lucky to have received this wonderful award. So I thank all of you again for giving me the William T. Lifland Award.

[APPLAUSE]

MR. WEINER: Steve Houck will now present our Distinguished Public Service Award.

MR. STEVE HOUCK: Thank you, Michael.

Since its inception in 2007, the Section's Distinguished Public Service Award has been presented just four times: to Ira Millstein, Joel Klein, Bob Joffe and most recently in 2014 to Eleanor Fox, whom we are pleased to have with us again this evening.

The Award is presented to individuals who not only have been leading antitrust practitioners, but who also have brought distinction to the antitrust bar as a whole by making significant leadership contributions to the public interest through service to the bar and society generally.

As I will detail momentarily, the Hon. Paul A. Crotty eminently qualifies on both counts: he has used the problem-solving and litigation skills he developed as a top-notch antitrust lawyer to benefit his fellow citizens throughout a lengthy, distinguished career in public service—both on the federal bench and at the highest levels of New York City government.

As a very small, but concrete, example of his public spirit, Judge Crotty participated in the first panel of today's program on litigating complex cases, along with his fellow Judges Colleen McMahon and Kevin Castel, notwithstanding a very early 8:45 start time. And we are delighted that Judge Castel could join us as well for this evening's Award presentation to his colleague and friend, Judge Crotty.

It is especially fitting, I think, that this Award is presented by the New York State Bar Association. As best I can determine, Judge Crotty has spent his entire life in New York State, apart from four youthful years in South Bend, Indiana and a then a stint in the US Naval Reserve. Born in Buffalo, Judge Crotty received his law degree from Cornell Law School—yes, Cornell Law School—came to New York City to clerk for a federal judge and had resided here ever since.

As I and my fellow Antitrust Section Executive Committee members, Ned Cavanagh and Meg Gifford, who are also here tonight, can personally attest, Judge Crotty was a superb antitrust litigator—first as an associate and then as a partner at Donovan Leisure Newton & Irvine, then one of the preeminent antitrust law firms in the city and the country. Ned, Meg, and I along with Judge Crotty—or Paul as he was then known—are all alumni of that firm.

I first worked directly with Paul on a mega-antitrust matter known as the *Uranium Cartel* Case or MDL-342. Our client was the plaintiff Westinghouse Electric Corporation, which had been pushed to the edge of bankruptcy by a cartel of foreign and domestic uranium producers. Donovan Leisure was substituted in after Westinghouse's initial counsel had been disqualified due to a conflict of interest. Since we couldn't talk with prior counsel to learn about the cartel lest we be tainted by the conflict, a small team of the firm's lawyers flew to New Mexico to debrief a then little-known plaintiffs' antitrust lawyer who also had a case against the uranium cartel—Anne Bingaman. Anne, of course, later went on to head the U.S. Antitrust Division.

The Donovan Leisure team sent to New Mexico consisted of Paul and another partner, Jim Daniels. And, as the many associates in this room will appreciate, the team would have been incomplete without someone to actually do the work, i.e. an associate, which turned out to be me. And what I most remember now about the trip was the three of us driving our rental car from the Albuquerque airport to Santa Fe and the three of us being very excited about the prospect of having a fun time in Las Vegas on the way back. Because according to the road signs, Las Vegas was just 50 miles away. What it took the three tinhorns from the east a while to realize was that the signs referred to Las Vegas, New Mexico, not Las Vegas, Nevada, which was actually 650 miles away.

But fortunately, Judge Crotty is being honored tonight for his dedication to public service, not for his knowledge of geography. And as to that there can be no question. By my calculation, he has devoted approximately two decades of his life to serving the citizens of New York State. Most of you now think of Judge Crotty as a U.S. District court judge for the Southern District of New York, a position he has fulfilled with distinction since 2005.

But Judge Crotty also gave many years of invaluable service to New York City in a variety of critical positions in city government in the 1980s and 90s. First as Mayor Koch's Finance Commissioner, he helped restore the city's fiscal standing not too long after its brush with bankruptcy in the 1970s. Having succeeded at that, he remained in the Mayor's cabinet as Commissioner of Housing, Preservation and Development, in which capacity he spearheaded a program which ultimately resulted in the renovation or construction of more than 100,000 units of affordable and homeless housing. It his book *Ed Koch and the Rebuilding of New York City*, NYU Professor Jonathan Soffer concluded that Mayor Koch's housing initiative, in which Judge Crotty played such a prominent role, to quote him, "has generally been viewed as the greatest success of his 12-year mayoralty."

Then after several years in the private sector as a group president at Verizon, Judge Crotty returned to city government in the 1990s as its top lawyer, Corporation Counsel, during Mayor Giuliani's first term. There he not only ably managed the 800-lawyer New York City Law Department, but he utilized his litigation skills honed in his days as an antitrust lawyer to personally and successfully argue cases in courts ranging from New York Supreme court, New York County to the United States Supreme court.

Judge Crotty's public service in city government is, I submit, especially noteworthy in this contentious era. Not only did he serve mayors of both political parties, but he did so in a non-ideological, non-partisan manner, where his only goal was to achieve the best results he could for the citizens of New York City.

Finally, it would be remiss of me not to acknowledge the support Judge Crotty has received from his wife Jane, who is also here with us this evening. Both Paul and Jane have raised three wonderful children, and Jane, I should note, enjoys a very successful career of her own in communications and public policy.

Paul, can you step forward? It is with great pleasure that I present to you this very well-earned Section Distinguished Service Award. Congratulations.

[APPLAUSE]

HON. PAUL CROTTY: Thank you.

The first thing I want to do is call to your attention this is not an authorized podium. The authorized podium has a yellow light on it and a red light on it.

I learned a long time ago from a colleague at Donovan Leisure, the former presiding justice, First Department Appellate Division Owen McGivern, the best speaker is a finished speaker. So I won't impose on you for too long.

I told this story this morning, I hope not too many of you were there—well I hope you were all here this morning. But if you weren't, I want to tell you about Judge McLaughlin, who was picking up his papers in the Second Circuit after the argument is over, and one of the lawyers said can I have one more word? He said, yes, so long as it's "adios."

[LAUGHTER]

But I am deeply honored by this award of public service, because I am joining such wonderful company. Ira Millstein was a great leader during the city's fiscal crisis if 1974-75. He walked around for days at a time with the city's petition for bankruptcy in his bag, threatening people unless they did it, a petition would be filed.

And Eleanor Fox, who made the presentation today, I first met Professor Fox when I was working on the *Kodak* case, and she was representing GAF.

Bob Joffe, a great lawyer from Cravath, Swaine & Moore, and Joel Klein, who did such a wonderful job running the city schools, a thankless task for anybody.

Public service is in our family's bloodstream. I've always enjoyed public service, because it's the work of justice. When you first get together you have to debate and discuss and deliberate about how to make our society more just, more equitable, fairer and more open to all of us. That's the work of public service. So I am glad that I was able to participate in it for so long.

I encourage all of you to continue the work that you do in forums like this, where you discuss how the law is to be devised, how it is to be developed, how it is to be implemented is of value more than you can appreciate, a valuable public service.

So I thank you for the honor that you've bestowed on me. I want to say thank you to my family, particularly Jane, to my friends and colleagues at Donovan Leisure who contributed so much to me by way of their example, to the workers that I enjoyed working with in city government, Marty Gold over here from Sidley & Austin, and there are many others that are wonderful, conscientious public servants. And the judges that I am privileged to serve with now, chief among them is Kevin Castel, just an absolutely marvelous lawyer.

From the bottom of my heart thank you very much for this wonderful award. I appreciate it more than I can say. I hope you continue the good work.

Let me close with what Ed Koch said many years ago. I think it's still true. Public service, when it's done well and honestly, is the noblest of all professions. Thank you very much.

[APPLAUSE]

MR. WEINER: And now the part we have been waiting for since we started at 8:00 this morning: Dessert and drinks next door.

Thank you for coming.

(Whereupon, the proceedings of the Antitrust Law Section concluded at 9:05)

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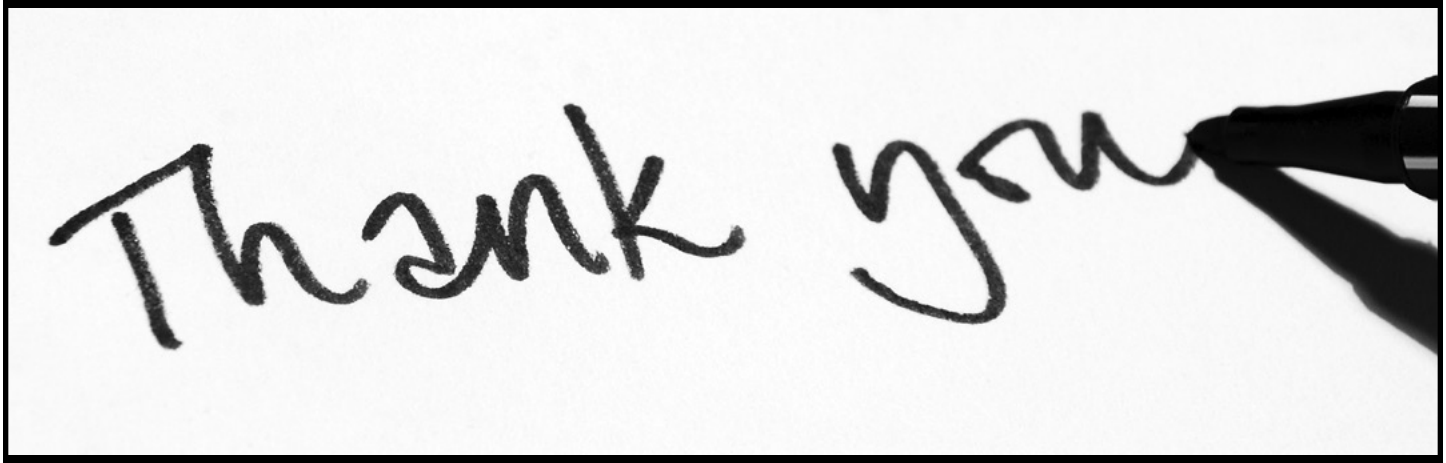

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