NEW YORK STATE BAR ASSOCIATION

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2018 Antitrust Law Section Symposium

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2018 Antitrust Law Section Symposium

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NEW YORK STATE BAR ASSOCIATION
ANTITRUST LAW SECTION

ANNUAL MEETING

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New York Hilton Midtown
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New York City

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Introduction and Welcome

MR. WEINER: Good morning. And welcome to the 2018 Antitrust Section Annual Meeting. I am Michael Weiner, and for the next three hours and four minutes I am the Chair of the Section. We have an action-packed program today. A lot of people have done an awful lot of work to put the program together for today. I think we are going to learn a lot today. That's all I am going to say, and I will turn it over to Wes Powell, our Program Chair and Vice-Chair of the Section.

MR. POWELL: Good morning, everyone. Welcome again to the 2018 New York State Bar Antitrust Section Symposium. We have five really terrific panels lined up for you today, and then cocktail receptions and dinners and other things thereafter. So hopefully, you'll all be with us for as much of the day as possible.

I want to begin the day by thanking a bunch of people. Obviously, we thank you and our panelists and moderators, whom you will meet as the day proceeds, for all the hard work they put into this program. There are dozens of other members of the Executive Committee and those in the broader Antitrust Section who have helped plan these programs and supported them, and we thank all of them.

We thank, perhaps most of all, our stalwart Section liaison to the State Bar, Tiffany Bardwell, and her colleagues Sydney Joy and Kathy Suchocki, who have done more to contribute to this than we can possibly begin to name. So I thank them.

Then also, near and dear to my heart, I want to thank my Willkie colleagues who have helped me with all aspects of planning this, Sruti Swaminathan, who is going to be here, and Stu Lombardi, who is here today. I thank them both.

We are going to begin our day, as we usually do, with a program on Annual Developments in Antitrust Law, which is moderated, as it usually is, by Elai Katz of Cahill Gordon.

With that, I am going to hand it over to Elai.

Antitrust Developments in 2017: The Year in Review

MR. KATZ: Thank you, Wes. And thank you all for coming. Welcome, everyone. Good morning. I'm pleased to be yet again leading the discussion on developments in 2017. It was an exciting year, and I'm very pleased to have these two very esteemed antitrust experts to talk about those topics with us.

So first, on my left, your right, Professor Harry First, who is the Charles Denison Professor at NYU Law School. He's taught for a few years there. He's also a co-director for the law school's Competition, Innovation and Information Law Program. He was a Fulbright Research Fellow in Japan and taught antitrust as an adjunct professor at the University of Tokyo, which I find fascinating, because I just went to Tokyo, and it was great. He also was Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York from 1999 to 2001. And he has written quite a lot. Recently he wrote a book on *The Microsoft Antitrust Cases: Competition Policy for the Twenty-first Century,* with Andy Gavil. He's written many chapters, articles and case books. But something I do want to mention is he has been recently writing about excessive pricing, especially by IP rights holders. We may get to that later. And last but not least, related to this group here, he was awarded the Bill Lifland Service Award by this Section last year.

To my right and to your left, we have Suzanne Wachsstock, who is Vice President and Chief Antitrust Counsel of American Express. She leads a New York-based team with global responsibility for antitrust compliance and strategy. This includes regulatory inquiries, litigation, compliance, M&A, JVs and many, many other things. She sits on the Antitrust Council of the U.S. Chamber of Commerce. She's an active leader in this bar association and at the ABA. In 2015 she received the individual award for in-house antitrust counsel from the International Law Office Associate Counsel Association. And I should say she should also be commended for back-to-back panel participation. Last night she was a panelist in the Women in Antitrust Program, and I see several people who participated and attended that.

MS. WACHSSTOCK: The good thing is they are here. I guess that's a good sign.

MR. KATZ: Yes, suppose so. But late at night and early in the morning, so thank you for doing all that. Before joining American Express, Suzanne spent 13 years as an appellate lawyer and antitrust lawyer first at Davis Polk then as a partner at Wiggin and Dana in Connecticut.

With those introductions, let's get started. The first set of topics we want to talk about today is mergers. It seems every year there are a lot of mergers of interest, and this past year, 2017, is no exception. So Suzanne, please get us going on mergers.

MS. WACHSSTOCK: Sure. I think as people know, the intent here is not to run through every case and even every case of importance that happened in 2017. It's really that we are picking out themes and areas that are interesting. When we talk about mergers, I am going to talk about three matters. One is a case that one might have predicted would not be brought based on principle; one is a case one might have predicted would not have been brought based on practice, and one that one might have thought would be brought given one of the other ones that was brought but was not brought. So keep that in mind as we go through this.

MR. KATZ: Let me interrupt. It goes without saying, but we should always say it on the record. None of us is speaking for the organizations that employ us or perhaps even others, including our clients. And with that, please continue.

MS. WACHSSTOCK: Thank you. We'll start with *U.S. v. AT&T*. The basic facts: You may be aware that AT&T is one of the largest internet and telephone providers. It had acquired Direct TV in 2015, so it was the largest satellite content distributor. It announced a merger with Time Warner, which among other things, owns the rights to Wonder Woman, Harry Potter, and through Turner Broadcasting, CNN and TNT, with its NBA broadcasts. So there is a lot of content we all care about.

This was clearly a vertical case. There is no argument that Time Warner and AT&T are direct competitors. And there was a history in this industry; the Comcast and NBC Universal deal was addressed via conduct remedies, behavioral remedies. There was a lot of speculation swirling at the time that Makan Delrahim spoke at the Antitrust Bar Association Fall Forum this past year. I have a quick little story—I went out afterwards, to the restroom or whatever. And a reporter ran up to me and said: I missed the speech; did he say anything about the *AT&T* deal? And I said no, he didn't mention *AT&T*. But for everyone who was there, he all but explicitly said we are going to challenge the *AT&T* deal. He basically spent the entire speech talking about how we don't like behavioral remedies; we are going to undo consent decrees; we're going to require divestitures. I don't remember if he explicitly talked about vertical transactions or vertical mergers at the time.

So for those who were there, he didn't mention *AT&T*, but everybody knew what was happening. And then very quickly after they announced their challenge to the deal. The allegation is that consumers would pay higher prices for Time Warner content, because AT&T would be able to charge more for licensed programming. And also, that there would be some stifling of innovation or competition from other online streaming firms that compete with the Direct TV Now service. The concern is all about content.

Obviously, there was some speculation that perhaps the President's antipathy towards CNN might have had something to do with it. Of course, the DOJ expressly disclaimed any political motivations. There apparently were discussions around divestitures, but the parties declined. I believe the suit is heading to trial in March. So I don't know if you want to talk about anything interesting there.

Again, a key point there, focus on structural remedies, not behavioral remedies, and a desire and interest and willingness to challenge vertical deals.

PROFESSOR FIRST: Do you want to do all of them? I am glad to say something about this one right now. Because it is four minutes, and we haven't mentioned the name of the current President. That's pretty good. You said President, but not by name.

The big question, the reason why this case was on the front page of *The New York Times*, why it got so much publicity, why it made people taking my antitrust class think they were taking a class that had relevance was because the President, who had met with Randall Stephenson in Trump Tower saying, oh, all we talked about was jobs; we are going to preserve jobs. And then said, well, this is the kind of deal that I'll never approve in my administration. So he said that in October.

And Makan Delrahim, as I recall, said—as a private citizen then—that he didn't think there was any problem with it. So unfortunately, I think from the point of view of antitrust people, that clouds the question of whether there is a legitimate theory in this case, or whether it was brought because of some interference or direction or connection with the President's policies or the President's views.

So as I read the complaint, and we'll see how it works out, there actually is a legitimate theory, and we can talk about it, a unilateral effects case pleaded. Whether it will work out at trial, we'll see. I'll just offer one final thing. If Hillary Clinton had been elected, the stories would have read like this: "Well, it is really good that the Justice Department is finally moving ahead in the Antitrust Division with being serious about vertical mergers. They didn't do a great job in the Obama administration, a lot of criticism about being too easy on decrees, particularly in vertical cases. Finally, they got some spine. Good thing we elected Hillary."

MR. KATZ: I wonder…Those would be the headlines, probably. But I wonder actually if they would do something similar to what was done in the *Comcast* situation. I think one of the reasons, from my perspective, it turns out that these kinds of vertical deals are settled with a remedy less than a structural remedy is that when you go to trial, when you file a complaint, you don't know what judge you're going to get; you don't know all the facts that are going to come out; you don't know if you are going to win. And you have to make a decision, are we willing to get something that we think will be helpful to remedy this concern? Or do we go for more and risk the chance of getting nothing?

I think that in part this administration—and by the administration, in my view, two very different groups, one is the people in the White House and the other are the people running the Antitrust Division—have a different risk profile as far as how they might approach an issue, even if their concern for competitive effects may not be all that different than we might have seen when we had Bill Baer running the show.

MS. WACHSSTOCK: So we will come back to vertical mergers and what's changed and what might not have changed in the third case.

But in the second case, and I said this second one was a case that one might not have thought would have been brought based on practice. And that's the *Parker-Hannifin* case. Those who practice in mergers should be familiar with this. This is a case that provides a reminder, which I provide to my non-U.S. colleagues all the time, that the U.S. pre-merger notification program is not a clearance program.

So often we are doing deal analysis, and we will say, okay, what's the clearance process? So what happened in this case, Parker-Hannifin had agreed to acquire a company called CLARCOR Inc., active in, among other things, aviation fuel filtration systems. They dutifully filed a Hart- Scott-Rodino filing. The 30-day waiting period expired, and they went about their way to close the deal. Sometime later, several months later, the Department of Justice filed a complaint challenging the deal. So they said, wait a minute, but we got cleared, right? We did everything we needed to do and you let the deal go.

And DOJ's answer was, yeah, you went through the HSR process; we didn't challenge then, but we have a right to challenge now. At the time there was a lot of swirling, because when the deal cleared, it was right before the inauguration. And the question was, was it the former administration leaving and then new people that came in? I suspect that's not the case, because the staff really didn't change over. DOJ issued a press release at the time saying they had serious concerns substantively. There was some suggestion that maybe the parties withheld documents that were important, but not necessarily ones that they should have provided.

There's no suggestion they violated the Hart-Scott-Rodino requirements, but maybe they should have said, by the way, you may not have noticed, but there is this issue in the case. And DOJ realized it later. So they filed suit. They alleged that this deal would create an unlawful monopoly in the aviation fuel filtration industry, reduced innovation, increased pricing, etcetera. And they sought divestiture of either Parker-Hannifin or CLARCOR's aviation fuel filtration assets. Not very long after the case was filed, Parker-Hannifin did, in fact, agree to divest CLARCOR's assets, so that this issue would go away.

But I think it is just procedurally a reminder that, even if you get HSR "clearance," substantively don't assume you are free for the deal to go through. Obviously, we always know that if the deal is under the HSR thresholds that agencies always have the right to challenge.

I do think this question is interesting—was there something they knew about but they didn't have to produce documents on, but there might have been an issue? Did they have some affirmative obligation to raise this? Or strategically should they have raised it to make sure it was off the table? I think that is a big question for business. I don't know if I would advise my clients, go ahead, tell them about this issue, because they might not see it.

PROFESSOR FIRST: So your risk profile is what, Suzanne?

MS. WACHSSTOCK: I want to say hypothetically.

PROFESSOR FIRST: Hypothetically. Yes. I don't do this kind of advising, but I would assume that if you have the probability that it is going to come out, you would want to get it out and get it done with, particularly if it is something easy to fix. So it seems to me to be fairly situational in that sense. But I view the whole case as maybe just a slipup on someone's part. It was a small part of the deal as I recall.

MR. KATZ: Yes, I think that may be part of the thinking when you think about a deal and you wonder maybe they'll miss it and should we let them know, as long as there is no affirmative obligation to provide documents under the rules of the HSR Act. It is a strategic question. But I think that question, if it's 60 percent of the business, 80 percent of the business, then it may very well make sense to get some clarity if you think there's a real chance. Because the deal might be literally unwound.

Here most of the value of the transaction has been accomplished. It's just a very small part of the deal. I guess it was possible to excise that part of the business, and perhaps a decision in that moment was not a bad decision to say, yes, we know there is an issue here, and if it turns out later on that somebody has a problem with it, we will be able to solve it. I think that's the kind of thinking you need to include.

I want to tie this back to the prior matter that we were talking about related to AT&T. Both of these are very unique US creatures. In other jurisdictions, there wouldn't be that risk of losing at trial. If it is the European Commission, if they decide that there is reason to block a merger, they block a merger. There are rights to appeal, but they can actually issue an order, which the Department of Justice cannot. And same thing, it goes the other way too. But if a regulatory process goes through, that's not the end of the game, because you can always go to court, and I think that makes our system unique.

PROFESSOR FIRST: Right.

MS. WACHSSTOCK: Yes. And another way our system is unique, and folks who do merger work, you know this: the filings, the notification requirements outside the U.S., are substantive. So you have to have an argument. You are telling the story. You are explaining why the deal is procompetitive. And by definition you are engaging with the agency on the substance. In the U.S. that's not what the Hart-Scott-Rodino filing does. It is just numbers, very basic. It actually is about your 4(c) documents, so the agencies will know what you have said, your company has said about the deal. But there is no advocacy as part of the filing. You get there, and you may get a second request and then you start having discussions. Or if you decide to go in voluntarily or the agency invites you in early, you may have meetings to start having a conversation on the merits. But in Europe, the issues are more naturally brought to the fore early, because by definition the filing itself requires it.

MR. KATZ: There probably would have been an obligation in Europe to explain this.

MS. WACHSSTOCK: Well, at least to advocate, right. So they wouldn't necessarily say here's an issue, but they would say here is why the deal is positive and here are the different components of the deal.

MR. KATZ: So you had a third merger.

MS. WACHSSTOCK: Yes. So the third, going back to this question: has the world changed in terms of merger enforcement? It is the case one might have thought would not have been brought, based on another case that was brought but that wasn't in fact brought. So this is the Amazon acquisition of Whole Foods. We all remember when that was announced, and there was a lot of swirl. And then a lot of smaller companies and bigger companies, retail supermarkets, were very concerned. We have an Amazon behemoth that was going to be entering the brick and mortar supermarket retail space. And what was this going to do to competition? Then FTC issued a release saying it had decided not to challenge the deal. I think essentially Amazon's position is we will have lower prices, at least for some products, which at Whole Foods is probably not very hard. But they also promised lots of innovation, stores where you don't have to go through checkout lines, just grab products and leave.

So this predicts some of the conversation that we will have later about whether there is some kind of movement in antitrust. Should antitrust be concerned about harm potentially to competitors or harm to potentially smaller players or innovative players where the deal or the activity that might be challenged itself is likely to lead to lower prices, higher output, higher innovation?

I am not so sure there is much more to talk about, except for the fact that it is a vertical deal. And maybe one might have thought that in light of the challenge of AT&T/Time Warner, there might be concern about Amazon sucking up those assets, these stores, and having potentially the ability to do something—I have trouble articulating it.

PROFESSOR FIRST: Potentially having the ability to help people who are so wealthy that they can afford to shop at Whole Foods. As well as all other grocery buyers. So we will see. I think we are going to come back to this at the end.

But the interesting thing about these two cases to me is that they are vertical merger cases. These are the cases that are hard enough that the Justice Department and the Federal Trade Commission have not even tried to rewrite the Non-Horizontal Merger Guidelines that have been in effect since 1984—because the theories are difficult, and the cases are very fact specific.

So in straight antitrust terms, particularly in vertical mergers, you don't have a presumption to rely on as you do in horizontal mergers. Under *Philadelphia National Bank*, there is no change in concentration and you really have to have a theory.

I think in AT&T, at least as pleaded, they actually do have theories that are unusual in the sense they are in vertical merger cases rather than horizontal, but they look to raising prices and affecting horizontal competition to some extent, or new competition for online video distributors.

Where would the theory be in Whole Foods/Amazon? I think that's the question. In trying to articulate from an antitrust point of view you say, well, what's the theory? Oh, yeah, that's right, that prices will be low…So we will come back to that.

MR. KATZ: I would say, too, there was less discussion of this, because maybe it turned out differently.

But to bring it back to politics, Amazon—in the same way that CNN is disliked by the President, and the *Washington Post*, under similar ownership to Amazon, is not a favorite. And Amazon is a greater threat in some way. The very, very deep pockets that Amazon has, and that have been financing the *Washington Post*, is something that may be of concern.

However, this was an FTC matter and not a DOJ matter, so the speculation about whether the President and the Attorney General had anything to do with the decisions is just not there in the same way. One thing I would say before we turn onto other things. To me, I'm not so sure that it is such a terrible punishment to CNN to say that they can't be acquired by a cellular phone company. And that's not to say anything positive or negative about AT&T. But the notion that the way to attack a news organization is to say we won't allow someone to acquire you, I just don't know what kind of punishment that necessarily is. But I will leave it at that.

MS. WACHSSTOCK: Obviously, there is always big business, an infusion of cash, or there is some other benefit arguably to a merger like this, because somebody will economically benefit.

MR. KATZ: We will have questions at the end.

PROFESSOR FIRST: But write it down.

MR. KATZ: So I think we will turn away from mergers and onto the discussion of Section 5 of the FTC Act, which has two separate parts. I'll let Harry introduce the first part.

PROFESSOR FIRST: Okay, so it is a nice setup that this has to do with Section 5, and we are going to see whether it does or doesn't. And actually we don't fully know that yet. This involves the world's favorite high-tech defendant, Qualcomm. And when I say the world's, they have wonderful litigation that's going on everywhere. I shouldn't say everywhere, but just Asia, Europe and the United States, and there may be other continents.

This is a case that gets just under our wire. It was filed by the Federal Trade Commission in district court for preliminary injunction on January 17 of 2017. The suit is framed as a monopoly maintenance case. Qualcomm has standard essential patents for the technology that connects cell phones to the wireless network, cell phones and notebooks, laptops—not so much laptops but iPads, things like that. These are standard-essential patents.

They are essential for the standard that is necessary for communicating, and they have been very important to our wireless technology and very important to Qualcomm. So Qualcomm also makes what are called variously baseband processors or chipsets, the stuff that goes into our phones, the processors that make them work. In certain parts of this market they have very high market shares, 80 percent plus.

Qualcomm has a licensing practice, which they call "no license, no chips." So you have to take a license to the standard essential patents at the rates that they claim are (you know the language, FRAND) fair, reasonable and nondiscriminatory, a term that contains one of antitrust's favorite words, which is "reasonable," and one of antitrust's hated words, which is "fair."

MS. WACHSSTOCK: We will get back to that.

PROFESSOR FIRST: Yes, we will get back to that, too. So to be chosen as a standard essential patent, you have to agree in the standards setting process to FRAND terms for your patents, which Qualcomm did. But then who knows what FRAND rates are. So the allegation is you've got to take license to the standard essential patents at the FRAND terms or else you don't get any chips. The handset manufacturers, the OEMs, are pretty much reliant on some of Qualcomm's chips, obviously at an 80 percent market share on certain of Qualcomm's chips. And the allegation is that this enables Qualcomm to charge higher than what would be FRAND rates, based on the need for the handset makers to have the chips and to license technology.

Now, other firms make chips; Intel, for example. But Qualcomm will not license the SEPs to competitor chipmakers, so they can't sell chips that are compliant with the SEP standards and communication standards. Handset makers have to take the licenses separately. So they are going to have to pay for the licenses no matter where they get the chips from. Apparently, in the pricing, the FRAND rates are too high and maybe the chip rates are a little lower, and it would force competing chipmakers to somehow meet that. The complaint views this as a tax on handset makers that they have to pay more for their FRAND license fees.

Now, the idea is that this enables Qualcomm to maintain its monopoly in chips, sort of the combination between the two. That's the basic theory. One part of it is this "no chips, no license" approach. The second part is an agreement that Qualcomm made with Apple, which was to reduce the FRAND rate to some extent in return for Apple agreeing to exclusively use their baseband chips and not buy from someone else. So it is an exclusive purchasing deal.

Again, the Federal Trade Commission said, given the need for chips and the fact that handset makers really need to have a reliable supply, and this exclusive again helps to exclude competing chipmakers and maintain Qualcomm's monopoly in the chip market.

So there are some issues with this case from doctrinal point of view. Does Qualcomm have some duty to license its SEPs to competing chipmakers? It may have a FRAND obligation to do that. It is not clear. But does it have an antitrust duty to do that? Do we view this as a price squeeze case, so you have to have a duty to deal and it has to be a predatory low price on the other end, or is it something else? These are the issues.

In addition to pleading a Section 2 claim and a Section 1 claim—because these are agreements, the licensing agreements and an exclusive agreement with Apple—the Federal Trade Commission threw in a Section 5 claim, a standalone Section 5 claim, which says: Qualcomm's practices, regardless of whether they constitute monopolization or unreasonable restraints of trade, harm competition and the competitive process and therefore constitute unfair methods of competition in violation of Section 5(a) of the Federal Trade Commission Act. So we stand alone.

Even if it is not Section 1, not Section 2, we have got you under Section 5. As I'm sure everyone in this room knows, this is big antitrust news, because there is this question of what in the world does Section 5 mean, other than a violation of the Sherman Act or the Clayton Act.

As I am sure you also all know, in 2015 the Commission came out with something labeled as a Statement of Policy, purporting to control how they were going to view this stand-alone authority, which has been in dispute in a number of other cases, actually involving FRAND licensing. And they said, well, it is a consumer welfare standard, and we will look at it and we will analyze it just like it is a Rule of Reason. But if it is really a Section 1 case or Section 2 case, we won't use Section 5. That's what they wrote in 2015.

This was agreed to by four Commissioners at the time, and not the fifth. Commissioner Ohlhausen dissented from that. We may soon have a zero-commissioner Commission. So who knows what the value of that statement is going to be in the future? On the issuance of the complaint, which was issued in a 2-to-1 vote at the time, Commissioner Ohlhausen dissented and said, well, just as I feared, that policy statement isn't going to control you weirdos on the left and you are going to file whatever you want—although the case maps as a very standard Section 2 case. Now, the case has been subject to a motion to dismiss, decided in June. So the motion for preliminary injunction is now over a year old. Do the district courts move that quickly? Or can we expect this? I mean the FTC, if they had litigated it themselves as an administrative complaint and taken this long, people would be saying, what is going on? Anyway, I don't know what's going on.

In June the district court denied the motion to dismiss. They got over *linkLine* by saying, they didn't break apart the transaction as a price squeeze. The court looks at it as one whole effort, one whole price, and says that the Federal Trade Commission has pleaded something, which, if they prove it, could unduly restrict competition, citing an old bundled pricing case, *PeaceHealth*. So the district court got past that issue, and then the district court punts, on the Section 5 stand-alone claim. Because it says you have good Section 1 and Section 2 claims, so we do not have to reach Section 5. So that's where the case stands in terms of litigation.

But the beating heart of this case is not monopoly maintenance. It is Qualcomm's excessive pricing. So as everyone knows all over the world where this has been attacked, because other countries have laws that prohibit excessive pricing, they have their FRAND royalties based on the price of the handset, not on the value of Qualcomm technology. So there is lots of other stuff in your little phones that are patented and it contributes to the phone. This is an important part, and it is essential, but it is not the only essential thing. So their royalties, the implementers, the OEMs feel and have litigated around the world, that these are excessively high.

Commissioner Ohlhausen, in her dissent, said you've danced around whether and how much these royalties exceed FRAND. They have a bargaining theory for why they are higher, but that's where it is. Of course, we don't go after excessive pricing, although I think we should, as Elai mentioned. Just to throw in the rest of the world for a moment, 19 days after the Federal Trade Commission filed its complaint, we had some follow-on litigation. Apple as the follow-on litigant filed suit based on the same issue as is part of the FTC's complaint, the exclusive deal. So they filed suit, and that litigation is pending. And we have a follow on set of countries, called the European Union, which has also attacked this agreement with Apple. And the EU just announced a fine for what they view as a violation of the TFEU, a fine of only $1.23 billion, which made Qualcomm feel bad, because it is less than the fine against Google, and aren't they more important? With that I'll stop.

MS. WACHSSTOCK: Just one point and then we will go on. I noted that when we were talking about the politics, in Commissioner Ohlhausen's dissent, she says that this policy was based on a legal theory, etcetera. But she also notes that the case was brought on the eve of a new presidential administration.

I just noted that she threw that in. Your point earlier was that it shouldn't matter for the Commission, but I am curious how you take that line?

PROFESSOR FIRST: Well, I am not sure. I was going to call someone last night, because I was thinking about this, why they filed in district court, frankly. But once filed, they don't have a majority to withdraw the case, because there are only two Commissioners. So this became a little bullet proof. Now, the question is going to be, how they are going to litigate it when there is a whole new Commission, and how are they going to view this litigation going forward? I obviously have no clue.

MR. KATZ: Well, we could talk about that longer, but we won't, because we have so many other things to talk about. Suzanne is going to talk about a case that was indeed brought under Section 5 and was indeed brought as an administrative case. Go ahead.

MS. WACHSSTOCK: This is the *1-800CONTACTS* case. I think it is pretty unusual for an antitrust case. Essentially, if you haven't been following, these are the facts: 1-800CONTACTS was upset that its competitors were bidding on 1-800CONTACTS trademarks, on Google for Google advertising—another contact lens manufacturer would bid to ensure that if somebody types in 1-800-contacts, my ad is going to pop up.

1-800CONTACTS took the position—they brought trademark infringement lawsuits across the industry, claiming that by bidding on 1-800CONTACTS keywords, the other contacts companies were violating their trademark rights. Ultimately they settled with most of the defendants, and as part of the settlement the competitors agreed not to continue to bid on 1-800CONTACTS' marks. They did not settle with one other player, Lens.com. That case ended up going to trial and appeal in the Tenth Circuit. The Tenth Circuit affirmed summary judgment for Lens.com, finding that the use of a competitor's name as a keyword did not create likely consumer confusion, and it wasn't a trademark infringement.

So interestingly, I don't know if the FTC's investigation was triggered by this, but they were looking into this. After that decision came down, they brought their suit. And they allege that the settlement agreement—so now the case is not about bringing the cases, but 1-800CONTACTS'settlements with its rivals and its agreements that the rivals would no longer bid on the 1-800CONTACTS brands--suppressed truthful advertising to consumers, and resulted in at least some consumers paying higher retail prices. They alleged that those agreements go well beyond prohibiting conduct that actually infringes 1-800CONTACTS' intellectual property rights, and thus there was no justification for the harm to competition.

So the case is ongoing. I think it is a very interesting case. I think you could really ask— it is pretty attenuated, getting to the proof of consumers actually paying higher prices because rivals can't bid on each other's brands. But I think it goes to the broader questions about settlement of cases in general. We have the issues in the pharmaceutical industry. Do you need a big reverse payment? What other kinds of settlements can create antitrust issues?

So I would throw that to my esteemed colleagues here. What do we need to worry about if you feel you have a legitimate claim and you settle the claim. At what point does that become an antitrust problem?

MR. KATZ: That case troubles me for one of the reasons you just said. A settlement—if we start with the assumption that a settlement that is not a sham—if it is a sham, it is a sham, and I think we all agree we can't do that. But if it is a settlement of real rights that you think you have, but it turns out that there is competitive harm, I think in the reverse payment areas, as the Supreme Court found, there were some unique things, both very significant harm because of the way the pharmaceutical markets work with branded and generics. And there was this very unusual thing where very large payments were being made in the opposite direction of what we would expect.

You don't see that here. Here what you see is a claim, and in the world of trademarks as well as patents, you win some and you lose some, and here is a claim that you can either win or lose. There is some question of harm. How harmed is a consumer who goes onto Google and is looking for a particular product, puts in the brand name, and doesn't get a competitive result?

But there is somebody who does get harmed very dramatically, and I think that's to me one of the more interesting parts of the case, and that's Google. Google makes a lot of money regardless of the billions that they may have to pay in Europe if they don't win on appeal.

PROFESSOR FIRST: Chump change.

MR. KATZ: A good portion of the earnings are from competing brands who feel need to bid against one another to make sure that when you search their name they come up first and their competitor doesn't come up first. So the competitive harm, in my mind, of this case that the FTC brought is mostly, to the extent that it is a violation, is to protect Google. And I think Google probably has the wherewithal if they wish to address the issue.

MS. WACHSSTOCK: Right. I would just say that in this case an administrative judge concluded that the evidence demonstrates that the advertising restraints imposed caused harm to consumers and the market for the contact lenses online.

PROFESSOR FIRST: So let me first speak up for the moment in Google's defense. So we do have a long line of cases involving auction markets, where it is the seller who is harmed. And we can start with the fact that the Justice Department used to bring these cases criminally against the antiques auction houses, for example. So we have moved to protect auction markets, even if the party harmed by less competition in the auction happens to be Google.

But as Suzanne said, this was not the focus of the Commission. And the focus of the Commission is understandable in light of the Commission's long interest in restraints on price advertising. So if you think about what's happening in *1-800CONTACTS*, at least in terms of sales on the Internet—if that's the market—the company is a dominant player. So what they were able to do is to block ads from firms that were going to provide contact lenses more cheaply—advertising about lower prices. This is something the Commission has always been concerned about. It takes a new guise, a new way of blocking that advertising, given search engines and the Internet, and this is going to be a theme maybe. So in that sense I don't see it as quite so odd. It is not a reverse payments case.

As you said, Elai, we don't have that huge reverse payment to tip us off that there is some splitting of monopoly rents, but that doesn't mean a settlement can't be competitive in some other ways. In fact, there has been litigation over trademark settlements. Probably not that many cases. But Lysol and Pine-Sol had a long running litigation about who can sell what kind of disinfectant and what can they call it. And they settled the trademark dispute at one point, and then there was litigation over whether the settlement was anticompetitive. The Second Circuit held in 1998 that it was not anticompetitive.

Now, one of the lingering questions is anyone who advises on settlements should think about whether the settlement itself is anticompetitive. It is an agreement. So this case reminds in general, and certainly for intellectual property rights, that settlements just because they are settlements aren't therefore lawful. We may have to think a little bit more about it. One of the interesting things in the administrative judge's opinion was that he did not count as a procompetitive benefit the saving of litigation costs. I think that's a hard issue. It doesn't go to output in that sense, but it is an efficiency. So I am not quite sure that that part of it is going to hold up.

MR. KATZ: Let's turn to another topic, although in some ways we are continuing with some similar themes. We are going to turn to monopolization. And I am returning to one of the victims of this last restraint we discussed is now alleged to be a violator of antitrust rules, and that's Google. But not in the U.S., rather in Europe. So tell us a little bit about what happened to Google in Europe.

PROFESSOR FIRST: From my point of view, first the bad news. I thought I was going to be able to describe this case from the Commission's press release. Unfortunately, last night I found out that they had recently released a 213-page opinion. Anyone who reads European Commission opinions knows that they are written in European English, so you are not quite sure you understand exactly what it means and their law.

But I will try to give you a little bit about it. Because it is quite an interesting, and in my view a little bit troubling, maybe even in the European perspective. And it is certainly different from U.S. law.

So it is a violation of Article 102 of the TFEU, which is abuse of dominant position. The Commission lays it out. This involves comparison shopping services. At the top it gives you a grouping of ads that Google's comparison shopping site will give you prices of various items, and it appears at the top with lots of nice pictures. It is a comparison. You can click on one or the other or click generally and have the product you want sold by different vendors, and you can look at it that way. So it is a site within a site in a sense.

That's generally referred to as a vertical search. There is a general search, you put in headphones, you get technical things, you get prices, you get all sorts of stuff. And the vertical specifics on Google's algorithms also pick up the specifics and give you something dealing with shopping, so you get product ads and prices. Google has other things, as we know. They have travel, and they have various kinds of products that are called vertical searches. So this only involves one kind of search.

The Commission says the more favorable positioning and display by Google in its general search results in pages of its own comparison shopping service compared to competing comparison shopping service, that is the abuse of dominance that the Commission says violates Section 102. So a couple of interesting things along the way for us. One of the interesting problems in today's world is what do you do about free goods? How do you think about markets and free goods? Search, we know, is "free." I've got quotation marks around "free." The Commission points out, well, it is really not free; you give up a lot of data. So there is a cost. You might not give up Euros, but there is a cost, and that seems to be plausible.

The Commission also says that it makes commercial sense for Google, as a two-sided platform to quote unquote—

MS. WACHSSTOCK: We are not going there.

PROFESSOR FIRST: Oh, we are not going there, right.

MR. KATZ: Next year. I promise next year.

PROFESSOR FIRST: We will give it up next year. So to give you something free on one side and to monetize it on other side. Newspapers, there are free newspapers; there are a lot of examples for that. And then there is a third basis for thinking about this from a competition point of view, that there is non-price competition in search. Different search engines can do different things. The one I like, duckduckgo, tells you it is private, so they don't know what your searches are.

There is competition when you think about these things as a market. So that's an interesting aspect of it. Market share for Google in searches, overwhelming, over 80% in Europe and on mobile phones almost 90%. An interesting factoid. On the comparison shopping service market—there are national markets for these services—it is hard to tell from the opinion exactly how many of these services there are. Google claims there are 319 comparison shopping service sites. The Commission disputes this. But in any event, the Commission does not give us market share figures in that market, which of course sets this apart a little from the way we look at it in the U.S.

So what is the abuse? There is some general language, if you are interested in where the Commission is in a legal sense. There is some general language in its decision. Whether the practice tends, for example, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. So some kind of discrimination against your competitors that places them at a competitive disadvantage. And the customers should have the opportunity to benefit from whatever degree of competition.

Basically, what Google seems to have done is they have treated their comparison website differently in their algorithm than competing comparison websites. It gets nice rich text and all those pictures. Comparative competitors don't. Competitors can get demoted under their algorithm further down. You know, 1,000 pages of results that you see displayed and you never get to the end of page one. They get to God knows where. They get demoted, and Google never gets demoted.

It is always at the top. They say this practice is capable of extending Google's dominant position in the national market for general services to the national markets for comparison shopping. This is market extension, however you want to think about it. It is a use of monopoly power to affect competition in another market. But of course, we know under *Trinko* that's not a violation of Section 2. Unless you either get or attempt to get a monopoly in that market, and there is no indication of that here.

And there is very little in the Commission's opinion spelling out exactly how that hurts competition. There is speculation that, well, if on comparison shopping sites, Google beats out all the others, then maybe Google will charge merchants more, maybe they'll innovate less. But it is literally just really speculative, so far as I can tell from reading the opinion. And that was the abuse. Abuse of monopoly power to foreclose competition in another market adversely affected. That's it. So keep this in mind as an important difference between abuse of dominance and monopolization.

Now I think the real problem is remedy. From Google's point of view, one of the remedies is a $2.7 billion fine. Okay, so that's tomorrow's earnings. I don't know. So how do they fix it is the question. And the Commission says you figure it out, Google. You know, propose to us something, so long as you treat yourself the way you treat everyone else. Now, how is the Commission going to assure itself that that's what's happening. How is that going to work? I am really not sure, and that's difficult.

So I do want to mention the other case against Google that's pending, which is the *Android* case. Actually two others, but I'll mention the case involving Android, where there is a Statement of Objections issued in 2016. You know, they are going forward with the case. It takes a little while for the Commission to work. They are not as fast as the district courts in the U.S. I was joking. So this is a case that looks a lot like the old *Microsoft* case. It seems like, from a normal competition point of view, much clearer. One of the things is a requirement that handset makers, if they need Android, and that's everyone other than Apple, if they need the Android operating system, they have to make Google search the default. It has to be on the first or second screen. This may explain why Google search has 90-plus percent on the mobile phone. I think they have a stronger and easier case to remedy on the *Android* case, which they can enjoin.

MR. KATZ: We have a few more topics we want to cover. And as Suzanne said at the beginning, we don't try to cover everything that happened in 2017. We try to pick things that are interesting and important.

The next thing, turning from Google, to another company that connects people on the internet, Uber.

Suzanne, tell us about this case in Seattle.

MS. WACHSSTOCK: Yes, this is an interesting state action case. If you are not following this case, one of the things that's interesting is that the Department of Justice is actually now on Uber's side, which I think is perhaps not so surprising, given the big incumbent players and where the DOJ sits.

So this is *Chamber of Commerce v. Seattle*. The background is that Seattle enacted an ordinance that expressly allows Uber and Lyft for-hire drivers to unionize. The U.S. Chamber of Commerce filed a lawsuit saying that because, as has been found in certain cases, these drivers are contractors, not employees, federal and state antitrust laws don't allow them to unionize.

The current status is that in August the district court judge dismissed the case, holding that the ordinance is not preempted by antitrust law, essentially rejecting the argument under antitrust principles, that where you have a bunch of independent contractors uniting to adjust price, that's a conspiracy.

So the case is now before the Ninth Circuit. What's interesting is that the Department of Justice and FTC filed an amicus brief. I think the amicus brief itself is very interesting to read. First, they go through state action immunity. Their basic point is that the Sherman Act isn't overridden by sovereignty immunity in this case. Immunity applies to states, not a municipality, so it doesn't apply on its face to Seattle. Municipalities have to demonstrate that the anticompetitive activities that would be allowed by municipal law are authorized by the state pursuant to state policy to displace competition with regulation or monopoly public service. And that intent to displace competition has to be clearly articulated and affirmatively expressed and limited to the particular field where the state has articulated its intent to displace competition.

What's interesting here is that the statute authorizes municipalities to license, control and regulate for-hire vehicles within their jurisdiction as necessary to "ensure safe and reliable for-hire vehicle transportation services." And it has an antitrust waiver, stating that there will not be antitrust liability with respect to regulations under this statute. The brief, though, argues that even though there is an express waiver of antitrust liability, the actual municipal ordinance which says that these drivers can unionize goes beyond the express statutory authorization.

I think there is really an interesting discussion of the claim that Seattle has, which is they've got evidence that allowing drivers to unionize maybe makes drivers happier and leads to safety and reliability. Safer and more reliable for-hire services. I think that's really the question. There is clearly an express waiver of antitrust liability. The question is does the waiver apply to this specific conduct, to the municipal regulation? Is the state action broad enough to cover this? We actually don't know where this case is going to go. But I think the question of the limits of state action immunity and how specific the state needs to be in anticipating all the regulations that municipalities might want to enact when they say we're delegating this to municipalities, and there won't be any antitrust liability. How much has to happen in that first delegation to enable state action immunity to apply?

PROFESSOR FIRST: This is a case that really bothers me, and I think it should bother every antitrust person sitting here. Because it is a conflict that runs very deeply in antitrust law. Are we going back to *In re Debs*, the railway workers strike, where we first used antitrust against labor? *Loewe v. Lawlor*, the Danbury Hatter's strike case resulted in an exemption for labor under the Clayton Act, Section 6. So are we going back to the point where antitrust is going to be wielded when people, you can call them workers even if they are independent contractors legally, but they are at the mercy of Lyft and Uber. And are we going to bring antitrust law down on them?

Why it is troubling is because the state action doctrine issue is a quandary, I think. If this had been a case where the state said, as cases usually are, where they are protecting the incumbent competitors, the hail taxis, from Uber as a new entrant, we'd be all over this case and say that's awful. But that's not this case. They are protecting workers from being exploited. Now we should wield the antitrust laws on the side of the Chamber of Commerce and capital?

One other thing, New York State filed an amicus brief, which was written by—I am not going to say who, because I don't know—on behalf of 12 states and the District of Columbia, taking the City of Seattle's side, that this state action immunity defense was appropriate, because of health and safety, and drivers who are paid better can unionize and will drive more safely. We don't know factually if that's true. But the state action immunity doctrine says the municipality can make that decision. So it is a tight thing.

But you see New York State on one side of this, the Chamber of Commerce and this newer federal administration on the other side of it. Why didn't the FTC bring this case? Why didn't the Justice Department prosecute these drivers for price-fixing? Send them to jail? Are you kidding me? So this is going to be interesting. It is in the Ninth Circuit. We will see if this gets up to the Supreme Court. The Solicitor General decided they wanted to file a brief in the court of appeals, which is not an everyday thing.

MS. WACHSSTOCK: Let me throw a lob here; would it matter if it was doctors who said we should be able to get together and unionize?

PROFESSOR FIRST: That's why it is so troubling. No, we don't want the doctors or the dentists, shall we say, and the federation of dentists to say oh, no, we are a labor union. So it troubles the soul of antitrust.

And so I was asked to sign the amicus brief, the law professors' amicus brief—I didn't—on behalf of the Chamber. Once I saw it was on behalf of the Chamber, I said I am not signing that. Something is wrong here.

MR. KATZ: We only have a little bit of time left, and we have a very important topic which this leads us to. So the legal issue we started to talk about, about things that have been part of the antitrust discussion for over a century, antitrust and labor and employment, the legal issue is a somewhat narrow one: the state action doctrine. But the concern, as we're hearing, has to do with major changes to our economy. Employment opportunities have been changing rapidly. Traditional blue collar jobs have become scarce. The types of jobs people take are being Uber drivers.

And other people who are part of the peer-to-peer workforce are usually independent contractors. That means they don't have job security or benefits, but they do have lots of freedom. These are the economic trends that we see before us. And I believe—I don't know for sure, but these kinds of trends have had dramatic political effects, as we have seen. And they have also brought on our next topic, which we are calling the future of antitrust.

We are not going to be talking about any specific case or legal rule, but more what I think of as a political development or policy debate, and to my mind an opportunity to reflect on the goals and the potency of antitrust. So in the debates that we have been having about widening gaps between rich and poor, stagnant wages for most Americans, concern about the size and power of large corporations, antitrust has been invoked as a possible remedy for these problems.

Candidates have brought up antitrust as an important topic. I think for the first time in a long while, probably since the beginning of the 20th century—and plus it was part of the election. It was a topic of discussion. Since then we have seen lot of writing, debate, Congressional hearings, proposed legislation. Some have called this "movement antitrust," others have called it "hipster antitrust." That's I think supposed to be pejorative, but some people might take that as actually a positive.

So what is the antitrust movement? Well, I think it is a political ideology. It is the subject of public agitation, inspiration, but it is not a legal doctrine to my mind. And it is most definitely not new. So I looked back at people who have been thinking about this; looking back at Richard Hofstadter, the great historian, who wrote in the 60s or maybe the late 50s, but I think in the 60s, an essay called "What Happened to the Antitrust Movement?" And it is in his book *The Paranoid Style of American Politics*, another more famous essay. But this one is very interesting. So back in the 60s he wrote what happened to the early 20th century antitrust movement that by the 1940s people got tired of it. His explanation, I think, is an interesting one. He says both the public and historians started ignoring antitrust because it became complex, difficult and boring. Why is that? Due to the technical refinements developed by lawyers and economists. And so that's us.

So he says in part it was successful in doing some real work, some real technical work, but it was no longer exciting as an inspiration for the public imagination. There has been lots of criticism of this antitrust movement among us, who generally like the antitrust laws more or less as they are. Some people around here think that there should be more enforcement here or less there, but generally a lot of people in this room and those we talk to think that more or less antitrust law has got it right. I think we should welcome this kind of political discourse. The fact that the discussion exists means that people think that antitrust law can do important work, and that's something we should welcome.

There is a lot of writing about this, and I am happy to share with anybody who sends me an email. I'll send you a long list. But the two things worth looking at, first is the Democrats in Congress put out something like a platform called "A Better Deal." It covers several policy areas, but one of the papers is called "Cracking Down on Corporate Monopolies." What it says is that extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth and threatens to squeeze out small businesses, as well as new innovative competitors. It is probably only the last one that we typically think of as something that is the goal of, let's say, the technical, boring antitrust.

So they come up with some new standards for merger review that have been embodied in the bill that was introduced in the Senate. In essence, this bill shifts the burden in very large mergers to show that the merger is not anticompetitive.

The second thing I want to mention is there is a really good article on this by Carl Shapiro. It is called "Antitrust in a Time of Populism." It is impossible to summarize, so you should just read it. He welcomes some things. He welcomes more rigorous merger control. He welcomes more vigorous or any Section 2 enforcement. But he rejects the suggestion that antitrust law can address inequality or rein in the political power of large corporations. And he also questions the premise, the entire premise, which is that there is, generally speaking, increased and undue concentration in the U.S. economy in general. He's not trying to say that there aren't some specific industries where we have seen increased concentration.

I think that's beyond dispute, but talking generally, he tries to look more closely at some of the assumptions that people have been using as a basis for their complaints.

So to my mind this discussion leads to two really big questions that are really worthy of our attention and hopefully discussion for some time to come. One is what should antitrust do? And the other thing is what can antitrust do? Those are hard questions, but let's start with something a little less hard, which is: Should we fear this movement? Should we welcome this movement?

So Harry, what do you think?

PROFESSOR FIRST: As you were talking, Elai, I was thinking, remember the Buffalo Springfield song, "There's something happening here, but what it is ain't exactly clear." I don't know what it is, it's not exactly clear. So that's it.

[LAUGHTER]

So like you, I welcome the debate, in part because it is nice to feel relevant and read things about it in the paper. People are paying attention. I've never gotten more calls from the press than when the *AT&T* case was filed, and it was unbelievable. So something is happening here. There is a valid critique going on.

Farhad Manjoo calls them "The Frightful Five"—Alphabet, Apple, Amazon, Microsoft, and Facebook. They were the five largest companies by market cap in 2016 in the United States. The five largest in 2006 were Citi Corp, Bank of America, General Electric, Exxon Mobil and Microsoft. So the thread through it is Microsoft. And the cases we've talked about, interestingly enough, as you step back, all have to do with how the economy has been transformed in one way or the other. So it is search. It is selling products on the internet. It is Uber.

There is something going on here. We are at a stage, and I think this is why we are paying attention to it, where the economy is going through a transformational shift because of technology. The technological thing at the core is the internet. And this is going to change the way our economy is structured. When that happens antitrust gets involved. That's how we got the Sherman Act. Another time was a reaction to the Depression.

What did these transformational changes lead to? They actually led to more antitrust enforcement, boring as it was, except for people who were prosecuted by Thurman Arnold. When we started realizing there was a problem with what was called the new economy, what did we do? Microsoft got sued. So antitrust does respond.

So then the question is what sort of response? What can we do? Can we pull in these other goals? Can we think about to some extent the effect on labor, income inequality. Carl's article is really good for demolishing some of the studies that try to show concentration in the economy. But studies also show corporate profits are really high and entry is really low. There are other economists who say investment is also low. This is a problem. A lot of our economics is based on the notion that high profits will attract entry and everything is great.

Well, if that's not the case, we have a problem in our basic doctrine. So there is a problem. The debate among various Democrats, the positions in the Democratic proposal, I view this antitrust debate as a microcosm of the debate within the Democratic party between the sort of people who take more radical positions and those would like to think of themselves as progressive, but may be more conventional. How Carl Shapiro could become conventional, but he is in this paper.

The paper doesn't talk about abusive practices at all. Every time he mentions markets, it is antitrust markets. There is something different going on—what do we do with platforms? He doesn't say. It is the traditionalists against the crazies. This mirrors a broader argument within Democratic circles.

One final point. There is hipster antitrust; I want Woodstock antitrust. In the 70s, the proposals that came out of Ted Kennedy and Phil Hart were far more radical than what the Democrats are proposing today. No merger among companies with assets of more than $2 billion. Yeah. And there was a de-concentration proposal, the Industrial Organization Act, that would have broken up industries where the concentration ratio was greater than 50 percent. Think about it. So these guys are nothing.

[LAUGHTER]

MR. KATZ: Suzanne.

MS. WACHSSTOCK: I was actually hoping that, Harry, you would take a more affirmative position on this.

PROFESSOR FIRST: No, I am one of the old guys.

MS. WACHSSTOCK: I guess I am here representing industry. I think what's frightening about some of the proposals is that they really try to do too much—and I guess I am a little bit conflicted, because I have my business interests and my personal interests. I am sympathetic to the views of workers and all of the social welfare goals that are expressed in these bills. But I don't think antitrust is the way to solve them. When you look at some of the specific principles, the standard should be whether these large deals may cause more than a *de minimis* amount of harm.

What does that mean? And the creation of a new competition advocate, who knows what authority they'd have? And I hesitate to point to something I read this morning—I don't know if any of you have seen it, Mick Mulvaney's email to the CFPB staff. It is worth reading. He's the Trump appointee to run CFPB, and he sent an email to the whole CFPB staff. I was actually surprised how compelling I found it. But it is about the rule of law versus the dangers of pushing the envelope. He says that his predecessor said repeatedly I am going to “push the envelope” on regulation. And he says that businesses can’t operate in a world where regulators are pushing the envelope. I think there is something to be said for this, representing the business side of this table. We have to know what the principles are. If you are going to try to balance all of the needs of society, and try to manage that through antitrust law, it is not possible.

But I also would recommend to people an article by Herb Hovenkamp, and it is still in draft form, but it is on these issues. I guess you could summarize it, again as you said, it is the conventional “antitrustees” defending antitrust against the crazies.

PROFESSOR FIRST: Including the AAI.

MS. WACHSSTOCK: Yes, that’s right. I think this notion that all of a sudden we are talking about is there going to be harm to small businesses and addressing that. Even if the way to address that is with higher prices and less innovation, going back to the Amazon/Whole Foods deal, I think these are scary proposals.

MR. KATZ: I think there will be a lot more discussion. But the most interesting part is the connection between antitrust and employment. We see it in a few different areas, including the Department of Justice. Really the same trends from the last administration to the current administration. If employers are going to agree with other employers to fix the prices of wages, this is a little bit different than what you normally see when sellers fix prices. This is buyer power. This is monopsony power. Those would be prosecuted. There may even be a criminal prosecution. Regarding criminal charges, we will see.

So the discussion of the connection between antitrust and wages and employment is an interesting one, even when we use some of the traditional tools that we don’t really dispute very much, such things like price-fixing.

In any event, I promised that we would leave some time for questions. I think if we’re permitted to steal just a few extra minutes from people’s coffee break, if you are interested in asking questions. So if you prefer coffee, don’t ask questions. And if you want to ask questions, ask questions.

AUDIENCE MEMBER: Thank you. A question and a comment. About a month and a half ago I was asked to consult with a whole bunch of merger arbitragers about the AT&T merger. So I tried to give my assessment. What I would like to mention first of all, which I think is the elephant in the room, in the answer, the agreement to be bound by arbitration on any discriminatory practices alleged. Just as with *NBC/Comcast*. Now that just expired or is about to expire, which I think is an issue. Seven years, is that long enough? What really concerns me, and I wouldn’t say it to Mr. Delrahim tonight, is that it appears that the DOJ is taking a rigid ideological approach against regulatory solutions. Just *a priori*. And I am also informed in this perspective from a friend at DOJ who has said to me, under his breath, things have really changed here. So I think that’s a concern to businesses. I think it is a concern to us, who really operate empirically with a set of doctrines. But when you are leading with the nose, we are against tasking them to go back and look at thousands of consent decrees. There is something that really smells. So I think with that, I just really wanted to ask you all to comment because the question arises. What has been so wrong with the *Comcast/NBC* consent decree? I know that the judge had some problems with it, but then he said okay. And so I think that that’s an issue that comes up, that will come up here. And there is a lot of precedent for vertical mergers for these kinds of solutions. So it is an open-ended question, but I think it is extremely important, the most important thing that right there in the answer is the agreement to be bound by those kinds of regulations.

PROFESSOR FIRST: Well, I think this does go along, and it picks up on the rule of law issue, which I think Makan Delrahim has already spoken about. He did at the first speech that he gave actually at a conference at NYU Law School. It is the rule of law. We are not regulators. Antitrust people have always hated being thought of as regulators. The question that you raise, and it is a really good question, is there a settlement which would cure the competition problems? And the one they came up with was fairly interesting, including agreeing not to walk away from negotiations, which is a key part of the theory for unilateral effects in the complaint. You know, I thought well, suppose they said we will just hold down our rates and we won’t raise them, which you do get in some proposals in merger cases. Antitrust people have always hated that but not necessarily state antitrust people.

So it is a real dilemma. I don’t profess to know where this is going to go in this administration. I just don’t know. But I think the undercurrents are concerning. But if it turns out that we get a little bit stronger enforcement and consents to make sure markets work, I think some of the agreements that were accepted in some of the past vertical merger cases didn’t really do anything about ensuring they’re really going to have enough competition. And there is a concern about the extent to which putting together all of these platforms may end up affecting innovation particularly. So I just don’t know. But I hear that underlying concern. Looking at all the past decrees seems like a ridiculous waste of time. It is like saying let’s look at all the useless laws that we don’t enforce and then spend time repealing them. Why? We don’t enforce them. So why? Housecleaning rather than enforcement. We will see. Let’s ask him tonight.

MR. KATZ: Anything else? I think with that we’re done. Thank you very much to the panelists. Thank you to the audience.

[APPLAUSE]

Criminal Practice: Recent Leniency Developments in North America

MR. POWELL: Hello, everyone. If you could start taking your seats, we're ready to start the next panel. Welcome back, everyone. We are going to turn now to criminal enforcement in North America and particularly with a focus on development in criminal leniency programs. With that I am going to hand it over to our moderator, Steve McCahey of the Department of Justice.

MR. McCAHEY: Good morning, everyone. I want to thank you, Wes and Michael, for putting together this panel, and thank you all for being here. I think we have a great topic today, and it is being presented by an excellent panel. Their bios are in the material you've gotten, so I'll touch on the highlights.

To my left, we have Marvin Price. He's currently the Acting Deputy Assistant Attorney General for criminal matters for the Antitrust Division. And in that role, his primary focus is the prosecution of price-fixing, bid rigging and other violations of the Sherman Act. Prior to becoming the Acting DAAG, Marvin was the Director of Criminal Enforcement, and prior to that he was the chief of the Chicago office.

Next to him is Adam Hemlock. Adam is a partner in Weil, Gotshal's antitrust practice group and a member of the firm's management company. He regularly represents clients in criminal antitrust investigations by the Department of Justice and has served as lead coordinating counsel for clients under investigation of multiple jurisdictions, including the EU, Japan and Canada, just to mention a few. Adam has been recognized in a variety of legal and business publications for his work on civil and criminal antitrust matters. And Adam is a contributing author to the Antitrust Advisor and the ABA's Law Developments. He is an adjunct professor at Columbia Law School where he teaches on International Cartels.

Next to him is Seth Farber. Seth is a partner at Winston & Strawn, where he co-chairs the firm's white collar regulatory defense and investigations practice. Seth focuses his practice on white collar criminal defense work, including antitrust and corporate internal investigations and related civil litigation. Seth has tried numerous federal cases, and he is an experienced appellate advocate. He was also part of a group awarded a 2015 Team of the Year Award in cartel defense by Legal 500. He's a former AUSA for the Southern District of New York and was a law clerk for the Hon. Joseph Tauro, U.S. District Court Judge in the District of Massachusetts.

Lastly, we're happy to have Ann Salvatore here. Ann is currently the Acting Deputy Commissioner of the Cartels Directorate, Cartels and Deceptive Marketing Practices Branch of the Canadian Competition Bureau. Since joining the Bureau she has worked in a variety of areas and has broad experience in both the enforcement of the Competition Act and developing enforcement policy. She participated in and led numerous investigations involving both international and domestic cartels.

Before we get going, I just have to give this disclaimer that any views that I express today are my own and do not necessarily represent those in the Antitrust Division or Department of Justice.

Lastly, I would ask if you will hold your questions. We will leave about ten minutes at the end for people to ask questions to the panel. The first area I want to talk about is the Antitrust Division criminal program. Marvin, let me start with you. As everyone knows, Makan Delrahim is the keynote speaker at tonight's dinner. He is the new Assistant Attorney General for the Antitrust Division. He's been on board several months now, and there are also a number of other additions to the front office over the past year. As head of the Division's criminal program, can you briefly talk about what changes, if any, we should expect with respect to the criminal program in general and with respect to the leniency program in particular?

DEPUTY A.G. PRICE: Thanks, Steve, and thanks to the New York Bar Association for the invitation to come here and talk to all of you today. I am very pleased to have this opportunity. I've had the great pleasure of working for Makan Delrahim for the past few months. As Steve mentioned, he started as the AAG on September 29 of last year, so he's been AAG for about three-and-a-half months now. And based on the experience of working with him, I am confident that the work of the criminal enforcement program will continue to be a top priority. As usual, the Division will continue to prosecute international and national cartels, as well as more regional and local price-fixing, bid rigging and market allocation that have substantial effects on U.S. consumers. Going forward, a high priority for the Division will be prosecuting companies and individuals whose anticompetitive conduct harms government agencies. We will devote significant resources to investigating and prosecuting companies and individuals who rig bids, fix prices, or allocate markets with respect to the products and services needed by government agencies to function effectively. Of course, this conduct results in a substantial increase in the cost of goods and services obtained by these agencies, and very importantly, causes significant harm to U.S. taxpayers who provide the funding for them.

As a result, as Makan mentioned recently, in these types of cases we will also consider filing a civil suit to recover damages for the U.S. Government. I think there will be a number of areas where the criminal program will continue to develop. For example, this front office is very supportive of efforts to continue to deepen our relationships and cooperation with foreign enforcers. I am certainly aware that the private bar has expressed concerns that as a greater number of competition agencies are increasing their efforts against international cartels, the cost of applying for and obtaining leniency has increased. This front office strongly supports efforts to work with other jurisdictions to lessen the burden of our investigations on leniency applicants. We want to make sure that the system operates as efficiently as possible for both leniency applicants and enforcers. Now, what does this entail? It may include coordinating any investigative timetables and key tasks, and when possible, being more strategic about our document and witness requests to alleviate burden. We have great relationships with our foreign counterparts, and we are trying to engage them to prioritize and be selective about what needs to get done. However, although we will seek to further our cooperation with foreign enforcers, and we will strive to be mindful of the burdens on leniency applicants, we also have to be aware of and cautious about the fact that foreign enforcers' investigations can have an impact on the prosecutions brought by the Division.

There are limitations on what we can do, as our investigations are our own. We are not conducting joint investigations with foreign enforcers because if our investigations are jointly conducted, that may significantly broaden discovery in our criminal matters and may have other collateral consequences. I am definitely optimistic that we can work together to lessen the burden on leniency applicants by coordinating closely with our foreign counterparts, while avoiding the pitfalls that could occur. Finally, another area where I think we will see development relates to the Division's treatment of naked agreements between employers not to recruit certain employees. These are so-called no-poach agreements, or not to compete on employee compensation, often referred to as wage-fixing agreements. As a number of you know, in October of 2016, the DOJ and the FTC released a document called Antitrust Guidance for Human Resources Professionals, in which we explain that these agreements are *per se* illegal and are subject to criminal prosecution. As a result, it is likely we will see further developments with respect to these type of agreements in the future.

Just briefly, with respect to the leniency program, our leniency program thrives based on transparency and predictability. In the Division we try to be as transparent as possible with respect to the leniency program and how it operates, so that companies and individuals can predict how the program will apply to them, should they apply for leniency. The leniency program we have now was put into effect in 1993. It is hard to believe that it has been around that long. Of course, what that means is that this August will be the 25th anniversary of the leniency program here in the United States. It has been an incredible success story. It has been adopted by dozens of jurisdictions around the world. In fact, there are actually more than 80 jurisdictions that have adopted their own leniency programs. And not too long ago I saw a leniency program that was being adopted by yet another country, Papua New Guinea, which shows you just how widespread the leniency programs are now and what an amazing success story this has been. I really think someone could write a book about the development of leniency programs over these past 25 years, along, of course, with what has happened globally in terms of economies of various countries interacting and the global economy and developments that have occurred with respect to that. With respect to the leniency program, I don't expect significant changes. It has been an incredible success story, and will continue to be that in the future.

MR. McCAHEY: Thank you. Adam, I'll turn to you now. Having heard Marvin's comments regarding the criminal program and in particular the leniency program, do you have any comments? Do you see any changes or differences for either corporations or individuals from what you've heard so far?

MR. HEMLOCK: Yes. A couple of comments. The point about being able to write a book regarding leniency is definitely true. Whether it will be made into a movie some day is a little bit less clear. To start with, the Division's transparency with respect to the leniency program and Frequently Asked Questions has been incredibly helpful for people in my position who are trying to guide clients and help them figure out how to proceed at that initial moment of truth when some sensitive conduct has been detected. I think it has also been great that the Division did focus on no-poach agreements. I will tell you from counseling clients that so few of them really appreciated that the antitrust laws applied to hiring employees at all. It is an area that just is not in front of mind for a lot of clients, certainly with HR professionals, but even in-house lawyers and even those who are experienced in antitrust matters.

I really think that there was a disconnect where there was not an appreciation of how antitrust applied in that circumstance. And the DOJ took it so seriously, that was useful as well. Regarding cooperation, we touched on so many jurisdictions that now have leniency programs and are now enforcing the cartel laws. That's a trend that we can expect to continue. One humble thought I have for the Antitrust Division as they coordinate and collaborate with many emerging jurisdictions and frankly advise them on how to run the programs, is the question of confidentiality. I have seen instances when you are working with a client to figure out whether to seek leniency, whether to cooperate and what the contours of that will be, including which jurisdictions, there is a pause. And the agencies want to remove those pauses and encourage leniency where there was a concern about confidentiality and whether an application for leniency would be kept confidential or whether the news would come out.

That is obviously substantial, because such a meaningful driver for the decision to seek leniency is civil exposure in the United States. To the extent that seeking leniency even in foreign jurisdictions may impact whether lawsuits are filed and what the bases for those are and whether they are going to get past the *Twombly* motion, confidentiality is key. And I would say in some jurisdictions perhaps there are questions as to whether leniency applications are entirely confidential.

Finally, one quick note on the question of compliance. As many of you know, in the context of the FCPA, the criminal division of the Department of Justice has issued substantial guidance for what it believes is a good compliance program. In the FCPA world there has been a very meaningful dialogue between practitioners, corporations, and government about compliance. It plays a very meaningful role in sentencing and plea agreements. Less so at the Antitrust Division. My sense here is the policy there has been, if you had a meaningful compliance program, you wouldn't have had a violation. So there is not much of a dialogue in that regard. I understand, of course, the Antitrust Division's policy and to some extent it makes sense. But I do believe there is room for more of a dialogue, whether it is in the context of a plea agreement, or frankly, for the Antitrust Division to make it more of a conversation with respect to cartel enforcement. One thing I think you've seen is that corporations that are seeking to be more compliant with the FCPA have latched on to that there are these Guidelines and that the government has been very forthcoming about its expectations. And, frankly, that has perhaps contributed to greater FCPA compliance. I can tell you clients have asked me what is out there with respect to the DOJ's compliance for cartels, and there isn't as much. I would posit that if there were more dialogue it may, frankly, contribute to greater compliance by corporations with respect to cartel issues. I'll stop there.

MR. McCAHEY: Seth, do you have anything to add?

MR. FARBER: Just a couple of comments. I should preface this by saying I completely agree that the leniency program has been a great success. I think what we are talking about now are ways to make something that has worked very well even better. But I do want to talk about one of the themes that Marvin touched on, international cooperation, because I think in this area, to some degree, the Antitrust Division is now facing a problem created by its own success. When we hear there are now 80 jurisdictions that have adopted their own leniency programs, including Papua, New Guinea, that creates a real coordination problem. It is encouraging to hear that the DOJ is focused on this, but going back to the theme of transparency and the clear guidance that we have on other aspects of the leniency program, there is really almost no guidance out there in terms of what leniency applicants can expect in terms of cooperation. There are a host of very practical problems that leniency applicants face, including how to deal with competing demands for witnesses, for prioritization of requests for documents, for answering inquiries from different authorities. Even things as simple as can you tell one authority what another one is doing. And I think we will come back to this later in the program.

One of the jurisdictions where it works the best is with Canada, and Ann and her organization, at least in my experience, have as good a working relationship with the Antitrust Division as any. But there is a wide spectrum of enforcers out there, and it creates practical difficulties for us as lawyers advising clients in terms of what you can expect when you go in to one jurisdiction, and then what you need to do in dealing with the other 79. Frankly, I've even been surprised to the degree to which there seems to be just a lack of basic communication about the status of things between enforcers. We, as counsel, get requests for what is this jurisdiction doing? Where are you with that other jurisdiction? It seems to me there is no reason why the jurisdictions shouldn't be talking to each other. Perhaps there are reasons, but it certainly would be much more efficient if there would be that kind of coordination. And I think it would help the leniency program in the long run because what is a bureaucratic obstacle that makes the process much more inefficient for applicants and more expensive for applicants to some degree can be a deterrent to companies entering the program in the first place.

"It seems to me there is no reason why the jurisdictions shouldn't be talking to each other. Perhaps there are reasons, but it certainly would be much more efficient if there would be that kind of coordination."

MR. McCAHEY: Thank you. Before we focus on the U.S. leniency program and the recently issued Frequently Asked Questions, I just want to talk a little about the antitrust enforcement in Canada. So Ann, let me ask you, I know we have some information in the materials handed out, but could you briefly talk about the Canadian enforcement program as it currently stands? And perhaps in doing so, could you highlight where the Canadian program and U.S. programs are either similar or different?

MS. SALVATORE: Sure. Thanks, Stephen, for this opportunity to be here and to share the Canadian experience, and how cartels are enforced in Canada. As in the United States, cartel agreements are also criminal offenses in Canada. What you may not know is that we have been at this for quite a long time. The original provision banning these types of agreements dates back to 1889, which is slightly older than the Sherman Act. The Competition Act today contains three main offenses dealing with criminal cartel agreements, the most prominent one being the conspiracy provision, which is Section 45 of the Competition Act. It is a *per se* offense; it prohibits agreements between competitors to fix prices, allocate customers or markets, or restrict supply of a product. Prior to 2010, there was an economic test, where we had to prove that an agreement unduly lessened competition. That changed in 2010 to become a *per se* offense but we are still dealing with that old section. The Competition Act does not have a statute of limitations, so we might have some long-running conspiracies where we might have charges that are pre- and post-amendment. So we are still faced with that economic test in certain cases. This offense targets hardcore cartel agreements. It is not applicable to legitimate competitor alliances, such as joint supplier marketing agreements. We also have a specific provision for bid rigging, Section 47, and a foreign directives provision that prohibits a corporation carrying on business in Canada from implementing a foreign directive for the purpose of giving effect to a conspiracy that would contravene Section 45.

In addition to the work that the Bureau does, there is also a role for private actions against this conduct. Specifically Section 36 of the Competition Act allows for a private right of recovery of damages caused by conduct contrary to the criminal provisions of the *Competition Act*.

Penalties for the main criminal cartel provision are a fine of up to $25 million or term of imprisonment not exceeding 14 years or both. The maximum fine for the foreign directives provision and bid-rigging provision is in the discretion of the court. And the maximum prison term under the bid-rigging provision is 14 years. These penalties are significant. We also pursue individuals but unlike the U.S., we are not quite there in terms of real jail time. Our terms of imprisonment are typically conditional sentences, such as house arrest served in the community. However, we have had recent legislation that means conditional sentences are no longer available for cartel offenses.

Just to give you some statistics, from April 2014 to March 2017, we had six individuals and 14 corporations sentenced for cartel activity in Canada. Fines over this period equaled just over $13 million, and the total terms of imprisonment handed down was 50 months. Again, not real jail time; house arrest or sentences served in the community.

I think one of the biggest differences between the Canadian and the U.S. systems is that in Canada we have a bifurcated system. The Competition Bureau is the investigative agency. We conduct the investigations, make immunity and leniency recommendations and refer evidence to Canada's prosecutorial body, the Public Prosecution Service of Canada, or PPSC. The PPSC is independent and has the final decision regarding whether to pursue a criminal prosecution for cartels in Canada, and has the final say regarding granting immunity or lenient treatment. The main advantage of this system is the independence of prosecutors; it helps to eliminate any potential biases. However, the relationship can be challenging. This means that we have to come to common ground on a number of issues. They do seek our input on a continuous basis, but ultimately, the final decision is theirs on negotiated fines and plea agreements, and whether it is in the best interest to pursue the prosecution.

Overall, the similarities are there between Canada and the U.S. As Marvin has mentioned, we have enjoyed a very close relationship with the Antitrust Division, and we have had some really successful cooperation over the years, and I'll leave it at that.

MR. McCAHEY: Thank you. Turning to the rest of the panel, I'll start with Seth. I know you've had some experience in the Auto Parts matters that involved both the United States and Canada. What has been your experience, and how do you as a practitioner perceive the relationship between United States and Canada?

MR. FARBER: As I said a few minutes ago, and at least in my experience, there is probably no easier jurisdiction for practitioners to work with on a joint basis than Canada. Which isn't to say there aren't any issues that come up even there, but I found it is a much smoother working relationship and much easier to get to a satisfactory resolution of those issues. As Ann said, obviously, there are some differences in the system, but there are very substantial similarities. That parallelism makes it much easier for you as a practitioner. I'll give one example, and this is public. We represented a company called Nishikawa Rubber in one of the 10,000 auto parts investigations. The company cooperated here in the United States with the Antitrust Division. We cooperated with the Canadian Competition Bureau. Those things proceeded in parallel, and we were able to work out resolutions in parallel.

I'll talk about the ultimate resolution in a minute. But one issue that came up, and it comes up frequently when you've got a cartel that spans multiple jurisdictions, is how do you avoid double counting; how the company you are representing makes sure that it is not getting punished twice, three times, four times for the same conduct. Traditionally, most enforcers take the position, well, that's your problem. We're going to impose the penalty that we think is correct, and you can talk to this other enforcer about the penalty they think is correct. We had a very specific situation with Nishikawa Rubber where there were parts manufactured in the U.S., sent up to Canada, put in cars in Canada, and cars were sent back to United States and sold in the United States. So both the Antitrust

Division had an argument--this was U.S. commerce—and the Competition Bureau had an argument—this was Canadian commerce. Ultimately, the result that we were able to achieve is the fine in the United States took into account all of that commerce, and the Competition Bureau, in recognition of that fact and of the fact that we'd been cooperating with Canada from the start and enabled them to do their full investigation, didn't pursue any separate enforcement action. I don't think that's a result I've seen people get anywhere else in other jurisdictions. I think it was also in part reflective of the fact that we were cooperating with them from the beginning. I think one thing that's probably important for any jurisdiction that you are operating in is not to favor one over the other, which is sometimes difficult to implement. We were able to do that with Canada and got a result that was a model for cooperation between enforcement authorities around world.

MR. McCAHEY: Adam, do you have anything to add?

MR. HEMLOCK: I emphasize again the extent to which the United States and Canada can cooperate with one another on this component liability where there are potentially price-fixed products but they are integrated with the downstream products and sold and perhaps resold, , between the U.S. and Canada, because their economies are so intertwined. I share Seth's view that there does appear to be some very meaningful and helpful cooperation underway in terms of negotiating resolutions and in terms of how the authorities look at it. One question I have for Ann, and this reflects my lack of knowledge of Canadian law. It is my understanding there continues to be some degree of uncertainty regarding the extent to which conduct that takes place wholly outside Canada with an only indirect effect in Canada may give rise to liability. My amateur understanding is that the authority has certainly taken a position that it does give rise to liability, but perhaps the court cases are not so clear or the law isn't entirely supported.

MS. SALVATORE: So definitely there is. We feel that there is liability when there are indirect sales involved. It really depends on the facts of the particular case whether we pursue those cases or not. Frankly, we don't have that many litigated cases involving indirect sales. So again, I think we look at these on a case-by-case basis. I can't give you really a definitive answer in a nutshell.

MR. McCAHEY: Marvin, on anything that's been said so far, are there any comments you want to make?

DEPUTY A.G. PRICE: Well, I definitely would say that the Nishikawa resolution was a model of international cooperation. I think the Canadian Competition Bureau gets tremendous credit, and they should get tremendous credit for that resolution. Because of the flexibility that they were willing to show, it resulted in the United States essentially counting the commerce for purposes of the fine in the United States and the Canadian Competition Bureau foregoing a fine themselves.

So tremendous credit to them. It shows what can be done when enforcers work together, communicate and are willing to be flexible and innovative in trying to come up with a resolution that is appropriate, which I think the Nishikawa resolution was, given the facts of that matter.

MR. McCAHEY: Thank you. Now I want to turn back to the Division's leniency program and again with Marvin. A little over a year ago, on January 12, 2017, the Antitrust Division published an update to the 1998 Frequently Asked Questions about the Division's leniency program. That material is contained in what's been provided to you. Could you just briefly talk about why the Division issued this update and briefly summarize the key updates?

DEPUTY A.G. PRICE: Sure. With respect to the Frequently Asked Questions in the update, first, I just want to be clear that the revised FAQs don't reflect a substantive change in the Division's leniency policy. The conditions for leniency are the same as they have been for decades. If a leniency applicant meets those conditions, they will receive leniency, reflecting the scope of the coverage it has earned, so not a word of the original policy has been changed. The policy issued in 1993 is still the policy today. The FAQs did not result in any change in the policy, and no change has been made in the policy. We issued the first set of FAQs in 2008, and those FAQs reflected years of policy speeches by Division officials, and they addressed topics like the criteria for individual and corporate leniency, the process of applying for leniency, and confidentiality issues. In January of 2017, the Division issued an updated version of those FAQs. Most of it was unchanged from 2008. The updates addressed questions that had arisen since 2008, and those included the scope of corporate leniency coverage to provide a non-prosecution protection to current and former employees, the scope of markers, the scope of the program's continued effort to provide transparency, predictability and fairness in the leniency program.

As I mentioned before that's very important to us. We think it's a key to a successful leniency program to have transparency, predictability and fairness. The 2017 FAQs provide practical, updated guidance regarding the program and how it works. So I am going to talk about an overview of the types of leniency, and I'll discuss the issue of coverage for current employees that came up with respect to the 2017 FAQs. For those of you who don't know about the way leniency works in the United States, let's say that hypothetically there is a cartel involving widgets. And the Antitrust Division has no knowledge of that cartel. We have no clue that a cartel exists with respect to widgets. A company comes in, self-reports, and tells us about their participation in that cartel. Then, if they satisfy the other requirements for leniency, they are able to get leniency based on fully cooperating with the investigation in that situation. That's referred to a type A situation, a situation where we did not know about the cartel before the company came in.

And then there is a different situation. Let's say that again there is a widgets cartel, but we do know about the widgets cartel. As a matter of fact, we have served companies with grand jury subpoenas asking for documents concerning the widgets cartel. We may have even searched those companies, because we were able to get a search warrant. We were able to show we had probable cause and get search warrants to search the companies for information concerning the widgets cartel.

Now we're in a different situation. We do know about it, and we do have evidence. We have information. A company can still come in and get leniency in that situation, and if they fully cooperate, and if they are the first company in to apply for leniency. The leniency program in the United States is one where only one company can get leniency per conspiracy. It is set up to create essentially a race to the prosecutor. Whichever company is first and successfully applies for leniency is the only company that gets leniency. Any other company that's going to cooperate would have to plead guilty. The FAQs discussed the coverage that current employees get in these two situations. And there is no question about what happens in the type A situation, and everybody agrees about it. The policy is clear that in type A situations, where we don't know about the conspiracy, that the current employees are covered by the leniency. They do get non-prosecution protection, as long as they fully cooperate with the investigation.

Type A company gets leniency; current employees, they fully cooperate, and they get leniency. With respect to type B, it is different. The policy makes it clear that with respect to Type B situations the current employees do not automatically get leniency. The FAQ that was involved in this situation was the 2017 updated version of FAQ 22. It basically reiterates the principles from the 1993 policy as it was written, and as I've just explained it. And it states for type A leniency recipient the current employees who cooperate will receive immunity. For Type B leniency recipient current employees who cooperate will be considered for immunity but are not guaranteed immunity. As a result of that FAQ, we heard concerns from the bar that the FAQs reflected a change in the policy or a change in the practice that would make it more difficult for corporate leniency applicant employees to get coverage. We took those concerns seriously, and we understood those concerns and the concerns were that the FAQs had inadvertently created uncertainty.

In fact, the aim of the FAQs, from our point of view, was to ensure transparency and to ensure certainty. So that was certainly what we were aiming to do. But we tried to address those concerns. One of the things that happened was that Brent Snyder, who at that time was the Acting AAG, because we were in a transition period, typically, his job was the criminal deputy. At the ABA Spring Meeting in 2017, he made it clear that the Division did not intend to signal a change in our typical practice of making leniency available to individuals from Type B leniency applicants. In fact, typically that is what happens. That is although the current employees are not guaranteed leniency, typically they are given leniency if they are fully cooperative.

An important fact with respect to this scenario is that we're now about a year past the time when the FAQs were issued in 2017. I think it is important to look back and see what happened over that year. What happened over that year is exactly what Brent said, which is that our typical practice has not changed. Current employees in Type B situations are typically being given non-prosecution protection. I think that the FAQ makes it clear what the policy is. But that that FAQ did not change what the policy or practice is, had been, and continues to be as it was prior to the issuance of the FAQs.

MR. McCAHEY: Thank you. Seth, let me turn to you first. Having heard Marvin's explanation as to why the FAQs were updated, what reaction do you have? And do you see a difference in your role going forward? And if you do see a difference, would it matter whether you were representing an individual or a corporation?

MR. FARBER: Well, I think there is a bit of a difference. Marvin accurately characterized some of the confusion that resulted in the bar following the promulgation of the FAQs. I think to a degree it still exists. It is certainly correct that the policy itself is unchanged and by its words the Division has always retained the discretion in Type B situations not to immunize certain employees. But in practice that wasn't happening. And most practitioners felt pretty comfortable that, if they brought in a company and got leniency, all the cooperating officers, directors, employees would get leniency, and so we would be able to advise the company on that and get corresponding cooperation from those employees in doing internal investigations and cooperation, etcetera.

Notwithstanding whatever comments Brent Snyder made in the Spring Meeting, there is still some uncertainty about it, because the FAQs say what they say, and there is a backdrop to them. The backdrop to them was the Yates memo, which followed a big public storm about whether the Justice Department as a whole was sufficiently prosecuting individuals. And I think there is a perception that this—whether it is right or not—reflects something of a response to that. I think there is still some lingering uncertainty about whether or not if you are representing a company and there are senior executives who are involved in the wrongdoing, you've got Type B leniency, whether they can expect to get immunity.

I suspect that if this track record that Marvin refers to plays out over time and there is enough experience, practitioners see that nothing has changed, perhaps that will dissipate. But I take Marvin at his word. The past year it has been that way, but most of those results are not public. It is very hard for us on the outside to see that people in the course of ongoing investigations, which take time to play out, have, in fact, not been prosecuted. What you really see are instances where people are prosecuted. And again, if that were a change that was implemented at the beginning of '17 in these long-running investigations, it takes some time for charges to be filed as well. So going back to what I said, I think there is still some uncertainty. Some of it also stems from the fact that when the FAQs were published, there wasn't any real announcement of what they were intending to do. I remember having to dig through them to figure out what's different here. So there is a bit of remaining uncertainty.

MR. McCAHEY: Thank you. Before I give Marvin an opportunity to respond, if he wants to, I'll just ask Adam the same question. Do you see any changes or how does it affect you?

MR. HEMLOCK: Yes, a couple of quick points. I share Seth's view that to some extent the Antitrust Division in speeches and other fora has tried to make clear that, generally speaking, if you are B, your current employees are going to typically get covered. But where I again focus is the moment of truth, where your client has called you and said, hey, just found some not-so-great documents, and I've got a guy in my office who says he overheard so and so. It is that race to ascertain the facts, but in parallel to be making a real-time judgment about whether to go in. The potential lack of certainty as to how the current employees in a Type B situation will be covered can be a sticking point, particularly with respect to a situation where management may have been meaningfully involved in sensitive conduct, or at least aware of it. This can be the case with a smaller corporation or family-owned business. And there are a whole host of issues that come up in that context, what I call the corporate governance challenge to advising a cartel client.

But that hiccup then does make a difference. It does likely require that those individuals that you are going to have to perhaps rely on for internal investigation will lawyer up. Depending on who they hire and the posture of the case, the cooperation from those individuals may not be quick. And all of these are steps that have to be taken before you can even make a judgment whether to seek leniency under Type B. Again, that's not to say that the DOJ should or shouldn't do anything different, but I just have that reaction as a practitioner and someone who has been in that position.

One other point I would just quickly note, before turning it over to Marvin, is former employees. The policy of the Antitrust Division is that former employees are not automatically covered. They can be covered if they individually work with the Antitrust Division and provide some cooperation. Again, at that moment of truth, there are routinely circumstances where former employees are critical for corporate counsel to determine what has taken place, whether there has been a violation, and make that nuanced judgment about whether seeking leniency is appropriate. I don't know what can be done in that regard, but I think some additional degree of some type of certainty that would enable corporate counsel when they do interact with former employees and say, hey, look, we may have a problem and that means you may have a problem. Let's talk about this, because there may be an opportunity to resolve whether the FAQs or the policies, the speeches and so on can provide additional comfort, impacting that initial conversation.

MR. McCAHEY: Marvin, do you want to respond to any of that?

DEPUTY A.G. PRICE: I don't think I have anything to add on the current employee situation. We've provided information to address those concerns. Like I said, we discussed that at the ABA Spring Meeting, and we've done that on other occasions. And certainly I am doing the same thing now, which is providing what I think is hopefully helpful information that the FAQ 22 was not meant to signal a change in what we had been doing in the past. I don't think there is much more that I can say about that. With respect to the former employee situation, one thing I will say is that the FAQ that applies to former employees, FAQ 24, does say that we will cover former employees when the former employee's cooperation is necessary for the leniency applicant to perfect its application for leniency. I think that's important to remember. That may or may not address what you raised, but I think it could address what you raised in certain circumstances. If you have a former employee, and that former employee is the one that has the most significant information about the conduct that has occurred, you need that employee to be cooperative in order for the company to obtain leniency. That FAQ addresses that and says that we would give the former employee a non-prosecution protection in this situation.

MR. McCAHEY: Marvin, thank you. Now I want to move back to the Canadian immunity program. Ann, could you talk about the program you have in Canada, what the provisions are? For instance, could you talk about how Canada treats individuals under its program? I understand that there are some draft revisions that are currently being considered for the program. If you could talk about those and why they are being contemplated.

MS. SALVATORE: Sure. Canada currently has two separate programs. We have an immunity program and a leniency program. The immunity program was formally introduced in 2000 and is currently undergoing its second update. Under the immunity program, applicants would receive immunity from prosecution as long as they cooperate with the investigation and any subsequent prosecution. Under the leniency program, applicants can apply for lenient treatment in sentencing upon the condition that they plead guilty and cooperate with the Bureau's investigation and again, any subsequent prosecution.

These programs are very much influenced by the U.S. program, so there are many similarities. They both have similar steps. We have the marker request stage, the proffer stage, the granting of your immunity or the signing of a plea agreement, cooperation and full disclosure, and then a plea—a guilty plea in the case of a leniency program. Again, because of our bifurcated system, it is the PPSC that grants immunity or leniency based on recommendations by the Bureau. Individuals are treated in a similar manner as corporations. They can apply for immunity or leniency; or typically they'll come in with the company. If the applicant is a corporation, then the individuals are also eligible for immunity, as long as they cooperate with the investigation and any subsequent prosecution. One of the differences between the U.S. and Canada is that individuals who come in first under the leniency program, so second overall, and who cooperate, even if they come in with the company, will be eligible for immunity under the leniency program. We feel that this is a big incentive to try to get that second party to come in, by making recommendations to immunize the individuals involved. Individuals of subsequent leniency applicants may be carved out depending upon their role in the cartel. We will look at whether those individuals were instigators, leaders, the degree to which they benefited from the cartel, and whether they were recidivists.

Both the immunity and the leniency programs in Canada are currently under review. We actually conducted a public consultation on the immunity program, and that public consultation actually closed just a couple of days ago. Before I get into what some of those proposed changes are, I would like to outline why we feel those changes are necessary. These programs, and in particular the immunity program, as you very well know, are the best weapons to detect and combat cartel activity. Therefore, we would be remiss if we didn't take the time to evaluate these programs periodically with the overall objective of becoming more efficient and more effective. It is also necessary to look at these programs in light of current practices. We're trying to address certain issues that have come up on cases, once those cases got to prosecution and align the programs with the expectations of the Public Prosecution Service of Canada. It is one thing to have a program; it is another thing to have certain asks from the PPSC, which change our current practices. We just feel we need to reflect what those current practices are in the actual programs. We look at these changes as adjustments, not complete overhauls.

We are looking at trying to achieve tighter timelines, and for the PPSC to be prosecution ready, in other words, to obtain that credible and reliable evidence early on in the process. As you can imagine, there have been some controversial issues and ideas that have come up and lots of debate with the PPSC. Of course, all these changes are still under consideration until we come up with the final program. So let me talk about some of the changes we're contemplating. The first change does have to do with the treatment of individuals. Under the current program it is pretty much an all-inclusive. A company comes in, your employees and your directors are all included in the immunity agreement or the plea agreement. In our proposed changes, we are moving towards a carve-in process, where relevant individuals must be identified and carved into the plea agreement or the immunity agreement. The view of the PPSC is that they don't feel it is necessary to provide immunity to individuals that don't need it. So the onus is on the applicant coming in to identify who is involved and who actually needs coverage.

Another change is the expectation that the Bureau will receive a waiver in terms of confidentiality on international cases. So in the current program—these are asks. Going forward we are going to expect these. And again, it just goes to being able to better cooperate with other jurisdictions. The third change is proffers, and the idea of audio recording these proffers. We have been criticized saying that this is moving away from the paperless process. We don't see it as that. There will continue to be no exchange of paper between the applicant and the Bureau. We've always recorded these proffers in some fashion, either close to verbatim notes or handwritten notes. This is just a better way of capturing the information that's being presented to us and, again, it is a proposal of the PPSC. They want to make sure that our recommendation is based on complete and accurate information.

Another potentially contentious proposed change is that the Bureau will reserve the right to require key documentary evidence and to interview key witnesses at the proper stage. However, I think this is important more on domestic cases. So we receive a proffer. If we feel that there is sufficient information to execute search warrants, we're going to need some key documents or some key witnesses and some evidence to seek those search warrants. These would be done obviously on a without-prejudice basis, and interviews would be subject to a use immunity investigative assistance agreement.

The proposed revised immunity program adds an additional step to the process. So marker at proffer stage, and then based on the proffer, the Public Prosecution Service of Canada, based on a recommendation from us, would issue an interim grant of immunity. This again facilitates the full disclosure process. What has been happening and what has happened in the past is an immunity agreement is signed, which then is supposed to be followed by full disclosure. Sometimes we're having difficulties getting to that full disclosure stage because the immunity agreement has already been signed. We feel that by introducing an additional step, an interim grant of immunity, it might make it easier to revoke the interim grant as opposed to the final immunity or plea agreement.

During the full disclosure phase of the program, witness interviews may be conducted under oath and may be video or audio recorded. Again, this is happening now even under the current program. And again, this proposal is based on the expectations of the PPSC; they want to ensure that in granting immunity, it is based on an accurate and full record. We feel this isn't controversial from our perspective. This is standard practice in other types of criminal investigations, and it preserves the evidence, should that witness not be available down the road. In terms of timelines, from the granting of an interim grant of immunity, we expect full disclosure within six months. This is similar to the program in the U.S.

And then lastly, the final immunity agreement will be signed typically like years down the road once the PPSC has determined that their cooperation, the party's cooperation is no longer required.

If I still have some time, I'll just quickly go over some of the proposed changes on our leniency program. The biggest changes are in the recommended fine structure. So typically the first in leniency applicant will be considered for a 50 percent discount. The proposed change is that any leniency applicant will be eligible for up to a 50 percent discount. And again, this will be based on the value of their cooperation, the quality of the evidence they can produce and the timeliness of their disclosure. I think I'll stop there.

MR. McCAHEY: Okay, thank you. Adam, let me ask you whether you have any thoughts on the program or the proposed changes just discussed? And if so, how would that impact you going forward, if at all, if you have jurisdiction in both the U.S. and Canada?

MR. HEMLOCK: Yes, just a couple of quick reactions. One, again to echo a sentiment that has been expressed earlier on today's panel, being there is a bit of a unique context when you are talking about the U.S. and Canada. Because the economies are so intertwined, legal systems are so similar, and there does appear, from my outside perspective, to be such meaningful and such good cooperation between them that, as Seth said, there is a greater ease in advising a client that has to balance its interests in those two jurisdictions and determine the best strategy. Ann's comment about the onus on the applicant coming in to cover employees is an interesting one. Again, to repeat, I think about it in terms of, well, at the moment of trying to advise a client whether or not to proceed, how that policy is going to impact, and it occurs to me, and I'd be curious to hear Seth's thought about this, there really is at these early stages a bit of a spectrum of what I would call exposure with respect to employees. You've got the men and women who have been really doing most hardcore conduct and then at the other extreme people who have no knowledge of it or weren't involved; they were just off in another division doing something totally unrelated. But there are often people in the middle.

For example, people who may have second or third-hand knowledge, clearly no involvement. But nevertheless, if you get into a dialogue with them as corporate counsel in an effort to determine the facts and figure out whether to proceed, they may feel that they have some exposure. Many of these may be lower level employees are employees who are not sophisticated with respect to the law. And there is a degree of comfort that I as a practitioner have, especially in the leniency A situation where it is right on paper, very clear that if we do go in, those employees are going to be covered.

How I would deal with an employee in that kind of gray zone, where I can't be as certain or at some point I may have to justify an inclusion in coverage with respect to leniency, would give me, perhaps, a little bit more complexity and would have to be further considered in the context of dealing with them. That's not to say that the policy doesn't make sense. And I can understand it very clearly from the government's standpoint, but it is something more to deal with.

MR. McCAHEY: Thank you. Seth, any thoughts?

MR. FARBER: Well, yes. I'll add a couple quickly. I mean I do think that to have a carve-in policy is, frankly, going to make the job of prosecutors more difficult because, as Adam says, there is not a black and white line between people who have exposure and those who don't. If you are representing an individual who is concerned that the prosecutors think they may have been involved in wrongdoing, you are going to want immunity before you go forward and start cooperating. And that's not a function of having been identified as someone who has engaged in wrongdoing. Just that there are lots of people who are in this sort of zone where they might find themselves becoming—maybe find themselves being what in the U.S. we would call subjects, or if they may move from that to being targets. The other thing that's interesting, going back to the coordination issue, is recording of coordinating witness interviews. I'd be interested in hearing what Marvin's reaction to that is and what the Antitrust Division's reaction is to having another authority who is going to be taking a videotape of one of your executives who may be identified as somebody who is potentially a key witness in a future prosecution that the Division is going to bring of a co-conspirator. Those are the kinds of issues that make it very difficult to juggle. Historically, company counsel is in the middle of that. But that's something that has to be worked out between the enforcement authorities, so at least there is an understanding of what's expected of companies in those situations when there are demands for cooperation.

MR. McCAHEY: Thank you. Marvin, let me ask you then if you have any comments on either the immunity program as Ann described it or the changes or anything that Adam just discussed?

DEPUTY A.G. PRICE: No comments on the Canadian program. Certainly, as Seth mentioned, when there would be videotapes made of or recordings made of individuals who we expect to be witnesses, we do have concerns about that. And certainly, that's something that we would want to talk about with the CCB. There may be ways to deal with that in terms of timing, a window when those recordings are made in relation to what we're doing in terms of prosecution, for example. But we also understand that the CCB has to do what they have to do, and they have certain issues that they have to address. But all of this is going to be done in the context of the outstanding cooperation that we do have and that's been remarked on by I think everybody on the panel today; the outstanding cooperation that we have with the CCB. We are talking with each other often about all sorts of issues. We have a fantastic working relationship, a very effective relationship, and I think that will make a big difference with an issue like this.

MR. McCAHEY: Thank you. I think at this time, I am going to stop, as I said I would, and open it up for questions for the panel, if anyone has any.

AUDIENCE MEMBER: So I have a question about this scenario. Suppose a company gets wind that the widget division may be doing something illegal in pricing. And they send a memo to the employees in the Division, and say we've hired outside counsel and we want to come set up a meeting and talk to everybody to get a better understanding of what's been happening. Please be advised the outside counsel represents the company. If you think you need a lawyer, that's a decision you have to make. One of the guys immediately calls up his brother-in-law who happens to be an antitrust lawyer, and says what should I do? And the brother-in-law says well, what did you do, and he tells him. And he says, oh my God, you'd better first thing in the morning go in and see Steve McCahey at DOJ and tell him everything you know to get leniency. And the company completes its investigation, heard from the employees, bunch of documents, talks with management. Three weeks later they make a similar call to Steve and come in and say, you know, my client, the widget company, I want to tell you about some problems in the widget industry. Does the company get immunity and do all the employees get immunity, even though the Division already knows three weeks earlier from one of the employees that all of this has been happening?

DEPUTY A.G. PRICE: So in the United States, if someone comes in, there is actually an individual leniency policy, and it is in addition to the corporate leniency policy. Typically when we're talking about leniency with respect to the United States or Canada, we're talking about corporation leniency, and who is coming in is the corporation. But we do have an individual leniency policy. This reminds me to make sure I emphasize for you that if you are interested in learning about the Antitrust Division's leniency policy, the FAQs use whatever search engine you normally use and put in Antitrust Division leniency, and it will take you right to our fabulous web page which has the policy, FAQs, speeches and all sorts of information.

So I really encourage you to utilize that. But in the United States if someone came in and the United States has both a corporate policy and an individual policy, and let's say someone did come in and apply for individual leniency. Under the United States system, the corporation can still come in and get leniency, even though someone has come in and gotten individual leniency. That's the way the policies are set up. So under your scenario, the corporation could still come in and get leniency.

MR. HEMLOCK: So that question raises another issue that I would just raise, which is the question of the whistleblower. You may know that the Senate passed an act—I forget the former title of it, but an act that would provide certain protections to whistleblowers for cartel conduct. I think nothing has happened in the House. My guess is in Washington today this is not a great priority, but at some point it may get some more scrutiny. But your hypothetical actually raises one concern I have with respect to enabling whistleblowers. To some extent the DOJ is going to love that; it creates more opportunities for their disclosure of cartel conduct. But I can see scenarios where a whistleblower's interests are going to diverge from those of the corporation, even if the corporation is trying to do the right thing. For example, what if you have a whistleblower who surreptitiously keeps documents, takes them home, builds up a record, and quits. And they know that they can go on the *qui tam* circuit and start filing cases everywhere and make some money for themselves.

Now, you may have a scenario where a corporation may find out about it, and that's the total right thing, they want to run in for leniency. But that employee may have materially interfered or prejudiced their ability to determine the facts, go to the government and comply with the terms of leniency and so on. And that is something that I think is going to happen.

AUDIENCE MEMBER: What's the *qui tam* provision that you are talking about for antitrust?

MR. HEMLOCK: So there are cases, including some cases right now where people have gone in under state law and filed actions claiming that municipalities in the states were defrauded and such behavior.

AUDIENCE MEMBER: So state loss claims act, *qui tams*.

AUDIENCE MEMBER: So for Marvin Price, two data questions. Do you have figures, and are they posted, on the percentage of amnesty that's amnesty-plus? And are the number of revocations more than one?

DEPUTY A.G. PRICE: There was a very noteworthy revocation that he's referring to, that's why he's asking whether it was more than one. So speaking of confidentiality, we don't publish stats on leniency applications or any aspects of leniency like that. So we don't have those stats.

AUDIENCE MEMBER: So there was one speech in 2010, I think, Scott Hammond said one was amnesty plus. Can you say whether that speech is still accurate? Just like the FAQs, nothing has changed?

DEPUTY A.G. PRICE: So Scott's speech was in 2010, so I can tell you that I actually don't know that number. But I would surmise, based on what I know and based on him saying that the speech was in 2010, that since then there has been at least that many amnesty-plus or the percentage has been higher. I would guess the percentage has been somewhat higher based on what I know.

MR. FARBER: Yes. Just look at the auto parts investigation, which is enormous—it was one huge example of amnesty-plus.

MR. McCAHEY: I think we are out of time. So I want to thank you, the panel, and thank you all for being here.

[APPLAUSE]

MR. POWELL: Thank you, Stephen and panelists. That was a terrific discussion.

Section Business Meeting

Election of Officers and Members of the Executive Committee.

MR. POWELL: Easy business first, let's have a motion to approve the minutes of last year's meeting.

AUDIENCE MEMBER: So moved.

MR. POWELL: Second?

AUDIENCE MEMBER: Second.

MR. POWELL: All in favor, say aye.

(Ayes vote.)

MR. POWELL: All opposed?

(None.)

Now we need to have our Nominations Committee report, and we're waiting for Stacey Mahoney to arrive. Okay, so I am going to play the role normally played by Stacey Mahoney, our Nominations Committee Chair, and just go through the Nominations Committee report. I am going to read the list of new nominees to the Executive Committee, which are: Lawrence E. Buterman, Latham & Watkins; Christian Day, Syracuse University College of Law; Ann Nardacci, Boies Schiller Flexner; Yuni Yan Sobel, Wachtel, Lipton, Rosen & Katz; Sara Ciarelli Walsh, Google Inc.

They are nominated for a two-year term on the Executive Committee. If I can have a motion to approve their nomination.

AUDIENCE MEMBER: So moved.

MR. POWELL: Second please?

AUDIENCE MEMBER: Second.

MR. POWELL: All in favor? (Ayes vote.) Any opposed? (None.)

Next up we have our slate of nominees to the leaders of the section. I'll read out the names, one of which happens to be mine: Wesley R. Powell, Chair; Nick Gaglio, Vice Chair, and Hollis Salzman as Secretary. May I have a motion to approve?

AUDIENCE MEMBER: So moved.

MR. POWELL: All in favor? (Ayes vote.)

MR. POWELL: Opposed?

(None.) Great.

And finally, we are nominating Elaine Johnson as Finance Chair to a three-year term. May I have a motion for that?

AUDIENCE MEMBER: She's already vice chair.

MR. POWELL: Fine, great. I think that we are done. Motion to adjourn?

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

(The Section Business Meeting concluded.)

Role of Market Power in the Digital Economy

MR. POWELL: Everyone, welcome back. We are now going to begin our next panel, which is "The Role of Market Power in the Digital Economy." I am going to hand it over to our co-moderators, Eric Hochstadt from Weil Gotshal and Kellie Lerner from Robins Kaplan.

MR. HOCHSTADT: Great. Thank you, Wes. Thanks, everyone, for being here. We are going to be talking about the role of market power in the digital economy for the next 75 minutes. I think it probably goes without saying that you see every day or every week an article about today's leading firms and how they are impacting competition across virtually every sector of the economy. Just last week the *Wall Street Journal* published a very lengthy article entitled *The Antitrust Case Against Facebook, Google and Amazon*, and the subheadline was a few technology giants dominate the world, just as Standard Oil and AT&T once did; should they be broken up? We won't dare to answer those questions during this panel, for lots of reasons. But the question is often posed, sometimes as the sky is falling or other apocalyptic terms. Does the Sherman Act from 1890, or its more recent brethren, the Clayton Act from 1914, have any relevance today? And we're not going to answer that question today either in the next 75 minutes.

What we will try to do with two accomplished economists, Rosa Abrantes-Metz and Pat DeGraba, is explore some of the economic thinking when it comes to analyzing firms in the digital economy. For example, are the economic principles the same or are they different? Do barriers to entry exist at all with the rapid pace of innovation? Or is it the flip, that there are super barriers to entry created by data ownership? How do we think about market power when firms are platforms or networks, when some of those firms do not even charge consumers to use their service? Think of Facebook, Gmail, LinkedIn. Since economic theory has driven much of the development of antitrust law over the last 50 to 60 years, we will bring the discussion home to how economic thinking about market power in the digital economy is impacting the practical day-to-day practice that we all are dealing with. We are lucky to have Nick Gaglio here to help us navigate why this matters with actual cases and investigations.

When it comes to mergers, how are the agencies and courts looking at digital players? Are they a game changer in the analysis, or is it just another argument in the toolkit and it depends on the facts? Then when you think about unilateral or single firm conduct, are barriers to entry too low and the pace of innovation too vast for a digital player to have market power that may be used to engage in exclusionary conduct? Or, do you judge every case on its merits, and there are some situations, like the *Microsoft* case, which we will talk about, where there was an issue? This is still a very ambitious agenda for 75 minutes. We hope you will find the discussion engaging. I am going to turn it over to Kellie to do the introductions for our panel.

MS. LERNER: Good afternoon, everybody. It is my pleasure to introduce our esteemed panel. To my left is Nick Gaglio, who has over 15 years of experience litigating antitrust claims at Axinn. He's assisted clients obtaining antitrust clearance for large and complex strategic mergers, and does so frequently as global coordinating counsel. He was recently named to a Who's Who Legal Competition Future Leader; and hot off the presses, he was just elected Vice-Chair here of the Antitrust Section of the New York State Bar Association. So congrats to him for that.

To Nick's left is Romy Abrantes-Metz, who is a managing director in the Global Economic Group and adjunct professor at the Leonard Stern School of Business at NYU. She also previously taught at the University of Chicago, and is a former staff economist at the Federal Trade Commission. A significant part of her work are matters involving collusion and manipulation in various industries, including commodities and markets. Her empirical screens have assisted in flagging illegal conduct in a variety of very high-profile cases, including Libor, Euribor, gold, silver, and other metals. She is experienced in matters involving unilateral conduct, namely mergers in U.S., Europe, Central and South America. And she co-authored reports on payment systems in Europe. If you don't get enough of listening to Romy today, I invite you all to come to the next Women in Antitrust panel on February 15, where she will be discussing economic screens.

To Romy's left is Pat DeGraba, who is a senior staff economist in the Bureau of Economics at the Federal Trade Commission. His recent research includes papers on exclusive dealing, multiproduct pricing and interconnecting regimes for telecommunications networks. He has served as the deputy chief economist of the Federal Communications Commission, as well as chief economist in that agency's Common Carrier and Wireless Bureaus. He has been a principal at Charles River Associates and an assistant professor at Cornell's Johnson Graduate School of Management.

Today, I'll be reprising my role as co-moderator with my colleague, Eric Hochstadt, who is a partner in Weil's Litigation Department. His practice focuses on civil antitrust, class action, and other complex and sports-related litigation, as well as criminal cartel investigations and antitrust counseling. He has litigated numerous dispositive and strategic motions, appeals, and has facilitated a number of favorable settlements on behalf of litigation teams representing clients, including CBS, eBay, Houghton Mifflin, GE, MasterCard and StubHub, among others. He's received a number of distinctions, including being listed as a "Leading" Lawyer for Antitrust in New York for Chambers USA, by Legal500 as a "Recommended" lawyer for antitrust nationwide, as well as Benchmark Litigation Rising Star.

I am Kellie Lerner, a partner in the New York office of Robins Kaplan, Antitrust and Trade Regulation Group.

So I wanted to kick it off with Nick, and ask you: Where does market power fit in our antitrust analysis from a legal perspective?

MR. GAGLIO: Sure. A why do we care question. As everyone who practices antitrust knows, the reason we still care and, as I think we will perhaps explore later in the panel, will continue to care about this is it is and will remain a critical screening for both enforcement agencies and courts to determine whether an antitrust violation may have occurred. It is a necessary but not sufficient condition. So obviously, with respect to mergers under Section 7, no substantial lessening of competition without the attainment or advancement of market power. In fact, the Merger Guidelines themselves say that a unifying theme is that of market power, and it is obviously central to our merger analysis. And with respect to Section 2, monopoly power, which is a substantial and even more durable market power, we will get into that definition at length in a moment. Is it obviously a necessary element of even exploring whether there can be a Section 2 violation at all?

Obviously, we are focusing today on unilateral effects, but even in terms of coordinated activity, market power is necessary in the Section 1 context, not only in the Rule of Reason situation, but of course, for cases that don't fit neatly within the classic per se framework. It is frequently part of the conversation to determine whether or not to apply per se or Rule of Reason treatment. So put another way, you certainly care about market power, because you can't have a violation if you don't have it. But, just because you do have it doesn't mean you do have a violation. We will get into this a little bit. But I do just want to note at the outset that from a legal perspective one of the things that we struggle with is the ambiguity that is created when courts, economists, commentators and others talk about market power, talk about monopoly power. And we will get a little bit into the difference between those two. It can be challenging when courts are using these terms sometimes interchangeably, sometimes in a vague context. So, when you are talking about evidence that will show market power, I think the first thing you often have to do is get down the first principle, and think definitionally what you are trying to do.

MS. LERNER: Thank you. How about from an economic perspective, let's hear from Romy on market power analysis.

MS. ABRANTES-METZ: Even though the law defines them differently, economists see them very similarly. They are essentially the same. It is the ability of one firm or more to raise their prices above a competitive level in a profitable manner. So economists do tend to treat them equally.

MS. LERNER: How about market power versus monopoly power, do you see any distinction between the two concepts?

MR. DeGRABA: Let me start with the standard FTC disclaimer that nothing I say represents the opinion of the commission or any commissioner. I've been an economist for a long time, and economists don't see a difference between market power and monopoly power. As Romy said, it is the ability to raise price above the competitive level. I've heard some people come into the agencies and use both terms but I never really understood what the distinction was supposed to be. I Googled the difference between monopoly power and market power, and the third result that came up on Google—which we will talk about later probably—is a paper by Krattenmaker, Lande, and Salop, sitting on the DOJ's Antitrust Division website, and it is entitled "Market Power and Monopoly Power in Antitrust Law." And in the introduction, it says there is no difference between the two terms. They go on to talk about the difference between the ability to restrict one's own output and to restrict a competitor's output. So I don't know what distinction people try to make between the terms, but from an economist's point of view, they both refer to just the ability to raise price above cost.

MS. LERNER: Great. Pat, staying with you, why is market power relevant from your perspective?

MR. DeGRABA: There is a slight difference in focus between the analysis of market power in a merger investigation and in a unilateral conduct investigation. In a merger, the focus is on the *change* in the level of market power resulting from the merger. The agencies will typically take the level of market power of the pre-merger market as the starting point. The market in principle doesn't have to exhibit market power pre-merger. However, as a practical matter it is often the case that the pre-merger market has some degree of concentration in order for the post-merger increase in concentration to generate significantly more market power. Typically, if it is a very competitive pre-merger market, most mergers will not increase market power enough to cause concern.

In conduct cases there is a different focus. In a conduct case, the investigation typically starts by establishing that the party under investigation has market power. A case might then try to establish that the party leveraged its power from one market into another market, or used its market power to raise rival's costs or disadvantage a rival in some anticompetitive way. So in many of these cases you establish the existence of significant market power as the first step in the analysis.

I want to talk about one particular case that actually provides a counter example to what I just said. I worked on the FTC's Intel/AMD investigation for several years. In that investigation Intel was investigated for offering computer manufacturers (OEMs) large rebates if they refrained from using (or used a small percentage of) AMD CPUs in their business desktops and notebooks. The antitrust concern was that eliminating AMD would allow Intel to set high prices for CPUs which would keep computer prices high. These high prices would extract rents from consumers. Intel would capture these rents through high CPU prices and then distribute some of them back to the OEMs in the form of those rebates. Most discussions of this case focused on whether Intel had monopoly power in chips, which they probably did. The case settled and so was never litigated. But an interesting part of this case is that the most important market power concern was not Intel's market power but that Intel executed these exclusivity or loyalty agreements with enough OEMs downstream that those OEMs jointly had market power. The actual harm from this case came because the exclusivity caused prices to be higher for the vast majority of computers, and that harmed consumers. Had Intel not had exclusive deals with enough OEMs that jointly had market power, consumers could have left the OEMs that had the higher prices and the exclusive deals with Intel and gone to competitors that didn't have the exclusive deals, which would have had lower (competitive) prices. In principle, that case could have been brought even if Intel didn't have any market power at all. All they needed to do was organize a large enough group of OEMs downstream who jointly would have market power to create the antitrust harm to consumers.

MS. LERNER: So let's talk a little bit about identifying market power. And either Romy or Pat, both sides, what type of screens do you use to test market power?

MS. ABRANTES-METZ: Well, there are a variety of approaches that should be undertaken in general. Obviously, one of the first parts is what is the market share in the relevant market? But just like in the case of coordinated behavior, you have to analyze whether that market share is 70 percent or more, whether there are other characteristics. Because just having market power means it has the ability potentially to move and affect prices in a certain way, doesn't necessarily mean that you will do it. But there has got to be usually more conditions that need to be analyzed, such as are there barriers to entry, and what is the size and the type of competitors that are present. Are there economies of scale, elasticity of demand and similarity, homogeneity or not of products? I think in a lot of the industries there are a lot of natural experiments that can be studied to attempt to determine whether market power exists.

For example, the FTC, and I remember back in the past I used to also help in these studies, looking into oil and gasoline markets when there are pipeline disruptions to understand whether there was a significant increase in prices, how long did it last, how quickly was additional oil or gasoline moved into the market? So all of these natural experiments are important to understand whether there is an ability to raise prices. This is common to any industry. Now what is particular about multisided platforms is that in this case pricing is a multi-side process. So just like economists understand that when we have complements and substitutes, we need to take into account the effects of those prices of those products into the demand of the specific product.

The same kind of effect exists when we have multisided platforms. We have what is commonly known as indirect network effects where, for example, imagining Facebook, if you have an account at Facebook and if you are connected, as I am, with friends from Europe—where I am from—whom I don't see for decades, it is so much more valuable to me that Facebook allows that connection, and the more of them the better. So, the demand for the particular product is going to be directly linked to either the size or the quality of customers on the platform, and that is what is the solution of multisided platforms from a one-sided firm. It is important for that to be taken into account when we are talking about market power. Because the effect from one side of the platform will likely affect the side of the platform we may be more interested in.

So depending on the cases, there may be cases where the feedback is stronger and cases where it is not as strong. But those effects need to be considered. And when you talk about constraints on raising prices on one side, those constraints may end up coming from different sides of the same platform or any side of a leading platform. There is also potential that typically there is some critical mass that a platform obtains to function at a certain level. This can potentially raise barriers of entry, and it can also limit supply side interchange ability. So all of these need to be taken into account. When we are looking at other measures of market power, for example, comparing price to marginal cost, as we discussed earlier, the ability to price above marginal cost, that is not always and frequently the right measure to use in multisided platforms. To start, many of the products are free on one side of the platform. And even if they aren't, others may have a marginal cost that is almost zero.

So adaptations and new measures need to be developed. Talking about market shares, for example, if normally the market share is going to be value based, then if the price is zero, you cannot compete in market shares traditionally. There are a variety of challenges that have to be overcome. And not all of the tools have been developed yet for multisided platforms in order to incorporate all of these effects. Sometimes you can take them into account, apply the standard techniques to a one-sided firm and being mindful of all these other effects. Other times we may be able to adapt those. For example, if a platform provides certain products in a fixed quantity, in a fixed proportion across sites, you may be able to build a price index with which you compare price versus marginal cost. Other measures could also be tested; for example, profitability.

There are other cases that we always know that moving into profitability and looking at the profitability and making use of accounting measures can sometimes be challenging, but it is a possibility. So even though the principles are similar and are to a great extent the same between a one-sided firm and multisided platforms, there are additional challenges created by the interdependance of demand that should be ruled out as a starting point and should, in most cases, be considered.

MS. LERNER: So much to follow up with there. How about just going back to screens in general, and outside of multisided markets, is there anything specific that you want to look at with your screens in a digital market.

MR. DeGRABA: So the agency still looks at concentration measures, the Herfindahl Index, which is just a square of the market shares of all the participants in the market. This has been used since the 80s. The 2010 Merger Guidelines has a nice section that outlines the concentration levels that are very unlikely to cause a problem, concentration levels that might cause a problem, and concentration levels that will be presumed to cause a problem. They look both at the post-merger level of concentration and the change in concentration that comes about from the merger. So when a merger of two companies with large market shares occurs, that is usually more of a problem than a merger between two companies with small market shares. The larger the companies are that are merging, the bigger the changes are. I'll leave you to the Guidelines if you actually want to go through the numbers to find out the details of the HHI.

Much more recently, the 2010 Guidelines introduced what has been called in the literature upward pricing pressure, or UPP, and the UPPI, the Upward Pricing Pressure Index. The measure of UPPI is based on the diversion from one merging party to another merging party. When merging party, A, raises its price, some customers will stop buying from A and go to the other merging party, and that's called diversion. So the upward pricing pressure takes a measure of diversion from one merging party to another, and multiplies it by the profit margin on those units that are diverted. Typically, you care more about the upward pricing pressure when you have very differentiated products. Market share alone may not tell you very much in differentiated product markets, because those products may be very different, in which case they would likely have very little competitive impact on each other; i.e., if the products aren't very good substitutes, they don't constrain each other's prices. When two such products merge, there is not much diversion from one to another. So when they merge you don't get much of a price effect. Typically, you'll look at the upward pricing pressure in markets with differentiated products. For products that tend to be more homogeneous, the Herfindahl Index or market share is actually a very good predictor of when you'd expect to see significant post-merger price effects.

MS. LERNER: Great. Let's look at barriers to entry in a digital context, digital markets. What does empirical evidence tell us about how to figure out whether today's winners are really going to be tomorrow's losers? Any lessons there?

MS. ABRANTES-METZ: We have already seen there is a lot of rotation in this industry, and I'll give a few examples later. I would like to start by addressing the fact that the *Wall Street Journal* article and others do compare a lot of big size companies, multisided platforms in existence today to very large firms from the last century and say because those were regulated we should regulate and break these ones apart. I think even though there are similarities between these companies, these two different sets of market leaders, I think there aren't enough differences. I am of the opinion that we are not at a point in which we should do that, in particular, because these are typically industries where there is a lot of very active competition. There is a lot of innovation developing very quickly. And there are low barriers to entry.

You know, trying to start oil extraction is a lot more costly than sitting in my living room and trying to write code for a new platform and hire a bunch of friends to do so. And we know that's the story of the beginning of many of those industries. So there has been enough empirical evidence that there is rotation. That small players enter without basically anything and displace large players. For example, we have obviously the example of Blackberry and Microsoft in mobile phones, and AOL in messaging and Yahoo in big news online. There is enough evidence that I don't think we should be concerned at this point. That doesn't mean that there couldn't be and there are companies that have significant market power, but that does not always have to be bad either.

So I think the analysis needs to be who has been hurt? Have consumers been hurt? And from what we can gather now, in general, what we see is consumer's choices are increased and prices are typically dropping. So there is rotation. There is entry. There is exit. There is new entry. There are leaders being displaced. I think that's healthy to see in an industry.

MS. LERNER: Do you have anything to add?

MR. DeGRABA: I think I'll stay with what you said.

MS. LERNER: Let's move onto the type of data that you look at when assessing market power in the digital context. Is there any specific data that you look at? You touched on this a little bit, but in particular what data do you look at if the product is being offered for free?

MR. DeGRABA: So before I answer that, I will remind the listeners of my disclaimer that nothing I say here reflects the opinion of the Commission or any

Commissioner, and anything I say is my own opinion. So there are plenty of digital markets where you could still look at concentration measures. Where services are sold, one can calculate market shares based on revenues. To the extent that the services are offered at no charge, you can look at the shares based on quantity. For example, in the FTC's 2012 Google investigation they did notice that a very large proportion of online searches used Google.

So now I'll venture off into my own opinions here, and talk about a notion that at least I haven't seen anyone fit nicely into, the notion of market power. And I'll call this the "go to site," by which I mean when end users want to do something, most of them go to the same site. I think Google falls into this category. Most of the online search today is done on Google. Now is that enough to really to say that Google has market power with respect to end user customers? Often when you think of market power, you think there are customers who cannot switch to other good options. When I think about search, there is nothing that keeps me from going to Bing or to some other search engine. So while the market shares suggest most consumers prefer Google to other search options, it is not clear how many would switch to another engine if Google tried somehow to extract rents at the expense of end users. One can think of Amazon as being another example. A lot of people buy things on Amazon, and they have a large share of online retailing. But there is nothing that keeps me from going online to Walmart and buying from them if they offer a better deal than Amazon.

One may also consider that a large online firm might be big enough to have an anticompetitive or competitively unfair effect on its competitors. For example, in 2012 the FTC investigated Google for a number of alleged practices. In a statement explaining why they closed the investigation, the commission stated that one concern was that "Google placed unreasonable restrictions on the ability of advertisers to simultaneously advertise on Google and competing search engines, or multihome."This could raise advertisers' costs of dealing with Google's rivals. At the close of the investigation, Google committed to refrain from this conduct in the future.

MR. HOCHSTADT: Great, thanks, Pat. So Nick, you started us off with the why do we care question. So now bring us back to some of the enforcement actions, and maybe let's start on the merger side of the house. What do the closed investigations by the DOJ, FTC tell us about these issues of market power when it comes to these digital players? Are they game changers or just arguments that will convince?

MR. GAGLIO: I really think it is the latter, frankly. One of the takeaways is, as always as a litigant, if you can substantiate your story with evidence, and particularly this story about entry, then you are going to have a better chance at convincing the agencies that you actually either don't have market power or can't exercise it. And I would be interested to hear and pick up on Pat's comment, but the role of disintermediation is a constraint on exercising the theoretical market power you have.

If we look at Expedia/Orbitz, for example, that's kind of an easy one for the agency, frankly. Because you have actual entrant evidence in the preceding 18 months. They characterize it as new, innovative. And when obviously combining that evidence and entry with an absence of substantial head-to-head competition between Expedia and Orbitz, they found that hotels and other providers weren't necessarily viewing those two as direct substitutes. So it was less that Expedia or Orbitz didn't have any market power, but that the other market structures and that evidence of entry I think led the agency to approve it.

Another similar example, maybe a bit more challenging, was the Trulia/Zillow merger. Where on some narrow market level you can say that this is the one/two realtor sites, and so you could say perhaps there is indirect evidence there of market power. But when you actually got into the analysis—again, the agency spent six months looking at documents from the parties, talking to industry participants—and again you have a lack of diversion. You have real entry from other participants. And you have, frankly, realtors not necessarily relying on those two for placing their ads. So frankly, the closed investigations show that the traditional toolkit that the agencies have is still capable of getting to the right result, even if the superficial analysis is suggestive of market power.

Further, to the theme of the saying the more things change, the more they stay the same, look at the *Draft Kings/Fan Duel* merger, which was abandoned, or look at the *Bazaarvoice* case, which obviously DOJ successfully litigated a year or so ago. If you have internal documents that speak to an enormous unilateral effects theory, if you have merger rationale documents that talk about enormous enhancement of market power, you are not going to waste time arguing with Pat, how do we define the marketplace? You've got an enhancement of market power problem.

Just to drill into that a little bit on the *Draft Kings* case. As you got into the parties' documents, these are basically the two biggest daily fantasy sports providers. Everything in their documents seemed to suggest that contests, structure, entry-free price, prize levels, all these vectors on which these two companies were competing seemed to be informed by each other. So that makes an easy call for the agency, and you don't actually have to have this argument about indirect evidence of market power. Similarly with *Bazaarvoice*, and I am thinking here particularly of a speech not too long ago about the difference between the competition for the market and competition within the market, and you really have the sense that Bazaarvoice felt the PowerReviews acquisition was going to create this kind of syndication barrier to entry and was going to lock the store. And that's what I think convinced the court more than anything, and convinced DOJ to bring the case in the first place. In that sense, we are not talking about having to rejigger our analytical framework. It is the same, what do the actual merger documents say, and what is the evidence of substantiation of entry?

MR. HOCHSTADT: Let me pick up on the Zillow/Trulia transaction you mentioned, and maybe, Pat, I'll throw this your way. Is that an example of the agencies looking at a platform and looking at effects on both the realtor side and on the consumer side and showing today the agencies in their investigations are looking at the full effect when you are dealing with platforms?

MR. DeGRABA: So that's an interesting merger in that a couple of commissioners actually put out a statement and explained why they closed the investigation, which means I can talk about it—at least to the extent that what they said is public. That was interesting for a couple of reasons. One is that they really looked at each side of the market by itself. One potential problem was that real estate agents advertise on Zillow and Trulia. So one of the markets that was at issue was whether the price of advertising to realtors would increase. The other side of the market dealt with consumers who go to the websites to go look for homes.

On the advertising side, they looked at evidence of head-to-head competition between Trulia and Zillow. For instance, they looked at cities where Zillow had a presence and Trulia didn't, and compared the advertising rates there to those in cities where both of the companies had a presence. They didn't find that the price of one firm depended on the presence or non-presence of the other. They also noted that a very small amount of advertising spent by real estate agents occurred on these portals, and that there were many other places where realtors could advertise. I don't think they said it explicitly, but it looks as though the market for advertising for real estate agents is much bigger than just online advertising. So you had both online channels, and channels that are not online, and the market included both of these channels of advertising.

On the consumer side, the question was: Was there any likely harm to consumers? And there the evidence was that there were other real estate portals that consumers could look at, such as realestate.com and Redfin. They also found that because Trulia and Zillow were selling advertising, they had an incentive to keep consumers using their portals, and they had incentive to continue to innovate and make the portals better. So there was unlikely to be any reduction in innovation or reduction in quality as a result of the merger.

MR. HOCHSTADT: Thanks, Pat. Going back to some of the closed investigations, you talked about the *Bazaarvoice*, a litigated case, can you speak to us in terms of how do we harmonize the closed investigations? You talked about Expedia, Orbitz. You could talk about Sirius/XM, where the oncoming of the streaming services was a big factor in closing that investigation. But then you've got *Bazaarvoice*, *Staples/Office Depot*. Is there a way to harmonize those cases, or does it just boil down to a few guides or documents? And there is a market and a strong unilateral effects case, digital entry and those sorts of arguments are not going to be sufficient to overcome the presumptions that come from increased market shares and the unilateral effects there?

MR. GAGLIO: Yes. I think this goes back to what we were talking about, frankly, with the flexibility of the agency's approach to handle different situations. On the one hand, when you have something like Expedia/Orbitz, kind of an easy call, because the entry had already occurred. Sirius/XM was an interesting example because there it was a combination actually of evidence of some nascent or even potential entry from streaming services, but which, frankly, at that point had not really taken off, certainly not in the way that all of us are dependent on them now. Because of the nature of the competition between Sirius and XM, particularly that they had essentially locked up each other's positions with various OEMs, in the agency's view there was a relative lack of head-to-head competition in the medium term. That actually created a runway to allow these nascent alternatives, in terms of streaming media, to emerge.

To contrast that with your own experience, obviously, in *Staples*. I think that the lack of an Amazon business thrust into that market was compelling to the agencies, is the real key difference. There wasn't, in contrast, a runway to allow Amazon to build up. If you think about the Merger Guidelines, timeliness of entry has been part of the agency's toolkit for ages. And I think these cases really show—it doesn't matter if you are in widgets or the digital economy, the agency is going to assess the sufficiency and timeliness of the entry.

MR. HOCHSTADT: As Nick mentioned, we represented Staples in the case, and I won't comment on this too much, other than to say the judge in his decision said he had the unenviable task to try to figure out if Amazon, particularly in the office supply space, could have entry in a timely, sufficient, and likely manner to displace the perceived lost competition from Office Depot. That is the challenge in these cases—to try to build a record that can convince the agency or the court in a prospective looking exercise. We talked about Sirius/XM back in 2008. Pandora, Spotify, where were those players back then? So it certainly is a challenge. It is the kind of thing nowadays you find when you are dealing with the agencies that you are coming in early on with economists to try and develop these entry arguments and to try and win the battle with the agency very early on at this point, and what kind of record you think you need to create to really overcome any unilateral effects or structural presumptions.

MR. GAGLIO: I think the answer is yes. So if you come in as early as you can with that type of evidence, like it always is before the agencies, you come in and you get right to competitive effects, right. As we were joking earlier, if you can avoid arguing to Pat about the indirect and the structural point, and get right to the reasons that the merger is not going to enhance market power, I think many of us feel better off. So if you don't have actual entry, like you had in *Expedia/Orbitz*, you turn to the incentives that are actually driving innovation by your client. You want to be able to show that what's driving the quality or the price competition for your client is not your target, obviously. I think that was the big problem in *Fan Duel/Draft Kings*, because they weren't able to successfully point to any other competitive constraints that seemed to be driving what was otherwise a very frothy market to try and become the dominant daily fantasy player. Again, it sounds a bit like a broken record, but none of these is different. There has been a lot of commentary about why we need to change the toolkit. But none of the types of evidence that we're talking about is really that different from any other industry.

MR. HOCHSTADT: You are getting ahead. We are going to address that question about whether the toolkit needs to change. But let's first touch on moving from mergers to unilateral conduct cases. In this area, digital economy, unilateral conduct cases, what's the best guidepost out there? Is it still the *Microsoft* case from the D.C. Circuit in 2001? And what does that tell us, what guidance does that give us in terms of this area?

MR. GAGLIO: It is a helpful guidepost for a practitioner, in part because the court showed a real willingness—and you know, it is interesting to think this is already 18 years ago now—but to show a real willingness to look at both indirect and direct evidence of market power. Folks will recall that after going through and deciding that the sort of nascent middleware companies in terms of Java and Sun were not true competitors to be considered in the marketplace with Microsoft, it didn't stop there. It said so we've got substantial market shares, a presumption of market power. But then it engaged with Microsoft to determine whether or not some of the arguments Microsoft made really showed direct evidence of, as Microsoft is showing, an absence of market power. They pointed to R&D spending that they said a monopolist would never be able to actually engage in. They tried to look at the price of Windows and suggested that that wasn't actually at the maximum short-term profit maximizing level.

The court did a couple of things that were interesting. I think first of all, they refused to—and again this is jumping ahead to our question—they refused to say that because this is a dynamic technology industry, we need different rules, so we're not going to say that you have to look at direct effects and that you can't rely on the structural presumption. So that's why it is still important to worry about this, as I said from the outset. But secondly, they really took that evidence on. So from a practitioner's perspective, there is always an opportunity to end up with a different result from *Microsoft* if you can show that the incentives that are driving your client's quality improvements, that the spectrum of entry—like disintermediation altogether where you have a market changing effect—if you can marshal that evidence, then I think the framework the agencies are using is adequate.

MR. HOCHSTADT: One more on *Microsoft*, and this touches on something Romy said about empirical evidence, the rotations, and the low barriers to entry. How much do you feel like *Microsoft* and its guidance for today was driven by a very high market share that the court believed was durable over time, as opposed to being transitory?

MR. GAGLIO: I think the durability was important. Maybe we will get into this on a discussion of network effects. I think it was the lack of likelihood of that being disruptive in a relatively short time. Absent the applications program interface problem, if Microsoft had been able to show that Java's ability to have a multi-honed framework for developers to bring new applications to the table, I think the entry story would have been more compelling, and the result might have been different. So was it durable? Yes. But I think the entry, more compelling than it really was, could have overcome that.

MR. HOCHSTADT: That's helpful for guidance in terms of today, going forward. Let's turn to the question we have been itching to get at and touch on it from both a legal and economic side. From the economic standpoint—and Romy and Pat, I'll open it up to you—do you think economic thinking needs to change further? Does there need to be more evolution when it comes to thinking about market power in the digital economy? And I mention that only because economic thinking and its evolution has been a big driver of antitrust law, especially over the last half century. So do you feel like the current economic tools in the toolkit can analyze the current players that we have or there needs to be further thinking?

MR. DeGRABA: I haven't really seen a weakness or a case where there was a big gap in the economic analysis. The profession has a decent understanding of things like network externalities. That's one situation in which you can think of size as actually creating market power. It can be hard for a competitor to enter successfully, because if the majority of customers are on an existing network, the existing network is more valuable for all of its customers than an entering network with few customers. So that's one situation in which large share can be a sources of market power that can be durable. In general, though, largeness by itself, isn't an offense. Large share doesn't necessarily grant market power just on its own, nor is it necessarily a symptom of market power. I think that the rest of the toolkit, including looking at options that customers have, looking at diversion from one type of firm to another, when you look at the rest of the standard toolkit, it seems to pretty well deal with the market power issues.

MS. ABRANTES-METZ: I tend to agree with that. I think the economic theory is the same. I think that what is important is to have in mind that if you are to apply one of the traditional tests that were essentially developed for a one-sided firm, you need to be conscious that there are other effects that need to be considered. Now, if one wants to have measures that are more directly applicable to multisided platforms, those ideal measures have not yet been developed. I think as more and more complex applications show up, economic applications of the theory will develop further. But the structural thinking about how to approach the problem, as long as those externalities are accounted for, is the same.

MS. LERNER: So just following up on that, and I think we can all expect where Nick is going to land on this, but do you think that our antitrust laws are flexible enough and have evolved enough to deal with market power in the digital age?

MR. GAGLIO: Yes. And I sort of spoiled it from the beginning. But I think there are a couple of interesting points here. I mean there seems to be a fair degree of consensus across the political divide, at least at the agencies, that the toolkit has flexibility and there are some nice features from both. Commissioners Ohlhausen and Sweeney in the last six to twelve months are both making the same point there. If you think about what we have been talking about, the nature of looking at both direct and indirect evidence of market power, considering entry, you know, this is something that the agencies have been doing a long time. The facts of entry may be somewhat more complex if you are talking about a platform market, as Romy was talking about, and the need to consider some of the cross-platform elasticities and what really drives pricing decisions, particularly when you have asymmetric pricing on either side.

Do network effects in markets, where it tends to be a little bit of a winner take all for either the most efficient player or the first mover, does that need to be considered in a somewhat different way? Perhaps. But at the same time, I think the agencies have proven up to the task to see whether there are competitive constraints driving innovation, driving customer quality. Romy mentioned *The New York Times* article, and the one thing about this comparison to Standard Oil and some of these other companies, these giant companies today are driven by innovation. And as I think the article mentioned, they are pretty beloved. I don't know how I would drive somewhere without Google Maps and from the benefit of Waze. I think a lot of us take a lot of value from being able to shop conveniently from Amazon. So it is interesting to me there is a lot of gnashing of teeth, particularly from competitors of these successful companies. But if consumer welfare is being harmed, a lot of consumers don't seem to be aware of it.

MR. HOCHSTADT: Let me get into that. What about the issue of data, right. So we have been talking about when you are trying to analyze these digital players, and some of them may be offering free services and the like, so it is hard to do market share calculations. But what role does data and the amassing of data and the ability to control data play in your thinking about whether or not a firm has market power?

MS. ABRANTES-METZ: Well, a few months ago the *Economist* had a good article about how dangerous it is to have all this data compiled about users and how that can potentially drive to the inevitable situation where we have essentially permanent monopolies. Again, going back to what we said earlier about how easy it is to enter into these markets, I think that could not be further from the truth. That doesn't mean that data is not an advantage. That there isn't a critical mass. The empirical evidence is that so very many companies have started without data. Namely, Facebook in India, when it started it had no Indian users so it had no data. But a few years later it was leading in that area in India.

Spotify, the same thing here in U.S., competing with Apple iTunes. So there are enough examples to show that this is not an inevitable situation. Now could abuses occur? Yes. And I don't think that the agencies should be sleeping on it and should keep an open eye for potential anticompetitive behavior. But I do not think it is at the level of concern that I often see in the media.

MR. HOCHSTADT: One other legal question I want to follow up on with Nick in terms of the competitors gnashing teeth and so forth. So Nick, we hear sometimes in the articles on predatory pricing jurisprudence requires under *Brooke Group* a recoupment element—which I am not aware of where anybody has proven that since *Brooke Group*—and monopoly leveraging, not entirely sure what the Supreme court did or didn't do with that in *Trinko*. From your perspective, is there an argument to be made that the current, especially in the single-firm space jurisprudence, is too hands off and too restrictive, because the traditional boxes don't fit a player who may be willing to grow market share at the expense of making a profit to drive out its competitors? Or is it your perspective that the current lay of the land in Section 2 single-firm conduct has the right legal tests, because ultimately it is consumer welfare at the end of the day, unless there can be a showing of harm to price or reduction of output or quality of innovation, so what?

MR. GAGLIO: Probably no surprise, I think it is the latter. It is always useful to think about first principles and so the Brunswick admonition, that the issue is what happens to competition and not competitors. It is somewhat complicated in the digital space where when you get a huge investment and you get huge innovation, and as a result for some short amount of time or indeterminate amount of time, you may benefit from a network effect barrier that allows you to profit from that innovation, and that is sometimes the incentive for making that innovation in the first place. That in and of itself—and I think it is clear under our current Section 2 jurisprudence, is not violative of anything. That is how we want innovation to drive investment. The focus of Section 2 is on something exclusionary, something predatory. That arms the agencies to be able to look at why people are doing things. Competitors complaining is a very different situation from consumers complaining. I think this focus on the actual exclusionary effect allows the agencies and the courts to get to the right conclusion.

If I could actually just pick up on something Romy said about data. One interesting thing from a practitioner's perspective is how the agencies are going to treat data in a particular situation. In some circumstances it has actually been a relevant product in their analysis. Other times it has been an asset that the merging parties simply have, and at other times it is considered a barrier to entry itself and analyzed that way. I think it is important to think about the different roles that data can play when you are going into the agencies as well.

MR. HOCHSTADT: I'll just pick up on one thing you said and go back to the basic principle of Section 2 monopolization, not becoming a monopolist, because that ultimately is the incentive or the reward.

MR. GAGLIO: Absolutely.

MR. HOCHSTADT: Pat, Romy, Nick, do you have any final thoughts for the audience here, based on the topics we have been discussing here today?

MR. DeGRABA: I think that the consumer welfare standard is still the hallmark of the analysis. I talked a little bit about the *Zillow* case. The commissioners also released a statement when they closed the Google investigation. I think that statement supports the notion of the consumer welfare standard. The investigation included, among other things, concerns about bias advertising. The claim was that Google placed some of its own properties more prominently within its search results than competing properties. That is, they changed the way they presented their screens, in that some of their own vertical search companies, which are search engines narrowly tailored to a specific market, were presented prominently, while competing properties were pushed farther down the results page. The FTC looked into this and closed the investigation. On that particular count the Commission basically found that, after investigating the documents and both Google and industry practices, they believed the changes in the way that Google presented their screens had made consumers better off, and the changes were implemented to allow consumers to have a better experience. They also noted that other general search engines were also changing their reporting of results in similar ways. This also bolsters the notion that the changes were implemented to make consumers better off and not just to make competitors worse off. The commission recognized that some competitors were made worse off by the way the screens were reconfigured. But as long as consumers benefited from the changes, they were not going to press a case in this area.

MR. HOCHSTADT: Thank you, Pat.

MS. ABRANTES-METZ: May I just add, from an economist perspective, in thinking about digitally how firms compete, I think this is a particularly interesting industry area of economics both, theoretical and empirical, and the relevant aspects of antitrust, because it has so many components that do not favor long-lasting market leaders. As we discussed earlier, yes, firms do figure out ways to keep being leaders. Obviously, the example of Microsoft was how particular practices were used, many of them at the end, that are not found to be a violation, but how so many of these strategies are not necessarily illegal. And the economic theory does show that many of them, such as for example tying, can have pro, not anticompetitive effects. So, from an economist standpoint I am looking forward and expect to see in the future how firms will develop new strategies in such a dynamic fast-moving industry to figure out how they can keep their position in a legal way.

MR. GAGLIO: The answer is to continue to innovate and drive value for their consumers. In thinking about the digital economy, I think the commentators who urge a change in the standard seem to be particularly worried about this winner-take-all framework. It is important for people to remember that a relatively high level of concentration might be characteristic in some of these so-called winner-take-all markets because of network effects, but it does not mean that those markets aren't contestable. They are frequently contested by market changing and disruptive innovation. Perhaps even more importantly, they are often heavily contested before a winner emerges. I think the agency in *Draft Kings/Fan Duel* is in a position to protect that competition for the market before it actually is decided. By the same token, I think we can be a little bit sanguine, once the winner has emerged, that as long as they are continuing to innovate and be customer focused, if the loser in that situation is concerned, it is their right to run to the government. Let's not pretend that's perhaps just a form of rent-seeking.

MS. LERNER: We are almost out of time here. I want to leave a few minutes for questions. Any questions from anyone in the audience? Yes, go ahead.

AUDIENCE MEMBER: I think it is fair to say that the European Commission has been more willing to bring abuse of dominance cases in the digital economy and against nuts and bolts companies than the enforcers in the U.S. Do you on the panel think that the approach in Europe is just plain wrong?

MR. HOCHSTADT: Do you want to start that? Good question.

MR. DeGRABA: There seems to be less of an explicit consumer welfare standard. It seems as if in Europe, if you have a dominant position, there are certain things that you just can't do. We certainly don't have that here. So yes, they seem to be a little more aggressive than the U.S. agencies. I'll actually mention this briefly. One portion of the Google investigation looked at allegations that Google had scraped information on competitor's websites and passed it off as their own, and that Google threatened to remove from Google's search results entirely those rivals that complained about this practice.. The Commission's closing statement says that Google committed to refrain from this conduct in the future. In that instance the concern was that Google's size could allow it to successfully threaten customers. So, when there was some harm, I think the agency went after it, but the agency's action was narrowly tailored. They found a specific harm and went after the specific harm.

MS. LERNER: I have to take my moderator hat off for one second and just say that I think sometimes in U.S. antitrust law we find we are trying to fit a square peg into a round hole. And we know when we see it and somebody can scream anticompetitive, but it is just working in the framework. The European laws are just far more flexible. I am going to guess that Nick's response will be companies need to have certainty and they need to know when they are violating the laws. I certainly do give some credence to that, but sometimes there is conduct that just smells so anticompetitive and you can't approach it from the U.S. law. Yes.

AUDIENCE MEMBER: You talked about the possibility of how to think about it when a firm has a large market share, but might not have market power. And I wondered if you had any observations about the inverse of that. I am thinking about the possibility of a firm with a small market share having market power, and obviously, I am thinking in particular, about the *AMEX* case and what really happened there? I wonder if you have any observations on that particular issue?

MR. GAGLIO: To me that just begs the question of what the right measure is. And obviously, we are all eagerly waiting for the Supreme Court to put us out of Suzanne's misery. But I think if you look across the platform and you really do see cross-elasticities, then either will decide that they actually do have market power or more than likely that absence of market share really doesn't actually translate to any market power. The way you would intuitively think of it to me is what's most interesting. The Supreme Court has the opportunity to say you do have to look at both sides of the platform, if there is evidence, as I think the Second Circuit thought, that the way pricing decisions are made on one side impacts demand on the other and vice versa.

MR. HOCHSTADT: One more thing I'll add to that, picking up on what Romy said, from an economic perspective it will be interesting to see what the Supreme Court does in terms of any bright-line rules. Because we are talking about network effects where the feedback might differ, depending on the companies that you are talking about, it will be interesting to see if there are any bright-line rules that come out of this versus a much more flexible case-specific approach, which has been the tradition of antitrust for long time. Way in the back.

AUDIENCE MEMBER: This is really for the economists from the beginning of the discussion. Isn't it silly at this point to say that market power is the ability to price above marginal cost, and then market power equals monopoly power. When it is a matter of degree? I know that is the classical definition, that anybody with a differentiated product has market power which is the same as monopoly power. It all just seems quite silly. As opposed to the matter of degree in whether a firm or a set of firms is constrained in setting their price, their output or their innovation. So we always have these discussions about market power that start off with if a firm can charge more than marginal cost, they have market power. It just seems completely disconnected to reality in what cases and practitioners are really doing when it comes down to assessing market power. So when are the economists going to give that up?

MR. DeGRABA: So I will say that I taught in business schools for nine years. And while I taught that in the perfect competition model, equilibrium price equals marginal cost, I also said that this existed almost nowhere in the world. Because if your price equals marginal cost, that meant you didn't want to actually increase your sales at your current prices. And I asked my MBA students, who had business experience, does your company not want to increase its sales at the current price? Of course, the answer was no. The competitive price is something a lot more like the long-run average total cost. I wince when I hear the phrase price equals (short run) marginal cost, because it typically doesn't. It virtually never does. And I've got to tell you, if I could find a decent definition that distinguished market power from monopoly power, I'd listen to it. I just haven't seen that yet.

AUDIENCE MEMBER: So I have a simple question for the panelists on market power in the digital economy. We can go left to right. Does Microsoft have market power in desktop operating systems? Does Google have market power in general search? Does Amazon have market power in the online sale of books? Simple question.

MR. GAGLIO: I am going to punt.

[LAUGHTER]

MR. DeGRABA: So, wow, I am going to get myself into a lot trouble now. I think there are three different analyses for these three companies. The market power story for Microsoft is based on network externalities, which means that an individual user gets more benefit from using a product when more customers use the product. Customers benefit directly when their computer and their software is compatible with the computers and software of other users with whom they want to interact. Additionally, more software is written to work on operating systems that have the widest distribution. Microsoft being the dominant operating system for x86 machines benefits from this. If I were to switch from Windows, my computer and work product likely would not be compatible with many other computer users and much of my existing software would not work as well or at all. These switching costs are the foundation for a market power story for Windows with existing customers, and forward looking new customers.

For consumer search, Google does not benefit from such direct switching costs or compatibility externalities among its customers. As a user, there is nothing that prevents me from searching somewhere else. I typically go to Google because I like the results that I get better than those from other search engines. If one of those engines returned better results, I could switch to that engine tomorrow without incurring any switching costs.

But that's not the end of the story. Google accounts for a very large share of online search and publicly reports high accounting profits for its search products. So one should ask why other firms have not entered and/or expanded enough to erode Google's share and/or profits. It might be that Google has better algorithms for returning useful results, or in some other way is just better than others at giving consumers a better experience. It might be that because of its size, they have access to more information that allows them to return better search results, or there might be access to some other scarce asset that I don't know about. I don't know why Google seems to have a better product and a persistent market share.

Amazon. It's difficult to find many indicia of market power for Amazon. Their prices are just lower. They do have a large share of online retail, but they never seem to report an accounting profit of any material size for its physical delivery services. I do a lot of buying on Amazon, because I go to three or four other websites, and Amazon usually has the lowest price. I am a price-conscious guy, I am an economist. I don't know if Amazon's prices are lower because it has a lower cost of distribution, or is Amazon simply not taking profits that it could be taking?

I recently bought a bathroom scale on Amazon that arrived at my house in one day. I can't figure out why society needs 24-hour bathroom scale delivery capabilities, but I was happy that it came in one day. Should I be concerned that Amazon seems to be building the most efficient on line direct to customer distribution system on the planet? I see companies like Jet.com providing service in the same space, and I have bought things on other sites like the Walmart website. Here again, I don't have a switching problem out of Amazon the way I seem to have a switching problem out of Windows. And I don't know if there are some other facts behind what Amazon is doing that I don't know about to suggest they have market power. But from where I sit as a consumer and a casual reader of public information about Amazon with more economics training than the average adult, I am very happy Amazon is around.

MR. HOCHSTADT: I am so glad Pat fielded that question. I think that wraps up our time. I want to thank Pat, Romy, and Nick. Thank you all.

[APPLAUSE]

Practical Issues in Counseling at the Intersection of IP and Antitrust

MR. POWELL: Please take your seats. We're about to start our next panel. Thank you, everyone. I know it was a quick changeover from our last panel to this one, but we're pleased to have Rebecca Kirk Fair, whom I've known for a million years, moderating our panel on "Practical Issues in Counseling at the Intersection of IP and Antitrust Law."

MS. FAIR: Thanks, Wes. I'll apologize in advance. I am struggling with a bit of a cold. But with four kids at home, it is expected in the wintertime. Thank you all for coming this afternoon. I am excited for the panel. We had a lively dinner discussion last night, and hopefully we can reenact it today. We have had a good month as a start to the year for sparking topics that we should discuss today. In particular, you are probably aware that Qualcomm was fined $1.2 billion this week by the EU, and we will touch on that a little bit. The FTC and DOJ submitted a joint statement on the intersection of IP and antitrust, and we will briefly explore that and how it fits with FRAND, types of royalties and some of the issues that have been coming up with non-practicing entities. And we will also talk a little bit about how IP and antitrust intersect in both the aviation and telecommunication space, because we are fortunate enough to have in-house counsel from both fields.

My name is Rebecca Kirk Fair. As Wes said, we have known each other for a million years. I have been practicing antitrust in Analysis Group in Boston for almost 21 years. I've had the good fortune to study many of the kinds of technologies and platform economics that were discussed in the session before us. I have had less of an opportunity to really explore the issues that have arisen in the *Intellectual Ventures* and *Capital One* case and some of the other overlapping IP and antitrust issues. So this has been a great experience for me to learn a bit more about it. Before we start, I'd like to introduce our panelists.

Immediately to my left we have Alex Long. He was kind enough to come in from Cincinnati this week, and we were also lucky with the weather. He is the chief IP counsel and general counsel of engineering at GE Aviation, a world leading provider of jet engines and components, as well as avionics and electrical power and mechanical systems for both commercial and military aircraft. Alex leads the conception, development and execution of IP strategy for this $28 billion aerospace business. He provides executive legal counsel to GE Aviation's $2 billion R&D engineering organization. He is also a former IP litigator from Latham & Watkins in San Diego. Big move to a colder climate. And his practice was enforcing and defending against patent infringement and trade secret misappropriation claims across diverse technologies, ranging from molecular diagnostics and life sciences to aerospace, telecom, semiconductors, and computer hardware and software.

To your left we have Melissa Scanlan. She is a Vice President at T-Mobile and is responsible for all intellectual property, including transactional matters, active risk management and litigation disputes. She is also responsible for antitrust counseling and advice for the company, including antitrust guidance involved in corporate mergers or acquisitions and in network spectrum auctions and bidding behavior. Prior to joining T-Mobile, Melissa was associate general counsel for InfoSpace, where she managed complex commercial litigation with an emphasis on public securities class action defense and also advised on proactive risk management practices. Prior to that she was with Arnold & Porter in Washington, where she handled antitrust litigation and advocacy before the DOJ and FTC.

Renata Hesse joined Sullivan & Cromwell, where she's a member of the firm's litigation group, focusing on antitrust counseling and merger planning. She's following a distinguished career in government. She led the Antitrust Division at the DOJ twice as Acting Assistant Attorney General and served the Division for more than 12 years. Her other roles in the Antitrust Division include oversight of the criminal program as the Deputy Assistant Attorney General for Criminal and Civil Operations, Chief of Networks and Technology Section, and as a trial attorney. Recent highlights include playing leading roles in the Comcast and Time Warner Cable merger and the U.S. Airways and American Airlines merger. She is frequently recognized as a leading and influential antitrust lawyer, with a particular emphasis in the areas of intellectual property and high technology industries.

With that I'll jump into the topics, and I will turn it over very quickly to the panelists. As an economist, I find the idea of IP and antitrust intersecting strange, because they are almost at polar opposite ends of the objective spectrum, trying to provide protection and effectively a legal monopoly protection for inventors with patents, and on the other end you are trying to encourage short-term and near-term competition through the antitrust regulations. So they often come at odds with one another, and increasingly, there seems to be some question as to whether or not you can reconcile the near-term and long-term competitive objectives. So before we jump into the specifics of aviation and telecommunication, I was hoping, Renata, that you could provide a little bit of a perspective of the regulators and what they are trying to achieve with both sets of policy.

MS. HESSE: Sure. Although I don't think I'll speak for what the Trump Administration is trying to do. Sorry.

[LAUGHTER]

A little bit of a shift there. So actually, I usually start these things by saying I actually don't think that IP and antitrust really conflict. I think they are both designed to do the same thing, which is to encourage innovation and investment in R&D and bring better products to consumers. I think, though, the sort of exaggeration maybe of that tension between the two leads people to get themselves into these corners where they can't actually see across and get a bridge to agreement. I am always trying to bring people together, since I generally don't like conflict. But I think the key issues really derive from the same fundamental debate, which is how much antitrust makes sense in the context of an intellectual property construct that really does correctly say if you invent something and get it patented that you have a right to enforce that and that is a property right, just like any other property right.

So where is the boundary between those two areas of law? I think that has shifted over time. In the U.S. generally, I would say the shift has always been more in favor of IP rights, so there are very few antitrust claims that would go against enforcement of an IP right. I always bridle when people say I can do anything I want with my IP right. You antitrust people are just wrong. There is no antitrust, there is no restraint on what I can do with my IP right. I think that's just not true. If you look at *Walker Process* and sham litigation, those are both examples of doctrines which say, well, no, there are actually limits to what you can do with your IP right. That's another example when you get people into these corners they say things like that, which I think are just not accurate. So in the U.S. during the Obama Administration there was a lot of focus on standard-essential patents and enforcement of those patents and in particular injunctions, people who were seeking injunctions on standard-essential patents. Because the view was that's actually a category of patent where the IP holder has made a commitment to a standard-setting organization that they want to license the patent and they want the patent implemented. As a consequence they, in my view, essentially conceded that injunctions are not a remedy that they want. They actually want people to use the patent, so they can be paid royalties.

There was long period where the DOJ and FTC really worked hard to try to give guidance to the public. And Dave Kappos of PTO and I did a joint statement on this issue where we were able to bring together the IP and antitrust constituencies to come up with a way of saying effectively in these certain kind of circumstances there is a limit on your ability to enforce your IP right in that way. This sort of questioning about standard-essential patents has been spread around the world.

And more generally, on people thinking about how should antitrust respond when complainants say, well, this actually wasn't a licensing regime, as what you see in the *Qualcomm* case in Europe, that in some way actually impaired competition. I think what you've seen abroad is, for a variety of different reasons, having to do with how different economies operate and I think in many ways generally slightly less deferential to IP holders. I think a little more action abroad in terms of the Guidelines that were created in China, India, Korea, Japan and around some of those very issues about can you be required to license your IP to someone. In the U.S. we generally say no, we don't force people to trade with other people. In China they feel a little bit more willing to do that. Then you see a legal structure in Europe which I think the Commission has tried very, very hard to bring cases that provide some framework for understanding these issues and for bringing some clarity of the relationship between IP enforcement and antitrust. So the *Huawei* case that they successfully prosecuted was an example of that, and I think the *Qualcomm* case is the next chapter in that.

MS. FAIR: Thank you. Maybe I'll start with Alex. We were talking a bit last night about certain compulsory licensing and whether or not you had that obligation to license to others. You had some perspectives on how IP protection really is encouraging innovation in aerospace.

MR. LONG: Yes. I'll start off and join Renata in disagreeing with your premise at the very beginning about conflict in IP and antitrust. I don't think they are in conflict at all. I think they are very complementary. Intellectual property is inherently procompetitive. It promotes innovation and protects the value of R&D investments to bring new technologies and products to the market. Antitrust protects against the anticompetitive effects. I don't see antitrust necessarily designed to be procompetitive; it is designed to protect against anticompetitive behavior. So I see them as very complementary. The aviation or aerospace business is an industry with very high capital investment. As you can imagine, it is a very regulated market.

The FAA and the IASA in Europe take a very strong interest in making sure that aircraft engines are airworthy; they fly around and they stay flying around without incident. It is a long life-cycle market in which aircraft engines are specifically designed for and certified by the regulatory authorities for a specific airframe. Once an engine goes on an airframe, it stays there for the life of the aircraft, which could be 25, 30 years. There is enormous upfront investment and effort that can begin ten years or more before an engine is actually put on to an aircraft and is actually flying around. The returns on that heavy investment, we're talking about hundreds of millions of dollars, if not billions of dollars, comes over the life of the service of that engine in flying around commercially. There is what we call MRO service, maintenance, repair and overhaul. So our commitment is once an aircraft engine goes on an airplane that it stays flying for the life of that engine. So it is in servicing that is really where the money is made.

And obviously, having that protection of your intellectual property that is built into the engine, if you will, and designed around repairing it and maintaining it, is absolutely critical. Because without that protection, the hundreds of millions of dollars and billions of dollars in investment are at risk. The other thing that I should mention about this, at least in the commercial arena, it is a small market in terms of players. There is GE. There is Pratt Whitney and Rolls Royce. Collectively, that's well over 95 percent of the commercial aviation market around the world. That inherently creates concerns for some. But again, this is a market that, unlike what we heard in the earlier session about the digital market space and perhaps telecom, as Melissa will talk about, this is not an industry where there are real network effects. This is an industry in which your main threat is disruption. So your objective is to develop intellectual properties and technologies that will get your engine on an aircraft and stay there for the next 25 years. Knowing that the next time around, when you are upgrading to next generation products, there is going to be a disruptive technology out there that is looking to unseat you in the marketplace from your market position. There is a constant effort to innovate, and the only way to protect that is with strong IP protection laws.

MS. FAIR: I am glad I simplified my characterization of IP and antitrust. Melissa, what can you come up with?

MS. SCANLAN: So I am coming in with you, Renata. Actually, I am maybe like Renata in that I am going to bring us all together a little bit. I agree with Renata philosophically and from a policy perspective that antitrust laws and IP laws really aren't polar opposites and in fact shouldn't necessarily be in conflict. Because at their highest level they share the same mission, which is the efficient, rational functioning of business innovation and the economy. I think those goals are aligned. What I feel, looking at these issues through my prism of being in-house counsel at a growing and successful telecom company over the last ten years, is that is true in aspiration, that's true in theory, and it almost is never true in reality.

T-Mobile sits in a somewhat different place in terms of our technology development and the importance of our technology than Alex does. It is an important distinction for this discussion. We offer a very complex service over complicated networks. But for the most part, our intellectual property is provided by others. We have a network that's put together by big companies, like Ericsson and Nokia. They create the technology and they provide the technology, and we purchase it and put it together into a network. We offer handsets from Apple and Samsung and others, and we're selling them, so we are in the chain. But the technology is, for the most part, created by others.

Now, we have our own patents that we create. We have engineers who are smart and who innovate on our network and innovate in other ways. And we have patents and we pursue patents and get patents. But our position with patents is very different from Alex's, where you have probably three very big players in your space, all of whom have very significant IP, and there is a little bit of mutually assured destruction that happens with that. So with us the big threat on the IP side, which has grown in a crazy way over the last ten years that I've been at T-Mobile, is not from competitors. We have competitors. AT&T, Sprint, Verizon are our primary competitors. They each own a lot of IP and develop a lot of IP. So far the competitors don't sue each other in our space. That is not a thing that happens. But we have a crazy amount of IP litigation that is brought by trolls. Some small trolls, a lot of small trolls, a lot of medium size trolls, then a few really big, nasty, horrible trolls, like IV. And I'll probably end up talking more about IV, because I am obsessed by IV. We have had no less than five lawsuits brought by IV. They will tell you they are an innovator, but they don't innovate, certainly not in our space. They purchased a whole lot of patents, some good, a lot mediocre, some terrible, and they go around asserting those patents against companies who are actually doing business. That's their business. Their business is suing companies who are doing business.

I don't want to spend all my time right at the beginning talking about IV, but I would say when it comes to the intersection of IP and antitrust, I spend a lot of time thinking about the IP defenses, the tools that I have in my chest on the IP side. I wish I had more tools on the antitrust side. Because I absolutely get that the antitrust laws are designed to promote innovation and promote efficiency and promote a functional economy. And I look at IV and other trolls, and I think, gosh, if our antitrust laws can do anything from a policy standpoint to further those goals, we ought to have a way to bring an antitrust claim against IV. Many have tried, most recently Dan Anziska at Troutman Sanders, representing Capital One. He brought some great antitrust claims against IV and very well pled with a very smart expert, Scott Gordon. And they just lost summary judgment in the Eastern District of Virginia. So far we have not figured out a way to use the antitrust laws to prevent that kind of troll behavior, which to me is absolutely not about innovation.

MS. FAIR: So before we turn to the patent troll topic, I am going to turn back to Renata for a moment to talk a little about *Qualcomm*, and then maybe Melissa, you could chime in on the perspective of someone who is dependent on Apple, but doesn't have standing to bring suits themselves. This just came out this week, so I know you haven't had much time to reflect on it, Renata. But for those in the audience that haven't had the opportunity to follow the news, could you provide a little bit of a background of why Qualcomm is being fined in the EU for fees they paid to Apple for exclusivity and maybe some of the U.S. perspective on similar kinds of contracting.

MS. HESSE: Sure. I am not an expert on the *Qualcomm* case, nor do I want to be. But the case is interesting, I think, because it is an exclusive dealing case effectively, where Qualcomm paid Apple lots of money to buy chips exclusively from Qualcomm. And I presume that there was a showing to the Commission that that arrangement resulted in harm to other people who wanted to sell chips to Apple, and Apple is a very important buyer. So in exclusive dealing we haven't seen a big exclusive dealing case in a long time in the U.S., at least not one brought by the government. So it is an interesting case from that perspective, and it will be interesting to see how it unfolds. It is also interesting in that it is not really an IP case. I mean it is about licensing patents, but it is really a straight up—more straight up contract case as best I can tell.

I did want to pick up on something that Melissa said, which I think is important, because I do think it is a little bit of an atmosphere behind all of this. People often used to ask me, you know, why is it that this is such a big deal now? Why is everybody thinking about antitrust and patents and IP enforcement? Why is this all coming up? Why are the NPEs such a big deal these days—not trolls? I do think that Melissa picked up on an important piece of this, which is that there was this period where people were paying tons and tons of money for patent portfolios. And when you start monetizing patents that way and when companies start paying that much money for patent portfolios, then people start thinking about ways to demonstrate some return on investment having done that. So I do think this adds what people would think of as straightforward operating companies divesting their patent portfolios to third parties that then effectively became enforcement vehicles to make money off of those patents. You saw a rise of this kind of behavior.

IV is a different kind of troll in that sense. But many operating companies have split up their manufacturing operations from their patent portfolios and have—not sent them off—it would be an interesting set of facts if we could see that—but have given those patents over to another entity, which is then free to go out and just try to make money off the patents. So I think that's part of the reason why you are seeing so much of this activity these days.

MR. LONG: If I can jump into this. I mean I am a staunch supporter of and believe in intellectual property rights, strong intellectual property rights. I empathize and sympathize with Melissa's perspective. But I think whenever I hear these challenges and concerns about NPEs or PAEs or trolls, whatever you want to call them, there is always a definitional problem of what's a troll. At GE we have thousands of patents. Do we practice them all? Could we possibly assert them or try to monetize them? Yes. It is the way to get a return on that investment. So we start with that premise. The other issue here is I don't think that the NPE issue is an antitrust concern. I think primarily the issues that are there—and I do believe that there are issues there—you know, are best remedied in the realm of IP law or specifically in patent law here. I think both substantively and procedurally there are improvements that can be made to our system that could help to reduce if not eliminate the issue. You've got to start with the fundamental premise. The NPEs or PAEs, whatever you want to call them—I am avoiding the word troll, need a way to realize a return on their capital investment.

And there are situations, as Renata has spoken about, where companies would choose to separate into a holding company the patent assets and separate manufacturing and sales. There are significant tax reasons for that, for example. It really just comes down to, even in a company like IV, the way I see their business model, and I am not an economist, is they essentially channel—they are compensating the inventors, the innovators who are upstream in the development of those patents and themselves who are looking to get a return on a downstream end when they are going out trying to affirmatively license the stuff. I think the main issue that we tend to hear about, at least where it became a very combustible kind of topic when you were talking about this, is the fact that there are a lot of bad patents out there. Ultimately that's what the main concern is. If you didn't have so many bad patents, maybe there wouldn't be a so-called troll problem. I think there is an issue when you have a patent aggregator, a troll, that amasses a lot of bad patents, then the value of that portfolio is artificially amplified. Because you may have a thought that individually the patents themselves are not worth very much at all, because they are bad. They shouldn't have been issued or the improvements are incremental.

But when you combine it all and assert it against a T-Mobile or another company, and you have that sort of weight of 20 patents or so asserted against a company in the aggregate, they do take on an artificial increase in strength and value. And I think that is part of IV's plan and business model. That is the problem that I think needs to be addressed. But I do believe it is more in the realm of, again, procedural and substantive patent law in how these things get forced, how they get challenged. I think providing more guidance to the patent office and the court system in that realm needs to come from Congress.

MS. FAIR: Melissa, what's your reaction to pursuing the issues with trolls or NPEs through the patent law, as opposed to through the antitrust law?

MS. SCANLAN: Yes. I agree with a lot of what Alex said. First of all, I would never think of GE as a troll, just for the record. I don't think that you have to be practicing every patent that you own before you can assert them. I think there is a vast world between GE, as an excellent highly functioning business, providing critically important service, and IV, which I think doesn't do anything really, other than assert patents. Although they for some reason deny that that's the case.

[LAUGHTER]

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Antitrust: Practical Issues in Counseling Program

Thursday, January 25, 2018

Moderator Rebecca Kirk Fair, Analysis Group, and panelists, Melissa Scanlan, T-Mobile; Alexander Long, GE Aviation; and Renata B. Hesse, Sullivan & Cromwell, speak during the Antitrust Section's "Practical Issues in Counseling at the Intersection of IP and Antitrust" program during the NYSBA Annual Meeting at the Hilton Midtown in New York City on Thursday, January 25, 2018.

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So I would never think that. I think that attacking mediocre and poor patents is obviously important. We do it all the time, and in fact, we have done that with a huge degree of success in IV. It has taken us five years and an ungodly amount of legal fees, but we have essentially eviscerated every one of their patents that have been asserted against us at the district court level. They have not made it to a single trial, because we blew all their patents out on Section 101 grounds and other grounds, summary judgment motions and just really good, aggressive lawyering.

So we use all those tools, and we have to. But I take issue a little bit with what Alex said in that I just don't believe that there shouldn't be a role for the antitrust laws. I don't think the antitrust laws should be saying, okay, well, yeah, these are patents, they are special, there are these special property rights, and so the antitrust laws are going to step way, way back and not be involved. To me, the antitrust problem is not that they're asserting bad patents. That is a problem, that one can deal with the patent laws. You've got to have a lot of money, smart lawyers. You have to have the time to do it, but it can be done. In my view, the antitrust problem with IV is more around how they do it. It is the amassing of enormous portfolios, maybe with one or two or three valid patents and a total number of crappy patents and offering to license them.

Query whether that's even real. I didn't feel that it was real with us. Meaning that it wasn't ever in the realm of reality with us. And then if the answer is no, we're not going to do that, then a lawsuit ensues. In our case it was asserted across virtually every piece of technology in our service offering, and that's a lot of technology. The not even implicit threat—implicit in terms of the corporate pleadings, but quite explicit when talking to IV—the explicit threat is look, guys, you'd better figure out a way to come up with a really good settlement offer, and by the way, they mean a really, really good settlement offer. Because if you don't, you may win here or there or get rid of this patent or that, but we have 30,000 more patents in our war chest, and we are just going to bring another lawsuit and bring another one. And guess what? That's what they did. So that process of packaging everything up, take it or leave it, and you know, you've got to pay us an eye-popping amount of money for us to go away—oh, and by the way, when we do go away, it is only going to be on a five-year term. It is not going to be forever. It is that way of doing it that I feel like the antitrust laws ought to be able to get to, and that's the way I feel like the antitrust laws fail us. No offense.

MS. HESSE: We've been thinking about this for long time, and it has been a struggle. And there was a large policy debate within the Obama Administration about are there things we can do, tweaking the patent laws, the ITC? Are there tools we can put into the hands of people who are being pursued by patent assertion entities that at least make it a little bit easier to combat them than it is currently? Some of those things have happened. But to me it is the opacity of the portfolio which is the most challenging thing.

MS. SCANLAN: Well, combined with take it or leave it.

MR. LONG: It seems like the main complaint here—and again I empathize with that—is the cost involved to shed a spotlight on what's improper about what IV is doing or the patents they are asserting. The cost to litigate is very high. And procedurally, for some companies it can bankrupt them. And it is existential, and that's what companies like IV count on. That is an issue. I take this academic view that it was easier to tear apart a bad patent and bad patents never got there in the first place, if they didn't enjoy this strong presumption of validity. What the courts have done over the years, of course, is taken the teeth out of injunctive power. It is not automatic. Heightened pleading standard to try to show there is a *bona fide* claim there.

But still, I agree, there is a long way to go. And damage law has been a huge issue. Because at least in the US, and this harkens back to some of the things we were discussing last night about the *Qualcomm* matter. How do you evaluate a big pool or portfolio of patents to attribute real value? I mean not hypothetical, but just put a dollar amount on one relative to the other. It is way too fuzzy. I think you could essentially usurp that the IV business model, if it was clear that you could expect lower returns than they could expect going into this, and disincentivizes the business model, if you know that at the end of the day, even if they are successful, they are only going to come out with this low return. And I think that is back in the realm of patent valuation and how these matters are litigated and resolved. I am not sure what kind of prohibition we can put on if we agree, well, patents are valid and every patent, the value is whatever the market can bear. Because that puts you against that idea where antitrust can really have a role in regulating. That's the way I am looking at it.

MS. FAIR: Alex, we circulated some reading materials in anticipation of this panel. I am curious, some of the articles that were in there and even some of the steps that were taken in the *IV/Capital One* opinion walked through circumstances where one may see an antitrust claim that would have standing in the context of patent assertion. I am curious what your thoughts are in terms of the tax benefits of separating the patent assertion portfolio from the operations. Is there a circumstance raising rival's costs? For example, if GE separated its patent portfolio that was roughly related to engines that you are not pursuing, and then had someone go out and pursue litigation against Pratt and Whitney and Rolls Royce in a method using the approaches that IV is taking, could that ever violate the antitrust laws, and is there any room for antitrust enforcement in that context?

MR. LONG: Well, the line that is drawn today is this idea of sham litigation, going out to assert patents that you know are not good. There are some elements there, and there is a lot of litigation involved in the elements. And the Noerr Pennington doctrine is what protects you. If you've got a patent right, patent is the exception to the government monopoly or monopoly rule, and you start with that presumption of validity that's given by statute. So you've got already a lot to protect a patent owner in that regard. They're within their right to go out and assert the patent however they want. Where you cross the line, of course, is when you have bad patents or even questionable patents. And I'll be very clear, no way on my watch would we ever go out and assert a patent that in my mind is just not good. I think there is an ethical issue, frankly, associated with that. And GE, of course, there is a lot about the part of the company in terms of being an innovator.

MS. FAIR: Reputation.

MR. LONG: Exactly. Now, the issue really does go back to this idea about is it a good patent or is it not, or is it somehow unsavory to aggregate a bunch of patents where you may have a few good ones and a lot of bad ones. It is an interesting question, and maybe there is something from an antitrust perspective to look into when you have a lot of patents, and you have some question about the validity of these patents. But I don't know, how to regulate that, going into the mind of the patent aggregator.

MS. HESSE: I don't know if you have to do that. What you described is privateering, I think, basically. And I do think that privateering can be an antitrust problem. So if you are taking your patent portfolio and selling it to somebody else, and you are agreeing with that somebody else that you are going to take those patents and harm your competitor, it seems like there ought to be an antitrust claim in there somewhere. That one doesn't strike me as hard. The problem is it is not that clear. You don't see an agreement between the entity selling the patents that says now take these patents and go off, you know, and only go after my competitors; don't go after other people. But that certainly would be something that I think people would be interested in looking at, if you could find it.

MR. LONG: Yes. I mean, it has to be based on the facts. You have to look at it from the point of view, if the patents are based on an investment, ought you not be able to get a return on that? Is your objective to harm your competitor or to get a return? The same action can result in both. So I think the way the law looks at it right now is they do look at questions of intent and good faith and things of that nature, which are imperfect. Those are imperfect tools to regulate this issue.

MS. FAIR: Maybe bringing it back to something else that you brought up in terms of what's the value of the patent, and what's the value of any given patent in the portfolio? Something we were talking about last night included the difficulty in extracting the value of something being part of a standard and the value that patent or that technology would have absent being adopted as part of the standard. And how do you think regulators can deal with that and put some guardrails on FRAND licensing in a way that will allow us to address some of the complications with standard setting and technology that's at the heart of going forward?

MS. HESSE: That's a good question. We tried really hard to come up with some guidance on that. I think it is a hard question to answer. How do you divide those two things up? The idea of FRAND is that you charge the rate you would have negotiated in the absence of becoming part of the standard. It is a hypothetical exercise, which is hard to replicate in the real world. There is a lot of stuff that happens, and we are now back to standard-essential patents. Because I think the patent world has a way of figuring out that valuation, and it is a crazy test in my view, but there is a test, and you apply the factors. But the challenge in the FRAND context, how do you then extract this value that can be gained when you agree to put your patent into a standard? And I've always viewed that patent holders sometimes say, well, no a FRAND-encumbered patent (they don't like when you say something is encumbered) is no different than any other patent. I put it in the standard, and I can extract whatever rents from that patent the market will bear.

I think fundamentally FRAND is a bargain that people enter into when they decide to put their technology into a standard. Doing that gives them access to a much larger market, which is a benefit for them. And in exchange for that they are agreeing not to try to extract the rents you can get from that. I am not a hundred percent clear exactly what position Makan is taking on this. But Luke Froeb talked about this in Brussels a month or two ago. He said that this whole idea of holdup versus holdout, so people worry about patent hold up in the context of a standard-essential patent. They worry that the patent holder essentially will say, well, now that you've implemented my standard, 3G, 4G, LTE, the standard, you are using my patent and you owe me royalties. I know you don't have a choice.

You've got to implement if you want to sell a phone or have your wireless network work, you've got to implement this standard, so you are going to pay me whatever it is that I want. And that holdup concern, I think, was at the root of people putting FRAND into the IP policies. Luke has this idea that somehow patent holdup and patent holdout, which is this notion that a licensee will then say, wait a minute, I need you to show me that I actually infringed these patents, that these patents are actually valid and enforceable, I need you to show me that before I pay you anything. And yes, if we have to litigate that, we will litigate it. And yes that's going to take lot of time, and while we are going through that process, I am not paying you for patents I don't think are infringed or aren't valid or are unenforceable for some reason. I've always thought that holdout is a creature of the patent laws effectively. It is the way that the patent laws are designed to kick bad patents out of the system. And we want people who are licensing patents to actually test patents through litigation, because we want to kick bad patents out of the system. We don't want them in there.

This isn't to say that all people who hold out, to use that phrase, are good actors and that they are the angels and the people who hold up are devils. There are always good people and bad people on both sides. But Luke's fundamental thing is that these two sides are symmetrical. That holdup and holdout, the implementer and the patent holder, are symmetrical. That the implementer has a choice before they implement the standard to determine whether or not the royalties are going to be such that they want to implement. I think that's a faulty assumption, particularly for standards like the telecom standards. You have to implement that standard. You won't have a product if you don't. So it is not really an option to say, well, maybe I don't use that standard. Your electric plug, USB, there are hundreds of standards you can think of that there is really no option on the implementation side. If you want to have your product work, you have to implement it. So there has been a shift there, and it will be interesting to see what comes of that.

MS. FAIR: Melissa, I imagine you agree that these two sides are not symmetrical, but I am curious if you've had recent experiences where you would be able to demonstrate or think through why the holdup probably would be bigger than the holdout.

MS. SCANLAN: Yes. Well, I'll just echo what Renata said. I think the issue and how we view it from where we sit in the industry is we are not contributors to standard-essential patents. We are not contributors to the standards. As Renata said, though, we absolutely buy a lot of products that have to comply with the standards. So our vendors are all about the standards and all involved in the standards. The challenge for us as a business is when you've got the Apple/ Qualcomm issues that are going on—or before that, this wasn't necessarily standards, this was just big litigation. You had the Apple/Samsung smartphone wars going on. The challenge for us as a business in that situation is we depend on supply. We absolutely have to have iPhones and the latest Samsung phones to sell to our customers, and we have to have a functioning network with all the pieces that are required for the network.

But we're not in privity with any of those except with the handsets. But on the Qualcomm side we are not in privity with any of the battery manufacturers, so we actually don't end up having a seat at the table. We have monitored those litigations closely over the years. We have tried to get involved, and we've made motions to the court from time to time to put in filings that state our position, in the supply chain and as a key participant in that micro economy, if you will. And courts have generally not been particularly interested in hearing from the carriers. I think partly that's because they are trying to simplify what is already an incredibly complex proceeding. At the ITC we don't have standing either, because we are not the direct importer of the batteries in the case of Qualcomm.

The challenge for standard stuff, we follow it. We pay attention to it. We are very likely impacted by it, but we can't actually really advocate around it in a direct way. We can call up our suppliers and say we would really like them to do X, Y or Z, but—

MR. LONG: Go work it out.

MS. SCANLAN: Go work it out. Everybody just get along.

MS. FAIR: So the session immediately before this one was talking a bit about market definition and market power and whether the toolkit for antitrust is sufficient to evaluate charges of the abuse of market power in evolving marketplaces, with platform economies and things of that sort. I am curious with the acquisition of large patent portfolios, whether by a non-practicing entity or whether by a participant, as well as the possibility that some of the standard-essential patents be contributed to a standard body by maybe coming from one of the participants in the space. How would we see the evolution of assessment of M&A in the context of this kind of complexity? Is there a moment in which FRAND negotiations can actually amount to a holdup that violates the antitrust laws? How do you think about acquisitions, patent portfolios from competitors, by competitors, and do you think that the antitrust laws are sufficient to assess these tangential acquisitions of IP, when the boundaries of any market might fit into your own technology expansion?

MS. SCANLAN: Renata has to start with that one.

MS. HESSE: There is a lot packed in there. So let me try to unpack a few things, and then maybe somebody else can pick up the cudgel and move on. So the patent portfolio acquisitions can trigger Hart-Scott, and the agencies do look at them. The biggest ones—when they did those I was not at the Division for the Nortel patent portfolios that were sold. They spent a lot of time looking at those, then ended up with a statement or two that said, this is going to be okay because we don't think any of the incentives of the acquiring companies are going to be any different—if I am recalling that statement correctly—than those from whom they are buying the patents. There was one exception to that. I think they singled out Google a little bit, and said, well, we are not so sure about Google. But the reality is it is really, really hard for the antitrust agency to unpack a portfolio of 100, 200 patents and figure out whether there is a problem with combining that portfolio with the other portfolio. That is really hard to do, because it requires actually knowing something about the patents, what they cover, whether it is going to create a blocking position that didn't exist before.

I think the hope of the agencies has always been, if somebody who is actually licensing from these guys and would be blocked by this combination of patents, they are smarter than we are, so hopefully they are going to come in and tell us about it. You know, that's hopefully true, but you know, it is not such an easy thing to rely on. But absent hiring a bunch of patent experts to come in and evaluate the patent portfolio and tell you whether or not there is something about the combination that creates a position that didn't exist pre-combination, it is very hard. With respect to standard-essential patents, they do think very hard about it. And the FTC has done a bit of this in Section 5 with ensuring that the commitments that were made by the current owner of the patents get passed onto the new owner, so that the patents continue to be licensed in the same way. The FTC brought a case against somebody who—I always thought this was a little bit of a strange case, not because I liked what the company was doing, but I wasn't quite sure about the antitrust theory. But someone acquired the patent and raised the royalty by some huge amount and—

MS. SCANLAN: Common practice in pharmaceuticals.

MS. HESSE: Yes. And the FTC did go after them. So there is some activity. But it is a challenging area for the agency, because fundamentally they are not patent experts.

MS. SCANLAN: Yes. I would just add to that I think it is clearly a challenging area, even if you are a patent expert, it is a challenging area. Because you almost need to be a patent expert and a business market expert. I do think that as the IV antitrust claims have played out, it is hard for courts to even wrap their heads around the idea that a big portfolio of patents that are directed to a particular industry, say the banking industry, is already really hard. So if that's hard, then this analysis that Renata is talking about is even harder, it seems to me, because it is not even context specific.

In the *Capital One* litigation you at least know that you are in the online banking space. And still even there it was hard. It did seem from reading the summary judgment decision—which was very lengthy and a well-considered decision, and the judge there was very clearly relying on the U.S. platform's expert testimony, it seemed that he could get over at least on summary judgment the idea of defining a cluster market in the banking space, which was huge. Then the problem is, the whole thing went away on *Noerr-Pennington*, which was a heartbreak. But I do think that acquisitions of—particularly when it is acquisition of a patent portfolio, not particularly the assertion of it, but the acquisition, that is tough.

MS. HESSE: By the way, the patent pool letters are a little bit helpful, though not exactly the same thing, but they are combinations of patents that are then licensed out for a particular use. And the Division reviewed these—there are two of them—and published business reviews which talked about the kinds of things that the Division worries about when you put patents together. So if you are interested in thinking about at least how to license patents or thinking about acquiring portfolios, they provide a little bit of guidance.

MS. FAIR: So I think we have about ten minutes left before I turn to the room for questions. If there is anything else any of you want to say. No? All right. Any questions for the panelists? Yes, in the back.

AUDIENCE MEMBER: I would like to ask a question on a subject that you didn't cover. I am interested in the interplay between the antitrust laws and IP in applications. And probably the most recent Supreme Court case to address that interplay is *Actavis*. And before *Actavis* a whole slew of circuit courts seemed to say you apply the IP law first, and if the restraint exceeds the scope of the relevant patents, then the antitrust laws come in. And *Actavis* seems to say no, that's not right, particularly if there is no express provision of the patent laws that displace the antitrust laws. And in the absence of that displacement, you do the antitrust analysis first. And you see whether or not the use of the patent laws is "anticompetitive." The Supreme Court basically left to the lower courts to figure that out. But you get into the conundrum of how a competitive effects analysis can be reconciled with the exclusionary scope of the patent to start with. And so I ask you, who are trying to help us counsel in the intersection of IP and antitrust, whether you have any formulations or reflections on how one reconciles the interaction of IP and antitrust when applied in the same setting?

MR. LONG: I'll jump in on that. I tried to address this in my opening remarks when I was responding to something that Rebecca said. You have to go back to what is the purpose of these legal regimes? Patents are protected in the U.S. Constitution. It is a Constitutional issue. And it is by design to promote "the progress of science and useful arts." IP law—we will just focus on patents here—is inherently procompetitive. It is a protection for a heavy investment and provides a monopoly but for a limited time. It is not forever.

Right now you get 20-year monopoly from the time that you file your priority filing. But in a regulatory environment where there is a lot of up front, in fact, it is a lot less than 20 years when you have that monopoly. But it is by design to provide some protection, some opportunity for you to essentially reap a return on that. I don't believe antitrust law is about promoting competition. I think it is protecting against anti-competition. So in that regard it is focused on unreasonable restraints on trade and unreasonable actions that take away from fair trade. Certainly I understand that when you have a government-sanctioned monopoly like a patent, that seems to rub up against the antitrust law, but inherently it is for a limited time. So I would agree with the initial premise that you said, that first you look at the patent laws and you determine whether there is some sort of illicit extension, overleveraging of the limited rights that you have that then create that antitrust problem. I think that is the right balance, because it is something that, assuming you've got valid rights, a foundational invention that you had to have investment in, really what you are looking for are unreasonable restraints that are created as a result of your patent monopoly and not the monopoly itself. I hope that addresses your point.

MS. FAIR: Yes.

AUDIENCE MEMBER: Is there any one Circuit Court of Appeals or U.S. Supreme Court decision that you could point to us that we could read and get a good flavor of what we've been discussing?

MS. SCANLAN: I don't know about any one.

MS. HESSE: The D.C. federal circuit decision in the *Motorola* case on the standard-essential patent issues and FRAND. *Actavis* is a really good one just for the intersection of IP and antitrust.

MR. LONG: What about *Illinois Tool Works*?

MS. HESSE: *Illinois Tool Works*.

MR. LONG: That case talks really about this idea that just because you have a patent monopoly, it doesn't create market power. It does get you back into the regime of what the laws are supposed to protect and what they are all about. That's why I like that one.

MS. FAIR: Yes.

JAY HIMES: Melissa described patent troll litigation as a place where she gets the feeling that antitrust has failed. I can think of another one that's in the industry. It is that drug that started out at a dollar a unit, and it was at that price for a long period of time, and all of a sudden it costs $100 a unit. There is no cost justification. And you try to explain to a user, who isn't a lawyer, that this thing called antitrust really doesn't seem to get at that. Do any of you think that there is a role for antitrust in that type of scenario?

MS. HESSE: In Europe.

[LAUGHTER.]

Sorry. I think the problem there is that those are framed up as excessive pricing cases effectively. And the U.S. has a very, very strong anti-reaction to regulating prices and trying to tell people what the right prices are. But you do see those cases happening in Europe now.

AUDIENCE MEMBER: So Renata, you would agree, however, that we let our courts determine FRAND rates. So is it such a stretch to ask the courts to also determine pharmaceutical drug prices sometimes?

MS. HESSE: So FRAND rates are royalties, and they are royalties that are paid on a patent that is, as I said, contractually encumbered. We do let courts determine damages for patents.

AUDIENCE MEMBER: Well, they said royalty rates. There have been cases that have done it.

MS. HESSE: No.

AUDIENCE MEMBER: Per unit.

MS. HESSE: That is an excessive pricing case, though, right? What's the cause of action then where that would happen?

AUDIENCE MEMBER: Well, we usually justify it by saying that we don't want courts to set prices. Yet we certainly let courts set royalty licensing rates. You said that.

MS. HESSE: Oh, yes. No, I don't think it is that we don't want courts to set prices. I think it is that we believe that the antitrust laws shouldn't be deciding, where there is no exercise of market power. This is where the patent primacy comes in, right? Because you haven't done anything to encumber that patent in any way, and you have a lawful intellectual property right? And you go out and enforce it, and you say this is the price, pay it or don't, I don't really care. But the antitrust claim there is not so clear.

AUDIENCE MEMBER: That is the point, isn't it? It looks like someplace where antitrust fails us.

MS. HESSE: But what's the antitrust issue?

AUDIENCE MEMBER: Excessive pricing.

MS. HESSE: Right. Gotcha.

BOB HUBBARD: But isn't that a function of the anticompetitive alternatives that flow from a prescription item? Because of the regulatory structure that the FDA puts in place and otherwise, it is not a patent right that's creating that problem. Certainly as to some prescriptions that are written to be brand specific and otherwise, you could think of a prescription framework that wouldn't create problems. You don't have to make the prescription brand specific. You could define it by various parameters instead of by some of the specifics of a specific product. I think that's a prescription problem, or a prescription regulatory problem. Not an IP problem.

MR. LONG: Maybe both.

MS. HESSE: If there is a generic that exists, then you have a prescription problem.

MR. LONG: There is a scheme for generic drugs to file an abbreviated new drug application and that takes advantage of the testing data on the safety and efficacy of the brand drug. And the law encourages generics to go that route if they believe that they can bust the patent. It is the only area of law where patent litigation is actually promoted. It is designed to have challenges to patents so that the generic can enter the market and drive the price down, which addresses the other problem. So fundamentally, the patents that protect the brand are the blocking issue. Because Congress has provided a means to skip by or to certainly curtail a lot of the regulatory hurdles to getting generics on the market.

MS. HESSE: Unless the generic fixes prices.

MR. LONG: That's another related issue.

AUDIENCE MEMBER: I was just going to say I think the other difference between the court setting FRAND rates and the example that you brought up is that FRAND is typically resulting from the standards setting process, which is effectively a sanctioned collusive act. And that's not occurring when someone secures a single patent, recognizes no one else is practicing it, and decides to jack up the price until someone enters. So I am not sure the comparison is all that accurate.

MS. FAIR: I think one of the difficulties with some of these drugs where the price went way up is that they are not even on patent anymore. It is just the difficulties of getting some of the production facilities set up and getting to a cost effective level to pull the price down. But I don't know that it is an antitrust question per se.

MS. HESSE: But I do agree that it would be logical for someone to ask, you know a consumer out on the street, well, why can't you fix that problem? It seems like a problem.

MS. SCANLAN: Seems like a problem with serious social implications.

MS. FAIR: And that may contribute to some of our other problems. Any other questions? Thank you very much to the panel.

[APPLAUSE]

MR. POWELL: Thank you, Rebecca and team. That was a great discussion.

If at First You Don't Succeed...Evolving Approaches to Health Care Mergers

MR. POWELL: Someone had to go last. We are pleased to turn to our final panel, on "If at First You Don't Succeed...Evolving Approaches to Health Care Mergers." And it also happens, for some reason, to include our first PowerPoint of the day. I am going to hand it over to Chris White to kick it off.

MS. WHITE: Thank you for the introduction, Wes. Welcome to the last panel of the day, everyone. The Antitrust Section has saved the best for last, of course. This panel will focus on antitrust issues, including recent developments and trends in enforcement and litigation, in connection with provider mergers. As a panel, we have identified a number of questions that will enable us to focus our discussion this afternoon on issues that may be of particular interest for antitrust attorneys who work with health care providers or work in other industries but are looking to learn from recent developments in health care antitrust. Our discussion will emphasize the so-called "tipping points" in enforcement actions and in litigation. In particular, we will focus on a couple of the thornier issues with respect to market definition, particularly geographic market definition, and will briefly address cross-market mergers. Then, we will address efficiencies, including the standards to satisfy when advocating for efficiencies in a regulatory action, as well as those applicable in the event of litigation. Finally, we will wrap up with a discussion of potential alternatives for provider deals that might not survive federal antitrust scrutiny, including considerations relating to the use of COPAs or Certificates of Public Advantage, which generally are designed to shelter a transaction from federal antitrust enforcement. Before we jump in to the panel discussion, I would like to ask the panelists to briefly introduce themselves. Lisl, could you please begin the introductions?

MS. DUNLOP: Hi, I am Lisl Dunlop. I am a partner at Manatt, Phelps & Phillips, right here in New York, and these days I focus quite lot on health care antitrust matters.

DR. RAMANARAYANAN: This is easier, because it doesn't force anyone to pronounce my name. My name is Subramaniam Ramanarayanan. I am an antitrust economist, and I am an Associate Director with NERA Economic Consulting in New York.

MR. NAGLEY: My name is Jared Nagley. I am an attorney with the New York Office of the Federal Trade Commission, Northeast Region. I'll take this opportunity, even though it is on the slide—you can never be too sure about these things—to say that the opinions I offer here are mine and mine alone and don't necessarily reflect those of the Commission or any individual Commissioner. I can never say that too much.

MS. WHITE: I am Chris White. I am a Vice President at Northwell Health, which operates hospitals on Long Island, in New York City, in Westchester, and on Staten Island. I need to offer the disclaimer that any opinions I may express today are solely my own and may or may not reflect those of my employer, Northwell Health.

So with the formalities behind us, we will begin the substantive discussion by taking a step back. Some of you may be aware that the New York State Bar Association held a full-day program on health law issues yesterday. It is reasonable to ask the question, if we held a full day of programs on health law yesterday, why do we still need to discuss health care issues during the Antitrust Section's programming today? Well, there are several reasons. First, if you are not aware of the size and importance of health care expenditures with respect to the U.S. economy, the federal government estimates that health care expenditures account for approximately 17.9 percent share of the country's Gross Domestic Product, or GDP, and this percentage has been significantly growing over the past several decades as depicted in the illustration on Slide 5. Data including that relating to current trends in population growth, demographics, health care expenditures, and inflation indicate that health care expenses will be an increasingly significant part of the economy for the foreseeable future.

For example, demographic data indicates that we are becoming an increasingly unhealthy population. Inflation in the health care industry is continuing to increase at rates that exceed the rates of inflation for general consumer goods. At the same time, we are seeing an increasing prevalence of and higher expenses associated with innovative medical technologies. All of these factors suggest that health care will continue to become an increasingly significant part of the economy. The federal and state antitrust enforcement agencies appear to be fully aware of the significance of health care, both as an economic matter for the country as a whole, and also as an individual consumer matter. Slide 6 shows the Federal Trade Commission's enforcement statistics by industry sector for 2016, the most recently available data. It shows that the agency devoted roughly 50 percent of its resources to health care matters, including those involving the pharmaceutical industry, medical devices, and other sectors of the health care industry. Of this amount, roughly one-half, which equals approximately 20 percent to 25 percent of the FTC's enforcement activities, was devoted to the traditional health care sector, which generally is understood to include hospitals, physicians, and other providers.

Historically, the FTC's enforcement activities involving the traditional health care sector were largely centralized in the so-called "health care shop" at the FTC. Today, health care enforcement activities are performed in the FTC's merger "shops," conduct "shops," and its Regional Offices, including the Northeast Regional Office. This has resulted in a great depth and breadth of health care expertise at the FTC. Additionally, the U.S. Department of Justice also has developed its own strong healthcare expertise. In recent years, the DOJ has filed several health care merger enforcement actions and successfully enjoined two major health plan or insurance mergers. It also has filed several antitrust complaints challenging the conduct of health care providers. Locally, the New York Attorney General's office also has numerous experienced attorneys with significant health care expertise. There does not appear to be any reason to expect any significant change in federal or state enforcement trends or priorities in the coming years.

Additionally, it is worth noting that a substantial portion of the government's antitrust litigation occurs in the health care arena. There are several recent litigated health care antitrust cases where the agencies have tested their economic and legal theories in the federal courts. Historically, there is no other sector of the economy with a comparable history of litigated enforcement actions. Slide 7 depicts the agencies' recent litigation wins, losses and draws with respect to provider mergers, with the red boxes identifying cases where the government successfully stopped a merger, the green boxes identifying mergers that ultimately were allowed to proceed, and the one gold box identifying a merger where the FTC withdrew its complaint without prejudice and the merger appears to be proceeding under the protection of a state COPA, which we will discuss later in the program.

As shown on the chart on Slide 7, during the earlier years of the FTC's and DOJ's hospital merger enforcement, the government's record of success was somewhat mixed. During the early 2000s, there was a hiatus in federal antitrust enforcement activities while the agencies reexamined their traditional approach to merger enforcement and made some significant revisions to their analytical framework and tools, including their approach to defining relevant geographic markets for hospital services.

With that introduction, let's turn to the first substantive topic of today's panel, which will focus on geographic market definition for hospitals. Under The Horizontal Merger Guidelines jointly issued by the FTC and the DOJ, market definition typically requires application of the hypothetical monopolist test. As set out on Slide 10, application of the hypothetical monopolist test requires first identifying a small hypothetical or candidate market, and then employing an iterative process to determine whether a hypothetical monopolist of that candidate market could successfully impose a small but significant and non-transitory increase in price, sometimes referred to as the "SSNIP" test. If so, the candidate market qualifies as a relevant market. If not, the original candidate market must be expanded to include additional products or services, or perhaps additional geographic areas, until it captures everything that consumers would view as an appropriate substitute for the products or services sold by the merging parties.

In the context of hospital merger litigation and regulatory challenges, product market definition can be a matter of significant dispute, and we will touch on this topic later in the program. But geographic market definition typically has the most hotly disputed issue in many of these matters. For this reason, we are going to start our discussion today with the topic of geographic market definition. Jared is going to kick off this discussion, drawing upon his significant experience as both an antitrust enforcer, who must regularly consider geographic market issues, and as a litigator of geographic market issues.

MR. NAGLEY: Sure. Thanks very much, Chris. I am so tempted to give my disclaimer again. Let's just assume I've already given the disclaimer. As Chris said, and we will still talk about it a little bit later, but the product market in health care cases usually isn't something that's fought about by the time you get to court. There is a general agreement on general acute care, a GAC service market that is a cluster market with a whole bunch of products. The fight really is in defining the geographic market. The bigger the geographic market, the more hospitals that are included, the more dilute the effect of any particular merger in that market. In a second we will talk about exactly how we perform that analysis. One thing I wanted to say though about geographic market and the fights about it. The interesting thing I think about the government's approach to geographic market definition is that it is really flexible. A hypothetical monopolist test doesn't just work in a particular market. The hypothetical monopolist test works in rural markets, it works in urban markets, and I think its flexibility is what has allowed it to—with some hiccups—have success in front of federal judges at the district and circuit levels. So I was the lead attorney on the *Hershey/Pinnacle* matter. That was in central Pennsylvania. Our district court judge mentioned that central Pennsylvania is rural, true. But the hypothetical monopolist tests works in an area where people maybe drive a little bit more than they do for health care, a little bit further. And it also works in *Advocate/North Shore*, which was a geographic market that was defined in the northern suburbs of Chicago. So with that I am going to turn it to Subramaniam to talk a little about the specifics of how we apply the test, and then we will talk about some interesting issues that have come up as the test has actually been applied.

DR. RAMANARAYANAN: Thank you, Jared. So to give you a little more background and context, let me go back to what Chris was mentioning earlier about the geographic market definition often being contentious when it comes to hospital mergers. If you think back to the slide where there were a series of wins and then transitioning to a series of losses in the recent past, I think a lot of it has to do with these techniques and how the geographic market is defined. The tools that were used before were based primarily on patient flows, meaning you define a candidate market, you look at the number of patients going in and out of that market, and then compared to certain thresholds you determine whether that market is a relevant geographic market for antitrust purposes or not. And those criteria are based on whether that is a self-contained market. So you look at patient inflows, and patient outflows, that is, the number of patients that live in that market that seek care outside, and the number of patients coming from outside the market. So, before the 2000s, the relevant geographic market in hospital merger cases was defined using this patient flow metric. And some of you may have heard it being referred to as the Elzinga-Hogarty test, which is what this was based on.

Now there has been a shift in emphasis in the recent past. As Jared was saying, these days the Merger Guidelines make clear that when it comes to geographic market definition, the idea is to think about implementing the hypothetical monopolist test. Like Chris was mentioning, it is an iterative process. The Guidelines don't really specify a particular method but only outline the conceptual approach. This approach says you define a candidate geographic market, and you then think about whether a hypothetical monopolist or a firm that owns all the hospitals in that region would be able to profitably impose a small but significant price increase, which is typically five percent. If the answer is no, then the idea is there are competitors outside the market that impose a strong enough constraint, that the market ought to be broadened. So conceptually, I think it is clear, but the Guidelines don't really specify a particular method for implementing the hypothetical monopolist test. So I think in the recent litigated cases there have been a few different sources of evidence that have been used. In general, looking back at some of these merger challenges, I think what we've seen is there hasn't really been a dispute about whether the hypothetical monopolist test is the right framework to use or not.

But I think where they differed was on how the test was implemented and what evidence can be used. So in terms of the evidence that has proved to be compelling, payer testimony has proven to be critical—this was the case in central Pennsylvania, with *Hershey/Pinnacle* also in Chicago with *Advocate/North Shore*. Commercial payers are treated as principal customers for hospital services. So commercial insurers come in and testify that they would have to accept a price increase in place of excluding all of the providers in a particular region. That particular testimony seems to have been given a lot of credibility by courts in deciding what a relevant geographic market is. There is a role for economic modeling as well, and this came through in *Advocate/North Shore* where the FTC's expert had used the competitive effects model—a merger simulation model—to predict the price increase that would be imposed by a hypothetical monopolist in a candidate market. And to the extent that was greater than a SSNIP, then the FTC argued in favor of that region being a relevant geographic market. So this is one way of incorporating competitive effects into market definition.

So there are different sources of evidence you could use. I think to the extent all of these sources of evidence point in the same way, that certainly helps your case. But I think there are these different prongs of evidence that you can rely on in establishing that your candidate market crosses the hypothetical monopolist test.

MR. NAGLEY: One thing about sources of evidence, because I think it is an important point. So we talked about patient flows, and Subramaniam mentioned the Elzinga-Hogarty test. The problem with the Elzinga-Hogarty test, as helpfully explained by Elzinga himself in an amicus brief in the *Hershey/Pinnacle* case, is that it is only really good at measuring a certain kind of thing. It measures people who will travel based on a price increase. They will see that price increase and feel that price increase is an assumption. Now in *Hershey* we had evidence that 43.5 percent of the people who went to see doctors at Penn State Hershey traveled from outside our candidate geographic market. So what does that fact actually mean? Well, the fact indicates that some people are willing to travel a great deal for health care. But where patient flow data can steer you wrong is a problem known as the silent majority fallacy. I am getting comfy using fancy economic terms. Patient flow data doesn't do anything to tell you about the vast majority of people—the silent majority of people who want their patient care to be local and aren't willing to travel.

That some people may be willing to travel for health care doesn't speak to the vast majority who want local care. Also, the people who are willing to travel for health care tend to travel for non-cost related reasons (because they like the doctor, because of more squishy quality factors, because of being near family members). So traveling for health care isn't neatly tied to price, as all of you know who have health insurance—hopefully you all do. Your in-network costs are the same regardless of which hospital you go to. The last thing I'll say about it is that patient flow data isn't irrelevant. Patient flow can matter as a source of evidence, but patient flow matters to the extent that it informs what payers think they need in terms of servicing a local community. So patient flow doesn't matter in terms of telling you that, oh, 43 percent of the people traveled from outside the market; therefore, it is probably not a good candidate market. But patient flow may tell an insurer what hospitals are important to their members, and that may inform the bargaining dynamic, because the payers are the ones who are ultimately going to end up negotiating with the hospitals.

DR. RAMANARAYANAN: The focus on patient flow alone removes the focus from the payer, who is the direct customer for these hospitals. So that's been a significant shortcoming that's been recognized in the economics literature, certainly in the last ten, 15 years. So I think from a practical standpoint we do use patient flows, but definitely not as a dispositive source for market definition. Rather, we use it to help inform us about the competitive process, the competitive dynamics in the market. But I think certainly it is very well recognized and acknowledged that defining a market based on patient flows alone could lead to unreliable conclusions.

MS. DUNLOP: I agree with that discussion. It really highlights the paradigm shift in these recent cases, away from the focus on what the patients do, viewing the patients as the customers, toward the insurers as the customers and really focusing on the insurer/provider negotiating dynamic as the real core concern. Generalizing away from health care to other industries and other markets, the hypothetical monopolist test is used everywhere. We use it in product market definition as well, which we didn't talk about. So the key point when you are identifying how you apply the hypothetical monopolist is to identify your supplier, who is going to make up the hypothetical monopolist, and your purchaser. I think that what's really developed in *Advocate/North Shore* and, of course, *Pinnacle* is that really the only customer that we are concerned about is the payer. All of the other information about the patients is just helpful to inform us about the decision dynamics of that purchaser.

MS. WHITE: At least in the first instance or the first stage, right?

MS. DUNLOP: Yes.

MS. WHITE: As we consider geographic market definition and the movement away from the historical focus on patient flow data as a defining factor, it also may be useful to consider the increased willingness of the agencies and the courts to consider competitive effects as a component of defining the relevant geographic market. Would you please comment on how you have seen the application of competitive effects in the context of market definition, Jared?

MR. NAGLEY: Sure. It has been discussed in a few cases recently, including *Sanford*, which was just decided. But I can't really say much about *Sanford*, because it is still in litigation. Suffice it to say that the FTC wanted the district court—

MS. DUNLOP: I'll talk about it though.

MR. NAGLEY: Yes, and hopefully the result will be an affirmance in *Sanford*. But what I'll say about considering competitive effects in geographic market definition comes from *Hershey/Pinnacle*. In that case, what happened in the district court was there were rate agreements between Payer A and Payer B, large commercial insurers in the Harrisburg, Pennsylvania area. And the district court judge said he couldn't be blind to the commercial realities of the existence of these rate agreements. These agreements varied in length from five to ten years, depending on which payer. Now let's leave aside for a second whether the rate agreements were actually effective (we argued that they didn't do what the parties claimed they did). In defining a geographic market, the judge took into account the existence of these rate agreements and said, assuming they capped rates, how could there be a price effect from the merger? How could a hypothetical monopolist impose a SSNIP given the rate agreements? And without a SSNIP in a particular area, how could he define a geographic market? What the Third Circuit found, correctly—certainly we think anyway—was that private agreements have no place in market definition. The hypothetical monopolist test is hypothetical. It is in the name. If you don't engage in the exercise, you are just short circuiting it. So the question isn't what obligations a particular party may have taken upon itself voluntarily through contract. The question is what a hypothetical monopolist could do. Now, it is important to note that these private contracts have a lot of issues with them in terms of their enforcement, in terms of the fact that they are of limited duration. But bottom line, they contravene the spirit of what a hypothetical monopolist test is supposed to do, which is just to define the field, define the area in which you are supposed to evaluate competitive effects.

So we didn't object in *Hershey/Pinnacle* that rate agreements could be involved in a competitive effects analysis. We would have things to say about why we didn't think they resolved our competitive concerns with the transaction. But the point is that they shouldn't have any role—no role whatsoever at the market definition stage. And that was a mistake we think the judge made. The Third Circuit hadn't actually addressed that point exactly as such before our case. But it had done so analogously, in a case called *Queen City Pizza* with respect to product market definition, where the court basically said that if you allow private contracts to define the market, you are creating a very large loophole and defeating the purpose of the exercise of defining the market, which is supposed to be a judicial evaluation.

MS. DUNLOP: So that's the Third Circuit. This is a real point of contention between the FTC and the defense that we saw in *Hershey/Pinnacle* and I think you see it in the *Sanford* case as well. Which is to what extent do we allow reality to intrude on our thought experiment of the hypothetical monopolist test? Do we look at this as a kind of a perfect world where we have these factories sitting in an area and some hypothetical customer, and once you do your theoretical price increase, you have a SSNIP? And then you go out another ten miles if you have another factory. Or do we really look at what all these things are? They are hospitals. We have insurance plans that cover whole states of people—statewide, countywide, equally in each area. And each place stands and falls on its own facts. But there will be very different dynamics as to who those purchasers are. So the issue in *Sanford* is that there was a very, very large purchaser who was Blue Cross/Blue Shield. They had a market share approaching around

80 percent. Very, very significant in the area. There were two other commercial health plans, one of which was owned by one of the parties, and one was an independent third party. The question that the defense put forward was that, in this market, Blue Cross/Blue Shield didn't negotiate; they told providers what they were going to pay. So you can hypothetically join all these hospitals together and try to put a SSNIP on them until the cows come home—that price increase is never going to happen. So this approach to market definition just isn't going to work in this circumstance. Now they didn't try to put forward an alternative market definition, which as the court acknowledged in *Sanford*, certainly is their right not to do. The defense does not have to put forward what the alternative correct hypothesis way of looking at the market is. But of course, then the question is how do you define the market if that's the case? You do have the situation where power buyers, buyers such as the government, Medicare, Medicaid, Trinet, things like that—they don't negotiate. They set their prices.

MS. WHITE: Some sources suggest that the government typically pays about seven cents on the dollar.

MS. DUNLOP: There you go. There is no negotiation. And we, quite correctly I think, exclude those payers from the market when we are doing our market definition, because there is no competitive dynamic there. So why not take that into account with Blue Cross/Blue Shield? Now of course, there are questions of fact as to what extent that statement is true, and I wasn't in the case so I don't know how the evidence went. But assuming that Blue Cross/Blue Shield had 90 percent of the market— just assume for a second—shouldn't that be a relevant factor to take into account when you are doing your market definition? The *Sanford* court said no, these are competitive effects and completely agreed with FTC's position on this, and it is already being appealed. So on appeal we will see what the Eighth Circuit has to say about it. It will be interesting.

MR. NAGLEY: One quick rejoinder. This is probably not the only time I will disagree with Lisl. There are a number of factual issues in the *Sanford* decision as to whether there was actually no negotiation. Everyone can read the decision for themselves. It is a very difficult thought experiment, because as we find in a lot of the hospital mergers the stories are a little better than the facts on the ground. And I think that's why the FTC has had such a good success rate. As well, even in a hypothetical situation where there was no negotiation, why not take it into account when it comes to competitive effects? Again, no court has said we won't take it into account when it comes to competitive effects. We are just talking about setting the stage as to what the right area is to look at. You can't even get to terms as to what the area is to look at and how to evaluate it if you are going to fight about introducing practical considerations to a hypothetical effect.

MS. WHITE: We have one question before we move to the next topic. From an economic perspective, when you look at the economic analyses and tools that the agencies have at their disposal, do you believe that those tools can properly take into account the bargaining leverage of dominant payers? As an example, could the agencies re-evaluate the Evanston/Highland Park merger, or another retrospective case, to assess whether their merger modelling, if applied using pre-merger facts and data, would have indicated that a dominant local payer would not be exposed to the price increases as other, smaller local payers.

DR. RAMANARAYANAN: Correct.

MS. WHITE: Would the agency's pre-merger modelling have identified the dominant payer's immunity to post-merger price increases?

DR. RAMANARAYANAN: Yes. So in *Evanston*, when they went back and did the retrospective, they found that the price change for Blue Cross was much smaller, when compared to the other smaller payers. So in general when you are thinking about the modeling aspect, the assumption here is you have an insurer that's bargaining with these hospitals, or in the pre-merger bargaining dynamic, the assumption is that all of the leverage that the payer has over the providers is already fully used up. So to the extent the payer has some leverage, it is already present before the merger. The typical argument that the FTC economists, as well as the attorneys, use is that the merger doesn't really change that dynamic, because the payers had that leverage to begin with and they have that leverage going forward. So the only thing that's changing is the bargaining leverage of the hospitals. Now you could in theory think of an instance where, at least prior to the merger, the payer is not using the full extent of its bargaining leverage if doing so means hospitals are going out of business or it is financially difficult for them to survive. So there could be cases like that. I don't think these models account for that. The models which are typically used could be modified to reflect this dynamic in some way, but I don't think I've usually seen that being done in any of these cases.

MS. WHITE: We are likely to learn more about these and other market definition and competitive effects issues in the coming years, given current predictions about the likelihood of continuing provider and payer consolidation across the country. Turning to a slightly different competitive effects issue, Subramaniam, could you please help us to understand current economic thinking on so-called "cross market" mergers?

DR. RAMANARAYANAN: Sure. So until now we have talked about mergers within a market, a geographic market. Recently, there has been a stream of economics papers that look at cross-market mergers. So these are mergers involving hospitals in geographically distant regions—so, patients don't really choose between these hospitals; there is very little patient substitution between these hospitals. Basically, the empirical approach these studies undertake is to look at a past sample of such mergers where you have hospitals acquiring other hospitals or a system acquiring a hospital across these distant geographic regions, and then to examine the impact of these mergers on prices. And the empirical pattern they found is that in general, there has been substantial price increases. I think one study finds 8 percent to 10 percent percent, another finds 17 percent to 18 percent.

So there are fairly significant price increases in the aftermath of these cross-market mergers, even though there is no geographic overlap. So that's the empirical pattern that's being uncovered with these studies. Of course, just because there is a price increase doesn't really necessarily mean there is a competitive issue, because we need to think about the underlying mechanism that's causing this price increase. If you have a within-market merger, typically the idea is patients could substitute between the two hospitals before the merger, and the payers have the ability to play them off against each other. But after the merger, this competition is lost. If it is a cross-market merger, to the extent the payers can't really play these hospitals off against each other, the question is what is the mechanism that could increase the bargaining leverage of the hospitals? And one of the mechanisms these articles are exploring is the presence of a common customer across these markets.

For example, if you have an employer that has employees across all these different markets, and the employer is looking to offer insurance products that cover hospital services across these different markets, then a cross-market merger between hospitals across these markets could in theory lead to increased bargaining leverage because insurers compete to be featured among the employers' insurance plans. So if I am an insurer, and I know I have to offer a plan that covers employees in these different regions, and if there is one system that covers all the different regions, but then that system is not in my plan, in my network, then I am not going to be chosen by the employer. So that is a mechanism that is being put forward and that is a mechanism that is being tested. I do have to say it is still in a very nascent stream of literature. It is still being developed.

There are other possible reasons for why prices may go up in a cross-market setting. It could be because one of the hospitals is a better negotiator than the other, so the prices go up after the merger because of enhanced negotiating skill, which is not really a competitive issue. There could be quality changes, or other mechanisms at play which could also possibly explain such a price increase. I think these are well recognized in the papers. And I think what the authors are trying to do right now is trying to disentangle these effects just to make sure that if there is a price increase, is there really a competitive concern that underlies the price increase. I think that is where the economics literature stands on these issues, at present.

MS. DUNLOP: I think on a practical level, what you see is when these providers are not able to do within market or in-market transactions, is that they are looking to do cross-market deals. So when *Hershey/ Pinnacle* got knocked back, a deal came up with the UPMC and Pinnacle, which I believe had some cross-market issues. Obviously, we didn't hear about a challenge, so presumably there were no effects there. A little earlier or late last year there was an announcement of a transaction between Advocate, that failed to get its deal done with North Shore, and Aurora, which is a hospital system up in Wisconsin to the north of where Advocate is. So I took a look and thought it was not going to raise cross-market issues, because the deal was across a state boundary. The literature that Subbu referred to only really analyzed the empirical effects of within-state transactions. But what you find is that Blue Cross/Blue Shield of Illinois actually does extend up into Wisconsin. All of the Aurora facilities are actually in-network for Blue Shield. I think this at the moment is a bit of a theory looking for a problem. But it is interesting to know about because that could be kind of the next direction—as we said, if at first you don't succeed, you look for something else to do. So making a transaction that isn't in the immediate geographic market might be a potential solution. Here's something to think about if that's the way your client is going.

DR. RAMANARAYANAN: For a while it was a fact looking for a theory.

MS. WHITE: When litigating issues of market definition, the burden is on the government or the plaintiff, in the first instance, to assert a properly defined relevant market. Once the government has satisfied that burden and established a prima facie case, the merging parties bear the burden to rebut the prima facie case. They may offer evidence that competitive effects are not likely to occur, or may seek to demonstrate that any risk of competitive effects will be outweighed by procompetitive efficiencies, sometimes referred to as the "Efficiencies Defense" as described on Slide 13.

MS. DUNLOP: Just to clarify, the reason that this burden is shifting is not just because they have defined the market, but because within the market that they have defined, the concentration is super high. So the government gets the benefit of what we know as the *Philadelphia National Bank* presumption, which is a 50-year-old case. It just had an anniversary a couple years ago. And then the burden shifts to the defense. Otherwise, if the government just proved that a market in which market shares were not so significant, it would not get the presumption, and it would have to go on and affirmatively prove anticompetitive effect.

MS. WHITE: Right. In today's provider merger environment, the vast majority of merging hospitals are likely to include in any presentation to an enforcement agency at least some significant claims or efficiencies justifications. However, the Supreme Court has not expressly held that an efficiencies defense qualifies as a legal rebuttal to a prima facie Section 7 case. Indeed, the Supreme Court has questioned whether an efficiencies defense exists. Nonetheless, the FTC and the Department of Justice have identified efficiencies as a legitimate defense in the Merger Guidelines. Several federal circuit courts of appeal also have either articulated the existence of the defense, or they have performed an analysis of the defendants' claimed efficiencies justification.

Several decisions issued by the circuit courts of appeal have included detailed discussions of the merging hospital's claimed efficiencies before concluding that the hospitals failed to establish the claimed efficiencies would be of a sufficient character and magnitude to effectively eliminate the risk of a predicted competitive effect. This raises the question whether the efficiencies defense is somewhat illusory. Beyond the Agency's discretion to accept an efficiencies during government review, is the legal standard for proving efficiencies too high, particularly given that the government must only prove a *likelihood* of competitive effects? Does that suggest that it is not possible to successfully assert an efficiencies defense? Jared, given your experience both in analyzing efficiencies in connection with merger investigations and in litigating the issue, would you be willing to answer these questions?

MR. NAGLEY: I think to take a step back, I'll start by talking about what the efficiencies defense is. It is hard for me to step back without first saying that the defense is absolutely not an insufferable burden. That no one at the circuit court level has succeeded with an efficiencies defense doesn't mean that the bar is too high. It means that the evidence presented has been really bad up to this point. And I think that's an important distinction to make. We will get into that later, but I had to say it at the outset. Okay, so what's the efficiencies defense? The circuits that have considered the efficiencies defense, whether they have expressed skepticism or a willingness to believe that such a defense exists, all analyze it basically according to the Horizontal Merger Guidelines Section 10. So an efficiency must offset the harm that's predicted in a concentrated market. The efficiency presented has to be merger specific. It has to be tied to the merger itself. Because otherwise, if you could accomplish—by the way, it doesn't seem like a very high burden. If you could accomplish the same thing without the merger, then with a less restrictive alternative, why would you do the merger, and why is that a justification for the merger? The efficiency has to be verifiable, not speculative. You can't just have a good story. You have to have some evidence. A lot of good stories, but very little evidence historically. And the efficiency you are claiming can't result from an anticompetitive reduction in output or service. You can't pull back services or pull back output and claim that as an efficiency. The other thing I'll note is other courts, including the Third Circuit, and as mentioned in the Horizontal Merger Guidelines, don't think of the efficiency defense as just a balancing test; e.g., you have eight units of harm; the efficiency has to come up with eight units of benefit, and you are all square, and then the defense has been satisfied. To the contrary, when the potential adverse competitive effect of a merger is likely to be substantial, extraordinarily great—I am going to say that again—extraordinarily great cognizable efficiencies will be necessary. So it is not just you get one, I get one. If you are going to have a merger in an incredibly concentrated market, you better have a really great cognizable efficiencies story that's really, really substantial.

MS. DUNLOP: Or move to Canada.

MR. NAGLEY: Or move to Canada. It is a great country. So efficiencies will almost never justify a merger to a monopoly or near monopoly. I guess there could be a scenario where it does. We haven't seen it yet in the courts. And the point being with respect to how the defense actually works, usually you won't see an efficiencies defense work in a situation where the presumed anticompetitive effects would be very high. More likely the defense could work in a situation in which the predicted harms are more modest and the efficiencies are high. A couple of things to say about the efficiencies defense. Again, no circuit court, anyway, has ever found extraordinarily great cognizable efficiencies were demonstrated. To give you one example of the proof not necessarily meeting the requirements, in *Hershey/Pinnacle* the largest single efficiency was the foregoing of the construction of a $277 million bed tower. Essentially, the parties said that were the merger to happen, Hershey wouldn't have to build a $277 million bed tower with 100 beds, and that should be something we consider in terms of going on the scale to counter the predicted harm caused by the merger.

Now, going very quickly, just to give you an example, with respect to the bed tower, the efficiencies defense in *Hershey* was premised on certain claims: Hershey was over capacity, routinely past the 80 percent capacity utilization rate it claimed was the optimal target (for the trailing 24 months it had been slightly over 85 percent in terms of capacity). Were it not for the merger, Hershey claimed it would need to begin construction on a new bed tower to address its capacity issues immediately. Pinnacle had sufficient excess capacity to accept immediately the "extra" Hershey patients because Pinnacle was in the 60s in terms of capacity and had no foreseeable prospects of increasing that utilization rate. And only a merger would allow Hershey to move patients to Pinnacle this quickly and efficiently because Pinnacle had shelled space. Basically, one of Pinnacle's hospitals had an excess floor that had already been built out but not fully fitted with beds, which could be done very quickly, as these things go, (a matter of months, rather than waiting four years for a new bed tower to be built). Now, at the end of the day, as the Third Circuit found, there was no evidence that Hershey needed 100 beds. It looked like Hershey might have needed only 13 beds at the 85 percent capacity utilization rate the hospital actually targeted, which is a very modest number of beds, and not enough to justify a 100-bed tower. So the claim wasn't verifiable because Hershey hadn't put forth any evidence to support the claim that they would need these beds.

The postscript to the story is—and it was posted on my door in my office, because when these articles came out it made me very happy. The decision of the Third Circuit came down September 27, 2016. In February 2017 Pinnacle built out its shelled space, because guess what? It didn't have capacity. It was operating at 85 percent capacity during regular times and over 100 percent capacity during flu season. So it needed its space. Hershey, as of the date I am having this conversation with you, has not put a shovel in the ground to build the bed tower that it said it absolutely needed before the merger. It is talking about it at a later date, but no timetable has been announced. So at the end of the day—I say this because this is like a lot of efficiency claims—the story is a lot better than the facts on the ground. Hershey didn't need the beds, and Pinnacle couldn't give them the beds. So I think all of you can access all of the cases that are in the circuits that have considered the efficiency defense. But I think you'll find that the evidence is similarly lacking. And I do believe that—and again, this is me speaking for myself—I do believe that if the evidence put forth by parties to a proposed transaction was very solid, and did not seem to be created ad hoc post the initiation of an investigation, then maybe we would have a successful efficiencies defense at a circuit. But at this point that's not the case.

MS. DUNLOP: We don't like to see that. But I like to think that Jared is happy with these articles on his door because no enforcer would want to be responsible for stopping a procompetitive transaction. But never let the facts get in the way of a good argument. Obviously things have panned out the way they have, but circumstances change. I think what we haven't addressed is this whole standard of proof, burden of proof question. Also, even though Jared was saying theoretically an efficiencies defense could win, you know, if the evidence were there and the facts were really, really good, there is still such skepticism expressed in some of these opinions.

The Third Circuit and the Ninth Circuit both say things to the effect of we are not even sure if this is a good defense. We are not even sure if this is cognizable. And anyway, they didn't make it out. So I get you on "anyway, they didn't make it out." But having an appellate court say that they don't even know if it is really something they should get into, I think is pretty powerful weight against the parties being able to prevail with an efficiencies defense. And then with that language about needing extraordinary efficiencies to overcome a transaction that has a highly anticompetitive impact, the FTC is not bringing cases where you've got combined market shares of 40 percent. They are bringing cases where you have got combined cases of 80 percent once they have defined their markets.

So you get the presumed enormous anticompetitive impact, and you have to come up with some extraordinary efficiencies. I think that's very difficult to do in terms of trying to quantify efficiencies and then in terms of the actual standard of proof. This extends beyond health care of course. I was on a case several years ago, *Saint-Gobain*, which was about glass manufacturing, that the FTC was reviewing, and we had an efficiencies defense there, which was, we thought, very powerful. And one Commissioner, Josh Wright, found that, yes, it was a fairly powerful defense, and it was quantifiable, and these things were real, and voted against the complaint but was outnumbered. In his separate statement on his vote, he pointed out that the staff and the Commissioners seemed to have been holding the parties to a higher standard of proof. That the efficiencies had to have been proved with some greater degree of certainty than the anticompetitive effects.

The anticompetitive effects are only a likelihood, and yet the efficiencies had to be pretty well certain to happen in order to be considered. I think that there is that imbalance when it comes to efficiencies. There is a built-in skepticism. The standards of merger specificity and things like that are applied very, very stringently, without potentially taking into account realities in the marketplace. So for example, you look at *St. Luke's*, where the judge rejected the efficiency of extending electronic records and things like that into the acquired entity, saying you could do that without a merger. You could develop these networks without the transaction. And yet, without the transaction where is the money and the incentive to actually go ahead and do some of that stuff? So I think that there is a prejudice against efficiencies, and especially once it gets to litigation, it is very, very hard to prevail on that basis.

MR. NAGLEY: Well, I will say, we bring cases at 80 percent. I would hope you would have a good story if you were trying to have an 80 percent merger. And with respect to health care anyway, there is no doubt that the one thing that economists—I am sitting right next to one, Subramaniam, so please correct me if I am wrong—agree on is the more concentrated a provider market is, the higher prices are. So we have a real certainty when markets are really concentrated, particularly in the health care context when provider markets are concentrated, prices are higher. So shouldn't we be really certain if we are talking about those 80 percent cases. I don't think it is too hard a burden to overcome, particularly—though there are some circuits that are skeptical about the existence of the efficiencies defense; there are circuits amenable to that defense and still no one has succeeded.

MS. WHITE: The circuits appear to be *potentially* amenable, or theoretically amenable, to the efficiencies defense but have yet to endorse one. There is no question that the challenge of asserting a successful efficiencies defense is a really tough issue for hospitals and other providers that may be considering a merger or acquisition. Increasingly, some providers who are evaluating a possible merger, consolidation or other collaborative activity appear to be seeking a Certificate of Public Advantage, or COPA, which may effectively enable them to circumvent federal antitrust review of the transaction. A COPA typically involves a process pursuant to which a state extends to a private party the antitrust immunity that the state enjoys as a sovereign entity. Under Supreme Court precedent, a state can confer its antitrust immunity on a private actor or actors under certain circumstances. First, the state must clearly articulate and affirmatively express its intent to allow the parties to engage in specified conduct, as a matter of state policy. Usually, a state satisfies this requirement, sometimes referred to as the "clear articulation" requirement, through legislative action. Second, the state provides active and ongoing supervision of the authorized activities of the private actors. Where these two conditions are satisfied, a state can effectively shield from antitrust scrutiny mergers, consolidations, and other collaborative activities that might otherwise raise antitrust concerns.

It may be reasonable to ask why a state would be interested in issuing a COPA under circumstances where antitrust analysis appears to suggest that a transaction would be bad for consumers. To answer this question, we can consider the different reasons that have been identified by various states around the country in connection with their adoption of COPA laws. A number of COPA laws were adopted in the early 1990s; approximately 18 to 20 states have enacted COPA laws. Initially, few parties sought COPA protection. However, in recent years, several states have issued COPAs, typically over the objections of the FTC. In several instances, the FTC has made public its objections both during the state's legislative process and also during the state's COPA application and regulatory review process, including by filing public comments and objections throughout these processes. Additionally, FTC staff has issued several statements advising individual states that, while reserving comment on whether the states' respective legislation satisfies the "clear articulation" prong as necessary to properly effectuate the COPA, the staff will be monitoring the state oversight activities to ensure that the state adequately provides "active and ongoing" oversight for those activities consistent with the standards for state action immunity.

States that have adopted COPA legislation and granted COPAs to health care providers have articulated a number of reasons for doing so. For example, states have expressed a desire to preserve otherwise at-risk health care service, or to preserve what appear to be threatened access to care for medically underserved populations. The state may have reasons to anticipate that a proposed arrangement creates opportunities for lower costs, improved efficiencies, or better utilization of resources or equipment. In many instances, a state's interests in a particular transaction may be largely consistent with the goals of antitrust enforcers. But the state also may have other objectives or items on its agenda, such as a desire to preserve local jobs, or to otherwise maximize the merging parties' contributions to the health of a local economy. It is important to note that, in many areas across the country, hospitals are the largest employers. With that background and introduction, I'd like to ask Lisl, who has a tremendous amount of experience in the COPA arena, for her comments.

MS. DUNLOP: Well, I've been looking at it for quite a bit and advising a few clients on it. But in your materials there is a short paper that I put together for the California Bar Association's *Competition* publication, which is coming out soon, where I go through what is out there in the COPA universe. There is a footnote, if you are interested, about what states actually have them and what states don't. The FTC views COPAs as disruptive to the normal competitive process and the usual operation of the antitrust laws, which should apply to health care, just like everything else, and are sufficient to maintain competitive markets. What states are doing with COPAs is stepping back and saying there is a bit more here than just competition. We need more than just competition to ensure the delivery of health care to our constituents.

That competition itself, while focusing on commercial payers and things like that, is all very well under antitrust laws. But we have a lot of Medicare patients they are worried about. Rural geographies, public health challenges that we want to meet. And they may not be met by having multiple providers in the market trying to compete to provide better diabetes services or trying to deal with a particular health crisis, the opioid crisis, or something like that. That collaborative activity, whether through a merger or maybe some kind of joint venture activity, is something that they want to encourage to potentially achieve these broader public benefits. So several states have carved out using the state exemptions from the antitrust laws with the ability to consider transactions that would probably have trouble getting through the FTC. And certainly given the FTC's participation in some of these COPA processes, you can be pretty sure that you would have challenges. And once granted, be careful for what you wish for. You come out at the end of the process and the conditions attached to COPAs can be enormously burdensome. I was speaking to parties who were part of a COPA in Montana, and it was absolutely notorious within the health care industry and provider community up there. It is a relatively small state, and it was hard for them to comply with all of those conditions and tremendous resources had to be devoted to compliance and reporting. So the active supervision element of the COPA is no free pass. There is a lot that goes on after the COPA is granted and the merger is allowed to go ahead.

Now, to the extent that there have been any retrospectives of these things, and there haven't been very many COPAs granted—there is the North Carolina one and then the Montana one. There apparently were some public hearings several years after the Montana COPA was granted at which representatives of health plans, the community organizations and various other constituents got up, and overall apparently the experience has been very positive. But there hasn't been a good formal analysis done of things like price impacts, which obviously from an economic perspective and FTC enforcement perspective we are interested in. In North Carolina some work was done. Gregory Vistnes had a brief ready to go and did an analysis. But he very much focused his analysis on whether the actual conditions that had been imposed on the parties as a condition of granting the COPA in the first place really met the competitive concerns. And he recommended some changes to those. He didn't do an analysis of what happened price-wise or service-wise or quality-wise or any of the other dimensions of competition that we might be interested in.

And now we have *Wellmont/Mountain States*. Given how much interest there is in COPAs—and New York actually introduced one for a particular type of collaboration that it was interested in promoting—the FTC really wants to get a look under the hood a little bit to see if they are on solid ground in challenging these things. Are they potentially procompetitive? Are there benefits from them that the FTC would actually recognize? They have made a public call for people to do some work on this—I don't know if any economists have answered that call. If there are any in the room that are interested in this stuff, it would be really great if you would do some work on this. Then I think you'll be holding some public hearings on it later in the year.

MR. NAGLEY: Yes. First, the one thing we can agree on is there isn't much analysis on the effect of COPAs. There is certainly not a lot of research which indicates that they work, and so I am skeptical. But the FTC put out a call in November for empirical research on the effect of COPAs. And the FTC is trying to target the fall of this year for a workshop on them. Just to give you the agency's position on COPAs for a second, though, I worry that—again, it is a good story, but it is really, to harken back to something Lisl said earlier, COPAs are a solution in search of a problem. The rise in COPA applications may be tied to the fact that the FTC has been so successful recently in stopping what we deem to be anticompetitive hospital mergers. Beneficial collaborations are already permitted under FTC guidance. The FTC issued extensive guidance on the types of collaborations that would be beneficial. So query do you need a COPA, because then the only thing—if what you are doing is legal anyway, there is no benefit to it. And if you need a COPA, then all we are doing is immunizing actions that are likely to be anticompetitive. At this point it is good to remember that even though, as Chris liked to point out in the earlier slide, a lot of the FTC resources on enforcement have been spent in the health care space recently, the overwhelming majority of provider mergers and collaborations that the FTC sees in a given year don't get challenged. Roughly 2 percent.

So again, is this really a problem that we need COPAs for? Chris touched on this earlier. One reason to be skeptical about COPAs is that oftentimes they are enacted—maybe Wellmont/Mountain States, for a political purpose, under political pressure. Because the hospitals tend to be large employers and have political influence. That's not a good way to make law. So with respect to COPAs, at the end of the day, you are asking to immunize conduct that might be anticompetitive. There is no empirical evidence yet that they are good. There is empirical evidence that the more provider consolidation there is, well, that's bad; prices go up. So I don't know why at this point the FTC wouldn't be skeptical about COPAs. And I will mention, since we are sitting in New York, that the New York Attorney General has been skeptical about COPAs and has also commented officially to the legislature in letters in 2013 and 2015, that the COPA is an overbroad solution for a problem that might not exist.

MS. WHITE: If we have additional time, I would like to note—especially since New York has recently extended its COPA legislation—that there are different kinds of COPAs. Most of our discussion has focused on COPAs that were designed to protect mergers and consolidations. In contrast, the New York COPA has been applied specifically to the participants in the Delivery System Reform Incentive Payment, or DSRIP program, which brings together otherwise independent providers to serve a particular Medicaid population, on a nonexclusive basis. The state's DSRIP activities were approved by the federal government under the Medicaid waiver process. In this sense, the DSRIP COPAs are a "whole other ball of wax."

MS. DUNLOP: I was just going to say, you have 10 more minutes.

MR. POWELL: Yes, you have 10 more minutes.

MS. DUNLOP: So now I can challenge what Jared said. Because the FTC's position is that COPAs are immunizing anticompetitive conduct. So the assumption is that the conduct is anticompetitive. My own opinion is that COPAs are not necessarily doing that; that the underlying conduct is not necessarily anticompetitive. All a COPA is doing is shifting who gets to look at it, away from the FTC—which of course they hate—to the states.

MR. NAGLEY: Some of the states don't like it either.

MS. DUNLOP: But the states that do like it feel that it is giving them the ability to look a little bit more broadly at what's going on in their markets and take into account things that the FTC might not take into account. Harking back to our efficiencies discussion, you might get a better run at your efficiencies claim at the Department of Health or a State AG than you would at the FTC.

MR. NAGLEY: So with respect to something you said earlier—look, this is a conduct remedy. Conduct remedies are difficult to enforce. Regulatory schemes are hard to monitor. They have all sorts of opportunities for evasion. The organizations in COPAs that are providing the data that you are going to use to monitor their effectiveness are usually the parties themselves. That's a problem. And on top of which, let's think about it this way. A COPA exists for potentially a limited period of time. So North Carolina's COPA, in '98, allowed a merger to happen in the western part of the state. And then they decided that they don't need a COPA anymore. So what happens? We all know the problem of unscrambling an egg. Once assets get merged together, it is really hard to take them apart. So what happens when a state allows basically a merger to monopoly, for reasons that may just be a lovely story—may not be a lovely story and may actually have some benefits—but then there is no potential relief when the COPA regulation goes away.

MS. DUNLOP: That's not true in *Wellmont/Mountain States*.

MR. NAGLEY: Even those COPAs that Lisl will say have a lot of teeth, like *Wellmont*, one of the penalties can be losing your protections under the COPA if it is found to be that the anticompetitive effects are greater than the benefit being derived from the combination. You still run into the problem of North Carolina, which is at the end of the day, you could behave well for a year, you could behave well for two years potentially. But what happens in year five, after a merger has been allowed between hospital systems? They have been fully integrated, and it may be on paper that there is this sanction that is possible, but is it really possible to unscramble the eggs five years later?

MS. DUNLOP: In *Wellmont/Mountain States*, they have to provide a plan of separation, which has to be updated every two or three years. They have to give thought to, if the COPA gets taken away tomorrow, how do we actually do this? I think that's a serious penalty.

MS. WHITE: And to give the government credit where I think credit is due—

MR. NAGLEY: Well, thank you. We used to be colleagues.

MS. WHITE: The work of the Federal Trade Commission, the Department of Justice, and other federal agencies in connection with the Affordable Care Act, or the ACA, and the rollout of the Medicare Shared Savings, or MSSP program, and its Accountable Care Organizations, involved a substantial amount of cross-agency federal collaboration. This collaboration was, at least in part, in response to providers' concerns that their participation in the MSSP program could create exposure to antitrust risk or other risk.

Providers in New York expressed similar concerns in connection with the implementation of DSRIP. Similar to the ACA, DSRIP involved the government, specifically the state government asking providers to perform specific activities. At the same time, providers understood that the federal government was warning them about potential antitrust exposure. Where there is uncertainty between federal and state laws and regulations, the providers bear the risks associated with proceeding in the face of that uncertainty. If you recall the federal agencies' collaboration around the implementation of ACA, there seems to be a similar opportunity for increased collaboration among state regulators and the federal antitrust enforcers. Ideally, the governmental entities should seek to resolve the uncertainly and reduce the providers' risk. If, at the end of the day, a state fails to properly effectuate its "active supervision" of a COPA recipient, whose conduct is the federal government likely to challenge? Not the state. It is the provider who bears that risk. It is reasonable, as a taxpayer, to ask whether this dynamic is consistent with good government, or leads to valuable expenditures of our providers' money. Unfortunately, to some observers, it could appear that, by creating uncertainty, this dynamic requires providers to spend time and money trying to protect themselves, rather than focusing on their legitimate business and mission-driven activities.

MR. NAGLEY: The only thing I would disagree with in that statement—we should all get along and work together—is that I disagree with the direction of causality. In lots of cases with respect to COPAs, it is not poor providers who are being subjected to the uncertainty of these regulations. Rather, it is the providers that are actually initiating the process by which the COPA is granted. Now that may not be the best process, and it may not be the only process. But there are certainly times—*Cabell/St. Mary's*, *Wellmont/Mountain States*—where the parties were very much involved in advocating for the position, advocating for the COPA. So my only comment to that is that causality sometimes goes in the other way. Maybe it often goes in the other way.

MS. WHITE: Potentially. And in terms of counseling with respect to COPA issues, Lisl, would you like to add any thoughts? In your view, is it valuable for providers to secure COPAs? Would you encourage a party to seek a COPA?

MS. DUNLOP: Well, it depends on the circumstances of course. But certainly in terms of the premise of this panel, which is if at first you don't succeed, if you want to do a transaction, and you are in a state that has a COPA mechanism, that's certainly something to consider and think about whether that might be a better route to approval than going through the FTC. One of the things that I think the COPA process allows us to take into account more—and it is an efficiency that's often claimed at the FTC in provider mergers, but it is never, ever accepted—is the idea of delivery system transformation and movement to value-based care models, risk sharing. One of the arguments that parties often bring forward is that a transaction will allow them to do more of that, and shift our contracting away from the fee-for-service model—which under traditional antitrust economics, of course, prices will go up because of the transaction—to a completely different model where the whole continuum of care is taken into account, and the provider takes risk. It is a very different paradigm for health care coverage and delivery. And yet it is very hard to substantiate that both in numerical terms, timelines, exactly what's going to happen and how the model is going to roll out. So of course, it is a non-cognizable merger efficiency. But I think on the state level, the Departments of Health have a lot more experience in seeing these types of arrangements actually come to fruition. I think there is more scope for acceptance of the movement to those kind of models as a procompetitive benefit of the transaction. As that develops, I think there will be more acceptance, hopefully, at the FTC level as well. I see a great deal more value-based payment going on these days than five years ago.

MR. NAGLEY: Well, at the end of the day there may be situations where parties can get together and can take on risk in a way they couldn't before. In many of the cases, *Hershey* being one of them, risk was already being taken. So it is a matter of actually having the facts to show the added benefit made possible by the transaction. I don't know that it is an insufferable burden to show that the parties couldn't separately take on risk without the transaction but would be able to do so with the transaction. And also, as much as the fee-for-service world may be a dinosaur and a thing of the past, at least that's how it is talked about, the reality is the vast majority of health care payments in this country, well over maybe 90 percent, are fee for service. Actually, a little more when I last checked. So all of this sounds great, but again, unless there is a substantiation for it, it is just an interesting story.

MS. WHITE: Do any panelists wish to offer concluding thoughts? We are happy to take questions as well. Yes.

MR. NAGLEY: Everyone wants to go to the happy hour.

[APPLAUSE]

MR. POWELL: Thank you, Chris and the rest of the panel for a great discussion. Hopefully, we will see everyone later at cocktails and dinner. We are adjourned. Thank you.

Antitrust Law Section Dinner

MR. WEINER: Good evening. I know that for many of you this is the one event, the one contact you have with the Antitrust Section for the year. Particularly if you are new to the Section, you are missing a lot. This year, in addition to the full day of programming over at the Hilton today, we had our usual Antitrust Symposium. We had many, many programs and also this year we had for the first time a three-day Interactive Antitrust Trial Training Academy. Nobody else in the country—nobody else in the world—has a program like this. Three days working with direct and cross examination, expert witnesses, opening and closing arguments.

We're going to repeat a similar program this year, and I really encourage everyone to look into it. None of the events that we did during the year would have been possible without a lot of hard work from a lot of people. I am not going to begin to thank everyone who participated, but I do want to take a minute now to thank our sponsors, who contribute not only to the success of this evening but also who enable the programming that keeps us going all year long.

I want to thank the sponsors, and in particular I want to call out our Platinum Sponsors, of which we had seven this year. We had two full legal service providers Complete Discovery Source and Epiq Systems. We had two financial institutions, Huntington Bank and Wells Fargo. And we had three economic consulting firms, Analysis Group, Compass Lexecon, and NERA Economic Consulting.

So please, let's take a minute and thank all of them.

[APPLAUSE]

I also want to thank two more individuals. First, Tiffany Bardwell, who is our New York State Bar Association liaison and meetings coordinator, who has been instrumental in working behind the scenes in making all these events happen, and also Sam Stelk of Dechert, the assistant who kept the trains running on time.

[APPLAUSE]

And finally, before I turn things over to our new chair, Wes Powell, I just wanted to introduce the people at our head table. And since Elaine just put some food in her mouth, I'll start with Elaine Johnston, who is our finance officer. Sitting next to Elaine is Bill Efron; Bill is the Director of the Federal Trade Commission's Northeast Regional Office. Ilene Gotts, who is dinner co-chair. Hollis Salzman, who is the new secretary of the Section. Steve Edwards of Quinn, Emanuel & Urquhart, who is going to tell you about the next person, Ned Cavanagh, who is our Lifland Award winner this year.

[APPLAUSE]

Andrew Finch, who is the Deputy Assistant Attorney General at the Antitrust Division and who is pinch-hitting for Makan Delrahim, who came down with the flu. But Andrew is even more articulate—if you can imagine that—than Makan is. And he's a New Yorker, so we're looking forward to good things from Andrew.

[APPLAUSE]

Jeff Martino, who is the Chief of the New York Field Office of the Antitrust Division.

[APPLAUSE]

Nick Gaglio, who is the new Vice Chair of the Section. And finally, Wes Powell, who is the new Chair of the Section. Wes, take it away.

MR. POWELL: Thank you, Michael. And thank you, everybody, for being here. I have the thrill of getting to introduce a friend to many people in this room and certainly a friend of mine, Andrew Finch, the Principal Deputy Assistant Attorney General for the Antitrust Division. I claim a tiny bit of credit for Andrew being available to be here tonight, because we saw each other at another state bar event two weeks ago. He was waffling about whether he was going to make it here. I said, you've got to come. And thank goodness he did, because we have a terrific alternate speaker tonight.

Andrew, as I think everyone knows, Makan Delrahim was confirmed in September, and assumed his current role as Principal Deputy Assistant Attorney General for the Antitrust Division. For several months prior to that, when Makan Delrahim's nomination was pending, Andrew actually served as the Acting Assistant Attorney General, and in that capacity, he oversaw all of the

Antitrust Division's activities, including civil and criminal enforcement, policy and international engagement. He obviously continues to have a significant role in all of those matters now.

For the roughly 12 years before that, Andrew was at Paul Weiss, where he became a partner, and he practiced in all areas of antitrust for clients in a range of industry, including financial services, insurance, manufacturing, publishing, just to name a few. Before that he had another stint at the Antitrust Division where he was counsel to the then Assistant Attorney General for the Antitrust Division between 2003 and 2005. He began his government service career as a law clerk to Judge Dennis Jacobs in the Second Circuit.

Although his time and his colleagues' time at the Division has been brief, as we have all seen with the challenge to the AT&T/Time Warner merger, they are off and running on an active period of enforcement. I think I speak for the room when I say we're really looking forward to hearing Andrew speak about that and really anything else that's on his mind tonight. So please join me in giving a warm welcome to Andrew Finch.

[APPLAUSE]

ANDREW FINCH

Deputy Assistant Attorney General

United States Department of Justice

Antitrust Division

(Reading Makan Delrahim's Remarks)

Thank you for welcoming me. Makan is very, very sorry that he can't be here. I'm honored to have the opportunity to speak to you, and, as a member of the Section, to welcome Wes as its chair. We're all looking forward to seeing what the Section accomplishes under your leadership. With that, I'll turn to Makan's message.

MAKAN DELRAHIM

Improving the Antitrust Consensus

It is a great honor to have been invited to address this distinguished group of lawyers and academics, and I sincerely regret that I cannot be here in person with all of you this evening. Unfortunately, I picked up this terrible flu that has been going around, and neither I nor my voice are well enough to deliver these remarks. The New York State Bar's Antitrust Section is among the nation's most active and influential antitrust groups. America's competition regime depends not just on public enforcers like the Antitrust Division, but very significantly on a private bar and academic community that together counsels clients and provides feedback to enforcers, legislators, and judges on the state of the law.

Associations like the Antitrust Section have tremendous importance to our free market system. The New York State Bar is not only an impressive and important group today, but an institution with a long and proud history. In fact it was 80 years ago just last month that former Supreme Court Justice Robert H. Jackson addressed the New York State Bar Association at a dinner much like this one. Jackson was not then an Associate Justice of the Supreme Court—in the winter of 1937, he had only recently been appointed President Roosevelt's Assistant Attorney General for Antitrust Enforcement. Jackson was such an extraordinary talent and such a thoughtful lawyer that leading the DOJ's antitrust efforts appears as only a footnote on his resume.

AAG Jackson told the assembly that night that "Bar Association after-dinner speeches often voice the high and solemn esteem in which we hold ourselves." Apparently, even in the Great Depression speakers opened with jokes and polite laughter. In keeping with that view, these remarks reflect the value of an active antitrust community, and the progress made for decades to gradually and carefully improve this important body of law. The institutions of antitrust have shown a remarkable propensity for growth and evolution thanks, in large part, to continued collegial dialogue.

That point bears emphasis because we find ourselves, once again, in a time of change in the economy and in perceptions of the role of government. One of your panel topics today talked about the so-called "digital economy," a concept that has been the subject of discussion at nearly every major antitrust event this year. Questions have arisen as to the adequacy of antitrust analysis for new markets and new modes of doing business. The history of antitrust enforcement, of course, reflects many changes in markets and economic organization, as the great engine of innovation that is the free market builds upon and restructures itself. Throughout that history, the tools of antitrust analysis, particularly those of economics and the consumer welfare standard, have proven time and time again capable of adaptation to meet the needs of changing market circumstances.

I served on the Antitrust Modernization Commission from 2005-2007, after Congress convened a bipartisan group to study the antitrust laws and provide recommendations. One of the foremost questions before the Modernization Commission was whether and how antitrust laws should be updated to reflect the so-called "New Economy," in which innovation, intellectual property, and technological change are central features." A similar concept to the "digital economy" you discussed earlier today.

The first recommendations of the Commission were that the unique features of those markets could and should be considered by enforcers analyzing market dynamics on a case by case basis. Those recommendations seem apt in our current circumstances. Antitrust law, focused clearly on maximizing consumer welfare through the operation of the free markets, has the flexibility to adapt its analysis to the actual circumstances of those markets. There has been consensus on that viewpoint for decades that should continue.

This speech is entitled "Improving the Antitrust Consensus" because alignment on the ultimate goals of antitrust does not mean our work is done or that the field should not continue to advance. Antitrust enforcers, academics, and practitioners, have long cooperated in refinements and improvements. The leniency program turns 25 this year, while the HSR Act is just over 40. The 2010 Horizontal Merger Guidelines underscored the importance of unilateral effects analysis and of considering the potential efficiencies of transactions. In the coming years, we will continue to build on the work of those who have come before us, to improve on and adapt antitrust enforcement to incorporate new learnings and reflect new market realities.

Two initiatives are underway at the Division to improve antitrust enforcement and benefit the free markets. First, the Division's recent consent decrees reflect several provisions designed to ensure we can meaningfully enforce them. Our approach will be to enter into consent decrees only when we can effectively enforce them, and when we do enter into consent decrees, to enforce them

effectively. I will explain what we mean by that. Second, we take seriously the role of antitrust enforcement in supporting a deregulatory business environment, and will launch this year a series of roundtables to discuss efforts the Division can take to support deregulation.

The use of consent settlements to resolve antitrust disputes has become more and more commonplace, to the point that they now resolve all but a handful of Clayton Act filings. As you know, the Division routinely files consent settlements on the day it files complaints to challenge unlawful mergers. These decrees have become so common that one might forget they arise from a conclusion that a transaction was illegal under Section 7 of the Clayton Act. The complaints brought alongside such challenges should not be ignored, however— they reflect a conclusion by the Antitrust Division that a transaction broke the law.

Consent decrees have sometimes been criticized as excessively regulatory, but I submit that they don't have to be so. We should endeavor towards an approach to using consent decrees consistent with a view of the Antitrust Division as a law enforcement agency, not a regulatory one. Antitrust prosecutors have been empowered by Congress to be law enforcers, with their allegations ultimately subject to an independent court's findings of fact and conclusions of law. If we remain cognizant of this when agreeing to and enacting decrees, we can avoid stepping too far into the regulatory arena.

Law enforcement carries with it both limitations and obligations. We're bound to uphold the law. Robert F. Kennedy once addressed a different New York audience— the Economic Club of New York, and specifically described his approach to antitrust enforcement as Attorney General. He said: "I have a constitutional office of the United States Government and I shall perform the duty I have sworn to undertake—to enforce the law, in every field of law without regional bias or political slant." The Antitrust Division takes that duty seriously.

For example, faced with a violation, the Antitrust Division has an obligation to the public to ensure any settlement contains meaningful relief and that the settling parties obey its terms. Filing a consent decree that would be difficult to enforce certainly minimizes litigation risk and provides for a quick win in the press, but it goes without saying that the unenforceable decree provisions would not vindicate the Division's duty to protect competition.

I spoke a few months ago at the ABA's Fall Forum about the difficulties of enforcing behavioral conditions. When a civil settlement purports to bind a company to ignore its own profit incentives, it puts enforcers and corporate counsel in an untenable position—how can a small team of lawyers keep capable executives from doing what executives are trained to do, day after day for years? The free markets depend on businesses taking advantage of their assets to maximize their returns. The risks and penalties of a civil consent decree violation would need to be high enough to deter such conduct. Meanwhile, behavioral conditions are fundamentally regulatory, imposing government supervision on what should be free markets. Antitrust enforcers have long preferred structural remedies, in large part for these reasons.

The Division has also been improving significantly on the enforceability of the consent decrees it enters into. This past December, in a single week, the Division filed settlements resolving its prosecutions against three unlawful mergers. In all three, the Division required divestitures, not behavioral restrictions, as a key part of each settlement.

Each of these three consent decrees also contains a set of procedural provisions designed to improve their function and enforceability. The Division will continue to insist that each of these terms be included in future civil merger and non-merger settlements.

First, a key provision relates to the burden of proof should the defendant violate the decree and the United States move for contempt. Contempt proceedings in decrees are rare enough that many practitioners may not be aware that, even though the standard for proving a civil antitrust violation is a preponderance of the evidence, the default rule for seeking contempt on a settlement is clear and convincing evidence. The new terms contract for the same preponderance standard for decree violations as for the underlying offense and for decree interpretations.

The default clear and convincing evidence standard makes it difficult for the Division to enforce decrees and is often counterproductive for both parties. It sets up a dynamic where the Division, needing to meet the heightened standard, must engage in extensive investigative efforts to prepare a case on a decree violation. This subjects parties to more burdensome CID investigations reflecting the kind of record the standard requires the Division to build. Meanwhile, the party accused of a violation, knowing they will have the benefit of a favorable evidentiary standard, has an incentive to hold out from resolving the dispute and exacerbate the situation. The clear and convincing standard not only makes it more difficult for the Division to enforce its decrees, but in the process adds burden and delay to decree violation investigations—to the detriment of all sides.

Contracting around inefficient legal rules has a long history, and the Division believes that by contracting with settling parties to apply a preponderance standard to contempt proceedings, it will significantly increase the efficacy and efficiency of decree enforcement. The second decree provision that appeared in all three recent settlements relates to the common practice of parties to a contract agreeing to more efficient fee shifting rules. Under the default rule, the Division bears the costs of decree enforcement investigations and proceedings, even in the presence of a serious violation of the decree and a meritorious judgment from the court. In a 2013 study, Professors Eisenberg and Miller examined several thousand U.S. contracts between public companies and found that in more than half, the parties agreed to contract out of the default rule to provide for some form of fee shifting. The contracting parties settling Division enforcement actions are in most cases familiar with fee-shifting provisions in many of their contracts, and this adjustment simply shifts that approach to the decree context.

The Division's new fee-shifting provision requires defendants to agree to reimburse the United States for attorneys' fees, expert fees, and costs incurred in connection with any successful consent decree enforcement effort. Decree violations, when they happen, impose burdens on taxpayers that would not have arisen absent the Division's agreement to a settlement. The goal of fee shifting is to encourage speedy resolution of decree violation investigations, and to compensate taxpayers for the costs associated with investigation and enforcement necessitated by the violation.

Another provision designed to improve enforcement relates to the term of the decree. If a court finds that a defendant has violated the consent decree, this term permits the Division to apply for a one-time extension of the term. The Division would of course only do so if appropriate to the market circumstances and the facts of the violation, but having the ability to extend the term should make the

relief in decree enforcement proceedings more meaningful, and in so doing discourage violations.

Finally, the Division recognizes that market circumstances can change in ways that obviate the need for a consent decree or even make its continuation counterproductive. As part of our philosophy of enforcing the settlements we accept, we believe it's important to have a mechanism to do away with decrees that no longer make sense for any party. The new provisions include a term that permits the United States, after a certain number of years from the date of entry, to terminate the decree upon notice to the court and the defendant(s).

Practitioners should expect to see these four types of provisions in future decrees: A preponderance standard, fee shifting, and the possibility of extension or early termination. The Antitrust Division believes they will meaningfully increase the enforceability of the settlements we enter into.

As I mentioned at the outset, institutions like the antitrust bar and academic community play an important role in helping the enforcement agencies build on and improve the consensus approach to antitrust enforcement. Another major priority of this Antitrust Division is deregulation—we believe that fostering competition helps markets to regulate themselves and as a result limits the need for regulatory intervention.

The Division plans to launch a new program of roundtable sessions focused on antitrust and deregulation. The program will include speakers from a range of legal and advocacy organizations across the policy spectrum on a series of panels on topics related to deregulation. Though we are still in the planning stages, we wanted to preview these listening sessions and point out how seriously we take the ability to get feedback on possible next steps to support our deregulatory efforts.

We are considering panels on three topics. First, deregulation by eliminating old antitrust consent decrees. This panel follows in the footsteps of Assistant Attorney General Baxter, who in 1981 created the "Judgment Review Project" to systematically review the more than 1200 existing judgments then on the books from the Division's civil cases. The time is ripe to consider taking another look at the 1300 long-standing consent decrees still on the Antitrust Division's books.

This listening session would support these efforts by fostering discussion on (a) the appropriate term for decrees, including whether perpetual decrees should ever be imposed, (b) what role industry reliance on existing decrees should play in the decision whether to terminate decrees, and (c) whether it is appropriate or effective to enter into decrees that constrain market power, rather than restoring the competition lost due to a violation.

Another listening session topic will involve regulatory exemptions from the antitrust laws—if we view antitrust as enabling markets with limited regulation, how should we think about regulatory exemptions to antitrust? For example, how should we think about *Credit Suisse v. Billing* and the impacts of its implied repeal doctrine on competition? Should we think differently about express statutory exemptions than implied ones? Is the state action doctrine, in its current form, right or useful? These are just the kinds of questions where an in-depth conversation from a range of constituents will be helpful to the Division in formulating policy positions. The third listening session we are currently planning would focus on what may be the most important and relevant question to the average American: What are the consumer costs of anticompetitive regulations?

This session would focus on whether state and federal agencies take appropriate account for the consumer costs of their regulations, which tools are best for minimizing regulation, and how federal and state regulators should balance harm to consumers and competition against perceived public benefits of proposed regulation. As advocates of competition, we hope to engender a discussion of how lawmakers can do a better job ensuring government action supports, rather than impairs the operation of the free markets.

We look forward to working with the antitrust community, including many in this room, as we set out on these listening sessions to help support the Antitrust Division's deregulatory efforts.

I will conclude with another quote from Robert Kennedy's 1961 address on antitrust to the Economic Club of New York, remarks titled "Vigorous Antitrust Enforcement Assists Business." He explained that the Sherman Act stands as a "charter of freedom standing for something precious in American life." Attorney General Kennedy recognized that the vast majority of mergers benefit the economy, but that "the history of antitrust law enforcement shows that successful antitrust prosecutions have often strengthened and brought vitality" to the markets. The Antitrust Division's challenge is to leave unrestrained the freedom of the markets, but also to prevent and meaningfully remedy conduct that harms competition itself.

The initiatives I have described tonight have in common an emphasis on treating antitrust as a law enforcement exercise that supports the free markets to maximize consumer welfare. With our focus squarely on those goals, and the addition of improved consent decree enforcement provisions, the Antitrust Division plans to enter into consent decrees only when we can effectively enforce them, and when we do enter into consent decrees, to enforce them effectively. Meanwhile we greatly value the views of those in the bar, academia, and around the world, and look forward to a continued dialog on how to improve on the antitrust consensus. Thank you.

[APPLAUSE]

MR. POWELL: Thanks for stepping in. We are going to have dinner now. Thank you.

[DINNER SERVED]

MR. POWELL: First of all, I want to thank my colleagues that helped me in the preparation of today's CLE program. We are very lucky. Every year in our Section we have chairs of the Section who put on programs, I think Michael Weiner did an outstanding job.

[APPLAUSE]

And I want to thank him first of all for his service. Among other things that Michael has done this year, and I won't list all the accomplishments, he oversaw the first and wildly successful trial training program, which was mentioned and which we hope to continue. It is an incredible addition to the suite of programs we put on every year. I think it is our best year yet of programming by our substantive committees. We are so fortunate that we have incredible programming, and it is in large part because of the committee members. Michael was really driven this year. He continued our diversity membership mentoring activities, and he has taken over the fundraising for this event tonight. So join me in thanking Michael.

[APPLAUSE]

With that, I am going to call Steve Edwards to the stage to confer our Bill Lifland Award of Service.

MR. STEVEN EDWARDS: Thanks, Wes. So this is the moment you've all been waiting for. It is certainly the moment I've been waiting for, because it is a great honor and pleasure to be able to present the William Lifland Award to my friend, Ned Cavanagh. I've known Ned for 38 years. We met in 1980 when we were the youngest members of the City Bar Trade Regulations Committee. The committee chair was Bob Jaffe of Cravath, and there were many incredible lawyers on the committee, including Bill Lifland. There was a famous event that we still talk about from time to time, when Bill Lifland said something, and Lloyd Constantine responded by saying in words or substance: You are the lapdog of the capitalist pigs.

[LAUGHTER]

We were all shocked. But Bill sat there impassively, as always, the consummate professional. I haven't heard anything about Lloyd Constantine. But, don't get the wrong impression, because Lloyd is great lawyer. And one of the great things about that committee was we were a group of people with very diverse views. We all loved antitrust, and we would debate antitrust issues with great passion. So it is very fitting that this award is being given to Ned Cavanagh. Like Bill, Ned is a consummate professional. He's a walking encyclopedia of antitrust law, as well as civil procedure, conflict and torts law, which he teaches. Ned has written 54 articles, and he's also written chapters for nine books on antitrust. He is, in a word, prolific. Ned has had a long relationship with Cornell. He went to Cornell Law School, and that's where he is now teaching. After law school Ned went to Donovan Leisure, which at that time I have to say was the best litigation firm in the country. He worked on a number of infamous cases, including the Tetracycline price-fixing cases, *Berkey/Kodak* and the *Uranium Cartel* litigation. And at Donovan, Ned had many great mentors, including my former partner, Sam Murphy, who we were just talking about a moment ago, and Judge Paul Crotty, who was here last year.

Ned went into teaching in 1981. He started out at Pace Law School. Then in 1982 he went to St. John's, where he has been on and off ever since. And for a period of time he was the Assistant Dean at St. John's. He's also taught at Columbia, Fordham and Cardozo. With Cornell, if my math is correct, that's six law schools. If there is somebody from another law school in the audience here who would like to hire Ned, you better get on it, because he's not going to be doing this forever. Ned also worked for the Antitrust Bureau for a year, and he consulted with a number of law firms, including my own law firm. And I have to tell you, there is nothing better than having Ned Cavanagh at your side when you are dealing with a difficult case.

We had a number of cases together that were extremely complex and required a lot of creativity. And Ned always had a theory that would enable us to win. My favorite was a price-fixing case where we convinced the government not to prosecute, even though our client had been at the key meeting and had agreed to fix prices. Our defense: He was lying. I got a lot of credit for that one, when the government decided not to prosecute. But a lot of that was Ned. He made me look good. I still talk to Ned

from time to time when I get stuck on an issue. When the associates come back and tell me that there is nothing to support my theory, I just call Ned. He always has great ideas off the top of his head, and he doesn't charge me.

Oh, and I forgot to mention that Ned was Chair of this Committee in 1996. He is also very active in the ABA Antitrust Section, and has served as counsel. And Ned and I have both served on the Eastern District Advisory Committee for Civil Rules. So we honor Bill Lifland with this award, because he was a very special person. And we are giving this award this year to Ned Cavanagh, because he is also a very special person and a great friend. So I would like Ned to come up here and accept the Bill Lifland Award, which this committee presents annually to a distinguished antitrust practitioner in recognition of his or her contributions and accomplishments in the field of antitrust and service to the Antitrust Section.

[APPLAUSE]

So while you were sitting at dinner, I said to Ned, am I actually supposed to give you something? He said, I think so.

MR. CAVANAGH: Thank you. Gosh, what do you say after that. Wow. Very generous. Thank you for your friendship over the years. I am honored and humbled to receive this Lifland Award. My family is here. My wife, my son Christopher, my son Andrew, and his wife Angela.

[APPLAUSE]

Thank you. My daughter could not be here. She's not traveling because of imminent birth. I also want to thank my colleagues. One of the ironies of this, the Lifland Award, was actually given to Bill Lifland the year that I became chair of this committee. And I remember when Barry Brett had suggested that we give an award to recognize the service to the bar, and it was a great idea. And we looked at each other—in those days we were a much smaller Executive Committee, and we all thought Bill Lifland, it is just perfect. I am so humble and honored. For those of us who knew Bill, he was a great antitrust lawyer. He was a scholar, and he taught at Fordham for years. He used to give the Annual Review of Antitrust every year at the program. And we still do that. But Bill set such a high bar, it just seems that now we have like three people doing it, and Bill did it all by himself. He was just a terrific guy, and this award is really an honor.

I have a couple thoughts I want to share with you tonight. I might tell you that Michael Weiner has got a shot glass, so I am not going to be long. I was thinking on the way down from Ithaca, when I started, in those days, this event was in the spring, and it was just antitrust lawyers, two or three tables. And I remember being asked to come to this dinner and it was a sign of favor. There was always a head of Antitrust Division who came, and it was really a great time. Then soon after that, *Illinois Brick* and *Brunswick* cases were brought. And then in the early 80s, the Reagan Administration change in enforcement, and we were all of a sudden going for bid rigging and government contracts, which didn't generate a whole lot of antitrust work. And we fell upon hard times and the Section fell upon hard times.

At the end of the 80s we were a group looking for a mission. We had Steve Edwards, Steve Houck, Barry Brett, and Peter Greenwood, and a few other people who got us through that period when not a whole lot was happening. So not surprisingly, with antitrust contracting, there wasn't a whole lot happening in the Section. But things picked up in the 90s, when we had an influx, Ilene and Bill Rooney and Wes Powell and Lisl Dunlop came, and we became vibrant again. We are now doing great programs. Bill Rooney, your fall programs are great. Wes, the Annual program is great. What really makes me happy is that this sort of whopping world of antitrust, Washington is now coming to us to attend our programs, which I think is cool.

This is the kind of award I guess you get toward the end of your career. And I am a little worried that somebody is going to tell me something. I want you to know that I still have some gas in the tank, and I am not ready to give up. But we, as an antitrust group, have got our work cut out. We have a lot of things we need to do to make sure Section 2 is vibrant. Maybe we should be looking to our cousins across the pond. And abuse of dominance is a way of making Section 2 vibrant. We have to do something about remedies, direct purchases, indirect purchases, *parens patriae*, state business creating overlapping and confusing awards for damages. We want to make sure that the victims collect, and we also want to make sure that the defendants are held accountable. We need to do that. We also need to have a consistent merger policy. And lastly, I think is most important, is we have got to convince the judiciary that they should worry less about false positives and making mistakes and more about getting cases right. Decide cases on the facts, instead of deciding cases on presumed facts, based on Chicago's School of Economics.

We have our work cut out for us, and that's a lot of work. I've been a very lucky guy. I worked at Donovan with Steve Houck and Judge Paul Crotty. Judge Crotty encouraged me, even after I left, he encouraged me, introduced me to Pat Rohan, who was the dean at St. John's Law School, and he hired me, even though my credentials as an academic were somewhat thin at the time. Pat then encouraged me to go to Columbia and do further graduate work. There I met Harvey Goldsmith. Harvey was just absolutely the best guy, a friend and a mentor and someone who really helped my career.

So I've been very lucky. I've been lucky to be part of this group. I've taken a lot, and I hope I've left something behind. Thank you very much.

[APPLAUSE]

MR. POWELL: Everyone thank you for coming. I hope that you will join us for dessert and drinks in the reception area where we began tonight. Have a great evening. Thank you.

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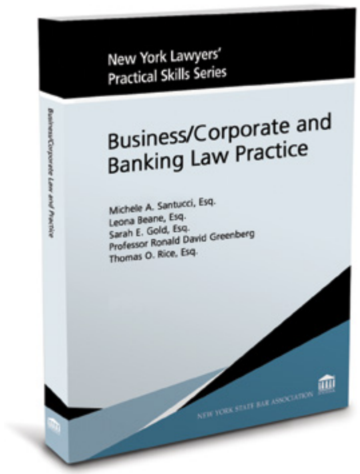

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