

# 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 orga-

nization 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 enjoy.

**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 anti-competitive.

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 real-

ly 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]

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