NYSBA

2011 Antitrust Law Section Symposium

January 27, 2011
Hilton New York

New York State Bar Association

Annual Meeting

of the

ANTITRUST LAW SECTION

January 28, 2011 Hilton New York • New York City

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Introduction and Welcome

MR. MADSEN: Good morning, everybody, and welcome. This is the Antitrust Law Section program. If you're here for some other program, you're in the wrong place.

Welcome. I am Steve Madsen. I am, for another few hours, the Chair of the Section. I want to thank you all for coming, particularly at such an early hour and on an official snow day. I'm delighted to see that just in the very few moments that I have been talking, our audience has grown, so the number of audience members now exceeds the number of panelists on the dais here with me.

(Laughter.)

I want to thank our Program Chair, Jay Himes, who put together a really terrific day for all of us. I think we are going to find it is an exceptional program. We have very many distinguished guests and speakers.

To give you a high-level thumbnail outline of our proceedings today, we have our Business Meeting for the Antitrust Law Section at 12:00 noon right here in this room, and then a break for lunch. At 1:10 there's a short presentation by a representative of the New York Bar Foundation. This evening we have our Annual Dinner, which will be held at the University Club. That will certainly be a gala affair. I'm hoping that everyone will have shoveled out and be able to travel by that time. At that dinner we will bestow upon our colleague and dear friend Ilene Gotts the William T. Lifland Service Award that is given by the Section. We will also confer posthumously the Antitrust Law Public Service Award upon Robert D. Joffe. And our Keynote Speaker will be the Honorable Christine Varney. I bet you've heard of her. She runs the Antitrust Division at the Justice Department.

Let me now invite Jay to the podium so we can tell you more specifically about today's program.

MR. HIMES: Hello. I will try to be brief because, as you probably realize by looking at the program flyer, I have done an ambitious thing; some would say foolish. I have tried to fit six programs into the time that we usually use for five.

Now during one of my less lucid moments I thought about handling this situation the way judges handle juries. I could pick a couple of alternates, have them hear all the evidence, and then at the end, when things start to get exciting, send somebody away. But I really didn't think that would endear me to any of the people preparing for panels here. So you'll forgive me if during the course of the day I have to keep the program train running on a very tight time schedule.

Some quick preliminaries. We are offering 7 CLE credits, but you have to remember to sign in at the front. If you missed that opportunity a few moments ago, please find a convenient time to do so. Perhaps you can do it while I'm talking, and you probably won't miss anything worth paying for.

You doubtless have noticed our written material as you walked in. Like last year, it is voluminous. However, unlike last year, we are offering the same material on a CD, and it is not voluminous, at least not to physically carry around. You are welcome to take either or both, or I suppose neither.

Lastly, you will get a program evaluation form, and we would ask you to fill it out at the end of the day. For those of you who are not Section members, we have membership applications out there, and we hope we can entice you to join and become active in the Section.

I'm not going to take the time—because there really isn't any extra time—to describe each of the six programs. Suffice it to say that a goodly number of Section people have worked tirelessly to create what I think is a world-class group of individuals who will be presenting here today. We have present and former top-level officials, practitioners on both sides, academicians and experts from consulting firms.

We believe the presentations will be uncommonly insightful and stimulating, and we believe you're entitled to nothing less. We will try to have brief periods for questions and answers, and we encourage you to provide your reactions.

I get to introduce all the panel moderators here today, and I'll tell you and all of them in advance that I will not do their bios justice. There is just not enough time, but our book and our CD contains full bios for each of them.

Caveat Venditor: Buy-Side Collusion

MR. HIMES: We begin with our first panel: Caveat Venditor. For those of you who are not conversant in Latin, it is seller beware. I have to credit my son for giving me the name for seller; he's in his eighth year of Latin. Caveat I could figure out by myself. We actually have sitting in the wings—if we can ever get a telephone here—a fourth member of this panel, Peter Carstensen, who is a University of Wisconsin professor. He was snowed in when the plane flights were canceled. If the hotel can get us a phone, he will dial in and participate.

You all know about manufacturer or supplier conspiracies. Sometimes, however, it's the customers or the buyers that do the collusion, and that is what this panel is about. It is led by Richard Parker, who is an O'Melveny partner in D.C., where he co-chairs the firm's antitrust competition group. Rich is a former Director of the FTC's Bureau of Competition. Now he does M&A work, government investigations, treble damage cases, class actions. You name it, and Rich does it. He is an antitrust practitioner at the highest level. He is one of the best around, and we are really excited to have him.

Rich, it is all yours.

MR. PARKER: Thank you very much, Jay.

Do we have a phone line yet for Peter Carstensen?

MR. HIMES: We do not. I'm waiting for the hotel to try to get one. I sent him an email.

MR. PARKER: Welcome, everybody, to this panel. Hopefully we can get Peter Carstensen on the line, but let me start by introducing the others.

On my far left is Christine Meyer, who is with NERA, an economist with a very distinguished background. She graduated from West Point, and was an MP in the first Gulf War, and then came back and got her Ph.D. in economics from MIT. She has consulted on all kinds of antitrust matters, litigations and mergers, and does have direct experience on these buyer side monopsony issues. So we are very fortunate to have her on this panel.

To my immediate left is Felice Ekelman. It turns out, for whatever reason, that many of the venditor—using the Latin word—supplier side cases are employment cases where firms allegedly collude or share information or do things to reduce wages in the relevant labor markets. So we are fortunate to have a real live employment labor lawyer here from Jackson Lewis who has a lot of experience on that side representing employers and some of the issues that they are talking about.

Is Peter on the line?

MR. HIMES: Yes, he is on the line.

MR. PARKER: Let me also introduce Peter Carstensen. He is a Professor of Law at the University of Wisconsin, and was unable to get in because of the airport closings. He has been a professor there since 1973. Now, I am speculating that that makes him a Green Bay Packer fan, which is a very good thing to be right now. But he has a JD and master's in economics from Yale.

I always have a view that many Law Review articles are a waste of good trees, but Peter has written what I think is a definitive article, and it's in your materials in the William and Mary Business Law Review. This is really an outstanding article on just the issues that we are talking about. It's outstanding from an academic point of view and outstanding from a practitioner point of view as well. So we are very fortunate to have that in the materials, and I would recommend that to you.

What I would like to do is start out with all of the speakers giving us an overview on some of their thoughts, and then we'll have a discussion. But let me just say this, particularly given the size of the audience here, I would like to keep this quite informal. Everybody on this panel wants to be talking about what you are interested in and think is important and helpful. So I would encourage anyone to ask questions at any time, and we'll do our best to address them, or we'll write them down and get back to you if we can't.

Peter, I hope you can hear me. Let me turn it over to you for your opening statement.

PROFESSOR CARSTENSEN: Okay, I hope you can hear me. It's a pleasure to be in snowy Madison and be connected this way, since I don't have to put on a suit at this hour of the morning.

Four points to be made quickly, I hope.

(1) Buyer power, whether individual or collectively created, often arises from fairly small market shares, at least relative to what we think of in terms of seller power. This is because buyers are the active force in the market; they are the ones that decide from whom to buy, how much to buy and thus often exercise significant power, even with relatively modest market shares.

(2) Collusion among buyers can involve more and more diverse firms than seller cartels, because there is more of a shared interest among buyers in lower cost.

(3) Of course related to number two, collusion among buyers has the potential to be more durable than seller collusion because of limited incentives on the part of buyers to defect from or cheat on a buyer cartel.

And (4) finally, at the margin, it can be very difficult to distinguish between a legitimate joint venture that creates a

buying group and a sophisticated buyer's cartel.

So that's going to set you off with some of my basic thoughts in this area.

MR. PARKER: Peter, before we move on, I was very interested in the studies you cited in your paper about how low are the market shares and the range of market shares in which the studies have found buyer power. Can you comment on that?

PROFESSOR CARSTENSEN: Yes. We have in the Toys 'R Us cases, which I think you have some familiarity with yourself, a 20 percent market share of toys nationally results in an ability to exercise significant coercive power over suppliers. In an English study of grocery markets in the U.K. we have market shares in the 8 to 10 percent range [producing buyer power]. Now, these are buyer markets, and I think that's important to emphasize here. So in the U.K. study it focused on the ability to buy all or some class of groceries sold in the U.K., not the retail side of the market. And there again, buyer power is observed in that 8 to 10 percent range, and it obviously gets substantially higher as you go up in market share.

Part of the phenomena here, I should emphasize, has to do with context. That is in grocery retailing, a firm is going to have a particular level of production; if that level is significantly reduced—same thing here with toys—by the defection of a current buyer, it may be very, very hard to replace that volume because you're already dealing with most of the resellers in the market. So that is, I think, part of the economic functional explanation for why in retailing we observe market power at fairly low levels.

MR. PARKER: I recall at the FTC there was—and I think the Toys 'R Us case is an excellent Seventh Circuit opinion written by Judge Diane Wood, but I recall the angst at the FTC because Toys 'R Us market share was in the 20s and 30s and various MSAs, which is not insignificant, but it is not the muscle-bound 60, 70 percent shares you frequently see in, for example, dominance cases.

Nonetheless, the record was very clear that at those share levels they were able to exercise significant buyer power over some very sophisticated and large toy manufacturers. I am not sure the studies that you're talking about existed back at that time, because that was a concern at the FTC. But I think that's an extremely important point to realize when you're counseling companies, that the government or plaintiff could credibly make a buyer power claim at a lot lower shares than what, at least this antitrust lawyer, is currently used to worrying about.

Let me turn it over now to Christine to give an economic perspective on this and her observations.

DR. MEYER: Sure. Monopsony cases in the antitrust context are fascinating for economists. They present economic analyses that are really unique and interesting for us to work on and are very nuanced. And I think, although that is wonderful for me, I think that should give you some pause as lawyers. I think that should give you some pause about bringing monopsony cases because of the difficulties involved. I think it should give you some pause about whether or not per se rules are the right approach in cases in which there are so many possible theoretical outcomes, and I think it should give you pause as to whether or not antitrust law is always the right hammer, so to speak, for this particular nail.

Let me just give you three economic points to keep in mind when we are talking about monopsony cases generally. The first is that monopsony is not just the flip side of monopoly. I know there's a tendency to think we can take what we know about a monopoly and just move them over to a monopsony. Let me stress one way in which monoposony is different from monopoly. When analyzing a monopoly, you are generally thinking about one particular market. You are thinking about a product market in which the allegedly monopolized product is sold. In a monopsony situation, you have to be thinking about two different markets. You're thinking about the upstream market that is allegedly controlled or at least influenced by the monopsonist. And you have to keep in mind the downstream market in which the alleged monopsonist then needs to compete in terms of selling his final goods. So, from the start, that gives you more complexity, and essentially at least doubles the analysis that needs to be done.

The second point is that in the input market, when you think about a monopoly, you start from the premise that the demand curves slope down. And that is true with the exception of some very specific examples that often get cited, of course, in economics textbooks, but which we hardly ever see in reality. Time and time again, empirical studies verify that demand curves slope down. There is hardly ever a demand for a final product that is either virtually totally elastic or totally inelastic. They almost always fall somewhere in between. But in monopsony situations, the important curve is what we call the labor-supply curve. It denotes how much labor time workers are willing to supply at various wages, and how much of the final product firms are willing to supply at various prices. And those supply curves, be it labor or otherwise, can be very inelastic, indeed nearly totally inelastic in certain circumstances, particularly in a short run. And in the long run, the supply curves can be virtually totally elastic. Think about workers' abilities to move around the country or just switch to other types of employment if wages in one area or in one industry segment are too low.

The paradigm of a downward sloping demand curve leads to some relatively strong results when analyzing a monopoly but the flip side of those results are not true for a monopsony.

My third point on how monopoly and monopsony cases are different comes from the premise that the gold standard for antitrust harm is consumer welfare. Depend-

ing on the nature of competition in the upstream and downstream markets there are monopsony cases in which there can be an exercise of monopsony power and yet no consumer harm. Now, that may not be the end of the story. We may look beyond consumer harm or consumer welfare in monopsony cases and that also sets it apart from monopoly cases.

So beware, the economics in monopsony cases is considerably more complicated than in a typical monopoly case.

MR. PARKER: So I am reading my favorite book here, The Horizontal Merger Guidelines.

(Laughter.)

We are all nerds in this business, you all know that. And it says, Section 12, Mergers of Competing Buyers, and the government talks about how they are nervous about monopsony power, and then it says at the end: "Nor does the agency evaluate the competitive effects of mergers between competing buyers strictly or even primarily on the basis of effects in the downstream markets in which the merging firms sell." So what they are saying here is we don't like buyer power by merger even if we can't ascertain in effect in the output market that consumers are buying. So tell me about that from an antitrust economic point of view.

DR. MEYER: Well, this leads to a real tension between two pieces of the Merger Guidelines. Although I hear what the Merger Guidelines say in Section 12, there is another relevant section, namely the efficiencies piece of the Merger Guidelines. This section talks about the fact that firms can come together and through economies of scale and purchasing can bring down their input costs. Whether this results in a reduction in the final goods price, of course, is a question of whether or not that cost reduction is going to be passed through to the ultimate consumer. But certainly, I think that sets up a tension within two pieces of the Merger Guidelines. So almost by definition they will have to take both the input and the final goods market into account, even though as the Merger Guidelines are set up, there's sometimes a compartmentalization of the two markets.

MR. PARKER: And I think it's been true that I think the agencies take the view, at least, you know, generals always fight the last war. So I think about when I was there, I remember a case involving a merger, I think it had to do with piston rings, and it was almost a merger to monopoly. Nobody ever thought that a 10 or 15 percent price increase on piston rings was going to add any cost to somebody's Mustang.

On the other hand, the agency took the position that Ford, the Mustang manufacturer, has the right to buy in a competitive market, and that is a big problem. You can see that that is enshrined in my favorite book here, that they really don't much feel compelled to show that the Mustang purchasers are going to pay one nickel more for the machine. And I think that's an important point to keep in mind.

Why don't we turn it over to Felice to talk about an employment law perspective here.

MS. EKELMAN: Now for something completely different. Given that the Department of Justice has been looking at no-raid agreements between companies who compete with one another, that's the genesis for really my role in this panel.

Since you're all antitrust attorneys, I am going to give you a little two-minute explanation about the world of employment law and how we intersect in this arena.

MR. PARKER: Probably better do three, given the level of quality, let's do three or four and don't go too fast.

MS. EKELMAN: All right, I'll try to speak slowly.

Generally speaking, workers in the United States have the right to switch jobs and to work anywhere they like. And generally speaking, courts in the United States don't like to preclude individual people from earning a living. So when the law of restrictive covenants is developed in virtually every state, a restrictive covenant agreement is lawful, but it has to be very carefully drafted.

Now, we are going to put California to the side, because there is a statute in California that says that agreements where an employee agrees not to work for someone else are generally unlawful. There are very narrow exceptions to that in California, but in most states, particularly in New York, restrictive covenant agreements are lawful.

Now, what's a restrictive covenant agreement? Typically it means that both during and for a period of time post-employment the worker cannot work for a competitor; the worker cannot solicit the employer's customers after they leave for some period of time, and the worker perhaps is constrained not to solicit their co-workers to leave their current job with their contracting employer and join the worker at the worker's next job.

Those are the very basic provisions in a restrictive covenant agreement. But a restrictive covenant agreement will not be enforceable if there is no protectable interests. What does that mean? You can't just tell someone, who is a barista at Starbucks, you can't work at a cafe across the street just because we don't want you to. That barista has to have some kind of confidential information that Starbucks wants to protect in order to preclude that barista from working somewhere else for some period of time.

Now in the coffee making business I can't think of what might be a protectable interest. But in other business, and this is quite prevalent in many businesses, employers don't want their employees to take confidential customer information, confidential business information, marketing information or financial information with them and use

that in the next job, so at their next employer they have an unfair leg up, so to speak. And so emerges the acceptance of the British rule or British theme of garden leave. So you see many contracts where employers say you can leave, you can go someplace else, but you basically have to sit on ice for that period of time and we'll pay you for that period of time, and in that way your knowledge becomes stale and we have an opportunity to shore up our relationships with the customers that you worked with. This is not uncommon. It is so in banking and in all kinds of industries.

The other reality that maybe you don't know about because you're antitrust attorneys, is that not only do you have to draft these things carefully and specify what the confidential information is and narrowly construe the competitive business and the geographic limitation, which in today's world becomes very difficult because of technology and the world is flat, as Mr. Friedman has told us, but it's also very important that you make sure that your agreement doesn't preclude somebody from earning a living. That's really the very basic underpinning of the case law that has developed over the years.

Now, one thing that happens in reality is that most of these agreements require that the signatory employee tell his/her next employer that the agreement exists. Why? Because it will give the prospective employer a pause before hiring the employee. The prospective employer then is on notice; well, you can't take stuff with you if your agreement says you can't take the client list or download all your email and everything you've created while you worked for your former employer. But it also creates an opportunity for the lawyers to negotiate.

There's a lot of negotiation that happens in the real world where one company says, okay, you've got an agreement with another company and they are in the same interests, there are all these silent agreements and understandings and we are going to respect each other's contracts. Okay, that's not written anywhere necessarily.

Now, there is one agreement that we didn't discuss, and I forgot about it until I was talking to a colleague. A number of the financial services major employers in the city agreed, because their brokers were jumping ship, and this little group of attorneys was having a field day enjoining all the brokerage houses every time a broker left and took their customers. As a financial services customer, you have the right to change your account from Merrill Lynch to UBS whenever you want. And FINRA will accept your change form for the management of your account, and so these financial houses got together and they agreed on a protocol of what to do when a broker wants to leave, what they can and cannot take, how much advance notice they have to have so that the home office can start calling the customers of the broker and say stay with me, I've got somebody else for you to do business with.

That's the reality of what happens in the employment world. There are very few cases involving no-raid agreements when they involve solicitation of customers and solicitation of employees. There are a lot of cases involving noncompete agreements. Basically, whether you go to federal court or state court, you have your choice in these cases, you have to tell the judge you want an injunction—five minutes, maybe a little more time in federal court—to decide whether or not there is something of value that that worker has to preclude him/her from going to work somewhere else for a period of time. Unless someone has taken something with them or started soliciting before they left, a lot of judges are going to say it is not really fair if the guy or gal wants to work somewhere else, why should we say they can't do it. Show me, explain to me what information they have about your company that they really are going to use when they go to the next employer. So there's a lot of work done that doesn't result in recorded decisions because there is a lot of negotiation, a lot of injunctions filed, complaints are filed, and these things get worked out within three, four or five weeks. So, it is like a fire drill in some of these situations.

So you really have to remember the underlying theory, that people are allowed to earn a living and work.

MR. PARKER: So let me see if I understand this. Now, outside of California, the Richard Parker Company could have my employees sign an agreement that says you can't go to work for Felice for a year after you leave here, and that could be valid if I could make a showing that there were some trade secrets or know-how or other kind of issue, am I correct?

MS. EKELMAN: That is correct.

MR. PARKER: And you cannot do that in California.

MS. EKELMAN: You cannot do that in California. The only limitation is in conjunction with a sale of a business. So if you're a business owner and you sell your business to someone else, there are limits on your ability to compete directly with the business you just sold because there has been some goodwill. And I am not a California lawyer, so I am not going to say anything more about California, other than to just assume California is a no.

MR. PARKER: All right, and when somebody would contest this agreement, would that principally be a matter of state law, federal law or both?

MS. EKELMAN: This is interesting. There's a real strategy to this, and I'll tell you a secret. If you don't have a great case, we tend to go to state court. If we have a good case, we tend to go to federal court.

(Laughter.)

MR. PARKER: These people are taking notes and there's a transcriber. I am being extremely careful.

MS. EKELMAN: I am making a joke so to speak. It's state law, but of course, you might have diversity. If we

have some diversity, yes, then you're going to have to show the dollar value of the damages.

Now, if you can go to court on an injunction and in the one week since the person has left you've discovered emails which show that—they were foolish enough to use your company email—that they were emailing colleagues and customers before they left about their plans and will you come with me, and I am going to get this new thing going and a new organization, let's all leave en masse or are you going to join me, then you've got something and you've got a really good case for an injunction.

In the early days of email I had such a case. It was a wonderful thing because we got an injunction, we got some money. It was very nice. I think people are a lot wiser now about their use of electronic communications than they were in the early days, eight or ten years ago. Indeed, this might have been longer ago than that. But it's really a state court issue, but of course if there's diversity, you may want to go to federal court.

The other thing, the strategy might be you can't really show irreparable harm because nothing bad has happened. You might start an action, and very often you're suing not just the employee who has left and breached his/her contract, but you may be suing the new employer for tortious interference with business relationships or contracts, depending on what they are doing.

There is a whole strategy about how many different common law claims you put in the complaint. In New York there is this faithful servant doctrine. If I am an employee and I am collecting a wage, I cannot double time my employer by working behind my employer's back. And there's a lovely Second Circuit decision out there which says if you violate this doctrine, the employer has the right to recoup all your wages during the period in which you were disloyal. So that is a nice thing to throw into the complaint as well.

So it's really state law, but we can sometimes go to federal court.

MR. PARKER: I asked that because I want to talk about the no-solicitation case. You'll see in your materials you've got the *Adobe U.S. v. Adobe* consent decree and analysis in there.

In full disclosure, I represented somebody in that case, and the facts I am about to spin out are like a composite. They are nobody's particular facts, but I just want to talk generally about a situation just to make a point and maybe get some discussion going here.

So you're in California, where you can't have the type of Parker-Felice agreements that we were talking about. And we all know that in the high-tech markets south of San Francisco Airport, people collaborate. There are platform companies and then application companies, and application companies write things for platforms and everything else. That is how work gets done. Maybe there are other industries in which that also happens, but it is uniquely important in that industry. And that whole industry happens within 50 miles of San Francisco Airport in the state of California.

So we have our two companies working together and you've got fifteen of your best people coming over to my work space, and I've got fifteen of my best people going over to your space. And everyone, including you and I, agree there is something really wrong while we are working together to cold call each other's employees. In other words, what I don't want to happen is you send over your fifteen top people, and I say these guys are really good, and while they are in the parking lot I call them and say hey, man, I got a job for you over here, I'll double your salary if you come over here. That is viewed by many people in the valley—and again, I am speaking very generally and hypothetically here, but I am trying to make a point. That is viewed as not a very good thing to do. By cold calling it means exactly what I said: Hey, you really did well in that meeting, are you interested in jumping over to the Parker company. I am much better to work for than Felice; you'll like me a lot and it is going to be great. I am really going to the top, and she is not and blah blah blah.

So she and I enter into an agreement that that is not going to happen. However, if the guy in the parking lot calls me and says hey, you know, I really like your company and I am getting tired of Felice, or let's go the other way, I am getting tired of Parker, then all bets are off, and there's no restriction on employment.

If you look at Adobe, that is exactly what cold-calling means. You will note in that case the Department of Justice, in what many people might think is a very aggressive approach, cites cases having to do with market allocation on the customer or seller side and says this is per se illegal. And assume that defense counsel were saying, well, this is at worst no harm no foul, because in the Silicon Valley there's a lot of ways to go to work for the Parker Company. I've got a web site, and we are dealing with the most sophisticated electronic group of people in the world, and you can find all kinds of information. So how can it possibly be that cold-calling limits employment. And the other point is that employment markets are large; we can all agree they are huge, and people can move from place to place.

So assume at least one of the lawyers was thinking, arguing, this is like buying a Mustang, folks, I am going back to Mustang—that is my favorite car, I love those things—and you've got ten Ford dealers, and two of them have agreed not to send you an email soliciting hey, buy a new Mustang or not to put a flyer in your mailbox or send you something unsolicited but otherwise can sell you a Ford. My guess is you would still get a competitive price for a Mustang. And that was the basic argument on no harm no foul.

On the other hand, the government—and I think it is very important that people in this room who are counseling people know the most important thing to read is Peter's article, and the second most important thing to read is the Competitive Impact Statement in *U.S. v. Adobe*. Because the DOJ really took a dim view of this sort of thing.

Now, on the DOJ side, let's assume hypothetically that the agreement did not apply to just the fifteen people involved but was sort of general or was not tied in the way, you know, the niceties and the like. But nonetheless the important point is that the DOJ considered that to be per se illegal, and I think any counselor ought to keep that thought in mind. You have those materials in your paper.

Note also—and I am going to ask this question generally to the panel, if this was in some other state, if this was in Pennsylvania or Illinois and I was going to collaborate with Felice, I could have put in those fifteen people's contract you can't go to work for Felice for a year or two years or some other number, isn't that more restrictive and isn't that governed by the Rule of Reason?

I ask that question, and Peter, do you want to respond?

I see Stacey Mahoney has a question.

AUDIENCE MEMBER: Consistent with that—

PROFESSOR CARSTENSEN: Yes, let me jump in here on this. I think it is important to recognize that this is one of these boundary problems. Certainly for a covenant not to compete, as Felice was describing it in terms of specific projects or ventures or whether the employee has access to appropriately defined corporate secrets, internal knowledge, etcetera, you can make quite a plausible Rule of Reason argument; is this an appropriate time period, and geographic scope.

Now, when you move beyond that—and the way I read the *Adobe* complaint and comments it is quite different. The focus there was there was no identified joint venture, collaboration or transaction to which a specific agreement about not soliciting was ancillary but rather it was that we won't solicit your employees in particular ways, period.

So that is where you move across the line, something that I would regard as per se illegal. I am very sympathetic to the government's analogy to market allocation agreements. What you're saying in *Adobe* is we are not going to solicit Google's employees or Intel's employees for jobs. And that, like other kinds of price-fixing or market allocation, once there is a restraint, it doesn't matter in our conventional legal thinking whether or not there is a provable adverse effect on consumer prices, or in this case employee wages, but because it has direct interference with the working of the market, it is illegal.

But I go back to your point, which is an important one. We have some real boundary conditions, and this is where counseling is, I think, very, very important to identify what is the legitimate business justification for specific kinds of covenants to not compete and not to work for a particular competitor for a particular period of time, for a particular reason. And that is in Part 5 of the consent decree in the *Adobe* case. They lay out what presumably defense counsel bargained very carefully for to get the protections so their clients would be able to have relevant agreements when there were projects, programs, transactions, etcetera.

MR. PARKER: Yes, I would say the other is it is very important for people who watch the DOJ generally to read that competitive impact statement on their views of the per se rule. And note that the trend in the courts in the United States has been to restrict the per se rule on conduct, but this, at least in my opinion, is aggressive, and I think it's highly significant.

The other point here is you can't have no-solicit agreements, but I'll tell you, I would be very careful to read the consent decree and try to set them up the way they have them in there. Because Peter is right, that was very carefully crafted.

Let me ask a question here, and I see Lisa Phalen from the DOJ and Cheryl Stein from the FTC here taking notes. So this is purely hypothetical.

(Laughter.)

And I am certainly not going to tell you what advice I gave.

Oh, my, I also see Bob. We have got every enforcer in the world here. So I am being very careful.

You get a call from a client who says I have a commodity product, and it has to be delivered in a truck, and I don't have a truck, but Christine has the trucks. And I'll tell you something, if my competitor and I went to Christine and said, look, we can fill your trucks, buddy, but it is going to be at this discounted price, and we could probably get a discounted price, and this is going to be good for consumers of my product because it is really going to reduce my distribution costs.

All right, is that a buyer cartel, or is that a joint buying group? And is that per se illegal or is that what? Without telling you what advice I gave him or anything else about it, how does the panel react to something like that?

DR. MEYER: My reaction from an economic standpoint is again I think we have to think about what the effect is. I understand if we are talking about the *Adobe* case and others, the issues may revolve around per se legality or illegality. But I think when we are thinking about antitrust issues, we ought to be concerned about the effect in the marketplace.

Here it seems to me the question is: what is the effect of the lower input cost going to be for consumers and also within that input market. So within the input market are

those depressed prices going to lead to reduced trucking services? I would think probably not. However, perhaps if it is a very specialized truck, the market may be monopsonizable.

Then, the next step is to think about what effect that would have in the downstream market. As long as those cost reductions are going to be passed on to consumers, I think there is a very precompetitive rationale.

PROFESSOR CARSTENSEN: I will weigh in and say I would follow very strongly the same line of thinking. I would want to know whether there is something specialized or unique, like is this the one trucking service in town, so there might be a foreclosure effect on others, etcetera.

The subjects that I'd be concerned about are competitive effects upstream or downstream in terms of this transaction, because it would seem to me there is more generic trucking, the trucking company will be able to look at all kinds of other options, and the question is whether this option is an economically attractive transaction for the trucker, given a wide range of alternative places it could do its business.

Just to insert a footnote or cross reference, there's a very good book by Roger Blair and Jeffrey Harrison on monopsony and antitrust just published last year. It is an update of their 1993 book on monopsony and antitrust. And they have some good kinds of econometric models in there on how you begin to test for adverse effects.

The other thing I would want to know is does there seem to be any kind of foreclosure effect or adverse effect on competition and why Rich's buyer here believes it could force down price. One possible explanation, and this goes back to the Merger Guidelines passages, is that there are economies of scale or scope that a regular trucking service can dedicate a truck or truckers to this service, so there's some real cost savings and that is the basis for the lower price.

The other is possibility is really wealth transfer, and for that we need to be more skeptical. Again, I want to know about what alternatives the trucking company has, because to the extent it has a price above cost prior and is now going to be lowering its price closer to its cost of doing business, then I am less concerned. If we have got an efficient trucking company here and we are transferring some of its economies, that is if their costs are below the average for the industry, then you're creating some long-term disincentives for companies to be efficient if the buyer can appropriate these gains.

All of that said, if this is a joint offer to buy services because we are getting prima facie economies of scale and scope, prima facie I'd say it is a legitimate joint venture. It is up to the challenger of that kind of venture to make a plausible case that its real function in this market is exploitation, that is, exploitation of buyer power, and that is really the only explanation.

Myself, I would be more comfortable with looking at that as a legitimate transaction. Unless some red flag comes up in the trucking case, I think it is unlikely.

MR. PARKER: That is a real-life issue. The issue I always have—maybe it's just me—is you have these GPOs in the healthcare area who say well, I represent fourteen gazillion hospitals, therefore, give me a discount on my equipment, on my products, on my Band-Aids, whatever. That is apparently okay. Then you have a couple other people who want to come together to put some pressure on Christine to lower her exorbitantly high prices, and frankly, you start worrying about that.

So I've always had an interest in distinguishing between a legitimate buying group, which apparently these GPOs are, because nobody is indicting them, or a real live buyer cartel.

Can anybody comment on the kind of efficiencies that you would be looking for, or is it just the 35 percent test in the Guidelines is all you need to worry about?

DR. MEYER: I think the efficiencies point is an important one. It hinges on what is available on the buy side of that market. So as Peter said, if the commitment to buy a certain amount of product at a certain place and time and at a certain schedule is going to allow that manufacturer, or that trucking company in this case, to be more efficient, lower its costs and pass them on as lower prices, I think that is a precompetitive rationale.

In the larger context, if you represent a firm that sells to Wal-Mart, you undoubtedly hear the stories of Wal-Mart pushing your client for lower and lower prices. So, if we really follow this rationale to its ultimate conclusion, you would conclude that Wal-Mart is anticompetitive. And yet what has the impact been? Well, pressure for lower pricing makes manufacturing firms more cost competitive, whether it be streamlining operations or looking abroad for lower cost production. Of course, that may raise some national economic competitiveness issues but certainly from an antitrust standpoint that can only be good, and I think, arguably, it has been good for consumers.

To think that Wal-Mart has in some sense reduced the amount of output and ultimately led to higher prices downstream and been anticompetitive flies in the face of common sense. So, it is critical to think about the upstream market and what the pressure is going to do. Is your case like a Wal-Mart type, where that pressure is going to cause that upstream firm, that trucking firm in this case, to become more efficient, leading to more output and lower downstream prices? Or, alternatively, is the practice going to lead the upstream firm to become less efficient or to cut back on production? If so, then that could be a problem.

PROFESSOR CARSTENSEN: Yes, I think I would be inclined to have at least some empirical questions about where Wal-Mart's gains come from in terms of its upstream suppliers, but I think we are in accord that what we are

looking at is, is there actual efficiency enhancement or bargaining down of overcharges if the upstream market has super competitive prices. And what the volume buyer is able to do is to knock those prices down without there being a blow-back further upstream, that probably is a net positive.

Again, my focus is more on competitive process than on static economic measures of change. But again, I think the hospital buying group is a good illustration along with the potential claims made about Wal-Mart, especially to the use of a strategy called the all or nothing contract. I will buy—using your bandage example—I will buy the following quantity of bandages from you, or we will buy nothing. And I need to sell these other hospitals some of my bandages. Now I am in a situation where I am pretty much compelled to sell the quantity demanded at the price offered. And as this has worked out in—well, Bob Taylor down in agricultural world and the Blair and Harrison book does this more generally. What you get are prices that are below the marginal cost of production but roughly equal to average total cost. So that the producer is now, again, in effect transferring some of the efficiency gains that it has made as a producer to subsidize in effect the inefficient production and the production level that is being now sought.

That is not long-run desirable in the marketplace. And Rich's example of hospital buying groups raises a lot of these questions. And we now know that in some merger enforcement actions the government has challenged mergers that are below that 35 percent threshold while they have been saying, no, we aren't going to bother to look at buying groups that are at less than 35 percent. And 35 percent is just way too high. We need to look and ask, are there real efficiency gains from the fact that I can now organize a bigger purchase block and that there will be real cost savings at that point, or are we looking at a situation where the size of the purchase permits the big buyer in effect to reappropriate—appropriate may be a better word to say—appropriate a bunch of the efficiency gains that probably arose elsewhere in the production process.

There is also here another economic concept called the waterbed effect. That is the big buyer—a Wal-Mart or hospital buying group—drives down the prices it pays, the producer is left with costs that aren't covered. It is covering its direct variable cost but not some of its fixed costs, and so it starts raising prices to its other customers, so they wind up, again, in effect subsidizing some of the costs of the volume buyer that more properly would be associated with the volume buyer. There you've got a problem in the downstream market because the competitors, the smaller competitors of the volume buyer, are facing higher costs for input not because their purchases are inefficient but because the volume buyer uses the volume purchases to drive down the price that it pays.

So as Christine said earlier, this is where it gets much more complicated to look closely at what are the sources of gain in the particular transaction. Are there real efficiencies, and there often are not. Or is this a wealth transfer? And this may not make it unlawful, but then you've got to look more critically at what wealth is being transferred in what way, with what kind of longer-term effects on competition.

DR. MEYER: And what Peter just said brings me back around to something that I started with but didn't flesh out. I think there is a general tendency to think of an alleged monopsonist as having market power both upstream and downstream. In other words, people tend to think of markets basically being stacked one on top of another. But that is a specific case and doesn't have to be true generally.

We assisted a client with a merger that was investigated by the DOJ. The case was cleared with a consent decree. One of the issues was the potential of vertical foreclosure. This was a case in which, although the upstream market may have been a more localized market, the downstream market was substantially larger in geographic scope. So while there arguably might have been some market power on the upstream side, what disciplined the entire market—both the downstream market and then, in turn, the upstream market—was global competition at the downstream level.

So we have to go beyond the thought that these markets have to be stacked and symmetrical.

MR. PARKER: Stacey Mahoney, you had a question, go ahead.

AUDIENCE MEMBER: I would like to go back to the labor situation because this is interesting about commoditized products and things like that. But if we are talking about efficiencies, we are already presuming a Rule of Reason case. The *Adobe* case was decided as a per se case. People are not commoditized; they are more like unique real property. We are differentiated products. So you look at the consumer welfare we are trying to protect, because at the end of the day if you control the input prices, i.e. the employee's salaries, the output will be sold for less. Of course they don't have to prove that because they are going on a per se theory. But if you look at employees, isn't the government by doing this suppressing the amount of money that the employees are going to get paid in an otherwise competitive environment? One of the Silicon Valley companies is competing with another to grab the best employees.

Then don't you really have to consider the potential output increase, because each of those people is really incentivized to produce at his/her highest level, as opposed to hanging tight and being comfortable in his/her job.

My point is, it really seems to be inconsistent with the economic thought process to look at these employee cases in a per se rubric, as opposed to the Rule of Reason where then we can get into the analysis of these other issues, which I think are equally if not more important in an

employee context as in a commoditized, undifferentiated product context.

DR. MEYER: Yes, Stacey, I think you're exactly right. When I read the *Adobe* decision, what really jumped out at me was that the focus was the effect of the practice on wages, and that wages were being held down. And that may be true, but I think that is a place for Felice and the employment lawyers to get involved. The decision did not focus on the anticompetitive effect, in other words, the effect on employment, and the effect on consumers in the downstream market.

As an employee myself, as we all are, we certainly like to have the highest wages possible. Perhaps that the practice itself is illegal, but without the anticompetitive effect, perhaps the antitrust hammer is not the right tool for us to hammer down this problem.

Felice, what are your thoughts on it?

MS. EKELMAN: Again I don't know much about antitrust law, but what didn't really make sense to me is that each of these workers was free to work for the competing employer if he/she initiated the process. So I really couldn't understand what the impact was if as a worker, I could go to Richard's web site, I could see what jobs are available, I could whisper to the supervisor whom I met at the cafeteria while I was there, I could have a beer and talk it over at a bar on Friday night. What's the difference or where is the harm if you didn't restrict movement? This was only restricting one small kind of movement. When I think—and again because I am only a lawyer—you know, when you move from one law firm to another, how many people move because of a cold call versus an interpersonal interaction. I mean the interpersonal interactions I would assume are much more effective. So I didn't understand, to be completely honest with you.

PROFESSOR CARSTENSEN: If I could jump in here with two thoughts. First, there is kind of cost-benefit analysis with respect to collusion. There are a bunch of conspiracies out there that have been charged criminally that do not involve really significant harm, but the benefit is worth the cost to the employer. Accomplishing something that limits and restricts competition is illegal. It doesn't matter as long as it's intended to affect the process. Here it does affect both employee mobility as well as employee income, even if the emphasis here may have been more on income.

I realize economists like more than one data point, and all I can offer is one. But I was out in California with a bunch of folks who work at several of the companies named in the *Adobe* complaint. And one of the things that was clear listening to one of those individuals who worked for one of those companies, who was a little restless, but not restless enough yet to go out looking. If there had been some cold calling, some of his interests and skills might be really very relevant over in that other company. Now, maybe sometime after that conversation, he might follow up. But when you're embedded in fairly large groups of people and you're not deeply dissatisfied but you're maybe a little restless, cold calling at the margin may mean that the employer has to be more attentive to more people. And the employees have one greater degree of flexibility in looking for additional work.

Again, you think about it in sort of a cost-benefit way, the cost to the HR and other folks of one more risk is that the employee will defect to a different employer and thus require more hand holding, more attention. If that risk can be eliminated at low cost, the fact that there are a dozen other ways that you could still lose the employee may still make it worth doing.

MR. PARKER: No, I hear you. And another argument, however, would have been that while Felice and I have this deal on no cold calling, and it is bilateral, and no, Felice is not going to cold call my people but Christine is and Stacey is and the other 27 people in this market are. And if they are still cold calling—just using my Mustang example—isn't the employee going to get a competitive wage and benefit package because everybody else is still cold calling, just as I would get a decent price on my Mustang despite the fact that a couple of people decided not to solicit me.

But that is the kind of argument that makes the world go around. And what we as counselors are dealing with is the *Adobe* decision and the aggressive decision on per se, and I think everybody needs to take that into account.

Do we have any more questions on this point? Or on any points that we have discussed today?

Well, I want to thank the panel.

(Applause.)

MR. HIMES: Let me thank all of you. Thank you, Peter, for getting up early in the Midwest. We are sorry you will miss the dinner, so have a nice dinner on us someplace in Madison. Thank you very much.

We are taking no break. I told you this is a tight schedule, so we'll go right into our next panel, which is our traditional year in review panel. I see Molly Boast just walked in, and Julie Brill is in the back and Elai Katz.

MR. HIMES: Thanks everybody. We are going to jump right into this panel. I will introduce Elai, and he'll take care of the rest of the introductions.

Elai, as you know, is a Cahill partner. He handles a wide variety of antitrust matters, you name it: Mergers, acquisitions, litigation counseling. He even tells people about the Robinson-Patman Act. So for those of you that want any advice on that esoteric statute, I am sure he will be glad to help.

You will probably recognize him as the regular *New York Law Journal* monthly commentator on antitrust, where he continues the tradition that began with Bill Lifland, one of his partners at Cahill.

Elai is recognized by Chambers as an outstanding antitrust lawyer, and again, we are privileged to have someone like that lead one of our panels here today.

It's all yours.

MR. KATZ: Thank you, everyone, for coming here. I know it was a harder day than most to get here.

We are fortunate this year to have with us two of the top antitrust attorneys in the land. We will be discussing antitrust developments during 2010, and the emphasis is going to be on the FTC and the Department of Justice because of the women that we are fortunate to have with us here today.

As many of you know, because I see many faces that are very familiar, this is a panel that we basically do each year. It changes from time to time, but each year we have a discussion of what has occurred in antitrust in the prior year. But as I said, this year is a special year because we are privileged to have both Julie Brill and Molly Boast.

I should say that because time is limited we can't cover everything that occurred in 2010, and we are going to emphasize especially the two federal agencies. But you will hear what each of us believes are the important and interesting developments. I will introduce first Commissioner Julie Brill and then Molly Boast.

Commissioner Brill was sworn in as a Commissioner of the FTC in April of 2010. Before she became a Commissioner she had been the Chief of Consumer Protection and Antitrust, Senior Deputy Attorney General for the North Carolina Department of Justice. Prior to that she had spent many years as an Assistant Attorney General for Consumer Protection and Antitrust in the State of Vermont. She also taught at Columbia Law School, and many other great things that I will not mention now, so we can move on to hear what she has to say.

I should say that she began her career as an associate at Paul Weiss for a short time. She had clerked; she was an undergraduate of Princeton, and she studied law at NYU.

COMMISSIONER BRILL: And I even graduated there.

MR. KATZ: And she graduated and got her JD there.

(Laughter.)

Was that examined in the nomination hearings before the Senate?

COMMISSIONER BRILL: Yes, you bet. Absolutely.

MR. KATZ: Well, I am glad they are doing their job.

Molly Boast is no stranger to you here. She's been a member of the Executive Committee of the Antitrust Section of the State Bar Association, and she has indeed delivered prior installations of this very panel reviewing antitrust development during the previous year.

She now serves as the Deputy Assistant Attorney General for Civil Matters in the Antitrust Division at Department of Justice. She had rejoined the government after seven years as litigation partner at Debevoise & Plimpton. Previously she was at the Federal Trade Commission, as a Director of the Bureau of Competition during the Clinton administration. There she oversaw a variety of important cases, including the first reverse payment case and *Hartford Fire Insurance v. California*, a case that she had argued when she was in private practice previously.

She got her JD and a Master's in Journalism from Columbia, and she was an undergraduate at the College of William and Mary.

So without further ado, I am going to turn it over first to Julie to hear about what has been going on at the FTC.

COMMISSIONER BRILL: Thank you so much.

Good morning, everybody, and congratulations for making it in here. I only had to go a few blocks, but I am sure some of you had to get up really early and shovel snow. Thank you for being here.

Jay, thank you for inviting me. And Elai, thank you for making room for me on this panel.

I haven't been to the New York Bar Association Antitrust meetings before. I've done a lot of work with the ABA within the Antitrust Section, but it is really nice to be in this new forum and get to know you, and hopefully you'll get to know me a little bit as my commission term lasts a little while. I will be a Commissioner until 2016.

We have been extremely active at the Federal Trade Commission over the past year. As Elai mentioned, I am not going to try to discuss every matter that we acted upon. Instead I picked out some matters that I thought had interesting points and therefore might offer interesting tidbits to the Bar in terms of what you might see going forward. I tried to pick cases where there were practice points available, and that perhaps you have worked on or that people in your firm worked on.

The areas I thought I would talk about are:

- merger enforcement and the Horizontal Merger Guidelines, so you could get a little bit of my perspective on the new guidelines;
- some work that we did in a very important conduct case, *Intel*;
- subpoena enforcement, which is a pretty hot area and was over this past year; and
- health care reform, to the extent that you all may be interested in what the antitrust agencies are doing with respect to that issue.

Merger filings have clearly rebounded. If you look at the statistics, you'll see they went up quite a bit last year compared to 2009. We are very active in reviewing all the HSR filings that we receive. But I think this past year was probably notable for a different kind of effort, which was a review of issues involving consummated mergers, or mergers that were very close to being consummated but were not necessarily HSR reportable. Some people have called it "the year of consummated merger enforcement"; clearly, it was a trend that is worth noting.

Polypore was a decision that the Commission issued in December, at the end of the year, so it falls just under the wire for this annual review time frame. We issued the opinion relatively quickly: nine months after the ALJ issued his initial decision, the Commission came out with its decision.

I think a lot of people have thought of Part 3 administrative adjudications as being something of a black hole. We have tried to improve that process and set new rules, especially new time frames for our review of cases coming up from the ALJ. I think our decision in *Polypore* demonstrates that we are committed to making this process as expeditious as it can be.

So the good news about *Polypore* is that, hopefully, it will be the first in a line of Part 3 decisions where the Commission will act expeditiously.

And note since this was a consummated transaction, the acquiring party had already combined the assets of the two companies. Those of you who read the decision probably saw that we required divestitures despite the fact that the merger had been consummated.

Another consummated merger that we examined closely was the *MDR/QED* matter, which involved databases for educators that are used by entities that market educational materials to teachers. The databases involve kindergarten through high school teachers, and contain information about the books the teachers bought in the past, and the subjects they teach. Those databases are used by publishers and marketers in their efforts to sell textbooks and other types of books. The consent that was ultimately entered by the Commission restores competition by requiring divestiture of robust information in that database.

The case was led by our New York Office. Susan Raitt is here, and Len Gordon was trying to get here but was caught on a flight from California. So another lesson out of the *MDR/QED* case is that our New York Office continues to be very active in the antitrust matters.

Another consummated merger to discuss is ProMedica's acquisition of St. Luke's Hospital. But first, I will take a bit of a digression from the theme of consummated mergers to note that the St. Luke's-ProMedica merger is a very good example of federal-state cooperation as well. Those of you who have been practicing before the Federal Trade Commission, as well as before State Attorneys General, probably know that the FTC and the states cooperate a great deal with respect to cases of mutual interest. The St. Luke's-Promedica hospital merger is a very good example of one of these cases.

We filed in federal court with the Ohio Attorney General to stop this hospital merger out in Ohio. This was not a Hart-Scot-Rodino reportable transaction. We were informed of the transaction and began investigating it before the merger was consummated. We entered into a hold separate agreement with the parties while we were conducting the investigation; otherwise, we probably would have had to go to court much earlier.

Another consummated merger which we recently filed was the LabCorp acquisition of Westcliff Medical Laboratories. Similarly, it was not HSR reportable. We heard of the transaction and we started investigating it ahead of time, before the merger was consummated, and once again, we were able to enter into a hold separate agreement with the parties.

We also looked at several transactions coming out of bankruptcy. In the *Fidelity/LandAmerica* matter, we took a close look, and ultimately required divestitures in the market for title insurance services after Fidelity acquired LandAmerica out of bankruptcy.

Other bankruptcy-related transactions that we looked at included the *Tops/Penn Traffic* grocery store merger, where Tops acquired Penn Traffic out of bankruptcy and we required divestitures, and the LabCorp acquisition of Westcliff that I just mentioned, where Westcliff was in bankruptcy as well.

So what are the lessons from the merger enforcement work that the FTC did over the past year? First, there is no safe harbor for consummated mergers. Even though HSR reportable mergers have picked up, and we are going to continue to look closely and put a lot of resources into those matters, we are not going to hesitate to look at mergers that are not reportable and have been consummated or soon will be. Similarly, if a transaction takes place through a purchase in a bankruptcy proceeding, it's not a free pass, and we are going to take a look to see if they raise competition concerns.

Another merger matter that I want to mention is the Google-AdMob investigation. What was interesting was that we closed the investigation and issued a statement about the reasons why we were closing that matter.

We concluded that harm to competition was unlikely with respect to this merger, despite the fact that both of these entities, Google and AdMob, were the leading players in mobile advertising networks. And the reason we determined that harm to competition was unlikely was because there was a new player that was entering this space—Apple. Apple hadn't previously engaged in this type of mobile advertising or set up a network for mobile advertising, but it was clearly a very well funded and technologically savvy player and was going to change the field as it was entering this market.

What was interesting about our Google-AdMob investigation is that it shows we are not going to hesitate to look at high-tech mergers, and we are not going to hesitate to look at mergers that are moving quite quickly. On this point I refer to the analysis of what was happening with respect to Apple and whether it was going to enter or not—this was actually happening in real time as we were making our decision, which was very interesting to me.

The other thing I think is noteworthy about the Google-AdMob investigation is it shows the Commission's commitment to transparency. We issued a closing statement and articulated the reasons why we weren't going to take action against that merger.

I think I'll briefly mention my views on the new 2010 Horizontal Merger Guidelines. Molly probably has a lot to say about it. She was one of the leaders in that effort. I think you were all called Gang of Six, right?

MS. BOAST: Yes, the G6.

COMMISSIONER BRILL: The G6, that is cute.

So Molly is clearly the expert on the details of the Horizontal Merger Guidelines, but to the extent that you care what a Commissioner might think about them, I thought I might just give you a couple of thoughts.

From my perspective there are three key changes in the 2010 Horizontal Merger Guidelines. The first involves the role that market definition will play and does play in merger analysis. Clearly, when you compare the 2010 Guidelines to the 1992 Guidelines, there is a movement away from what appears to have been a lockstep analysis, where first we analyze market definition, and then we go through the other steps in order to determine whether or not the merger is something that will be challenged by the agencies.

But the agencies' practice had changed over time, from 1992 to the present, and I think the Guidelines now better capture the way that the agencies actually do engage in merger analysis. And while market definition is a very important component, it is not the be-all and end-all, and there are going to be mergers where we are not really certain how to define the market, but we look at other issues that raise competitive effects concerns, or other issues that cause us to want to take a closer look.

Of course, there has been some consternation about whether that perspective represents a big change. I don't think there has been. If you compare the new Guidelines to how we approached the *Whole Foods* case, I don't think there is a big change. And the Guidelines state that the agencies will normally identify a market when they are taking enforcement action.

Of course, another of the key changes in the Guidelines is that the HHI thresholds have increased. I think there has been a recognition by the agencies that it didn't make sense to set a precise HHI and indicate, perhaps unrealistically, that if you're within this threshold, this will happen to your client, and if you move up to another threshold, then something else will happen. Our analysis, our science, the tools we have developed through economics, shows that the overall analysis is just not that precise. So I think there was a recognition that moving the thresholds upwards would help companies and their counsel better understand the circumstances under which we are going to take a deeper look at the transaction. I think that is what the HHIs really do for you and the business community. They don't necessarily say that transactions within the HHI thresholds will certainly be challenged, but they say if you fall within the red zone, we are probably going to want to take a second look.

The other thing I think is interesting is the new section on innovation. Previously the 1992 Guidelines had a footnote on innovation and the role of innovation in merger analysis. Now there is a new section—Section 6.4—devoted to innovation. I recommend you read it if you want to see an issue that has been fleshed out to a much greater extent.

Turning to conduct issues, *Intel* was our very large conduct case, probably one of the biggest efforts that the Commission has engaged in over the past several years. It was a Part 3 complaint that was filed in December 2009, after a fairly long and detailed investigation. The matter was voted of Part 3 in November 2010, allowing the parties to enter into extensive settlement discussions.

The concerns that the Commission had with respect to Intel's activity were that the company was trying to inappropriately maintain its monopoly in the central processing unit, or CPU, market, and it was engaged in efforts to obtain a second monopoly in a newer market called the graphics processing unit market, or GPU market.

We examined many activities that were potentially inappropriate monopolistic behavior, but the ones that we focused on in the settlement were Intel's use of market share discounts to squeeze out its competitors in the CPU market, creation of technological barriers to prevent the interoperability of competitors' GPU chips, and the failure to adequately disclose changes to some of the Intel's computer programs that made its competitors' products appear inferior. In fact, they weren't really inferior; it was just that the programs being developed by Intel didn't make them as interoperable as they should have been.

I am not going to go into the details of the settlement. The settlement really dives fairly deep into Intel's business and to some of the things that it needed to do to correct the problems with respect to competition in those markets and to restore competition as it really should have been in the absence of these kinds of activities. And of course, I commend the settlement to all of you.

So what are the lessons for the antitrust bar that stem from our *Intel* case? I think number one, maintaining competition in high-tech markets, as I mentioned before, is a top priority of the Commission. We are going to continue to be vigilant in challenging monopolistic practices by dominant firms in dynamic high-tech markets. The fact that it is a dynamic high-tech market that may be changing rapidly is not going to deter us from taking a look at it.

I think another very important lesson or noteworthy point with respect to *Intel* is that we alleged in our complaint that Intel's activities violated Section 5. We alleged some of the competitive problems were both inappropriate under the Sherman Act, as well as inappropriate under Section 5. So we asserted stand-alone Section 5 competition claims.

We also alleged Section 5 violations because some of our concerns were grounded in consumer protection. There were some failures to disclose issues that were a very big part of the case. So I think that is a very interesting point of note.

I will close with a brief discussion of subpoena enforcement. Very quickly, over the past year we have undertaken three Federal Court actions to enforcement of subpoenas that we had issued. One was in the *ProMedica* hospital merger matter I mentioned earlier, the second one involved our Church and Dwight investigation, and the third one involved a pharmaceutical investigation. We won all of these enforcement actions. We have a really good track record on subpoena enforcement, and we are not going to hesitate to enforce our subpoenas.

My personal belief, as one of five Commissioners, is that it's probably better for you to counsel your clients to cooperate with us, as opposed to not cooperating with us. We all know, because we are all big boys and girls, that there are going to be times where there are legitimate disagreements over the scope of a subpoena or whether we have the right to certain types of documents. But I think that what these actions show is there was not really a good basis for that kind of argument. And so while we did have to go to court, we were successful in getting those documents.

And as a very personal statement coming from me as a Commissioner, I'll note that it probably doesn't help your clients when I hear from staff that your client is not cooperating or engaged in delay tactics and similar activities. We hear from staff about these issues—and frankly, we get involved when the agency has to go to court, because we vote on those matters. So it is something I would like to ask you to keep in mind, in light of the trend we have seen in that area over the past year.

So thank you, and I look forward to chatting with you during the question and answer period.

MR. KATZ: Thank you very much.

Molly.

MS. BOAST: Good morning, everybody. Thank you for showing up and tolerating my late arrival, since I did indeed go to the wrong hotel, having been on auto pilot for a number of years.

I am going to follow Julie's lead and touch on a few of the cases I thought were most interesting over the last year, rather than trying to catalog everything we have done. And I am going to start with a few non-merger cases, because the reality is that with mergers down, as they have been over the last couple of years, the agencies have had an opportunity to do non-merger work at a level that is sometimes not available to them and certainly wasn't available during my last tour of duty in government.

In light of the fact that you've already heard from Mr. Parker this morning, let me start with the *U.S. v. Adobe* case. I am not going to take you back through the details of the facts, but as you probably know from Rich's comments, this was a challenge to a series of bilateral agreements, and in one instance a unilateral agreement between various high-tech firms in Silicon Valley pursuant to which they agreed they would not engage in solicitation efforts for each other's employees. That is the simple restraint that was challenged.

Now, we chose to challenge these as per se unlawful restraints for the following reasons. First of all, we

believed they were naked restraints, and that is indeed the legal basis that we set forth in the competitive impact statement. They were express. We did not detail the actual conversations in the complaint, but they were quite literal. We looked at a large number of these agreements and chose to pursue as per se illegal those where we had the following indicia: where it was express, where the agreements had been reached by various senior members of these firms, and where there was some pattern of adherence to them. This enabled us to tell whether they were being enforced or not, or whether steps were taken to make sure they were enforced in the future. These are the kinds of criteria our criminal section would look at in deciding whether to pursue and open a Grand Jury. We chose not to pursue these as criminal because we were in the employment law area, an area that was arguably novel. That is, because these restraints took place in the employment setting rather than in a product setting. But otherwise we believed that the agreements fully satisfied the criteria for per se treatment.

We cite some examples in the Competitive Impact Statement of preexisting enforcement actions or cases where courts had embraced per se rules to support our point.[1] One was actually a government enforcement action that had involved employment restraints. One was a reported case in which the restraint took place around an input, which is what this was: this was the labor input into the products that these firms made. And the third was a case where again the Court embraced per se treatment for a non-solicitation arrangement, as opposed to a broader "we won't hire at all" arrangement. So we believed we had ample authority to support the per se approach.

Then the next question concerned ancillary restraints. A large part of the argument made by the parties was that they were engaged in ongoing collaborations with one another, and that this was a very fruitful way to develop new products in this high-tech world, and that these arrangements actually preserved and protected those collaborations and even promoted them.

Our view of this argument, and again it is set forth in the Competitive Impact Statement, is that that would be all well and good, but these particular restraints were not limited to the specific collaborations that were brought to our attention. Therefore, we said they were overbroad both because they weren't limited to a specific project, and because they weren't limited to employees with a certain job function who might have been engaged in a project. Rather, these restraints covered all employees in these firms, and weren't limited in time. Therefore, they fell outside the ancillary restraints doctrine and were appropriately treated as per se illegal.

Now, the consent itself, and again this is discussed in the Competitive Impact Statement, recognizes that there may well be numerous types of arrangements where the ancillary restraints doctrine would apply, and we therefore carved out, in a series of intense negotiations with parties, the conduct where we thought some kind of a restraint on employee movement might be appropriate. To give you one example, we carved out mergers and acquisitions discussions, because it is not uncommon when key personnel are in the room discussing whether a merger is going to take place, to have an understanding that they are exposing their best talent to one another and they won't approach them. And there are other examples in the Competitive Impact Statement.

The other comment I wanted to make on this case that most people haven't really noticed— the term of this decree is five years. Normally Department of Justice Antitrust Division decrees are ten years. That is certainly the default in almost every instance. Why did we choose to go five years? Not the reason you might guess, that this is a fluid high-tech changing market. One of the requirements of the decree is that the firms are required to make disclosures of these arrangements to the employees when they have them in place, presumably on an internal web site. We believed, of course, the case would get a fair amount of attention when it was brought, particularly in that community, and that these disclosure requirements would effectively create a self-policing mechanism within the firms, and over the course of five years any lingering effects would have been eradicated. That was the rationale behind the shortened term.

Let me move to a case that is currently in litigation. I feel a little bit constrained in my comments, and so I won't do more than give you a brief overview of what is in the complaint and that is a challenge to some Most Favored Nations or MFN provisions entered into between Michigan Blue Cross Blue Shield and various hospitals.

Roughly speaking, the MFNs at issue fall into two types, although there are many variations on the theme. One is MFNs that require the hospitals with which Blue Cross was contracting to give Blue Cross rates at least equal to the rates they were giving to other insurers. The second was the set of MFNs that require the hospitals to give Blue Cross rates better than they were giving to the other hospitals; we called them the "better than MFNs."

In the complaint, first of all, we allege that Blue Cross had market power in the various localities in which these MFNs were in place. But secondly, in many instances Blue Cross promised the hospital that it would give it higher rates if it would enter into these MFN arrangements. So both Blue Cross rates were going up and its competitors' rates would go up if the MFN were actually given effect.

A third point of note, because I think one of the questions that will be asked over the course of the litigation is how do we distinguish the procompetitive MFN from the anticompetitive MFN? In many instances the MFNs were entered with what I would call a dominant hospital. What I mean by that is, a kind of must-have hospital, a hospital that had to be in the network for a competing insurer to compete effectively.

The complaint also sets forth a number of different types of effects from these MFNs, and they are fairly subtle. They are worth looking at. They have the sort of subtlety that reminds me of the coordinated effects section of the new Merger Guidelines. First of all, we alleged that the MFNs in some communities prevented entry by competing insurers; that is pretty straightforward. Second, we alleged they raised rivals' rates in certain communities; again, relatively straightforward. And then we got into more nuances, evaluating the incentives of the parties and what we learned during the course of the investigation, and that is that the MFNs effectively set forward a rate, and therefore while they might not have deterred entry altogether, they impeded effective entry from anybody that would really take share from Blue Cross Blue Shield.

Finally, we alleged that the MFNs prevented a narrowing of price differentials. One of the phenomena we observed during the course of the investigation was that the gap between Blue Cross's rates and others was shrinking and these arrangements were likely to slow down the narrowing gap. I bring these points to your attention because I think we too often think in sort of simple terms and miss some of the nuanced thinking that goes on in the agency, as we try to tease out the subtle ways in which competition can be adversely affected.

My last point on this particular case is that although the markets we alleged are largely local in some measure, because that is the way most insurers compete, we are seeking statewide relief. Not just because there are a number of insurers throughout the state that are affected, but also because there are a number of employers that have statewide operations, not the least of them being the State of Michigan, that would like one-stop shopping for health insurance for their employees. Therefore, having statewide relief so there is not an MFN operating in one community but not in another is very important to us. So stay tuned. We are just in the process of briefing a motion to dismiss in that case.

My third case for attention here today is also one where, oddly enough, although I've been involved with it for a year, I still feel a bit constrained to speak because it's in the Tunney Act process here in the Southern District, and that is our Section 1 case against KeySpan. This involves a very complicated set of facts, so I won't try to do anything other than characterize it for you at a very high level.

The case basically involved a swap of electricity capacity in the New York area, a sort of reserve capacity that under New York regulations is required to be available to meet peak demand, and it's all made available through a complicated auction process. The allegation is that KeySpan, believed that there would be new bidders in this process that might lead it to a lower rate than Keyspan had received in the past. It had a cap at which it could bid set by the New York regulators, and had historically bid at that cap. It had arranged a swap through a financial intermediary where it acquired additional capacity to spread out its risk from another competitor.

We treated this as a horizontal agreement, because we believed and the evidence showed, that KeySpan knew the financial intermediary was likely to arrange this swap with KeySpan's closest competitor. We also believed that the financial intermediary knew those were the likely two swap partners, and they both had market power.

Most importantly, of course, is why we chose to pursue a disgorgement remedy in this case.

This is the first case where the Antitrust Division has sought disgorgement. In a negotiated resolution we will receive, once approved, $12 million from KeySpan, which is actually substantially less than the amount of harm really incurred.

But I want to make sure people understand why we thought we were legally entitled to this remedy in this specific case. First of all, the language in the Sherman Act is that we seek relief that prevents and restrains the violation. In this particular case, KeySpan had actually sold the assets that it used in this auction market and was no longer in this business, so an injunction was not likely to be meaningful. And the thinking behind the disgorgement remedy was that if at the time Keyspan was bidding, it had believed it was at risk of having to disgorge what it gained from the auction, some or all of it, but all of it could have been at risk, then its incentives likely would have been altered during this bidding process, and it would have been less likely to bid the cap or enter into an arrangement that put it back at the cap.

Now since Keyspan is not in this business, the deterrent effect here applies to others in the market. It does not apply to KeySpan directly. But this is basically what we thought was a pretty strong case for a violation without an effective remedy, and that led to the disgorgement analysis. We chose the Second Circuit for our case filing not only because KeySpan is here, but also because the Second Circuit has a long history of securities cases in which disgorgement has been sought, where the courts have looked closely at the equitable powers of Federal Courts, their inherent powers and similar "prevent and restrain" language to support the notion that this is a proper case and appropriate use of the Court's equitable jurisdiction.

Let me move quickly to my one merger case. Elai asked me to talk about this, and it is not very complicated, so it won't take very long. This is a case called L.B. Foster and Portec. It involved a merger of firms that manufacture joints that connect railroad tracks. There are different kinds of rail joints, but they are extremely important because they convey the electrical signals as trains go through. And basically, they have to be bullet proof, because if one of them breaks, the whole system shuts down. As a result of that need for the bullet-proof quality of these rail joints, all

of the major railroads, so-called Class 1 railroads, will not buy joints until they have gone through a very rigorous and sometimes multiyear testing of the product, which they do on switches and things like that.

So the question was, as we were requiring a divestiture here, how do we avoid creating a situation where in this two-to-one market, there was a monopoly for a number of years while the testing took place. Because of that problem, the Division chose to require an up-front buyer for this acquisition, for this divestiture. While I will not call it disfavored, it is a seldom used approach in the Division. The rationale was if we can find a buyer that is known to the Class 1 railroads, perhaps in an adjacent space, and ultimately a buyer is approved, then the railroads won't require this extensive testing period. So in that situation we thought it was appropriate to impose an up-front buyer requirement.

I will make just one comment on the Merger Guidelines because we can come back to that in the question and answer period, and that is to pick up on something that Julie said about market definition. This is the way I think about it, and this reflects the conversation that the G6 had about how to think about market definition. Market definition gets you to a way to measure market share, which gets you a way of calculating market concentration. That is all market definition does for you. It is a proxy for figuring out a way to look at some possible competitive effects. So we spend pages and pages in the Merger Guidelines walking through what we think is the appropriate way to think about how to get to that market concentration measure. But the proper place for market share and market concentration, the end product of the market definition exercise, is in the catalog of the types of evidence we look at, which appears in Section 2 of the Guidelines. So it is a piece, potentially a very important piece, of evidence, but not dispositive. And that is what we are trying to convey with the structure of the Guidelines today. I don't think it is necessarily obvious unless you're following this little bouncing ball around, but that really was the import of what we were trying to do. It wasn't that we were trying to get rid of market definition. It is just that it has a much more limited role than people think it does, and we needed to reposition it for that reason.

Finally, even though it is in 2010, we recently published our consent in the NBC-Comcast merger, and I suspect there was enough newsprint filled on that, so I don't need to walk you through it. I'll leave that for the question and answer period as well. Thank you.

MR. KATZ: Thank you very much, Molly. I'll start, just as you ended, with the Merger Guidelines. And I want to focus on the decision that you had mentioned, Commissioner Brill, the *Polypore* decision at the FTC. This is a decision of the Commission affirming the ALJ's decision condemning this merger. I found it interesting as I was reading about the decision that it was a classical merger decision. It took a lot of time talking about relevant markets in this merger, which has to do with battery separators, items you put into batteries used in cars and golf carts and things like that. So I was interested in observing how detailed the analysis was in what I would call the traditional way, not in the way that Molly, I think, just suggested was perhaps the way the analysis is normally done these days. And Commissioner Rosch took note of that, as mentioned in his concurrence.

So my question to you is, should we look at the Guidelines more as how the agencies do their analysis as opposed to how decisions should be written? Are decisions going to continue being written with a careful description of the relevant market, or is this an anomaly of a pre-merger guidelines era.

COMMISSIONER BRILL: That is a very fair question, and it's worth spending a minute on to explain what happened. The *Polypore* case, even though we did act quite expeditiously in terms of our work once it came up from the ALJ, had been litigated by the parties under the old framework. So the 2010 Guideline revisions hadn't yet been finalized or implemented. So the parties litigated the case under the old guidelines; that is, they presented the evidence to the ALJ under the more traditional, lockstep analysis of the old guidelines. Accordingly, the ALJ's decision was written with that perspective, and when it came up to us, that was the state of the evidence and what the Commission had to deal with.

The opinion was clearly written under the old framework. But there was a little bit of discussion—I don't know whether it was too little so even some very careful readers might have missed it, but there was some reference in the decision to the fact that we were writing it under the old Guidelines. And we noted that the 2010 Guidelines, had they been used by the parties, would not have changed the analysis. We were in an interregnum period, because the parties had done the bulk of their work and the bulk of the evidence was presented under the old Guidelines. Molly and I are saying the same thing about the Guidelines: they are not intended to change the ultimate outcomes. They are not intended to do away with market definition. But it probably is a fair point that if we were to write a decision today where the case had been litigated under the new Guidelines, it's very likely that there would have been a little bit less discussion about market definition and a little bit more discussion about competitive effects and other issues. But I don't think it changes the ultimate outcome in any way.

MS. BOAST: May I comment as well?

MR. KATZ: Please.

MS. BOAST: I agree with everything Julie said but when we talk about the Guidelines reflecting the way the agencies practice as distinct from what gets published, what we were trying to do here is to show everybody how

we actually conduct an investigation. We do not spend a lot of time sitting there doing artificial exercises around market definition, because we'd be there for months. We go out and talk to people and we start to figure out how a particular transaction could cause harm, if at all. And then we start to think if the merger could cause that kind of harm, what is the market in which that harm would take place? You're sort of looking at it the other way around. This is the real world, how things get done. But I think when we publish a complaint, we do want to tell people that the evidence suggested that there was a proper market defined as X, Y or Z.

Now, I will be completely candid with you and say that we felt some need to try to show practitioners why we sometimes end up with multiple word, multiple adjective markets. Because when you go out and talk to people in the market, they will say this is where it is going to hurt, and you realize that might be the small to mid-range only copies, eight pages a minute, whatever it is, part of a much broader so-called market.

MR. KATZ: I wanted to talk a little bit more about post-acquisition merger review, which I think we discussed. There was a lot that had gone to the FTC but I think to the DOJ as well. One of the things that I noted again in that same *Polypore* decision was the relief extends—correct me if I am wrong, but extends what would be beyond a typical relief in a regular case where the deal hasn't closed. Typically you just have a divestiture, but here there is a continuing requirement under some contracts; there is some IP that will have to be licensed. And I wanted to understand from both of you, because I know you both deal with investigations of closed mergers, why should the relief be different, why should it be worse in a way at the end of the day for a closed transaction than a not yet closed transaction?

COMMISSIONER BRILL: So I think the reason it might feel worse in a consummated transaction is because the parties have taken steps to, as we say in the Agency, scramble the eggs. More needs to be done to restore competition to status quo ante. That is what we will look to accomplish in all instances where we are seeking relief from a court or where we are seeking relief in Part 3: we will always seek to restore competition to the status quo ante. Having said that, if the parties have consummated a merger, as happened in *Polypore*, if they start to mix up their assets, if they move people around and move production lines around, we are going to have to do a little bit more and dig a little bit deeper to bring competition back to the place where it was before the merger. And to be clear, we do that for both consummated and unconsummated mergers.

Some of the merger work we did over the past year, where the parties agreed to a hold separate, required more than what you might think of as a simple divestiture and required some IT and other information to flow to the party that was purchasing the assets. But typically speaking, it really is a function of what have the parties done.

MS. BOAST: And I would say that I actually don't think divestiture of IP and customer contracts is limited to consummated mergers. The idea behind a good divestiture is that you are divesting an ongoing, free-standing business that often will require—the one that comes to mind in the last year at DOJ was the B.J.-Baker Hughes consent, where customer contacts and IP were required. But that is very common.

I think the harder part of thinking about merger divestitures is that those divestitures are increasingly difficult to implement. In a perfect world you would have a subsidiary that would get spun off, and you wouldn't have to worry so much about it. But that is not what is brought to the table very often these days. Business is more complicated than that. The choice is either to seek to block the merger or to work through its complex details to get a divestiture that you think is competitively sufficient. But those are the options.

MR. KATZ: Molly, you had discussed, the rail joint merger and the requirement of an up-front buyer. Some commentators have suggested—they went ahead and counted decrees, and I won't bore you with the details—but they did some analysis saying well, could it be that the FTC, which traditionally had often asked for an up-front buyer—not always—and DOJ, which usually did not ask for an up-front buyer, were switching their practices. Is there any truth to that suggestion or that thought?

Before you answer, clearly you explained why in this particular case there was a very specific reason why, but still somebody had counted a number of cases.

MS. BOAST: Well, first of all, I think this commentator should get a life.

(Laughter.)

Because I don't even do that kind of counting. No, I actually don't think there is. I think what has happened over the years is there's been undue emphasis on drawing a distinction between the Agencies' practices when in fact they are not that distinct. The FTC will use up-front buyers probably more frequently than Department of Justice, yes, but also probably less frequently than most people think. Certainly, there is a large category of mergers where there are assets that can't be degraded, things like that, where the FTC does not require up-front buyers.

The other thing, and this is a gross over generalization, but the FTC I think on average has more mergers in the consumer market space, supermarkets, things like that, where it is really easy to deter customers, to send them off someplace else by slight degradation of the assets. DOJ has many mergers in middle markets where that tends not

to happen. So the risks for the FTC are much higher, and I think that is one of the reasons they look for up-front buyer requirements.

COMMISSIONER BRILL: Yes, I don't think there's been any change. I think it is just a function of the particular mergers that have come before the different Agencies. Everything is case-specific. It really depends on the facts. But nothing has changed.

We issued a 2003 policy—were you guys there, Rich and Molly, when this was done? I think it probably came after you.

MS. BOAST: Probably trying to restrain us.

COMMISSIONER BRILL: I won't comment on that. But there was a policy issued in 2003 that talked about when the FTC will seek an up-front buyer. And the factors are, to a certain extent, exactly what Molly described, and there are a few others. But nothing has changed in that regard. The factors are if there are many potential qualified buyers and the assets are not likely to deteriorate, then we are not going to require an up-front buyer. On the other hand, if the assets are going to deteriorate or could have the potential for deteriorating, as Molly said, or there are not many potential up-front buyers, we may look for an up-front buyer. Also, if the business or the assets that are to be divested would not be an autonomous, ongoing stand-alone business, then, too, we may look for an up-front buyer.

So it may just be sort of the quirk of the particular cases that came before us last year, but I don't think there is any change in policy on this. It is really going to depend on what we have before us.

MR. KATZ: I wanted to turn away from mergers to Section 5 of the FTC Act, which we had mentioned was used in the *Intel* enforcement action. I wanted to ask in a broad sense, there has been so much discussion about how Section 5 of the FTC Act can be used, but can you tell us a little bit about the advantages and disadvantages of using it? And I would particularly be interested and I think people in the room would be interested in hearing especially from you about how the mixing of consumer protection issues and antitrust issues comes into play in Section 5. I think you're one of those people who has a true expertise over many, many years in both antitrust and consumer protection. There are not that many people with that mix of knowledge and experience.

COMMISSIONER BRILL: Right. I am also very used to and comfortable with working with statutes similar to Section 5, because most of the states have a mini Section 5. That is the source of their authority. So I am very comfortable with all of these concepts. I actually have written a little bit about this issue and the overlap of consumer protection and competition concerns.

I wouldn't frame Section 5 as being advantageous or disadvantageous. I think those are loaded terms which make it seem as if the Commission only alleges counts that will allow us to win. So rather than thinking about it as advantageous or disadvantageous, I ask what does this tool mean and what was it intended to mean?

There has been a lot of discussion about Section 5 and its scope. From my perspective it is quite clear that Section 5 means more than what you see in the Sherman Act. It is worded differently. It was promulgated by Congress afterwards. The legislative history is quite clear that it's intended to be broader. How much broader, where the boundaries are, is something that is going to be determined by case law.

One of the powers of Section 5 is that it allows one to think about both competition and consumer protection issues. So it was very well suited to a case like *Intel*, where the practices that we were concerned about involved both competition issues as well as consumer protection issues.

I also think there are some other areas where Section 5 is likely to be particularly useful in terms of thinking about how the courts or the Commission should analyze a case. One of those areas is privacy. There is a lot of thinking going on both at the Agency and around the country about privacy and how privacy should be dealt with in the United States. What needs to be considered, when you're thinking about privacy, is not only how to protect consumers but how to protect competition in the online space and the offline space with respect to data and how data is sold and dealt with, especially with respect to consumers.

So I think Section 5 is really a particularly useful tool to use in certain areas. High-tech is one example, and privacy is another one.

MR. KATZ: The next question is more of a comment than a question. But Molly, if you wish to comment further, you can. But one of the things I noticed about the series of cases that you chose to describe is many of them are condemning conduct that can both be lawful and unlawful. Agreements about employees can sometimes be lawful and can sometimes be unlawful and swap agreements can be sometimes lawful and sometimes unlawful. My comment is it seems to me that we are seeing more of these kinds of cases being brought than perhaps we had in the prior administration where I think there was more concentration on conduct that almost everyone most of the time agrees is unlawful. Again, no need to respond if it's something that you can't, but that is something that I've observed and I think I find interesting and in some ways helpful for people to be able to see where the boundaries are.

MS. BOAST: I wouldn't go so far as to say there is an affirmative strategy to look for cases in a certain area and bring them. It's more a willingness to take that risk,

because win, lose or draw we will get some legal clarity, and that is helpful for everybody. But we clearly are not bringing cases where we don't see any potential for any anticompetitive harm.

MR. KATZ: I want to talk a little bit about health care. It appears to me that Department of Justice has been taking a more active role in health care in an area that in some parts of health care the FTC has traditionally taken a lead, and even in years past there have been some public disagreements. On policy, for example, Department of Justice put in a very strong brief on reverse payments. Can you guys tell us the extent to which the Agencies are cooperating on health care matters at this point?

COMMISSIONER BRILL: We are cooperating on health care matters. We are playing very, very well together in the health care sand box. Two areas where I think you're seeing much more cooperation now than in the past are, first, of course the area that you've mentioned, Elai, which is pay-for-delay. In briefs that are written by the two Agencies, there is essentially a 180-degree turnaround, to put it bluntly, from how it has been in the past. And that is a very, very welcome development from our perspective.

The other area where we are cooperating is with respect to considering competition issues that arise under the new Health Care Reform Law. There's been a lot written about ACOs, Accountable Care Organizations, and I don't know how many of you are in the health care arena and have clients for whom this may be a live issue. But even if you don't have clients in this area, it is probably a fairly interesting issue.

The Health Care Reform Act is designed to encourage organizations to think about how to improve quality, how to improve patient care and also how to drive down costs by bending the cost curve. One of the clear mechanisms that Congress set out for accomplishing this is to allow practitioners—doctors, hospitals, others—to come together in order to better coordinate care, to focus on the end result for patients, as opposed to what's tended to happen in the fee-for-service model, where each provider is providing a particular service and there really isn't overall accountability for the cost and quality of patient care. So that is the theory behind an Accountable Care Organization.

Now, of course what can end up happening in an Accountable Care Organization is, depending upon who comes together in order to be improve the quality of care for patients, and how many players come together and what their position is in the market, you could end up with an organization that has a tremendous amount of market power and could set prices in a way that isn't serving the overall goal of the Act and isn't driving down prices. So to the extent that Accountable Care Organizations might create a potential competition issue, the agencies have been asked to work with HHS and CMS to develop competition guidelines for Accountable Care Organizations. The guidelines that we are working on are designed, at least initially, to focus on Accountable Care Organizations that participate in the Medicare Shared Savings Program. That is, if they are going to participate in Medicare's program to share the savings from bending the cost curve by setting up as an Accountable Care Organization, the question is how the ACO can be structured in a manner that doesn't raise antitrust concerns.

The guidelines that we are working on with Department of Justice and with CMS are designed to address some of those issues: what kind of integration is needed, what are some of the other factors that we are going to examine when we are trying to determine whether these organizations are appropriately engaged in the kind of cooperative efforts that were the goal of the bill.

The Federal Trade Commission held a workshop with CMS on this issue back in October. The participants discussed some of the appropriate criteria, and right now we are working with the Department to draft those guidelines. I expect that the guidelines will be issued relatively soon, at least in a proposed form.

MS. BOAST: I have nothing much to add to that. Just remember we are bringing different expertise to the conversation in health care issues, because a lot of the Antitrust Division's work is in health insurance, whereas a lot of the FTC's work is in providers.

COMMISSIONER BRILL: It is a good synergy.

MR. KATZ: One follow-up that is of interest to me when thinking about these guidelines is when I hear about new guidelines being written that have some impact on competition, I think to myself to what extent will there be a *Billing* issue. *In Credit Suisse v. Billing*, as you all recall, the Supreme Court said that when the securities regulations are specific enough, the antitrust laws are impliedly precluded or impliedly repealed. I wonder whether these guidelines or regulations that come about will preclude some antitrust suits and whether you've given any consideration to that fact.

COMMISSIONER BRILL: So I am not an expert in all of that case law; I know what their general rules are. But I do think that the Health Care Reform Law was written in a way to address some of those concerns. So for instance, there is an antitrust savings clause in the Health Care Reform Act. While that might not be dispositive or wasn't dispositive in *Trinko*, it is still a factor that one would look to in order to determine whether or not we can move forward in terms of these guidelines.

Another is that the case law requires clear incompatibility between the two regulatory regimes. Here, far from clear incompatibility, the Health Care Reform Law actually addresses competition concerns and the need to insure there will be competition. And so I don't think that is go-

ing to be a problem. That will only be determined if a case is brought, and how it ultimately comes out. At this point we don't expect to see much of a problem there.

MR. KATZ: The last point, we are kind of running short on time and I did want to save a little bit of time at the end both for questions but also so I can tell you about some of the developments that had nothing to do with either of the agencies. But there is a question I would like to ask.

In the *KeySpan* case, when I look at some of the facts, to me as someone who does a lot of work in the financial services and securities field, at least some parts of that look like a pretty typical hedge, meaning a company goes to a financial services company, a bank of one kind or another, and says well, if prices go down for my product, I would like to buy some insurance for that, you'll pay me if prices go down, and if prices go up, I'll pay you. In the facts specifically in the *KeySpan* case, am I right to focus in on two things, on the fact that there seemed to be only two players in that market, and then there was, at least in the consent decree, there was a discussion of the fact that there was some thought previously of acquiring those assets or that, right? Are those salient facts, am I right on focusing on those facts, or are there other facts that I should focus on in that case?

MS. BOAST: It is a challenge to discuss some of this because at this point we are still in the Tunney Act, and as you probably know, we haven't brought enforcement action against the financial services intermediary. Not yet.

But the first point you mention is very salient: that is there was market power on both sides of the equation. Other things, and here I am hedging a bit because I can't remember what's in the complaint and what investigative facts I just have in my head. There were a limited number of swap partners, let's put it that way. Secondly, the allegation of previous M&A consideration gave the financial services firm extremely intimate knowledge of the market. There's no way it otherwise would have known what it did know. And the third point is that there was FERC regulation in place under which a market power analysis was done and there were questions asked. So it was pretty fact specific, unfortunately.

MR. KATZ: Thank you. So I am going to try to spend less than five minutes on some topics that occurred outside of DOJ and FTC.

The first one is the main Supreme Court case we had in antitrust, which was *American Needle.* Many of you have read it and heard about it. I think the main lesson is the defendants don't always win antitrust cases in the Supreme Court. They usually win, but not always. I think it remains to be seen whether there will be an impact outside of the sports leagues context in this case. I don't know that there is much more than what *Copperweld* has given us in understanding whether or not a joint venture in the case of a sports league is a single entity so that it can't be subject to Section 1 or it is indeed subject to Section 1 of the Sherman Act. But to me the most interesting part of the decision comes at the end, Justice Stevens, kind of his valedictory or swan song, and he had a discussion of the Rule of Reason. He said, toward the end: This is indeed subject to Section 1; go back and look at the case again, to the lower courts. But then he suggested, I think pretty clearly, there are a lot of reasons why this may not be an unlawful arrangement. The arrangement, for those of you who don't recall, was an exclusive agreement by the NFL to license logos to put on hats. And he said that this case should be judged under the Rule of Reason. He said the Rule of Reason can be used in an abbreviated sense in a twinkling of an eye not only to condemn practices but also to approve them. And I thought that was an interesting observation that he made about how the Rule of Reason, when used in abbreviated fashion, might go both ways.

Other cases that I think were important over the last year, there were a couple of cases that have to do with applying *Twombly*, the Supreme Court's leading case from several years back. I want to focus just on two. One is from the very beginning of this year in the Second Circuit, the *Star v. Sony* case. The plaintiffs in that case claimed that the record companies had conspired to fix the rates of downloaded digital music, as well as terms related to downloading music. The District Court had dismissed the complaint, and the Second Circuit had reinstated it. One of the things that I take from that case is that the question is often here, when there is parallel conduct how much must you allege to survive a *Twombly* 12 (b)(6) motion. The Court said that the plaintiff is not required at the pleading stage to allege facts that tend to exclude independent self-interested conduct. And I think it is also important, the emphasis on context that the Second Circuit had made.

I should add my view is that these are all very fact specific, and so context tells you about facts. It is a little hard to give a generalized rule, but everyone is seeking such a rule. I think there were joint ventures; there were alleged attempts to hide and offend; terms were unpopular, and there had been some government investigations, but I believe they were closed.

So I think people are still seeking guidance, and the Seventh Circuit recognized that in a case that came down at the very end of last year, late December of 2010, the *Text Messaging* case, where the Seventh Circuit did something pretty unusual.

They took an interlocutory appeal, a denial of a motion to dismiss. And Judge Posner had said that the reason that one should review a case such as that in an interlocutory fashion is that allowing a case of dubious merits to proceed to discovery can cause irrevocable and unjustifiable harm to the defendant, and therefore it should be looked at.

But just as in the Second Circuit's case, the complaint was sustained. I think one of the most important facts was alleged abrupt changes in the pricing structure. Suddenly the pricing structure changed substantially, and prices went up, in addition to some allegations of pretty specific information exchanges through trade associations.

Very quickly, I'll tell you that there are a couple of cases in the Third Circuit that have to do with hub and spokes conspiracies with the importance of alleging there is not only a hub and spokes, but also a rim if the plaintiff wishes to, in these particular cases, wishes to bring a per se case.

One case I'll try to spend just a minute on which is of interest I think is a case having to do with product design. In the Ninth Circuit there was a case called *Allied Orthopedic v. Tyco*. Tyco, the defendant, made sensors and monitors that measure oxygen levels in the blood, a kind of clip that gets put on your fingertip and when connected to a monitor tells you how much oxygen you have. They were the dominant player. As their patents were about to expire, they came up with a new kind of product, which made it so that companies who had previously created and sold, with some success, sensors that could plug into the monitors, now they no longer could plug them in. This was challenged as a violation of Section 2 in the Ninth Circuit decision that affirmed summary judgment. They said that design changes that improve a product don't constitute unlawful monopolization without more, and they really showed how courts are skeptical of claims of this kind. They did not take on the opportunity—which they were invited to do by the plaintiffs—to do a balancing of how much improvement was there versus how much anticompetitive effects there were. They said if there's a genuine improvement, it is not likely to violate Section 2.

MS. BOAST: No predatory innovation theory.

MR. KATZ: So I think that I will stop there, because I do want to give everyone a chance for a few questions, and I think if we go a little bit over, because we have a break, maybe we might be permitted to do so. So please, does anyone have any questions from the audience? In the back.

AUDIENCE MEMBER: Hi, my name is Jim Langdon.

I found your comments very interesting. I have two related questions. First is help me out because I am fortunate to be on a panel like this in Illinois next week, so I want to make sure I get it right.

COMMISSIONER BRILL: You're free-riding.

AUDIENCE MEMBER: The question is the Department of Justice, as Commissioner Brill knows and Molly knows, comes out with a monopolization, a Section 2 extensive report, hearings and all of that, many of your colleagues disagreed with that and would not sign off. One of the questions I've been asked to answer is we are looking at and seeing there are monopolization cases brought, like *Intel*, very interesting and complicated cases.

So the question is, that type of case, what are the changes from what that was, would have been, the Agencies now distanced themselves on it and what is going on now? Is there some new key type of analysis that is left out, or just would that have been brought in under the old DOJ? I actually don't know the answer to that. But I know if I ask maybe you can give me an answer that I can shuffle.

(Laughter.)

And one related question to that, obviously in *Intel* there were a lot of issues about exclusionary conduct, right. And in that case, we were very concerned about exclusionary effects. And in the Department of Justice and FTC's actions to redo the Horizontal Merger Guidelines there are still these others on the web site that are not horizontal—what Molly alluded to. There is an action every so often to challenge vertical aspects of some mergers, and the Agencies decided not to go forward. I wrote an article suggesting you should. That is where I come from. There should be some revision of the Non-Horizontal Guidelines, or at least address certain things like foreclosure. Those are my two related questions.

COMMISSIONER BRILL: So I don't know for sure what would have happened with respect to an *Intel*-like case under a previous Commission, but I think the really short answer to that is elections matter.

And with respect to revising the Vertical Guidelines or revising the Non-Horizontal Guidelines, we did actually bring a case involving vertical mergers—actually two matters, two investigations involving vertical mergers—the Pepsi and Coke mergers where they were purchasing their bottlers. So we did do some very important vertical work since I was on the Commission even over the past half year.

My personal sense is there isn't a groundswell of feeling within the Commission that the Non-Horizontal Guidelines need revision in the way that the horizontal ones had to be updated to better reflect economic thinking and the case law.

MS. BOAST: And I think that view was held, at least among some, and speaking for myself, as always, at DOJ as well. I think the harder question is should we withdraw the existing guidelines, because they are cited back to us all the time.

MR. HIMES: Well, thank you, all three of you. Let's have a really good round of applause.

(Applause.)

Endnote

1. http://www.justice.gov/atr/cases/f262600/262650.htm.

Fifty Miles From Home With a Briefcase: Expert Hot Topics

MR. HIMES: Our next panel is entitled "Fifty Miles From Home With a Briefcase." That corny title is mine. Google Will Rogers, and you'll find out where it came from. I don't know if any of you would figure that out, but that was the source. I was inspired.

On this panel we are indeed doing a little bit of juggling. Our moderator, Barbara Hart, who was instrumental with David in setting up this panel, found herself stranded in Chicago last night where she was away on business, and all of the flights coming into New York, not surprisingly, got canceled. So yesterday evening David said he would do two shifts here, one as the moderator and the other as a panel member. I am sure he will perform admirably there.

David, so you know, is one of Steve's partners at Cravath where he practices antitrust and intellectual property, securities litigation. He is a member of not only the State Bar, the City Bar as well. He is on CLE panels all of the time. He really knows his way here. So we are happy to have him jump in and introduce the panel.

So kick it off for us. Go ahead, David.

MR. MARRIOTT: Thank you, Jay, very much. I appreciate the opportunity to speak.

I think the title, while it wasn't entirely clear to me what it was meant to communicate, is nevertheless apt because our moderator, Barbara Hart, as Jay said, is stuck more than fifty miles from here with her briefcase in Chicago where she is doing a deposition.

So let me introduce our stellar panel here. Immediately to my left is Martha Samuelson. Martha is President and CEO of Analysis Group, which of course provides economic, financial and business strategy consulting services to law firms, corporations and government agencies. She has a J.D. from Harvard, an M.S. in management from MIT Sloan School of Management.

The key aspects of Martha's work involve the direction of economic analysis in large-scale litigations for clients such as Microsoft and MasterCard and Intel. She has served as an expert in many phases of litigation, including the development of economic financial models, the preparation of testimony, the development and presentation and review of pretrial discovery and critiques of economic and financial analyses of opposing experts.

Martha is Vice Chair of the American Bar Association Trial Practice Committee on Antitrust Law, and she sits on the Board of Directors of Boston Medical Center.

Immediately to my left is Janet Netz, principal of ApplEcon, a consulting firm of economists located in Ann Arbor, Michigan. She was an Associate Professor of Economics at Purdue University when she resigned in 2001 to join ApplEcon.

She has consulted in antitrust litigation in both liability and damages phases and has offered testimony related to class certification and damages issues. She's consulted in matters involving personal computer software, mainframe and microprocessor industries, among others. She has served as an expert witness in cases involving Microsoft software, a variety of computer components, PCP and EPDM chemicals, alder lumber and clean-air gasoline.

She holds a Ph.D. in Economics from the University of Michigan.

Immediately to Janet's left is Doug Richards, Managing Partner of the New York office of Cohen Milstein. Since joining the firm in 2009 he has been a member of its antitrust group.

Prior to joining Cohen Milstein, Doug specialized in antitrust transactions for approximately ten years as a partner at two leading plaintiff class action law firms, Pomerantz and Milberg Weiss. Doug has argued appeals on cutting-edge issues of antitrust law, including a 2007 Supreme Court case in *Twombly*.

He is a frequent speaker on antitrust issues and has published extensively on this subject. In 2009 Doug published an article in *Global Competition Policy* entitled "Class Action Standards in Crisis: Whether Common Merits Questions Predominate Does Not Depend on the Questions' Answers."

Doug has a B.A. from the University of Chicago and a J.D. from Harvard Law School.

While the title of our panel does not necessarily give away its precise contents, we are here primarily to talk about class certification, and more specifically the predominance requirement that goes on in that analysis, and even more specifically still about impact.

Let me give you a brief overview or road map that our moderator Barbara has set out for us, and we will try to implement in her absence. We want to begin by talking about the scope of the court's inquiry in the class certification context, again focused primarily on the predominance question. We then want to look at ways in which the parties are trying to both show predominance on the one hand and then to defeat predominance on the other hand.

With that introduction, we are going to turn to our experts and ask them to tell us how the experts fit into this part of the equation relating to class certification. We will touch along the way on *Daubert* and Rule 702, and then we will close by talking briefly about some of the amendments to Rule 26, which may impact upon the way we deal with our experts in the field.

First, by way of background, on the first question, which is how this predominance questions fits in. Everyone agrees, I think, that the inquiry required by the court at the class certification stage is a rigorous inquiry. And it may be about there that the agreement begins to fall apart. We agree upon the analysis being rigorous, because the Supreme Court said so. Beyond that there is not enormous agreement necessarily among practitioners historically about what that means. So what I am going to try to do briefly here is take us on a quick run down memory lane as to how we got here. And then we'll ask Doug to tell us where we are in terms of the level of inquiry that the courts bring to the predominance now listed in the class certification context.

So how did we get here? In 1974 the Supreme Court decided the *Eisen* case and in that case made clear in its words that nothing in Rule 23 gives the Court the authority, it said, to conduct a preliminary inquiry into the merits of the case in trying to make a determination as to class certification.

Eight years later, in the *Falcon* case, which was a case involving discrimination against Mexican-Americans, the Supreme Court said that what is required in this context is rigorous analysis. The problem is the Supreme Court didn't say what rigorous analysis means. In fact it conducted, in my view, no analysis in its case about rigorous analysis. So in the years that followed, the lower courts were left the pronouncements of *Eisen* on one hand and *Falcon* on the other to try to reconcile these competing principles. And what we saw in those years is the courts that followed the *Eisen* line of analysis tended to accept, more often than not, the allegations of the complaint relating to classification as true; they tended to stay away from the merits of the case, and they stayed away from resolving the battle of the experts.

By contrast, the cases that seemed more closely to the *Falcon* thinking refused to apply broad assumptions relating to impact; they undertook some analysis or inquiry into the merits of the case, and they tried to resolve, at least at some level, the dispute between the analysis.

Now, that all began to change when in 1997, the Supreme Court decided *Amchem* and said you have to take a closer look, and there was an amendment to the Federal Rules of Civil Procedure which related to class certification. In the years following those developments, the Courts of Appeals and certainly all the District Courts with those Courts of Appeals tried to reconcile these competing principles and see if they could find some way to bring together these competing principles of *Eisen* and *Falcon*. And they have done that.

We are going to turn to Doug and have him tell us how well they have done that and where we are in terms of the level of inquiry that courts bring this to this class determination.

Doug.

MR. RICHARDS: Well, I've been doing antitrust transactions now for about twelve years, so, to me, twelve years ago is in the beginning. I'll start with this history by saying in the beginning, about twelve years ago, there were a number of slogans that were pretty much accepted in all the circuits. If a question involved the merits of the case, it didn't get resolved in class certification. If you had a battle between experts, the court would not resolve the battle between the experts on class certification. All that the plaintiffs were required to make was some showing, and then they could move forward with class certification.

All of that stuff is now gone by consensus in all of the circuits. Things started to change in the *Szabo* case in the Seventh Circuit in 2001, where Judge Easterbrook, often a trailblazer in these sort of things, said the court has to resolve whatever factual inquiries are required under Rule 23.

Then the walls really crumbled with the *IPO* decision in the Second Circuit in 2006, in which I was peripherally involved. Where the Second Circuit very exhaustively went through this and said look, the requirements of Rule 23(a) and 23(b) are prerequisites to certifying a class. The court has to find that those prerequisites are satisfied, not might be satisfied; not that there is some showing they could be satisfied; not that it is not going to decide whether they were satisfied, because there's a conflict between the experts, none of that. The court has to find by a preponderance of the evidence that those requirements are satisfied. And that proposition, starting in *Szabo* and then being adopted in the Second Circuit, has become pretty uniform throughout the country, as the Ninth Circuit points out in its opinion in the *Dukes* case earlier this year.

I circulated on the inside edge of those tables what I thought was a convenient chart with regard to this sort of thing, because we don't have time to go through every circuit's language. And again the title doesn't necessarily match it, but what Ian Simmons and Ed Snyder, two of the more prominent conservative commentators on this sort of stuff, have tried to do here is pick out the language in First, Second, Third, Fourth circuits, etcetera, that shows what they think serves their argument and agenda in this. I would agree, and I think the Ninth Circuit in the *Dukes* case recently agrees, that all of this language does indeed show pretty much a consensus among all the circuits now that you have to satisfy by a preponderance of the evidence all the elements of a cause of action.

But there's another question that then arises, that hasn't gotten very much explicit attention in the Circuit Court case law, and it gets almost no attention in any of these quotes. What the Second Circuit said in *IPO* is you have to make sure that each of the elements is satisfied. What the Second Circuit of *IPO* did not do is look at commonality and predominance and say what does it take to show that commonality or predominance are satisfied? That analysis is not in *IPO*. That analysis is not in most of these cases. And that really leads to a kind of schism. We live in a bipolar world these days, where there are people on one extreme and people on another extreme on almost every conceivable issue. This is one of those issues, where there are two diametrically opposed views about what it means to show by a preponderance of the evidence that commonality and predominance of common questions are there.

The one view, which is exemplified by the majority opinion in *Dukes,* is—and I'll just give you a couple of quotes: "The purpose of the District Court's inquiry at this stage must focus on common questions and common issues of law or fact under Rule 23(a)(2) or predominance under Rule 23(b), not to proof of answers to those questions for the likelihood of success on the merits." What the Ninth Circuit there I think is saying is that you have to look at the content of the element of Rule 23 that is commonality or predominance, and all the content of that asks you to do is identify the questions. And with regard to predominance, weigh the questions against one another; it does not ask you to answer them. So answering them is not necessary to decide questions under Rule 23. That is the view expressed by the majority in *Dukes*.

Another bit of language from *Dukes* that I think says the same thing is the district court must focus on common questions and common issues, not common proof or likely success on the questions commonly raised.

Another example of a place where that side of the equation is presented is in the *Halliburton* case, in which the Solicitor General's brief said that the Fifth Circuit urged going beyond the Rule 23 criteria and assessing punitive class members' ability to prove their case on the merits. So when you're looking at Rule 23, predominance or common questions, say the plaintiff has common proof on the basis of which they will show impact to the class.

The point that these courts are trying to make, is all you're supposed to do is identify those questions and make sure they are in fact common. Identify the evidence and make sure there is actually evidence there that the plaintiffs could hypothetically try to use to prove a case based on common evidence. Not decide whether you believe that evidence; not decide whether that evidence is correct or incorrect; not decide whether that evidence is more persuasive than whatever opposing evidence the defendants might offer.

Now personally, as an aside, I find it very gratifying to read that language in *Dukes* because that is the point I've been trying to make in half a dozen things I've written and speeches I've made like this one for the last five years, ever since *IPO* came out. Even before *Dukes*, there was other language in numerous other cases. And this point is made in a Law Review article that is in your materials that I wrote with Ben Brown, and Cohen Milstein, that lots of the courts that have focused on this have said what's required is merely that the evidence be susceptible, the impact be susceptible by proof of common evidence. Susceptible is one word that gets used a lot. Another is capable of proof by common evidence. And I would submit, and I think the majority of case law cited in my Law Review article takes the view, that that susceptible and capable language is meant precisely to make the same argument effectively that the Ninth Circuit makes in *Dukes*. They are not supposed to be deciding whether they believe it. They are not supposed to be deciding whether it is right or wrong, but just looking at it enough to say it is conceivable, a jury could believe it, and if they believed it, it would in fact be common evidence.

Now, there is an alternative view of this, which I don't really think has been expressed yet by any court, but which the conservative side of the bar has very vigorously argued. One example of this is reflected in a piece from antitrust that is in your materials written by Ian Simmons from O'Melveny & Myers, one of the more thoughtful spokesmen for the conservative view of these things. He says what all of this means is that a court must decide whether it is more likely than not that plaintiffs will be able to prove each element of their *prima facie* case using cognizable common proof. So what they are trying to tease out of *IPO* and these recent developments, which again I submit they don't say—trying to take this to another level, which is that class certification should be a trial on the merits. The courts should be deciding whether the plaintiffs are right or wrong in order to decide whether to certify a class.

Another place where you find that extreme view taken is in the brief in the *Dukes v. Wal-Mart* case written by Tom Hungar, the person in the Solicitor General Office who had primary responsibility for *Twombly*, *Credit Suisse*. This is a quote from Tom Hungar's brief: "It is not enough for the case to present mere common 'questions,'—the answers to those questions must be found." So the conservative right, without any real support in the case law, is trying their best to take this pendulum, swing a little bit away from the standards that existed more than ten years ago, which only went so far as to say look, you actually have to satisfy Rule 23. They are trying to say, no, you don't have to just satisfy Rule 23, you have to prove your case. The only language that I would submit in any circuit court case that even comes potentially a little close to arguably supporting this extreme view is from *Hydrogen*

Peroxide. There is one sentence the defense bar loves in *Hydrogen Peroxide*, because it is so vague that they can at least try to shoe-horn their interpretation into it. And that is reflected in the handout that I set out on page 960, one of the elements of that quote is: "The Court must resolve all factual or legal disputes relevant to class certification." That is the language on which the defense bar hangs its hat over and over and over. I would submit it is vaguely expressed language. All the Third Circuit was trying to say is what all the other circuits have said, it is what the majority said in *Dukes*, what the Solicitor General said in his amicus brief, which is you have to satisfy Rule 23. So I don't really think that there is any genuine case law yet to support this extreme right wing view that is being developed. But we do have two cases, the *Dukes* and *Halliburton* cases, going to the Supreme Court this year where these issues are squarely in play.

So, what will the law be on that aspect of this question at the end of this year? Who knows. I would submit it depends on where Justice Kennedy is. I think we can all predict that Justice Roberts is likely to agree with the kinds of things we are hearing from Ian Simmons. I think we can also agree a lot of the liberal members of the Court are not likely to go there. But Justice Kennedy, I would submit, essentially in light of the SG's brief in *Halliburton,* is unpredictable.

The last point I'd make is that this is all a debate about what the law is, where lawyers take both sides and take words out of context, try and give new spins to old law, that kind of thing.

Then there is the other question, as a policy matter, which way should that go. It is amazing in these arguments how little attention the policy gets as to why the law should be one or why the law should be the other. And so from that perspective I'll give a plug to a controversy between Jonathan Jacobsen, who has a piece coming out in the NYU Annual Survey of American Law and a piece I wrote in response to it. Jonathan, I think, is forthright enough not to argue that this is the law; he argues that it should be the law, and I argue that it should not. And those materials should be out very shortly, but they are not in the written materials that you have before you.

But to sum up, I see that as the battle of the future. The question of what showing, whether the standards of more than ten years ago are still the standards, that is by the boards; those are not the standards. Everybody agrees now, and I frankly find it hard to argue that the prerequisites of class certification under Rule 23 are prerequisites; the Court should therefore have to find that it is satisfied. I don't really have a problem with that. The problem I have, and I think most of the courts have, is what does that mean with commonality and predominance. All it is asking us to do is say whether the questions are there; not what the answers to them are. And I think that is clear.

MR. MARRIOTT: Thank you, Doug.

Let me ask our two experts what their experience in the trenches has been on the level of scrutiny that you feel the courts in the recent years have been applying to this question of predominance. Are you feeling more or less scrutiny? What's been your experience?

MS. SAMUELSON: Janet and I may see some issues differently, but on this one I think we see it similarly.

I think the standards have changed dramatically from where we are, and they have changed in two ways. We have always had the Rule 23 requirement, but right now the rigor with which we have to address them is really different.

Hydrogen Peroxide was, in fact, remanded, and the class wasn't certified. The certification was dismissed by the Third Circuit.

From our perspective I think what's very different is it used to be on class cert. One, there was this question of did you just have to make a case, but it also was the case that you could really argue as a matter of theory that the class shouldn't be certified—that class should be certified or not. The clearest case I think was on pass through, where you could argue that markets are competitive and pass through will occur at a hundred percent level. You just can't do that anymore.

So one thing I think is more rigor. The second issue I think that is really different is the merits have clearly leaked in, both implicitly and explicitly. *Halliburton* is explicitly. But implicitly I think it is often the case that we are now called upon to address this issue of predominance within the context of a liability theory that is persuasive to the trier of facts. So the trier of fact really often goes through the grounds for liability, market structure, geographic market, whatever, in order to evaluate whether there's an actual tangible concrete method that is going to work in order to demonstrate predominance.

Janet, did you want to say something more?

DR. NETZ: Yes. From my point of view I am not sure that I entirely experience it as the level of scrutiny changing, but what is being scrutinized has changed. As Martha was saying, once upon a time in writing a class certification affidavit or declaration one could rely on descriptions of how analyses would proceed. So even on the matter of pass through, where theory says that it's a hundred percent in one particular situation, theory also says that it's positive in all situations but for some very narrow unrealistic settings. But one could describe here the method that one would use to determine what the magnitude of pass through is; here are the common data that will be used and that are available, and that was typically sufficient.

Whereas nowadays, I am being asked by the clients, who are driven by the court rulings, to do more than that, to not only describe here's how one could use common methods to show impact or quantify impact, but to go further and to actually demonstrate it either in an illustrative sense and say here is one data set where I can estimate pass through or overcharges or to flat out do it altogether.

So what I've seen is what used to fit into my expert report once the classes were certified has now moved into the class certification stage.

MR. MARRIOTT: That is great.

So as a form of counter point to what Doug has said, let me just offer a set of principles that I think come pretty squarely out of the cases in which I think Doug finds more ambiguity than I do. I'll suggest what I think are five principles that represent a trend toward greater scrutiny, some which I think are indisputable some perhaps more subject to dispute.

Five principles come particularly out of *Hydrogen Peroxide's* most recent Circuit Court case. The days of accepting the allegations of the complaint and deferring in some way to those allegations in this analysis are long gone. The decision to certify a class on this question of predominance is one that calls for findings, and it is one that is not merely a threshold showing. It is a findings exercise in which courts are increasingly engaging in evidentiary hearings, hearing testimony from experts, assessing their credibility, deciding who they believe and don't believe.

Third, factual determinations have to be made, and they have to be made by a preponderance of the evidence presented to the court either by way of affidavit or by way of live testimony.

Fourth. All factual disputes relevant to certification must be resolved, even if they overlap with the merits of the case, including issues that touch upon the elements of the claims in suit. So all factual questions relevant to classification have to be decided.

Finally, fifth. The obligation to consider all of the relevant evidence extends to expert testimony. Whereas courts were once not wading into the battle, they are now wading into the battle. And the opinions increasingly recite at great length what it is Expert A said and Expert B and Expert C said in reply, with the court then at the end of the analysis making a judgment as to whose view of that evidence the court accepted or didn't accept by a preponderance of the evidence.

This year, interestingly though, despite the fact there is clearly an increased trend towards more rigor in the analysis, not just use of the words but the actual application of the principles, despite that cases are still being certified, and they are still being certified with some frequency. By my count, it is admittedly a rough count, I found about eleven cases from 2010 where courts dealt with certification. In eight of those cases the classes were certified. In only three of those cases were classes that did not certify or was there a certification decision undone. So despite the increased rigor, there are still good numbers of cases being certified.

With that let's turn to the next question. Doug, I'll push this to you to start. What is it precisely that you do to go about showing an absence of—if you're on the defense side or if you're on the plaintiff's side—the existence of common issues predominating. What as a practical matter are you supposed to do, what is enough, what is not enough?

MR. RICHARDS: From a practical standpoint the lack of total clarity and ambiguity in the law I think has wreaked havoc on the actual conduct of class certification hearings. Because even though I think it's true and I think that the Ninth Circuit, the majority is correct, that the court is not supposed to be resolving these questions, in light of some of the ambiguous language and the arguments being made by the defendants, you run a huge risk if you're a plaintiff in presenting your evidence at a class certification hearing as though they are only supposed to be deciding so much and they shouldn't decide who is right and who is wrong. Because what if the judge disagrees with you, then you're not even giving the judge the tools on which to rule in your favor.

So what happens in the real world in one of these class certification hearings, which is like a trial, is fearful that if you actually conducted them in accordance with the correct view of the law and made it a truncated proceeding, you might not fully win over the heart and mind of the judge, and he might think, as some of them have—I think a distinct minority—that they have to resolve everything. You just go ahead and try the whole case on the merits; then after you try the whole case on the merits you confront this issue again when the judge asks you to submit findings of fact. You say to yourself, all right, well, now I have to submit findings of fact. Am I going to submit findings of fact that just say there are questions, and here are the questions, and the evidence shows that they are real questions. In which case again, you may not fully win over the heart and mind of the judge, so you can prejudice the judge against you, because the defendants will be trying it just like a case on the merits. Or do you instead submit findings of fact as though it were just a trial. Well, what happens again, fearful of making what could be a tactical mistake, the plaintiff lawyers then submit findings of fact as though it were just a total plenary trial on the merits.

So, having conducted a trial on the merits, because the judge is usually sitting back and letting parties do their thing, having submitted to him opposing factual presentations that make it look like a trial on the merits, and having invested the time and energy, sometimes a three or four-day trial to hear all of this evidence, a minority of courts, but some courts then say I've been put through all of this, so I am going to decide who is right and wrong. And then they wind up replacing the correct function of the jury, denying the plaintiffs their right to jury trial by just saying hey, I am deciding who wins and who loses; it is that simple, I am just doing it on class certification.

I think some courts have mistakenly done exactly that in recent times. A very good example of that is the *Plastics Additives* case in the Eastern District of Pennsylvania. I think that is what Judge Davis did. We had a three-day trial. You would have thought it was a trial in front of a jury, and then he wrote an opinion. You'd think from reading that opinion that he was the jury and he was just saying what he thought. If things were to go in the wrong direction, that is where this could lead, which would mean in class action cases you don't get a trial by the jury.

What you have to do then is you have to persuade the judge first, as the fact finder of your whole case. Then if you have won that, you then have to pass that test again by persuading the jury of the same things you just persuaded the judge of. I think that is a wasteful process. It means additional years of litigation, additional millions of dollars of expense in putting the same experts up to testify on the entire trial on the merits more than once. And the additional drag and burden and delay on the system that that can entail gets insufficient recognition, I think, most of the time when people are talking about these questions from the standpoint of policy.

One of the really acute aspects that we focus on as plaintiffs lawyers is how do you write these proposed findings. Now in *Plastics Additives* what we did is say okay, we have to submit full factual findings, because if the judge wants them, we want them to be there. And we think we are right on the merits anyway, so we ought to win, so put that stuff in there. So to clue him in and make sure he understands that he is not supposed to resolve most of this stuff, we put those as subsidiary findings through a broad finding, saying there is evidence from which it is susceptible of proof or capable of proof that..., and then boom boom, boom, boom, boom.

But what happens, having sat through a three-day trial and seeing all these detailed findings, the judge just examines all that out and adopts one side or the other on the actual findings of the merits. The consequence of when judges do that—and again I'll emphasize a minority have done that, as the Solicitor General points out in his brief in *Halliburton*—you've destroyed the right to jury trial in class actions.

MR. MARRIOTT: So Martha, Janet, where do the experts fit into this picture? Tell us how experts help and what really is the experts' best plan?

DR. NETZ: Well, typically my role goes under the predominance rule, and typically the questions that I am called upon to look at are whether the alleged anticompetitive behavior has a common impact on class members and whether or not that impact can be quantified on a common formulated basis.

Many of my cases are indirect purchaser cases where the firms that are accused of behaving badly sell their product to the direct purchasers. So a typical example is the firm accused of bad behavior makes some sort of component for a product; they sell it to manufacturers who then install it in a product. Those direct purchasers sell to say a retailer, who then sells to the indirect purchasers, the final users. So with that situation typically we step through it. We look to see is there common impact to the direct purchasers, and then do those direct purchasers pass on some of that harm to the indirect purchasers so that they too are harmed in a common manner. This introduces commonality at two levels: Is the impact common to the direct purchasers, and then is that harm passed on in a common manner to the indirect purchasers?

As I mentioned earlier, it used to be common to just describe how the impact was common, how common data could be used to show it and likewise how to quantify it. That has changed. In my experience mostly, it becomes doing the analysis to show that the impact is common, not simply that it can be shown but actually showing it. Quantifying the impact, in my experience, is still left to be a description: here are the common data that one would use.

I would say there are two big issues. One is it's very common to say or to show that the impact is common by showing that there's a price structure. Many of these cases are relatively complicated. It's not often where you have firms that manufacture a very homogeneous product, that gets sold to a retailer, that doesn't get changed in any way, and then that is sold to a consumer. We are typically talking about differentiated products, products that have different sizes, different qualities, different speeds. Often these products are then transformed in some way, put in a computer, for example, packaged in some way, and then passed on. So looking to see that the prices for these different products are related in a price structure through the market will indicate that some act that affects the price will affect all the prices.

The rising tide lifts all boats story, and the degree to which that price structure is analyzed, in my experience, has just increased dramatically. It used to be the case that a simple price correlation, a graph showing two prices move together, not much more than that was done. That doesn't pass muster most of the time in my experience

anymore. So much more has to be done to show that a price structure exists.

Another issue that I don't think has really been touched on that I find is an important change is the role of regression analysis. Regression analysis has been used by economists, and many other disciplines as well, for literally hundreds of years. It is an ancient technique, well regarded. Many if not most empirical papers in economics use some form of regression analysis. But I have found that in some class cases that that is being looked down on because it's viewed as being an average, and that an average isn't good enough. That in a class you have to show every single class member has been harmed; you have to look at every single class member. That argument to me is almost saying, we can't have commonality, we have to look at individuals; therefore, individual issues predominate, so that is the end of the class case.

I would be hard pressed, I think, in many situations to look at impact and quantify impact, whether it's a class case or a plaintiff case, without using regression analysis. It is the major tool in my tool box, and I find it disturbing to see that it's being called, just by using that word, average, as if it's now suddenly become a pejorative. Now, averages aren't appropriate in every situation. It depends on what the particular variable it is, how much variation there is, but it can be a very useful tool.

The last point that I wanted to make is that, to my mind, and this is entering the policy realm that Doug has alluded to, is that some of these rulings are essentially road maps to firms of how to fix prices or engage in any other anticompetitive behavior in a way that you get away scot-free, but for the efforts of the DOJ and the FTC. You know, make it complicated. Don't set a list price and sell to everybody at the same price. Vary it. Negotiate with your customers. Sell in multiple ways. Don't only sell through retailers; also sell directly to competitors off your web site. Let other people sell off their web site. Complicate it. Make your product different.

In Microsoft, Microsoft Word in American English and in British English are different products. If we look at the impact of any alleged bad behavior on behalf of Microsoft, do we really think there's going to be a different effect whether it is American English or British English? But those look like different products.

So from a policy perspective I am troubled that we are saying to firms, okay, you can rip off a lot of people just a little bit and you can get away with it, because you have put individual issues in there to such an extent that there can be no class.

MS. SAMUELSON: That is a point of view.

DR. NETZ: Well, I am sure a lot would agree with that wholeheartedly.

MS. SAMUELSON: I agree with Doug that there are significant policy issues that are getting raised. In fact, even to step back, the name of this panel, while I along with all of the panelists did wonder what in fact the subject was going to be, I wasn't at all surprised when I learned that it was going to be a class action panel, because that is really where so much of the action is in our business right now. It is really taking place at the class certification part of the process, actually both in antitrust and outside of antitrust, and an awful lot that will bear on us is happening with respect to class actions outside of antitrust, like the *Halliburton* case. But I think it's occurring because of the fact that 90 percent of the cases settle after they get through class certification, and so the problem is there's not really this extra forum that you were talking about, Doug. It doesn't really happen. If the big cases get through this part of the process then they tend to not get the second hearing.

I am going to address some of the points Janet made, but I want to talk about this in terms of how I think about it as an economist who is often on the defense side of what I now understand to be the red state and blue state phenomena.

What I am usually looking at is the question of heterogeneity or differences, and I am looking at the question of whether the sellers and the products are different, whether the buyers are different or whether how prices get set is different, and they are different in ways that matter with respect to this question of certifying a class.

So on one end of the continuum I think about something like a commodity product, thinking just about the product piece of it, and I think that is pretty heterogeneous, and that is likely to be an easier case for Janet. On the other end of it I think of something like customized commercial insurance; the insurance brokerage antitrust case, I think still class certification was argued—I am going to guess five years ago—and that has bobbed up and down and is still not resolved. That is a case where the products are highly customized. You think about commercial insurance, it will involve a big deductible, a term of years and a history and an industry that you're in, so it's hard to develop a model that explains prices in the actual world for those products. Judgment is a real key piece of it, so it's going to be very hard to end up with a class where you can demonstrate preponderance and demonstrate with a common method impact in the but-for world. You can't really do it in the actual world very easily.

Differentiated products, which Janet addressed, I think are a really complicated and an interesting gray area in the middle. I do think most firms don't run their businesses—I don't do this, I am an economist—don't run their business strategy around avoiding the antitrust issues. To the extent that customers are front and center,

and I think most firms are dealing with their customers in the ways that they feel that they have to deal with their customers.

But the question of using the regression with differentiated products is a very big deal right now with respect to class certification. There was an indirect purchaser case for *Intel* where the Special Master just declined to certify a class for many, many reasons—it is a really interesting case. But one issue that troubled the Special Master was the products in the class were all of Intel's CPUs, ranging from $34 very low-end CPUs to $500 very high-end CPUs. The Special Master was concerned that a regression that produced an average impact, without respect to how different the $30 product is from the $500 product couldn't really be reliable.

So, first I look at sellers, then I look at buyers. Buyers, there are just a host of fascinating issues with buyers right now and whether a group of buyers makes sense to certify as a class. I think you start off with the question of just what are the allegations. With something like price-fixing or securities fraud, it is easier to see that those allegations will lend themselves to a class, because if you paid too much, you paid too much, whether you were a big guy or a little guy. If there was fraud in the price of the security that you bought, it was there, whether or not you are a little individual or a large firm. So those allegations I think will tend to lend themselves more easily than non-price allegations, allegations with consumer fraud type allegations that are now bleeding into antitrust.

The most obvious difference in buyers, I think, is obviously the big guys and the little guys. And there the question really is if there is some sort of anticompetitive behavior, is it affecting everybody in the actual world, is it affecting the large buyers who may have some sort of buyer power back with respect to the defendant? Can you demonstrate that every buyer is going to be affected and improved in the but-for world?

Again, this *Intel* case I found really interesting. But the allegations in the *Intel* case are essentially you discounted too much, anti-competitively to various OEMs. The result was AMD's competitive position was harmed and Intel was able to raise prices higher. That is the logic trail in the indirect cases. And the Special Master was concerned about that on a class case and on a class-wide basis and said look, given those allegations it may be the case that some buyers, some downstream buyers, some OEMs negotiated very favorably, and whatever price increase you are able to put in is less than the discount that they received. And so the Special Master thought that buyer group was too different to be certified. The downstream purchasers from that buyer group were too different to be certified as a class.

Buyers typicality also is raised as an issue, and in some of these cases quite recently. If the buyers represent only a very small stream of commerce with respect to how the purchase is made, those classes don't get certified because the buyers are perceived not to be representative, typical enough of the class.

And then there's a huge, and I think fascinating area of non-price allegations. In lots of cases that I've been involved in there's a price component and then there is a non-price component. There is reduced innovation raised as a question; reduced choice is raised as a question. Those may be phenomena that if they occurred—one they are very squishy, very hard to value no matter whether you're talking about a class or some other market participant. But they are also cases where there are also allegations where the impact may be very different. I may not care at all about whether or not I have a choice. I may not care at all about the newest innovative product, and it doesn't make sense to certify a class with respect to non-price allegations. When those have come up recently, one way in which they've been pled by plaintiffs that I think is kind of interesting is essentially as converted into an *ex ante* price impact.

So there was an *Apple* case, it is not an antitrust case, but it is an antitrust phenomena as well. The issue was not telling phone purchasers that they were going to be locked in for some greater period of time than they realized. That is obviously a non-price allegation. What the plaintiff's expert did, that I thought was clever and that resulted in a class certify, was convert it into an *ex-ante* price allocation. The question is how much less would you have paid if you had known? What would the market-basing price have to be if that were known?

Lastly, there are also cases, again these are outside of antitrust, but I think they are going to come in. There are cases, classes pending of mortgage purchasers where the allegation is this group should not have been put into a particular mortgage category. And those are being pled against originators. I think it is going to be fascinating to see what happens to them as they go through the system, because I think you can't convert those allegations into an *ex-ante* price allegation. They are inherently subjective. Buyer A and whether the mortgage was bad for buyer A is in a different situation than homebuyer B. And what the courts do with those, I think, is going to be fascinating for the class process.

We actually had a case last week on this issue of buyers for the purchasers of RBS securitized mortgages where the class was not certified. Again, it was on a question of buyer knowledge, buyer ability to ascertain whether the allegation—buyer ability to be misled or not. But the court said look, the participants who purchased these securitized mortgages are all over the place in terms of their level of financial sophistication, the due diligence they've done themselves, and you just can't put them in a class. So that case went out, and that is the first one that has come up of securitized mortgage-backed purchasers.

Lastly, just how prices are set is something that really makes a difference in terms of whether it's appropriate to certify a class. Again, at one end you have an open market price that everybody sees. At the other end you have situations where prices are negotiated in sets of transactions where participants change. The *Private Equity* case, I think, was one of those where the participants in the various LBO buybacks changed over time and were more discrete and does that make sense to have that certified as a class? And that is still in the system right now.

MR. MARRIOTT: So having heard how the experts fit in I think the question naturally arises how *Daubert* and Rule 702 fit into this. That is all, of course, about the admissibility of expert testimony. What Rule 702 says is that expert testimony has to be based upon sufficient facts of data; it has to be the product of a reliable analysis, and the two have to come together in a way that is reliable.

So Doug, how does it fit into this context?

MR. RICHARDS: Well, there is a controversy between the circuits about whether evidence, to satisfy Rule 23, has to satisfy *Daubert*.

MS. SAMUELSON: We have a contention.

MR. RICHARDS: I think there's an argument to be made it shouldn't have to. But I am personally sympathetic to the view that evidence is only evidence if it satisfies the Rules of Evidence. So it should have to satisfy *Daubert*.

From my point of view, the bigger problem is the standard of review. What introduction of *Daubert* into this analysis tends to do is it insulates the District Court's decision even further from appellate review. Because as a practical matter, what winds up in these class certification hearings is the judge will hear all this evidence and he will say, well, all right, if he thinks the plaintiff's case isn't the greatest case in the world, not only does he have the ability to sort of stretch the law a little bit and make findings of fact in a way that legally he shouldn't be doing under Rule 23, but he also has the option of sort of doing a side step of that and just rejecting the *Daubert* opinion, throwing out the plaintiff's expert opinion instead. That has advantages for him, because rejection of an expert's opinion under *Daubert* is reviewable only for abuse of discretion.

So, you have this institution, which for all the good faith in the world and all these empty spots, District Court judges are under immense pressure to get things done, and it is asking superhuman qualities of them to expect that the desire to clear and manage their docket not to have some influence on how they rule in cases.

So, you wind up on a class certification hearing serving functions that were meant to be served by summary judgment, which is reviewable *de novo*, dealing with those instead under Rule 23 in *Daubert*, understandings where there's no effective appellate review. So a judge can basically just dump a case, get it off his docket, and there's not much you can effectively do about it.

To me that is really the problem, coupled with the fact that in working its way into the *Daubert* case law, has been this word reliability. Expert testimony in order to be admissible has to be reliable. Now, the courts that are careful in defining that and defining reliability, go out of their way to say reliability in a *Daubert* sense eans that you are applying accepted methodologies. It means nothing more than that. But as a matter of English language, reliability sounds like whether you believe it or not.

So what District Courts wind up doing is if they don't believe the expert's testimony is right, they'll throw it out under *Daubert*, calling it unreliable. And the consequence of that is they are not really applying *Daubert*; they are not really applying correct class certification standards. There is no way effectively to have the kind of appellate review that the judicial system is supposed to ensure. And it's having the consequence of enabling judges on a basis that is not consistent with American legal traditions to just dump cases to keep their dockets under control. I think it's a very pronounced tendency; it is very, very unfortunate. And what's been happening with *Daubert* law is like a siren song moving them in that direction.

MR. MARRIOTT: Martha, Janet, do you have any perspective on this question?

DR. NETZ: Really I only have to say for myself it is an extra proceeding that an expert may have to go through. But in general, we should be doing a good job whether there's a *Daubert* proceeding or not. So I haven't found personally that it has really made any difference in how I do my work.

MS. SAMUELSON: I think they are actually, again because of what we have been talking about for most of the panel, the increased role of the class cert part of the process, I actually think that there have been fewer *Daubert* challenges. When I went and looked it up for last year for 2010 I was really surprised that there were two economists excluded during the entire course of 2010. Seven *Daubert* challenges and two exclusions.

I do think your point, Doug, just even to draw it out a bit further, there is the word reliability and there is the word rely, and they are not the same thing. But it is often that because, in fact, if a judge is going to reach a conclusion, they are definitionally going to rely on one side and they are not going to rely on the other side. But the outcome of every court proceeding cannot be a discredited expert. I think even the lawyers do not want that to occur.

But it is a funny thing because I think that recently judges do, and I think it is connected with this increasing role of class certification, the increasing evaluation, rigor-

ous evaluation within and beyond the traditional Rule 23 criteria, that the judges are really often going through I relied on person X for this, I relied on this, I disagreed, I relied on another expert for this, and it creates confusion as to what the meaning of not relying on an expert is. Because it can't be that it's the same as the equivalent of a *Daubert.*

MR. MARRIOTT: I've been told our time is essentially up. We wanted to touch one other question; we'll see if we can touch it in the two minutes left.

The Federal Rules of Civil Procedure, 26 in particular, were amended last year. The amendment changed the way we were able to deal with our experts. The draft expert reports used to be discoverable; used to be that communications with experts were discoverable. That has been changed, and now there are some mechanisms in place that allow for draft expert reports to be work product and for communications, with some exceptions, to be considered work product as well.

The question is: How do you see that change impacting what we do in this context and more broadly in other contexts.

MR. RICHARDS: I know time is getting short. So I will say I don't know any lawyers who don't welcome the new rules. There used to be all kind of satellite litigations, skirmishes and wastes of time looking over expert drafts and why they changed the wording from this draft to that draft and all that kind of thing. Once in a blue moon it might actually add some marginal significance to the credibility of the exercise, but it wasn't worth the time or the energy that went into it. And I think it is a very healthy thing that we put that stuff behind us.

MS. SAMUELSON: We obviously think that. I think that WebEx may go out of business; that will reveal itself. But we obviously think the same. It has been silly.

MR. HIMES: Well, thank you. You were all terrific.

(Applause.)

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

MR. HIMES: We are now going to do our Section Business Meeting fairly expeditiously. Steve is going to take care of that, and then we'll break for lunch. We look forward to seeing you in the afternoon.

MR. MADSEN: While we are congratulating the panel on their terrific performance, we'll get our Business Meeting under way. This, after all, is my last official act as the Chair of the Section. So let me ask Section members, please stay. The amount of time allotted to the Annual Meeting is a mere ten minutes. You will get your lunch expeditiously. But Section members please stay. If you are not a Section member, it's not too late; there are signup sheets out in the hallway. Please join. I hope the presentations this morning have convinced you this is something you should be part of, and it's a great enterprise.

So I have two announcements to make. First of all, number one, see this? This is the long awaited Third Edition of a most learned and useful book, *New York Antitrust and Consumer Protection Law*, that the world—or at least the Antitrust Law Section—has eagerly awaited for some time. Here it is. A few copies are available for purchase outside at the publications table, and in fact there is an order form. So if they are sold out, you can order your very own.

Second, I want to announce a new initiative that we are starting today, and that is the creation of three substantive committees that are available to Section members, they can join, become part of it and they cover the antitrust waterfront. First, we have a Committee on Class Actions, which is chaired by Hollis Salzman from Labaton Sucharow.

Second we have a Committee on Vertical Restraints, chaired by Dan Anziska from Troutman Sanders. And a Committee on Horizontal Restraints, chaired by Robin van der Meulen from Willkie Farr.

These should be topics of interest to all of you. Pick one and identify yourself as an interested person, and you'll have a great opportunity to get more involved in the Section's activities. We'll be publicizing those and the signup procedure as we go forward.

Now, we really have two orders of business. Number one, we have to approve the minutes from last year's Annual Meeting. Those have been circulated and made available. And I would entertain a motion to approve those minutes.

AUDIENCE MEMBER: So moved.

MR. MADSEN: Is there a second?

AUDIENCE MEMBER: Second.

MR. MADSEN: All in favor.

(Ayes voted.)

MR. MADSEN: Any opposed?

(None.)

MR. MADSEN: The minutes carry.

Next I want to ask our distinguished friend Robert Hubbard to come and present the Report of the Nominating Committee.

By the way, the Report of the Nominating Committee was available outside.

MR. HUBBARD: Well, I certainly don't want to stand in the way of lunch.

We have been trying to expand the Executive Committee. We have tried to present more and more opportunities for meaningful participation in the Section. We have distributed a copy of the Nominating Committee Report. I will not read it. It will be included in the symposium. You should have gotten it as it was handed to you when you signed in.

We are very happy that we are expanding it. We still have some work to do in diversity terms, in terms of more people upstate, more in-house counsel, and other things. But those are the kind of efforts that had been under way under Meg Gifford's leadership of the Nominating Committee.

So the specifics of the people who are continuing on the Executive Committee, the people that we are nominating are all included, and the list is very long, and I will not read it here. But that is the Report of the Nominating Committee.

MR. MADSEN: Let's ask for a motion to approve the nominations of membership to the Executive Committee.

AUDIENCE MEMBER: So moved.

MR. MADSEN: Second.

AUDIENCE MEMBER: Second.

MR. MADSEN: All in favor.

(Ayes voted).

MR. MADSEN: Okay, now how about the officers.

MR. HUBBARD: Yes, and we also have nominated the officers. We have nominated Jay Himes as Chair, who

served as the Vice Chair this year and has put together the phenomenal program that you're enjoying now.

Bill Rooney we have nominated as Vice Chair; he put on an *American Needle* Program and has served as the Secretary of this Section.

Eric Stock is the Secretary; we have nominated him. He has served as the Finance Officer, and we were pleased to nominate him.

Next we have nominated Lisl Dunlop as the Finance Chair, which is a three-year term. The other terms are all one year.

Is there any discussion of those nominations or additional nominations?

MR. MADSEN: How about a motion to approve.

AUDIENCE MEMBER: Move to approve the slate.

MR. MADSEN: Okay, second.

AUDIENCE MEMBER: Second.

MR. MADSEN: All in favor?

(Ayes voted).

MR. MADSEN: Thank you very much, Bob.

Well, I can feel the burden of office rise from my shoulders, down, and it is my very happy duty to inform you that luncheon is served.

The program reconvenes at 1:10, with a presentation by the New York Bar Foundation, and our substantive panels begin at 1:30. Thank you very much.

(Luncheon recess.)

From Mediterranean Avenue to Boardwalk: Unilateral Conduct Revisited

MR. HIMES: We are moving right into "From Mediterranean Avenue to Boardwalk."

Our moderator here is Chul Pak, who is a member of the Executive Committee and a partner at the New York office of the Wilson Sonsini firm. He is of course conversant in antitrust counseling, mergers, litigation. Chul joined the Wilson firm after eight years at the FTC where he was actively involved in conduct and merger litigation. He is also of course active in the ABA Antitrust Section.

He is going to introduce this array of talent that we have brought for you today, which is truly an extraordinary panel. Chul.

MR. PAK: Thank you, Jay. So good afternoon and thank you all for attending this afternoon's session, in which we'll talk about Section 2. I personally find Section 2 to be an intellectually fascinating and challenging area of antitrust law because of its breadth, the variety of debate that goes on.

For example, the debate that happened a couple of years ago between Department of Justice and the Federal Trade Commission with respect to the proposed joint statement about Section 2, opinions about Section 2, which were then withdrawn by the Federal Trade Commission.

We have an illustrious panel here to talk about some of these issues. Let me introduce them. Far to the left is Commissioner Rosch from the Federal Trade Commission. Commissioner Rosch has been at the Federal Trade Commission since 2006; his tenure ends in 2012. Prior to that he was a partner at Latham & Watkins where he litigated a number of high-profile antitrust mergers and conduct matters, including the successful defeat against the Department of Justice in the Oracle-PeopleSoft merger. He is also a Fellow of the American College of Trial Lawyers. He was previously the Chairman of the Antitrust Section of the ABA, and even prior to that he was the Director of the Bureau of Consumer Protection at the Federal Trade Commission.

He has written provocatively, extensively and thoroughly about Section 2. Today he is also going to talk about the interaction between Section 2 of the Sherman Act and Section 5 of the FTC Act.

Next to speak will be Professor George Hay, who is the Edward Cornell Professor of Law at Cornell Law School. Prior to that he was the Director of Economic Policy at Department of Justice from 1973 to 1979. Professor Hay has written extensively on antitrust law matters. He has also taken time from his teaching responsibilities to testify as an expert on a number of high-profile antitrust matters.

Today he will be talking about the refusal to deal concept and the history behind it and some recent developments in refusal to deal law.

Third to speak will be my colleague, Jon Jacobson. He is a member at Wilson Sonsini. He too has written, litigated and spoken extensively about Section 2 as well as merger matters, representing significant clients such as Coke, Google and others for well over 20 years. Jon has also served as a Congressionally appointed member of the Antitrust Modernization Commission from 2002 to 2007 and was one of the principal authors of the report submitted to Congress in 2007. He is also a publications officer for the ABA Antitrust Section, and he was the editor-in-chief of *Antitrust Law Developments*, the 6th Edition back in 2007. I am sure many of you are familiar with it. I turn to it all the time, and then I walk down the hallway to Jon and say okay, tell me all the cases, and he will recite them to you, off the top of his head actually.

Then last, but not least, we originally had Rick Rule to speak as our fourth presenter, but he was unable to attend today because of an emergency client matter. In his place is his esteemed colleague, Joe Bial, who is special counsel at Cadwalader. Prior to joining Cadwalader, Joe was clerk for Chief Judge Ginsburg in the D.C. Court of Appeals. He has also served as a teacher and a professor at George Mason Law School. And he, like the others, has spoken, written and litigated extensively on antitrust matters.

So it's going to be a wide range of topics. We are going to go in some sequence of presentation and then follow up with questions and answers at the end.

So with that, let's turn it over to Commissioner Rosch.

COMMISSIONER ROSCH: Thank you very much, Chul. I appreciate that.

I've spoken before about the virtues of Section 5, as opposed to Section 2, as a vehicle for challenging single-firm conduct, and I would like to begin by clarifying one important point as a technical matter. The Commission doesn't have authority to challenge anticompetitive conduct under the Sherman Act. It only has authority to proceed under Section 5 of the FTC Act. When I discuss Section 5, therefore, I am not referring to those Sherman Act cases that are technically pled as Section 5 violations, but rather to the rare case in which the Commission challenges conduct beyond the Sherman Act's limits under the theory that that conduct constitutes an unfair method

of competition under the FTC Act alone. Those free-standing Section 5 claims and their relationship to Section 2 of the Sherman Act are the focus of my remarks today.

I would like to talk about four major points. First, I think a major virtue of Section 5 is that it enables the Commission to hold firms liable for anticompetitive conduct where the Sherman Act may not. Section 5 more generally provides a better vehicle to settle unsettled questions of law. Now, some have construed that to mean that any time a hard question arises under Section 2, we should duck that question and run to Section 5. That is not correct. Let me explain my thinking a bit more here today.

There are certain instances where existing Sherman Act precedent might potentially lead a court to find that a firm is not liable for certain problematic conduct under Section 1 or Section 2 of the Sherman Act. An invitation to collude case is the clearest example of that kind of case. Some may say that the Commission should stick to the Sherman and Clayton Acts even in those contexts, but from a doctrinal standpoint I don't think that is right. In those cases, if we shoehorn the facts of the case into a Sherman Act framework, we run the risk of either making bad law by bringing an unusual case within the gambit of existing Sherman Act precedent or alternatively, losing the case even though the firm's conduct is causing anti-competitive effects because the Sherman Act precedent is ill-suited to the conduct at issue. If that is the result and we have a better mousetrap, we should use it, provided that we clearly explain why that conduct constitutes an unfair method of competition so that future parties are on notice.

Indeed, that is exactly what I had in mind when I supported the Commission's position and voted out a complaint against Intel under a Section 5 course of conduct theory. An anticompetitive course of conduct is not generally a free-standing theory of liability under Section 2. In fact, the vast majority of federal courts that have considered a course of conduct claim under Section 2 have rejected it.

In *Intel*, the Commission had the benefit of engaging in an intensive investigation before filing suit to determine whether there was in fact reason to believe that an anticompetitive course of conduct existed, as opposed to just filing suit as private plaintiffs may attempt to do. The Commission was then able to augment its expertise by allowing the Bureaus of Competition, Consumer Protection and Economics to debate whether the application of a course of conduct theory and the facts that the staff had uncovered was appropriate.

I might add that the question here for me under Section 2, as under Section 5, is whether the cumulative effects of a course of conduct can make out a cause of action. Apart from the doctrinal benefits, I also thought that a course of conduct claim was proper under Section 5, as opposed to Section 2, because while such a claim could be far-reaching, Intel or any other firm with comparable market power would rarely be subject to the threat of treble damages, so long as the course of conduct claim was based exclusively on Section 5 as opposed to Section 2.

So I didn't see the Commission as ducking bad law at all. Rather, I saw us using our authority to reach a particular category of conduct that the Sherman Act generally did not and arguably should not reach.

Now the rest of my thinking here as to why Section 5 is in some cases a better vehicle than Section 2 is based on the insistence by the private bar and firms that there should be clarity respecting their vulnerability to liability under the antitrust laws. And I must say I take that insistence very seriously, as somebody who practiced law in this area, mainly on behalf of large firms, for 40+ years.

For example, the Supreme Court's decision in *Tampa Electric* articulated a number of factors that should be considered in determining whether an exclusive dealing arrangement is illegal. Now, that decision in turn has spawned such diverse exclusive dealing decisions as *Dentsply* on one hand, and *Barr v. Abbott* on the other. Similarly, with respect to bundling there's *LePage's*, which differs from *Ortho*, which in turn differs from *PeaceHealth* with respect to loyalty discounts; compare the very different analyses by the Eighth Circuit in *Concord Boat* and the D.C. Circuit in *Microsoft*.

With respect to deception, the First Circuit's decision in *Rive.com* is hard to reconcile with the D.C. Circuit's decision in *Rambus*. In other words, I look at Section 2 law and I see very little clarity.

Against that backdrop, the Commission has three choices, as I understand it, when presented with a case that it has reason to believe involves conduct with anti-competitive effects that may be plausibly cast as a Section 2 claim. First, it can litigate the case in a federal district court of its choosing under a Section 2 theory. The advantage here is that the Commission has the opportunity to add additional clarity to the law, provided it persuades a district court that it is right. The disadvantage is that as a practical matter, clarity is all but impossible, because clarity in most Section 2 contexts will come only with Supreme Court review, which is highly unlikely.

Second, the Commission can litigate the case in a Part 3 administrative trial under Section 2. The advantage here is that if there's an appeal to the Commission, we can author a decision describing why a particular practice should create liability under Section 2. In that regard we have greater flexibility and expertise than a typical federal district court. The disadvantage of course is that if we rule against the respondent, the respondent can forum shop its way to the circuit with the binding precedent that is most favorable to it, immediately nullifying any opinion that we issue.

Third, we can sue in Part 3 under a stand-alone Section 5 theory. From a prosecutorial standpoint, Section 5 has far fewer down sides, because Section 2 law is too thin in many of these areas. In fact, the only downside I see here is that an appellate court may rule that Section 5 does not cover the conduct at issue, but I frankly don't view that as a downside because then the Commission, the defense bar, and the firms will have clarity once and for all on the scope of Section 5 and whether or not a particular category of conduct creates liability and under what circumstances.

Now, some may say that the Commission has a fourth option, which is to sue in Part 3 under both Sections 2 and 5, as the majority elected to do in Intel. To be honest, the trial lawyer in me has not yet been persuaded that a tag-along Section 2 claim will ever make sense if the Commission's role is to actually win a Section 5 case. The minute we allege both claims, the respondent has the upper hand, because it can go before the ALJ and ultimately before an Appellate Court if necessary and get a ruling on the Section 2 claim. Once a court finds that conduct does not violate Section 2, a federal court is going to be hard-pressed to say that the same conduct is nevertheless inappropriate under Section 5.

The second argument I've advanced for why Section 5 may be superior in some context to Section 2 is, as I've said, no private right of action to sue for Section 5 violation occurs. Some may believe that follow-on class actions are inevitable, so let me explain my thinking here as well.

When Congress enacted Section 5, it made two findings that are directly relevant to the class action debate. First, Congress considered and rejected a provision that would allow private plaintiffs to sue for treble damages. Second and related to that, Congress only provided the Commission with prospective relief when it proceeds under a stand-alone Section 5 theory because it intended for the Commission to use Section 5 to reach novel or incipient conduct. Congress believed that the Commission would be a more expert agency than the federal courts, and as such could identify conduct that stand-alone Section 5 claims should reach.

Private plaintiff lawyers may not feel so constrained. To the contrary, the Supreme Court was concerned in *Twombly* and again in *Credit Suisse* that the private plaintiffs bar sometimes pleads antitrust claims with the primary objective of leveraging enormous costs of litigation into substantial settlements. So it makes sense to me that Section 5 should only be a tool for the Commission.

Now it was my reading of this legislative intent that was at the root of both of my statements in the two Section 5 cases that the Commission brought this last year, *Intel* being one of them, *U-Haul* being the other.

In June I joined the majority statement in a settlement involving U-Haul. In that case the staff uncovered evidence of an invitation to collude but absolutely no evidence of an agreement. I felt it was important to make that point clear to reduce the likelihood that the private class action bar would be tempted to sue U-Haul and Budget under Section 1.

Now, some cynics may say that the plaintiffs bar will always find a means to sue if it really wants to. I think the jury is still out on that, in part because we haven't used Section 5 enough to know for sure, but I am not convinced that that critique holds water.

Let me review the legal options for follow-on class action. The first and best option seems to be from a class action bar's standpoint is a suit under the Sherman Act. In other words, it can take our allegations under Section 5 and plead that the same conduct violates Section 1 or Section 2. If we are doing our job at the Commission, however, it should not be worth their time to do that. In an invitation to collude case, for example, the Commission has not found an agreement, which is an essential element of Section 1. Section 5 cases based on unilateral conduct are trickier for sure, because the Section 2 law is relatively unsettled, as I've indicated, so a plaintiff may try to recast our Section 5 theory as a Section 2 theory. But if we are doing our job and casting Section 5 cases as products of Section 5, as opposed to Section 2, the likelihood of that happening should be reduced. In any event, I haven't seen enough proof that that is occurring to know for sure.

The biggest threat of follow-on relief comes from the state FTC Acts. Indeed, that was the concern of Commissioner Kovacic in his dissent on the *N-Data* settlement. But an exhaustive study of state FTC Acts has found that most of those statutes have such significant limitations that there is little likelihood of follow-on litigation. And in any event, in the wake of the few Section 5 cases that we brought in my tenure, including *N-Data*, *Valssas*, and *U-Haul*, there have not been any follow-on suits under the state FTC Acts.

Third, I would like to briefly explain why I believe the Commission's expertise validates the use of Section 5 in certain unusual or anomalous cases that are not good candidates under Section 2. I've periodically heard people say that the Commission is no more expert than the DOJ, and that federal district court judges are perfectly able to address tough antitrust issues. For starters, I don't think anyone at the FTC—certainly not myself—would ever suggest that our counterparts at the Antitrust Division are somehow less expert or less equipped to make hard decisions on decisions of antitrust law. That would be ridiculous. The real problem is not that the lawyers, economists and senior officials at the Antitrust Division aren't first rate but rather that the FTC is an independent agency and the Antitrust Division is not. It is solely a prosecutor.

What the Antitrust Division does have authority to do is to sue in the federal courts. I've spent plenty of time

ragging on generalist federal district courts in the past and, frankly, so did the Supreme Court in Credit Suisse. But I am not sure I ever explained why I find them so problematic in the Section 5 perspective.

The reason again is not that the federal district court judges are not very smart and accomplished; many of them are among the brightest minds in the country. The problem is they are not required to be experts in antitrust law. When it comes to Section 5, Congress considered that the FTC Commissioners were likely to be more expert. Now, I understand from time to time some may look at the FTC's composition and say that any given Commission is less expert than other Commissions. But generally speaking, it's safe to say that if a newly appointed Commissioner shows up at the FTC without a deep background in antitrust law, they get a crash course in it. And I frankly think that this view is vindicated by *Three Tenors* and the *North Texas Specialty Physicians* cases. In both cases, the FTC applied a truncated rule of reason analysis articulated by the Supreme Court in *Indiana Federation of Dentists* to deem the practices at issue inherently such that we can then proceed from there. In both cases the D.C. and Fifth Circuit respectively agreed and adopted our analysis.

Had those questions been presented to a federal district court in the first instance, I think it is unlikely that the Court would have been equipped to apply a more novel form of analysis in the first instance.

Fourth and finally, and I know I am a voice in the wilderness here, but as I've said in my *Intel* statement, documents that illuminate a party's intent as it demonstrates evidence of effect or that evidences multiple anticompetitive practices should be relevant in assessing liability under Section 5. My concern is that if we challenge these kinds of conduct under Section 2, that evidence may not be considered as probative as it should be.

Now, to be sure, the Supreme Court's decision in *Aspen Skiing* holds that such an intent would be relevant to prove effects in Section 2 cases, but some Section 2 decisions have said that an analysis of the defendant's intent is irrelevant in a Section 2 case. Just take a look at Judge Easterbrook's decision in the *A.A. Poultry* case. And in light of the Supreme Court's decided distrust for civil juries and private plaintiffs, I am not sure that a federal court would depart from that view. Now I've given you my defense why I believe Section 5 provides a superior mechanism than Section 2 for challenging unilateral conduct.

Now I've given you my defense for why I believe Section 5 provides a superior mechanism than Section 2 for challenging unilateral conduct.

In closing I would like to offer one final thought for your consideration. As it currently stands, the FTC's Section 5 expertise is supposed to be irrelevant in clearance discussions with DOJ. Is that right? I personally don't think so, because for all the reasons that I've expressed here, I think there's a lot the Commission can add to prosecute as a result of this Section 5 authority.

So let the debate begin. I am glad to answer any questions you may have.

MR. PAK: Thank you, Commissioner. Very stimulating ideas. We will hold questions to the end, although the panelists will be responding to some of the specific points raised by Commissioner Rosch as we move along.

Next, Professor Hay.

PROFESSOR HAY: Well we were given a fair amount of discretion as to what we could talk about. I've always been fascinated by refusal to deal cases, dating back to my first times working in Australia back in 1990-91, where the grandfather or grandmother of all Section 2 cases or monopolization cases is a refusal to deal case, *Queensland Wire*, where the defendant (a vertically integrated firm) refused to sell much needed input to a firm that wanted to compete against it in a downstream market. The High Court said that the defendant did have a duty to deal but said nothing about the terms on which the transactions would take place. That question always mystified me: what are the terms? If there is a duty to deal on what terms does it exist? For example, could the defendant charge a monopoly price? If the defendant was charging more than a monopoly price, how would the court determine whether it is a monopoly price or more than that?

In any event, a variety of cases have come along in the U.S. and then just two months ago I came across a recent European Commission case which again raised the issue of a duty to deal. And so it caused me to go back and take another look at all the American cases and see where we are. So I've called it evolution, revolution or clarification, because what the recent cases stand for really depends upon your point of view. Some would regard *Linkline* and *Trinko* as simply the gradual evolution of a doctrine. Some on the left regard it as revolution, and others say no, the law hasn't changed at all, it has been the same for a hundred years. So I thought maybe a quick overview of some of the cases might help illuminate that issue.

All this is in your materials, and the print may be a little bit small, but the refusal to deal cases in a sense can be traced back to *Colgate*, the classic RPM case where the Court said: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the right of a manufacturer to deal with whomever it wants." Very curious. Many of you know this, but go back and reread Justice Scalia's opinion in *Trinko*, where he quoted specifically from *Colgate* but cleverly left out the first phrases ("In the absence of any purpose to create or maintain a monopoly") without any ellipses when he says there is no duty to deal.

In any event, that language suggests if there were a purpose to create or maintain a monopoly, there might be a duty to deal, although because the issue wasn't raised in the case, it doesn't tell us anything about when a duty might exist or what the terms of that duty might be.

Then in *Kodak v. Southern Photo*, again the Court found the defendant liable. Notice that the defendant had at one point been dealing with the plaintiff, but stopped dealing with the plaintiff, when the plaintiff tried to compete against it in the retail market. And if you're wondering how is the Court going to enforce the terms of any duty, it looked like it was saying, look, you've always dealt with retailers by giving them discounts. We simply want you to do for this guy what you have always done for him and what you continue to do for other people at the retail level. So the Court is suggesting that what's going on here in part is a discontinuation of a long-standing pattern of dealing. And we are not going to try to set the terms from scratch; we are simply going to tell you to go back to what you have been doing all along.

Then you get to *Lorain Journal*, refusal to accept local advertising. Well, presumably the paper in Albany accepted local advertising and had a standard set of rates. It was simply refusing to accept advertising from a particular applicant. So again, the Court is talking about really a discontinuation of a pattern of dealing. And the Court is not really getting into setting the terms, it is simply saying whatever your normal rates are, you can't refuse to sell at those normal rates to this person simply because he is a competitor.

Otter Tail had always been in the business, to some extent, of selling wholesale power although the rates weren't really set by Otter Tail; they were set by the Federal Power Commission. In effect the Court said do what you've always been doing, sell the wholesale power. We don't need to set the price because Federal Power Commission is there to set the price.

So finally, we get to *Aspen* where the Court endorsed the jury instructions that said refusal to deal by a monopolist would not be a violation if valid business reasons existed for the refusal. But the Court tells us very little about what would count as a valid business reason. For example, I want to charge this fellow a monopoly price, and he doesn't want to pay it; therefore, I am not going to deal with him anymore. Does that qualify as a legitimate business reason?

In the context of the case the Court didn't need to get into that because the defendant's behavior was so blatant, the Court had no trouble saying there was no valid business reason for the refusal.

Now we get to the modern cases. *Trinko* described *Aspen* as "at or near the outer boundary of Section 2 liability," but did not disavow it explicitly and seemed to suggest that the difference between *Aspen* and *Trinko* was all about evidence. In *Aspen* there was clear evidence from which a jury could conclude there is no legitimate business justification. And one interpretation of *Trinko* (perhaps overoptimistic) is that it is simply saying there was no basis for any similar inference to this in the *Trinko* case. There is no particular evidence from which a jury could conclude there was no legitimate business justification. Why? Because there had been no prior pattern of dealing. The defendant never set the price. There is no reason to believe that it would have been profitable for the defendant to deal. So that is a narrow interpretation of *Trinko* that says *Aspen* is still fine. The difference between *Aspen* and *Trinko* is that in *Trinko* there is no basis for a finding there is no legitimate business justification.

However, a broader reading of *Trinko* is the Court is creating a safe harbor for firms which have never heretofore sold to people in the plaintiff's position. *Trinko* had never been in the business of selling wholesale access. It didn't want to sell wholesale access. It was dragged into this pushing and screaming by a special statute. So that is a more generous interpretation, which is there is now a safe harbor for firms which have never dealt at wholesale. That interpretation seemed to be endorsed in the Second Circuit *Elevator Antitrust Litigation*, "because plaintiffs do not allege that the defendants terminated any prior course of dealing—the sole exception to the broad right of a firm to refuse to deal with its competitors—the allegations are insufficient to state a unilateral monopolization claim," again, suggesting that the Second Circuit sees *Trinko* as creating a clear safe harbor for firms which have never ever before sold at wholesale.

Now we get to *Linkline*, which of course is a price squeeze case, but I want to look at it here as illustrating the issue of duty to deal. Again, the Court refused to disavow *Aspen*. There are circumstances in which a firm's universal refusal to deal can give rise to antitrust liability. But it did not describe the decision in *Trinko* as an evidentiary decision. It says the conclusion in *Trinko* is that the defendant had no antitrust duty to deal. Again reinforcing the notion that what the *Linkline* court sees as the *Trinko* result is that a firm which has never sold at wholesale has no duty to do so.

Now we want to marry that with the price squeeze cases, and there are not very many of those. The *Alcoa* case was in part a price squeeze case, and the Court found it was unlawful for *Alcoa* to engage in price squeeze. Alcoa held the price of ingot so high and it kept the price of sheet so low that a competitor in the sheet business could not possibly compete.

In *Concord v. Boston Edison*, Judge Breyer generally endorsed the *Alcoa* standard although he had found for defendants, largely on the ground that both the wholesale and the retail level were so highly regulated, it was hard to see how consumers could be hurt. But he generally endorsed the concept of a price squeeze.

Now we get to the modern case, *Linkline*, looked at as a price-squeeze case. I think the broadest interpretation of *Linkline* is that *Linkline* has basically completely eliminated the concept of a price squeeze. The Court says look, you've got a couple of different theories of antitrust liability you can pursue. You can pursue the theory that the retail price is predatory. It clearly wasn't in this case; the defendant was making a lot of money. If you go that route you've got to satisfy the *Brooke* standard. Or if you want to look at the wholesale price, the wholesale level, you can pursue a claim that the defendant has a duty to deal. And you can say that the defendant has violated that duty.

But of course in this case, which is essentially the same as *Trinko*, the Court reads the defendant as having no duty to deal, and therefore, you can't claim that the terms are unreasonable. If the defendant has no duty to deal at all, probably because it had never sold at wholesale, then you can't complain about the terms. But the broadest reading of *Linkline* is that it has illuminated the concept of a price squeeze. You can no longer focus on the difference between the wholesale and retail price and bring what is in effect a predatory pricing claim against the retail division or downstream division, in which you say look, the downstream division of the defendant could not possibly make any money if they had to buy from themselves at the wholesale price they are charging to others and sell at the current retail price. So again, one interpretation of that concept is that there is no longer such a thing as a price squeeze, which you can attack as predatory pricing, simply for the retail division's behavior or the downstream division's behavior. That concept has been eliminated by *Linkline*.

The only possible note of optimism on the plaintiff's side is again this case is driven by the Court's notion that the defendant in *Linkline* had no duty to deal at all. Perhaps another case where in theory the defendant may have had a duty to deal, because it engaged in a prior course of dealing, the price squeeze concept might be resuscitated, although I have my doubts.

Then finally, for those of you who are claiming that a convergence is almost complete between U.S. and Europe, there is a fascinating case decided at the end of 2010. The case is identical to a combination of *Linkline* and *Trinko*. It involves telephone service like *Trinko*, but a price squeeze claim like *Linkline*. There the Commission pursued an Alcoa-type price squeeze claim. That was the claim, and the Court endorsed that claim. There was never a suggestion that because there had been no prior course of dealing that the defendant had no duty to deal.

So I am not making an effort to try to resolve these issues, but simply I find as a Section 2 issue this is fascinating to me. Maybe there will be no duty to deal cases in the United States anymore, but if there are, I'd be interested to see how it deals with this possible distinction between the U.S. and Europe.

Thank you.

MR. PAK: Thank you, Professor.

Next will be Jon Jacobson, and one of the topics John is going to talk about actually embraces some of the notions raised by Commissioner Rosch and Professor Hay with respect to cumulative effects in the unilateral conduct.

MR. JACOBSON: I am going to talk about that and then get into some of the policy issues that Commissioner Rosch raised.

So we have a fairly stark conflict in the cases and their approaches to course of conduct theories. In the *LePage's* case, the Third Circuit articulated the monopoly broth concept, which is basically if it floats, you can add it to your Section 2 claim. And by the way everything floats. The Third Circuit actually extended that in the *West Penn* case a couple of months ago. I should disclose that I am particularly unhappy about that, since I was on the losing end of the Third Circuit's decision. But we'll see what happens on remand.

(Laughter.)

We also have in what's generally viewed as a plaintiff-oriented decision, the *Microsoft* case, which basically says of course of conduct, we are not going to let you aggregate claims. It takes a pretty hard line. There is a passage in the *Linkline* case, adjacent to the passage that Professor Hay put up, that basically said we are not going to allow you to add two bad claims together. And we have a whole line of cases that most of you have cited or had cited against you in briefs starting with the Second Circuit's decision in *City of Groton*, that basically says you can't add zero plus zero and get anything other than zero.

So what do we make of all this? I think the sound approach to a course of conduct theory is to require the plaintiff to articulate the basis on which there is indeed a cumulative effect, as opposed to just adding up a different series of unconnected acts. I think in the cases that do that there is a basis for having the whole be greater than the sum of the parts. And I think that indeed is what the Federal Trade Commission did in the *Intel* case. The Commission's complaint explains how these various pieces of otherwise seemingly unconnected conduct in fact enhanced Intel's dominance over the CPU processor business.

So *Intel* is a Section 5 case. Does it make a difference that the Commission is proceeding under Section 5? Should the standard really be different for Section 5 than Section 2? I think not. There is no question that the purpose of the FTC Act in 1914 was to supplement the Sherman Act. So in 1914 Congress passed two statutes. The Clayton Act, was designed in part to prohibit specific practices that they thought might go beyond what the Sherman Act had prohibited. The Supreme Court had upheld tying in *Henry v. A.B. Dicks*. Section 3 of the Clayton

Act made it clear that tying was contemplated by antitrust laws generally.

But there was concern that the enumerated practices in the Clayton Act might miss practices that businesses would develop over time, so part of the mission of the Federal Trade Commission was to create an expert body that could analyze and prohibit those practices that went beyond what was strictly prohibited by the Sherman or Clayton Acts. So I absolutely agree with Commissioner Rosch and Commissioner Liebowitz about that.

Where I draw the line is saying that Section 5 is a replacement for Section 2 in areas where Section 2 may apply to conduct, but I think that is taking it too far. Section 5 was always intended to be more, not a substitute for Section 2.

So Commissioner Rosch does raise a practical problem, which is that in the real world the courts are nervous about private actions under Section 2. Certainly the *Trinko* case is a class action case, and the *Billing* case is a class action case. These are cases where I think the Supreme Court was concerned, perhaps legitimately, about the potential for abuse of the antitrust laws in this context.

Now, Section 2 of course applies to private cases. And although I am going to argue here with Joe Bial about particular private uses of Section 2, it seems to me that in a private case where someone is putting their own money down, as opposed to gambling that a court will award some fees at the end of the day after a settlement, you like to think that the incentives are more closely aligned with the purpose of the antitrust laws and the concept case is really not going to be brought. Apart from issues that we may talk about later on, the case is not going to be brought simply to grab a settlement and get some attorneys' fees at the end of the day.

So I think an appropriate view of course of conduct is to require the plaintiff to explain the basis on which the conduct is being aggregated, articulate a theory why the conduct added as a whole is more than looking at its individual parts. But I don't see a basis for distinguishing Section 5 from Section 2, and I am sure we can talk about that as time goes by. Thanks.

MR. PAK: Thanks, Jon. We'll turn it over to Joe now.

MR. BIAL: Thank you, Chul.

Given that I was added somewhat late to the program, hopefully this will keep your attention.

What I would like to talk about here is my involvement in several Section 2 cases over the past three, four years. I think in terms of the cases, obviously I've got cases against Google, cases against Cisco, NASCAR and others. And to the extent these are Section 2 cases, I think some of the theories regarding refusals to deal are potentially relevant. But as John mentioned, the *Microsoft* case, at least with respect to Google, a lot of the conduct that the Court scrutinized in the D.C. Circuit doesn't look very different from some of the conduct that Google is presently engaged in. And I'll get into that in a minute, and then we can take it up after the presentation.

But obviously, I think with respect to this kind of conduct in a Section 2 case, my clients, just to give you a sense of who they are, are small search sites that were squelched by Google. Google refused to sell them advertising. And if you're trying to be a search site, that is a critical input to your business. You can't possibly have people searching if you don't have queries.

So the claims in these cases are that Google has engaged in conduct to eliminate the ability of these companies to get the traffic they need to provide a viable alternative. They are niche sites. They are not Google, obviously. With Google you put in the word pumps and you get all kinds of stuff; you'll get women's shoes and you'll get various things. One of my clients is a business search; you put in pumps, you get hydraulic pumps. If you are looking for hydraulic pumps, that is an easy way to do it. It is a very profitable niche, and I think that is actually part of the reason why Google looked at these vertical sites and tried to eliminate them. Because if you eliminate the alternative, the one click-away that Google likes to espouse no longer exists.

In any event, how is this important on the economics? I think Jon Jacobson is probably one of the best people to discuss this here, because in the 2001 article he wrote with respect to Microsoft he made very clear that innovation is extremely important, particularly in these high-tech industries where you have high fixed costs, because obviously if you're trying to run a company and you need to spend a lot of money up front to get into it, and then once you're in somebody can just shut the door on you, other than through competition on the merits, it is a little bit hard to get investors excited about that kind of business. As opposed to a low marginal cost business where you may be able to build up business over time, and that is not what we are talking about here. I think Jon has appropriately pointed out in his earlier writings when criticizing the conduct of Microsoft that those kind of issues matter quite a bit.

The conduct in these cases, is it actionable? As far as the refusal to deal, I don't think you need to go that far with respect to Google eliminating vertical search sites. I think the Microsoft example is a decent platform, and obviously the facts will get hashed out over time here. But at least as a platform, one of the points that Judge Jackson made in his findings of fact was that when Microsoft took advantage of its what he called "very valuable real estate," in fact some of the most valuable real estate in the world at this time—which is the desktop—forcing others off that page, other than through competition on the merits, was problematic from the view of Judge Jackson.

The D.C. Circuit did not find those findings of fact to be clearly erroneous. So that kind of conduct was scrutinized and was part of the basis for liability in this case.

I think in terms of taking somebody off the desktop, the counterpart here is if you search on Google and you're down—you know, if you're down at the end of the page—you don't exist. But certainly where my clients found themselves, from routinely being at the top to basically being off the page or on page 100 or 200. I doubt that anybody has ever searched into page 200 on Google. Certainly I have not. And it is difficult to run a business if you have to have users clicking through 200 pages to get to your links.

In terms of the economics, just to give you a very high overview, how does this actually happen? How is it valuable to Google? Their chief economist is Hal Varian. I had the pleasure of studying Hal Varian's book in grad school. One of the things Professor Varian made very clear was having information gives you a lot of power. And in particular there's a theory that he developed for the most part called "revealed preference." Essentially, if you have enough information to trace out people's demand curves, then you can actually go in and price them. Obviously price discrimination is not necessarily anticompetitive. But if you use prices to drive rivals from the market, that kind of conduct can be scrutinized under the antitrust laws. I think in these cases the price levels for my clients' input cost, using Google's AdWords product, went from five to ten cents per keyword to prices that were $50 or a thousand times more than what they had paid. Now, I think Google's response had been that it's price discrimination. In my view, if you go from five cents to a $100, it is not that different than refusing to deal entirely.

But for the second—price auction, which is how these prices are set, what are the economic efficiency effects? I think if you just think about it, if you go to an auto dealer, and you have three bidders. Say you're bidding $20,000, somebody else is bidding $15,000, and you've got a third bidder bidding $10,000. In the second price auction, the winning bidder, in this case, pays you the second price, that is $15,000. So you're going to have a consumer surplus of $5,000 if you win the auction.

Well, what happens with competition if you have a rival auto dealer across the street? Then the individual may go over and buy—let's say the $15,000 bidder goes across the street and buys the automobile; your price now goes down to $10,000. So you can see the purpose of wanting to force everybody into the same auction. At least as far as the second-price auction, it is designed to get those prices as high as you possibly can. And I think Professor Varian has actually commented expressly on this point and has said that a big chunk of the revenue at Google comes from fully sold pages. Fully sold pages happen to be those pages where you've got a ton of bidders. So if they can't go someplace else, they are stuck in Google's auctions.

Let me just leave you on this note. There will be discussion on this, but let me leave you with one point with respect to search and advertising, lest you think that Google has not thought about this itself. This is a quote from the founders of Google, Larry Page and Sergey Brin, from 1998. It says, "A search engine could add a small factor to search results from friendly companies and subtract a factor from competitors. This type of bias is very difficult to detect but can still have a significant effect on the market." I think if you look at Google's quality scores and certainly if you look at the complaints in these cases it lays out the detail how that quality score is used. What we think, in very much the way that the founders of Google originally feared, is that bias would be part of their own search engine. I think that is the reason, at least in 1998, that they did not have advertising. They didn't have that until the 2000s. With that I'll turn it over.

MR. PAK: Thank you, Joe. I am going to give Jon a chance to respond just a little bit of background context, so that you know, Jon, Rick Rule and Joe Bial yesterday argued in front of the Second Circuit in a dispute involving Google and involving one of Joe's clients. There is a long history behind this. Yesterday there were only three judges. Today I see about 70 judges, so we'll take a poll after to see who wins, but for present purposes I think we should give Jon an opportunity to speak.

I would invite Commissioner Rosch and Professor Hay, if you would like to make any observations about this, beyond the specific facts, to please go ahead and speak.

MR. JACOBSON: So who here remembers the 1985 article from Baumol and Ordover called "Use of Antitrust to Subvert Competition"? Raise your hand. Very important article, and I commend it to you. We'll come back to that at the end.

I am only going to speak for a few minutes, but let's look at some of the sites that you're talking about. The Trade Comet site is what's called an arbitrage site, or made for ad sites. So Trade Comet is a site, they will put up an ad on Google; the Google searcher will then go to the web site, which is not called Trade Comet; it is called Source Tool. Let's say they are looking for pumps, so they will go to the Source Tool site, and instead of pumps, they will find a whole bunch of additional Google ads from another program called AdSense, and they will click on those ads. And then finally, after three or four clicks, as opposed to one click, find the pump site they want. Why does Source Tool do this? According to their own testimony, they were paying $400,000 a month to advertise on Google's AdWords program, (those are the ads on the upper right side of the page) but making $600,000 for their share of the revenue from the AdSense program. (Those

are the ads on their site that say Sponsored Links, Ads by Google). So that is what is referred to in the trade as arbitrage. Google had an algorithm. Trade Comet was not singled out. One of the aspects of the algorithm was designed to find sites that were made for AdSense that were arbitrage sites that provided no benefit to the users. The only benefit was that Source Tool was getting additional income from additional clicks on additional ads and deterring the user from finding what they wanted with one or two clicks and requiring five, six, seven clicks. Now Google may be wrong in its quality determination, but Google determined that was bad quality and was impairing user welfare. So the algorithm did not let that happen.

There is another type of site called scraper sites. Mr. Bial's and Mr. Rule's sites are scraper sites. They take content that is actually originated on other sites, pull it into their own and again generate revenue either from sales of the items or from AdSense. The Google algorithm is designed to inhibit scraper sites. How does it do this? How does it inhibit arbitrage sites? It makes the cost of the ad, the AdWords ad, for that particular site more expensive.

None of these companies were sought out by Google as competitors. The idea that a Source Tool, or a My Trader (the Ohio case), or Foundem (one of the complainants in Europe), or the site called Ciao in Europe that Microsoft bought so that it would have standing to complain to the European Commission about this, none of these sites was perceived by Google as a competitor. The idea that Google would be using its quality metrics to impair these trivial competitors to get a competitive advantage is the most preposterous concept one can imagine. It just doesn't make any sense at all.

So let's put the question a little bit differently. Why are resources being spent to inhibit Google's algorithm from making these quality judgments, and where is the money coming from that is trying to get regulators and courts to downgrade Google's quality search? Well, money is coming from Microsoft. Microsoft bought the Ciao site. Microsoft funds the organization in Europe called iComp, that supports Foundem. Microsoft lawyers are the ones who are representing myTriggers and Trade-Comet. Microsoft lawyers are the ones who have gone to the state Attorney General's Office in Texas.

So the question is why would they do this? Well, who has an interest in downgrading the quality of Google searches? It might be Bing. So that is, in my judgment, the use of antitrust to subvert competition. The concept that what Google is doing, which is clearly and plainly and utterly designed to enhance a quality search, that this is an impediment to competition, is a preposterous concept. Which is why when one of the few non-Microsoft backed cases actually went up to Court of Appeals in the Ninth Circuit, (it's called *Person v. Google*), the Ninth Circuit affirmed the dismissal, and I think appropriately so.

COMMISSIONER ROSCH: I would like to say two things about Google and Microsoft. First of all, I don't want to comment on the substantive aspects. Obviously, they are open investigations with the Justice Department.

I will say, however, I don't think Cadwalader or Wilson Sonsini do themselves or their clients any favors by taking strict sides on these refusal to deal matters. We at the FTC pay no attention at all to that kind of special pleading. It is self-interested pleading. We try to make up our own minds about the claims.

I agree generally with what George said, except that I think in both *Trinko* and *Linkline* we have neglected the important role of regulation. Part 1 of the *Trinko* opinion is all about regulation. Why should we spend scarce antitrust resources on prosecuting a Section 2 claim when the conduct is already regulated by federal policy? That is, in my judgment, the beginning and end of what Justice Scalia should have been talking about. And I was quite frankly amazed that he commanded a majority for the second part of his opinion in *Trinko*.

Secondly, in *Linkline* I think it's very possible to say that on remand there was no liability, because there was no predatory pricing, and no scenario akin to *Aspen Skiing*. Where you had a duty to deal, and it's arising out of a prior course of dealing. I think it's possible to rationalize pricing on the retail side. With regard to the wholesale pricing, there was no duty to deal because there was regulation at that level. So as far as I was concerned, that case probably is distinguishable from *Alcoa* and came out right.

Now let me make a comment about what Jon just said about Section 5. We used to say in private practice, and I am sure you do too today, that there are distinctions and then there are distinctions without differences. And to my way of thinking that is exactly what we are talking about when we are saying that Section 5 was meant to add to as opposed to replace Section 2. That is not what the Supreme Court said in this case. If you take a look at that trilogy of cases, which is frequently cited against the Commission, I am talking about *Official Airline Guides*, I am talking about *Boise Cascade* now, and I am talking about the *DuPont* case. Those are all cases that said to the Commission that you should not be using Section 5 to unsettle settled Section 2 law. I agree with that completely. It's just that I don't see that there's very much unsettled Section 2 law. Certainly the Supreme Court has not settled Section 2. It didn't even settle it in *Brooke Group* because it didn't tell us what the proper pricing standard was for below-cost pricing. It certainly did not teach the courts of appeals how to settle unsettled Section 2 law when it came to exclusive dealing, or when it came to bundling, or when it came to loyalty discounts, or when it came to deception. All of those things, as I indicated in my remarks, are completely different from appellate court to

appellate court. So the Supreme Court did not give us guidance in any of those areas either.

As far as I am concerned, it is a perfectly legitimate use of Section 5 to challenge single-firm conduct where we are not unsettling settled Section 2 law, and I think there are very few instances of that.

MR. PAK: George, do you want to comment at all?

PROFESSOR HAY: No, I don't disagree. Except I wonder whether he thinks about whether the government had a good case when it sued AT&T?

COMMISSIONER ROSCH: How shall I answer that? I sure didn't think so at the time.

(Laughter.)

MR. PAK: We are almost running out of time, but I should open it up to the audience. Are there any questions that people would like to address on any of the topics to any of the panelists?

(No comment).

Joe, would you like to get the last word in?

MR. BIAL: I'd love to get the last word in.

Well, I do want to say that we have gotten almost no discovery from Mr. Jacobson's client. So I think the fact that he made those statements, we have to test those with discovery, which is what you do in Section 2 cases, at least in private litigation.

My second point, your quote that these are trivial sites, I think if we go back and look at what you criticized Microsoft for saying about its competitors at the time, it would ring very similar to what you're saying now on behalf of Google.

Finally, I'll just leave you with this: do the search yourself. If you search "pumps" on Google, and I've got the printout, and I did this a couple days ago, you get water and trash pumps—that may be relevant. "Sexy high-heel pumps" and "penis pumps." So I am not sure how Google is more relevant than my client's site, but we'll leave that for discovery.

MR. HIMES: I am getting up here before we get into this. It is heartening to know that Microsoft is out there protecting nascent competition.

(Laughter.)

Thank you everybody.

(Applause.)

International Cartel Enforcement in the Digital Age: Collection and Use of Evidence Beyond Borders

MR. HIMES: If you look at the title of this panel, International Cartel Enforcement in the Digital Age: Collection and Use of Evidence Beyond the Borders, it doesn't have that same corniness as you saw in some of the earlier ones. That is not coincidence. That is because when I tried to name this panel Nowhere to Run, I got some push back.

Our moderator is Fiona Schaeffer. She is a partner at Jones Day in New York. Fiona comes to us from halfway around the world, where she got her law degrees both in Australia, Adelaide and subsequently at Oxford. She practiced for a number of years in Europe, appearing before the courts in Europe, and she has a practice that emphasizes particularly cross-border transactions and international investigations.

And Fiona, please introduce this fine panel.

MS. SCHAEFFER: Thanks, Jay. I actually deserve the least introduction and had the longest.

Because we have such an exciting panel here today, and I am sure you already know all these faces, I am going to do just quick introductions and then tell you about the format of our program.

We are very honored to have with us today Melanie Aitken, who is the Commissioner of Competition at the Canadian Competition Bureau and is responsible for pretty much everything that goes on in the government enforcement realm in competition in Canada and also liaises with the Department of Director of Public Prosecutions on criminal enforcement matters.

Next to Melanie is Michael Hausfeld, who is, I am sure as his name speaks, a household name. He is the Chair of the Hausfeld firm, whose creed is essentially global wrongs need a global right. Michael has spent his whole career making sure that that happens with criminal antitrust matters. He is also at the forefront of expanding civil damages actions in the antitrust realm in Europe and elsewhere.

Next to Michael is Lisa Phelan, who is the Chief of the National Criminal Enforcement Section of the Antitrust Division of the Department of Justice. All you need to know about Lisa is that she has been involved in criminal enforcement for 24 years and has seen everything, has been involved in some of the earliest prosecuted matters here, including the *Nippon Paper* case, and has seen the evolution of U.S. criminal enforcement, and now the next stage of our criminal enforcement regime, which is very much on the international stage. So she's seen it all.

Next to her we have David Ogden, who now is in private practice—oh, I am sorry, Scott, you guys switched.

Scott is a shareholder in the litigation group of Greenberg Traurig. Scott has actually been instrumental in the defense of many of the most significant class actions and civil and criminal cartel cases of the past decade, and, no doubt, will be in many more.

Last but definitely not least, David Ogden, who is now the co-chair of the Government and Litigation Group at WilmerHale. If you just Google David, he actually has his own Wikipedia page, and you'll see from that that he has served in a variety of high-ranking posts, including most recently the Deputy AG of the U.S., that is United States for those of you who are from somewhere else, and the Assistant AG for the Civil Division of the DOJ, as well as playing very important roles in the DOJ, DOD and other government agencies. A true Washington insider.

Today our panel is going to focus on a hypothetical set of facts, which bear no resemblance to the real world, and any criticisms can be directed to me. The goal here is to really show you through practical somewhat real-world examples how the flow of information can occur between one agency and another, and obviously now between agencies and civil cases around the world. So, if you got a problem in one place, you got a problem everywhere. I am going to introduce the hypothetical, which I think you have in front of you. Just to take you through the first facts here, we'll set the stage.

We have Big O Corp's CEO having a sumptuous lunch and is rudely interrupted at his headquarters in Manchester. The GC calls in a flurry of panic. The company's European headquarters are being searched by some rather nasty looking officials from the OFT, on behalf of the European Commission. They want to search the premise for documents relating to price fixing and market allocation of the rather unbelievable product market of rolled oats, the principal ingredients in instant porridge.

They seize files from all over the company, including some from the GC's office labeled correspondence between sales manager and in-house counsel about various trade association meetings. The sales manager actually had been prompted to write those emails after he had completed an internal in-house antitrust compliance training. The inspectors were rude enough to actually go on the global network, accessed from the GC's computer, and print out some files that were clearly marked U.S. legal advice.

So that is the beginning of our hypothetical.

Scott, isn't this a travesty of justice?

MR. MARTIN: It is terrible.

(Laughter.)

And David and I are the only defendants, but unlike the State of the Union, we are not integrated with everyone here. I have to say no toothbrush, no overnight stays, Melanie, no passports, Michael no checkbook. I know that is the most painful of all.

MR. HAUSFELD: We accept wire transfers.

MR. MARTIN: I am sure you do. Probably PayPal.

It is a travesty. And what this hypothetical is starting to get at here, for those of you who may be familiar with the facts that occurred in Manchester, England, is the *Akzo* case, which came from the European Court of Justice last year. That started really in February of 2003, and more precisely it started back in 1982, with a case called *AM&S*.

When the decision actually came out though, I think for those persons both within and outside the antitrust practice in the United States who hadn't been intimately familiar with issues of privilege abroad, it was astonishing. But it was not an unexpected result, after some 28 years of precedent in the EU.

The genesis of that case was a dawn raid in Manchester, England of Akzo's office by the European Commission. Akzo being a huge Dutch pharmaceutical conglomerate. So essentially at the outset you have three jurisdictions already involved, the U.K., the Netherlands and the EC. Having said that, the dawn raid occurs and there are two documents, which are emails from an Akzo general manager to the in-house counsel, which come into dispute as being potentially privileged.

As is the ordinary course in the context of a dawn raid, where you have that kind of a dispute, documents are placed into a sealed envelope—there's ordinarily not even a cursory look at them—and the dispute winds its way through first the Commission, now called the General Court, the Court of first instance, and ultimately to the European Court of Justice in 2010.

In the EC there is a concept called Legal Professional Privilege, or LPP. It does not apply to in-house counsel. Every time I say that I get raised eyebrows from a good portion of the audience. The theory being that in-house counsel, because they are employees of the company, are not sufficiently divorced from the commercial decisions so as to maintain independence in their decision-making.

It was hoped that after more than two decades since the *AM&S* decision there might be some reconsideration of that precept in the EU. And Akzo made a number of very convincing arguments that, in fact, if someone is a member of the bar or called to the bar or other law societies, certainly they have ethical obligations and can maintain their independence. That in the context of particularly cartel cases, etcetera, the necessity for in-house counsel to be intimately involved in rendering advice should afford protection for privilege within the European community in the member states. In fact, in the U.K. and in the Netherlands those communications would be recognized as privileged under the laws of those jurisdictions.

Nevertheless, in fact the documents are found not to be privileged. Never really any inquiry into the content, but rather the nature of the communication. Just happens that even after support comes from the U.K., from Ireland from the Netherlands, from the International Bar Association, and it is decided yet again in the *Akzo* case that what's protected is communication from outside counsel who are duly admitted or qualified in EU member states. Which throws into question here all of those communications from in-house counsel, and frankly, communications from duly admitted lawyers in the United States, to the extent that they were binding on anything concerning EU matters and EU law.

So Fiona, we do have a real predicament.

MS. SCHAEFFER: We do. And everyone knows that, despite all the ringing of hands, *Akzo* is not going to be repealed any time soon. So this is the state of the world we need to live with, and so life is not so jurisdictionally clear these days and life often crosses borders.

Scott, can you tell us the practical implications of *Akzo* on this side of the Atlantic, and perhaps specifically address the general counsel files marked U.S. legal advice being seized.

MR. MARTIN: Sure. I think the first rule is don't write it down. It sounds flip, but I am being quite sincere. To the extent that there is a necessity for in-house counsel in those member states to render that legal advice, any time it's in writing it is potentially susceptible. Oral communications are going to be more important.

The other strange anomaly here is to some extent you can have a direct conflict of jurisdictions. If, for example, the Serious Frauds Unit or the Office of Fair Trading in the EU had done the raid, if they had done it in conjunction with the Commission, the Commission would have had access to the documents, but oddly enough the U.K. would not. It's a bizarre set of circumstances.

As for the U.S. legal advice, there is a real peril there, that to the extent—we are talking about documents here of course in the electronic age too. To the extent those documents are resident on a server accessible from that Manchester, England office, they are potentially seizable.

And in the first instance they may be treated as confidential. The undertaking party may go ahead and contest and seek preliminary relief that they not be accessible to the Commission in the first instance.

I think once the dispute reaches the shores of the U.S., it becomes a very difficult choice of law question, as to which I've never seen an adequate resolution in this context, which is to say which jurisdiction has the predominant interest. I think if you're talking about, for example, with respect to U.S. legal advice, the potential for coordinated leniency application in the U.S., the potential for civil class action litigation in the U.S., the way that the activity that had been discovered and was being investigated internally, for example, might be treated in the U.S., that a U.S. court, I would hope, would respect that privilege. But we don't have any decisive law here.

MS. SCHAEFFER: Thanks, Scott.

If one of us had been there, we would have at least made sure that the U.S. legal advice was taken away in what they call a brown paper bag procedure, if we hadn't managed to convince them on site that it was not appropriate to take it. So at least they wouldn't have divulged the subject matter of those memos irrevocably.

We should all remember that the whole concept of privilege, even if it is communication that attracts LPP, the subject matter and the context is just much narrower than what we are used to in the U.S. So wherever we have in-house and outside counsel from those two jurisdictions, that is the U.S. and EU, conversing by email we have to remember that.

MR. MARTIN: I think that is fair, Fiona.

Very briefly, the other two principles coming out of the *AM&S* decision, because *Akzo* showed such deference to it in terms of the treatment of non-member state counsel and in terms of the narrow, as you noted, definition of LPP, for example with respect to preparatory documents, those documents that are prepared exclusively for purposes of seeking legal advice from qualified counsel, you're not going to see any broader relief there.

MS. SCHAEFFER: Thanks.

Michael, why don't you take it away for the next phase of Big O Corp's woes.

MR. HAUSFELD: So the next thing that happens in the hypothetical obviously is that someone makes a disclosure that is public. This is where the hypothetical gets somewhat disconnected with reality, because it presumes or projects that only several plaintiffs are in the class action complaint, and then the ball really starts to roll. Because now you have intersected both public and private enforcement. You've got your public enforcement authorities seeking evidence, and you've got your private claimants seeking as well to survive motions to dismiss now under plausibility standards as well as to get into pretrial discovery so that they can actually get into the merits.

MS. SCHAEFFER: Just to note that there had also been a couple of dawn raids going on at the same time in Canada and U.S.—perhaps not at dawn, but certainly in a raid nature.

So we'll turn it over to you, Lisa. I think the traditional view is the law enforcement in the U.S. really doesn't want the private plaintiffs bar interfering when they have an investigation going on. Is that too simplistic a view?

MS. PHELAN: Yes, I think that it is too simplistic a view. Of course we want the plaintiffs to succeed in obtaining the damages that they are entitled to. The concern is the pace at which they are moving and the specific actions they are taking that could possibly negatively impact a criminal investigation or proceeding.

So the facts there are a little hypothetical in the sense that when it says we have decided to stay civil proceedings. We typically will seek only when necessary, and only in the most tailored manner as possible, to intervene and try to stay some civil proceedings, but certainly not to the extent it isn't necessary.

But I just wanted to give everybody some background. I think this scenario of the leniency applicant going to multiple jurisdictions here in the oats industry is so reflective of what's happening more and more in a typical cartel case. Literally we are up to situations where as many as a dozen different jurisdictions will be approached by the same leniency applicant simultaneously or nearly simultaneously, and this creates both exciting opportunities, and as I was speaking about to the panelists, and some challenges as well. This means jurisdictions—some are criminal, some are not criminal. Everyone is operating with a different type of system. Some are administrative, and some focused on getting documents, while others might be more interested in covert, undercover actions that could obtain tape recordings, videotapes. So people's timetables may be different. Jurisdictions' priorities may be different.

So the process is to coordinate as much as possible amongst the jurisdictions before dawn raids or any other actions are taken. Of course, if one jurisdiction takes a covert action, then the potential for covert action in any other jurisdiction is gone. So the first step would be for us to ask the permission of the leniency applicant to speak to the other jurisdictions, can we call up to Canada, talk to Melanie and her people, can we call the EU and share the information that you're providing to us about the cartel? Most of the time the answer is yes, we can. And that is tremendously helpful. But even if the answer is no, I don't want you sharing the substantive information, we can still reach out to those jurisdictions and talk about the logistics and timing of any anticipated actions regarding

the industry. When are you planning to take some action; are you planning to take action, and what is your timing, and what kind of action?

As I said, in most common case we will get the permission of the leniency applicant to coordinate fully and share all the information, and that will set off a round of calls. And I am sure a lot of you engaged in the cartel area are used to the challenges. I've called at all hours of the day, middle of the night, to not only discuss and coordinate and make sure everybody has the maximum amount of information to decide what action, if anything, they might be willing to take or are interested in taking, but then oftentimes to set in motion simultaneous raids, which is the ideal way we like to go, all acting at the same time. We literally can't always do the same time due to time differences, because it would be 3 in the morning in Japan, while we were raiding here in the U.S. But within a 15-hour time span, we will try to all go overt simultaneously.

Sometimes, as I said, there are different interests. For example in the *Marine Hose* cases, we were interested in the opportunity to videotape a cartel meeting that was going to be taking place at an industry conference being held in Houston, drawing executives from all over the world working in the marine industry. We knew from other evidence who would all be meeting together. So we persuaded all the other jurisdictions interested in the matter to hold off until that meeting could take place. Then we were able to videotape a live price-fixing meeting, which is obviously terrific evidence that we are happy to get.

Once we and any other jurisdictions go overt, then it usually takes less than 24 hours to file a civil case. And as I said, we certainly don't want to do anything to thwart that case's progress, but at the same time there could be concerns that, say, a witness Michael or others might want to depose that we would rather not have another statement from out there, other than the one given to the Grand Jury or that might be given at trial in a relatively upcoming occasion. So in that situation we will sometimes intervene and ask the court to stay the civil action for some period of time. Again, always looking for it to be the minimal time, and always looking for just the narrowest of limitation that we can seek.

In the meantime, my friends in Canada and elsewhere around the world will be looking for opportunities to share the evidence that we've obtained in any dawn raid that we have done. There are a lot of vehicles by which we do that. Certainly we follow the Mutual Legal Assistance Treaty option, and letters rogatory and various criminal assistance statutes and treaties that exist with various countries around the world. We look at all of those with the opportunity to share that sort of tangible evidence. In addition to that, we keep up the informal dialogue as to what each of us is finding, what directions our investigations are taking, our timing, and where we are heading with things.

So the proposed title was going to be You Can't Run, and that literally is the type of environment that we increasingly create, where people really can't go anywhere without feeling that they are at risk of being touched by the investigator or law enforcement authority. And that includes literally on the day of raids we have found out that somebody we thought was going to be in Europe was in the U.S., or somebody we thought was going to be in the U.S. was actually in Japan. And we literally pick up the phone and call fellow investigators that day and have the person reached out to in the other jurisdiction.

So I would imagine that Melanie would like to expand on some of the things they do from the Canadian side.

HON. M. AITKEN: Well, generally that is very well in line in terms of what our experience is. We often will start with an immunity approach in our amnesty program.

The interplay between our criminal investigations and our civil class actions doesn't have the history that yours does. Philosophically I think that is changing and that is beyond antitrust.

Specifically within our criminal provisions in the Competition Act I think there's a couple of recent developments that may mean that this is going to increase. First of all, we have in general some indication from the courts of a lower threshold for certifications of class action. And secondly, specifically with respect to our conspiracy provisions, we have an amendment that came into force almost a year ago which finally removes, to our enormous relief, our market effects requirement in a hardcore cartel. So having aligned ourselves and having removed what was at least a distraction in terms of the difference with your provision here in the United States, I think we are going to see a lower standard overall and an easier job on the plaintiff's part to satisfy the certification threshold.

So I think again I would echo exactly what Lisa said in terms of our non-hostility to civil proceedings going on at the same time. I think there's a balance that needs to be struck, and it is not for us to strike it, but it is for the courts to strike it. We have to do more than simply say this is going to interfere with our investigation. It would be a rather careless submission to make if there is an important right to be protected by the plaintiff's class action. And so we again would just go in as surgically as we could and only when we felt we needed to stay proceedings.

As a practical matter it hasn't come up as much in Canada. In Canada we don't have any right of discovery prior to certification. And because that certification threshold was quite high, we haven't been getting over that terribly often. As I was sharing with my friend here,

in Canada, we have had our class actions in this area that have tended to be all on guilty pleas, and many resolved proceedings south of the border before they even start in Canada. So it has been a relatively easy go and things tend to get settled before certification even happens. So we just haven't had the circumstance too often where we have been looking at proceedings that will potentially harm our investigation or interfere with our prosecution. But we certainly don't have a low bar. And I mean rightly so, in terms if we want to stay some element of the civil proceeding, we need to really show that it is going to have an adverse effect on our case and prosecution.

With that being said, we tend to monitor, particularly while we are still engaged in the investigation and prior to the disclosures particularly to the defendants. I think our prosecutors in particular will be watching for things that might prejudice their activities. And in particular we are concerned about the obvious. We are concerned about revealing the immunity applicant's identity earlier than would be good—witness fatigue, inconsistent statements, and those sorts of harms.

In terms of the cooperation, again Lisa put it very much the way that it is, and we are very fortunate to have it. We will not, in the case of immunity or leniency applicant, reveal any information without a waiver but they are usually forthcoming.

We do have a formal EMLAT treaty, as Canada does with 30 other countries, but we don't use it very often. My search-back shows that we used it about half a dozen times, and it has been used either typically to conduct a search for the U.S. in Canada, in which we would seek to seal the materials in support of that to preserve the confidentiality, provided there was a rationality for doing so, or our request for documents in supporting grand jury testimony. But of course we can always just seek it from the company. So there are easier ways to deal with it mutually than an EMLAT. They are very work intensive, and usually it is better to use our cooperation agreement with the United States, which always preserves for both of us our sovereign interests. That very much has laid a great foundation for cooperation, which I think at the most important level for all of you is that on a day-to-day basis we are in constant contact and we are certainly the beneficiaries of that and grateful for those relationships.

So I think that sort of sums it up.

MS. SCHAEFFER: Thanks so much, Melanie.

So our civil cases are getting going, and Paul Droopy at the Grumpy firm is finding he is in a bit of hot water.

Scott, take it away.

MR. MARTIN: After Michael's minions file his civil cases, it is long after that that Droopy gets around to drafting a litigation hold notice. It is very broad. He sends it off to Big O Corp's general counsel; he circulates it to all relevant personnel in all affected Big O Corp offices around the world. He files a copy in the GC's email, confirming that the notice was sent, notifies a responsible partner, and then before going home and finishing his time sheets for the day, he duly crosses document retention off the to-do list.

In another vein, however, the GC was unaware that in 2010, Big O Corp had outsourced all company data storage to Cloudy Corp.

MS. SCHAEFFER: David, document protection, preservation and destruction are the things that we as defense counsel worry most about. Tell us what we need to do and how we stay out of trouble.

MR. OGDEN: Well, you don't follow young Droopy's example in any number of respects, and you don't disclose the name of a partner. But I am going to assume that it's Mr. Grumpy himself, the first named partner in the firm who is supervising Droopy here and who is really responsible for all of the problems. This kind of took me back a little bit to first year civil procedure class as I looked at this hypo and trying to spot all the issues and all the things that poor Droopy has done wrong. But I think the bottom line here is this issue of immediate document preservation is something that keeps any defense counsel up at night in any kind of litigation. I think it is particularly challenging and difficult in the global context where you're dealing with U.S. litigation and non-U.S. clients who aren't familiar necessarily to the same degree in-house counsel in the United States is with what the obligations are or how you go about doing these things. You've got materials that may be scattered across the globe in multiple places. It is a particularly challenging situation, which requires a great deal more activity than young Droopy has engaged in here.

According to a recent 2009 survey, there were some 45 cases in U.S. courts in which sanctions were imposed for violations in the e-discovery context, and I am sure 2010 was even more than that.

So fundamentally we have the obligation for Big O Corp to take reasonable steps to preserve all evidence within its possession, custody or control. Most of us are very familiar with that standard, but that includes all data located outside the United States. It includes all data whose storage has been outsourced where the control of the company would continue to prevail. And so long as there's legal right authority or practical ability to obtain the data, typically U.S. courts will say you have an obligation to take steps to preserve it.

Big O Corp should also have suspended its normal document destruction processes, its various cyclings of documents, its destruction of backup tapes and the like as soon as it reasonably anticipated that there would be litigation. And there, in this context I think if you don't act immediately upon notice of a dawn raid, you are run-

ning enormous risk, because it is in that little window that people start screwing around and are tempted to do the wrong thing.

You could easily have spoliation problems in that short window there. And if you don't act very promptly to get those notices out, you're just asking for trouble.

It also has to be very active. You've got to place your clients on notice of their obligations. You can't just draft a broadside letter like this and send it to the GC and say send it out to anybody who might have documents. You've got to help the GC figure out who might have documents; think through where the documents might be. Where there are IT issues, you've probably got to engage with IT experts. You may need to think about engaging an IT expert to identify where the documents are. The notice here may have been adequate. We don't really know, but it needs to be quite explicit about the obligations and talk about consequences for noncompliance. And then there needs to be follow-up. In ideal circumstances you'll have outside counsel follow up with key players in the process to make sure they understand it and got it. You need to have acknowledgement coming back from recipients saying that they got the notice and that they understand it and intend to comply with it.

The case law doesn't say this is an obligation, but I think it's really a good idea, as soon after that notice goes out to go ahead and take steps to start securing the key evidence, if that can be done, because that solves an enormous number of problems. A lot of companies' hard drives on laptop computers store information that may not be resident on any central system. Just sending a notice to folks who might be important that they shouldn't delete anything on their laptop may not work. People leave the company, things fall through the cracks. So if you actually get out and image those hard drives, that can solve some problems. If you've got a real issue and you know you're heading for serious litigation, it is time to take these things particularly seriously.

If Droopy had spoken with the general counsel in detail, asked him where and how electronic information is handled, he would have found out about Cloudy Corporation, and he would have followed up with Cloudy Corporation and made sure they were doing what they needed to do. And then Droopy should have set out on a program of reaching out periodically and making sure that people are continuing to honor their obligations. So there are a lot of reasons and a lot of ways in which this should have been done more rapidly, and Big 0 would be less likely to be headed for the kind of trouble it could get into, such as monetary sanctions against counsel or the company or directed inferences for the jury on issues of fact or potentially directed judgments and the like.

MS. SCHAEFFER: David, I just want to inject a little real world into this. And not me of course, but I do have a friend that deals with companies which are not U.S. based, which in fact are in regimes where there is really no discovery, where you can have all the questionnaires going out you like, and the reality is you get ignored. Do you and Scott have advice for folks on this panel, what do you do in those situations? Do you literally have a local language speaking IT person fly out with you and literally bang out of them where the stuff is?

MR. OGDEN: Yes, that is where I started with this problem that you've got when you have a client who has just not been in a situation that looks anything like this before and not dealt with U.S. counsel, not dealt with U.S. discovery, not dealt with or even begun to contemplate what it means to be in the middle of a lawsuit like this. There is a lot of skepticism, to put it mildly, as many of you well know and a lot of anger and resentment, which appropriately should be directed at Congress and the drafters of the Federal Rules. Sincere counsel is simply in the position of just trying to protect their client. There is no question there's a lot of anger and resentment. People don't want to comply. I really think you've got an obligation to give as straightforward and truthful but as dire a picture of what the consequences are.

Fiona, you've been there too, of screwing this up and how serious a problem it is. If you don't do that and you don't get them to do it the right way, it's not only they, it is you who is going to have a problem down the road.

MR. MARTIN: I couldn't say it any better than David did. I would add only two things. Number one, we will see more and more and more spoliation motions in coming years, not only because of the advent of electronic discovery but because of the breadth of discovery that is available.

Number two, I would agree with your suggestion, Fiona; I would always bring an Australian speaking IT person with me.

MS. SCHAEFFER: No inference from that.

Melanie, what about on the criminal side, surely these dire consequences must be multiplied threefold.

HON. M. AITKEN: Well, certainly obstruction in Canada is a criminal offense, and we take it very seriously. We have also recently increased our penalties for obstruction. It's now a jail term of up to ten years and a fine, entirely in the discretion of the court.

We do tend to make people aware, as I am sure the system does here, in terms of they ought to be on notice. If we don't have a real discussion going on with them, they will either have gotten a document retention letter, production orders or searches, or whatever it has been that is putting them on notice. And we consider that to carry with it the significant signal that should be carried with it with respect to preserving evidence.

Charges for obstruction could be recommended by us, of course, we at the bureau don't work like Australia. We have a department called Public Prosecutions which actually does the prosecutions in our criminal cases. We have been working closer with the PP, but we would recommend charges for obstruction if there was a *mens rea* element that had been satisfied. And obstruction could also be an aggravating factor at sentencing, so that is another thing to keep in mind.

So due diligence obviously suggests that counsel should be making the kinds of inquiries that you've been hearing about from David and Scott as to off-site data. It is very important that for immunity or leniency applicants they fail to do due diligence at a very high level at their own peril. They may well find that their own agents of cooperation are felt by the PP not to be fulfilled, and they can lose that status. So very important, I was searching for an example, and the best I could come up was a little bit far away, which is how to take a stand on this. In 2004, Morgan Crucible pleaded guilty to an obstruction charge in terms of obstructing a bureau investigation and paid a $500,000 fine. As I said, it is an aggravating factor, and it is really dangerous if you're an immunity applicant.

MS. SCHAEFFER: Lisa, do you want to give the perspective of Ian Norris also in all of this.

MS. PHELAN: I will. Well, I guess I can't emphasize enough how seriously the United States DOJ takes obstruction of antitrust investigations. In fact, it is not uncommon that we have ended up bringing an obstruction case even in cases where we never brought the underlying antitrust case. The chances of getting caught are so much higher now in the electronic age. For those of us around 20 years ago when obstruction meant the executive got a subpoena and put his documents in his briefcase and took it home and tossed it in his fireplace or ripped it up, the chance of us catching that was pretty low.

MR. OGDEN: Those good old days are gone.

(Laughter.)

MS. PHELAN: I know. So now with the way forensics and computers are, the FBI can bring back almost anything, no matter how many rent-a-geeks you've had come in to try to wipe it off the computer, it is probably still there. So the chances of us finding out that you did try to obstruct are pretty high. And the penalties are just so high and so serious now.

It isn't just obstructive acts taken in the United States. Even when we start with search warrants, we follow with subpoenas, and they come with a cover letter that says all documents called for by the subpoena must be preserved wherever located. And as Fiona suggested, a prime example of that is the Ian Norris case she named. This was a case involving the CEO of Morgan Crucible, which was a U.K. company, and all the actions that he took to obstruct the Grand Jury investigation occurred in the U.K. When the U.S. subsidiary of the company had received a subpoena, he called together in his office his subordinates, who he knew had acted at his behest and had been engaging in collusion, and he worked together with them to develop a joint venture cover story that they would all tell to explain the reason they had gotten together with competitors. They literally drafted up a script of what everyone was to say if they ended up being called to the Grand Jury or interviewed by government investigators. And they developed a task force to root out and identify all incriminating documents that might exist in the company and make sure they were either destroyed or concealed.

In addition, he reached out to the co-conspirators to suggest they might want to do the same, get on board with the plan. This individual, if you've read the papers in the last eight years, you might know he refused to come to this country when charged, and so we sought extradition. And after a long time and many rounds of legal battles, he was brought to the country about ten months ago, tried last summer and convicted and sentenced recently to eighteen months in prison for that obstruction.

So it is not something we take lightly. It is not something we'll walk away from. Incidentally, it is not something that seems to be very deterred. It is human nature, so no matter how stiff the penalties, every time we do a round of searches it is not uncommon to find at least one or more executive engaged in some type of obstruction. So I can't emphasize enough the need for you guys to get that message out talking about retention and protection of evidence.

MS. SCHAEFFER: The cover-up is always worse than the crime, as we all know.

MR. OGDEN: And for civil purposes, negligence is enough to get you in deep trouble, and across the board, the basic rule is something is going to go wrong somewhere, almost no matter what you do. So you really have to do everything you possibly could to show you've taken every reasonable step.

And one last point. Figuring out sort of cultural issues as to how information is maintained in particular jurisdictions that are important can be quite significant. There are some countries in which basically every business person keeps a detailed daytimer book in which they write down basically everything that crosses their ears and in writing. And your routine document preservation process may or may not capture that. So it really is an active process.

MR. MARTIN: Where Lisa's office is concerned, culturally it is true to the idea that no harm, no foul or the documents were not very interesting or material at all will not get you anywhere.

MR. OGDEN: Trust me.

MS. SCHAEFFER: So we have got a lot to move through here, and we are getting even more sexy now, because we are going to the French.

I won't have us read the hypo at this point, but just suffice it to say that of course we have a French defendant who is objecting to producing documents on the grounds that it is a going to violate the blocking statute and potentially put him in jail.

We also have a U.K. defendant who is playing up and saying I don't want to produce stuff from my customer services department or my human resources department because of EU privacy and data protection laws.

Michael, isn't this just a load of nonsense?

MR. HAUSFELD: If you're patient enough, private enforcement will always be heard from. So I was very pleased to hear Fiona's remarks that the department wants the private plaintiffs to receive the full restitution they deserve, because those are the kindest words I've heard from a public enforcer.

Private enforcement has changed along with public enforcement. Where you heard both Fiona and Lisa talk about the harmonization of dawn or slightly thereafter raids and the cooperation between different public agencies to pull together, to investigate and determine what occurred, so are the private enforcers.

There are claims in the United States brought by companies from Canada, Korea, European Union member states, as well as Australia. There is the same effort to pull together with regard to those global cartels the information necessary to establish the basis of the violation.

Now, I hear Fiona and Lisa talk about pulling together the coordination that is undertaken by public enforcement agencies and the sharing of that evidence. But there is as yet no mutual assistance treaty between the public and private enforcers either domestically or internationally. But you do have the intersection of different sensitivities in the production of documents and the search and necessity for this same information on both the public and the private side. Despite what Scott and David might recommend on the private side, we advocate publication often and circulation widely.

In doing that we have the same issues of what information can be obtained by the private enforcers and when. There are a number of avenues. The first possibility, if you're going to have what we call a follow-on private litigation, follow-on to either the announcement of a government investigation or a public decision, is it going to the amnesty applicant to see if they wish to receive a resolution of their civil exposure. Then the amnesty applicant, if they want to, is put in the position of talking to the public enforcers, what information it can share, since it would like to get out of its private civil exposure.

Then there's the issue of Grand Jury documents, something of which most private parties request as a matter of course, as well as transaction documents, as well as third-party discovery, as well as traditional interrogatories, just to find structure and possibly now with e-discovery, who are the responsible officials whose files you want to search, as well as depositions. How do you balance that against the public enforcer's interests to conduct their investigations and/or their trials appropriately? That is not an easy question and one in which there is no uniform answer. And which, if you take a look at the different responses and the different jurisdictions, you will find that there is no consensus as to how that works. But there is at the same time, if you have relatively contemporaneous proceedings, they need to adjust the interests of both of those proceedings to allow both to proceed without one interfering with the other.

Where else can you get information with regard to your civil case? Well, for example, in the European Commission there is a publication that is called the SO. That may not give you the detail that you need, but you know there is an SO. Then there is the Commission decision. And again, you may not be able to get the Commission decision or if you request the Commission decision and you are able to obtain it, that's going to have factual information. If you can't, there's always the Appellate proceedings from those companies that appeal the Commission decision which are public and which the appellant is going to reveal some of the evidence and the Commission is likewise going to be discussing some of the evidence that was used in terms of reaching the decision.

All of which gets to the point now what do you do, let's say in the United States, if there is litigation first brought in the United States to deal with privacy statutes or blocking statutes in other jurisdictions. For the most part, with chauvinistic tendencies, whatsoever, United States courts have almost mechanically rejected the French claims for privilege under the blocking statute. You do have issues under Aerospatiale of what information a U.S. plaintiff can get of a foreign defendant, particularly that which was produced outside the U.S. jurisdiction and in fact produced to public enforcers in foreign jurisdictions.

In balancing those factors, what you see now are many Canadian civil plaintiffs, as well as we are going to be seeing and we have seen some European civil plaintiffs seek to intervene in the U.S. discovery process, saying that if there was a global cartel and there was a common course of conduct and there is a uniform repository for that information related to that conduct, we would like to have that conduct, despite the fact there may not be a procedure available to us in our home state permitting that.

You have all of these new elements coming together to place or elevate private enforcement in the general enforcement of competition regulation and which now

needs to be considered by any defendant in terms of how you have to deal with exposure of this material that can be discovered not only by multiple jurisdictions on the public side but multiple jurisdictions in multiple ways on the private side as well.

MS. SCHAEFFER: Thanks, Michael.

Moving very quickly along, because we don't have much time left, the next portion of the hypothetical really raises the reverse scenario, that is where the government, in this case, the DOJ, is trying to obtain documents obtained outside the subpoena power of the DOJ that were produced in a civil litigation, and the government wants that for the purpose of Grand Jury proceedings.

Tell us about the recent case, Lisa, where that was actually permitted.

MS. PHELAN: Yes, actually, just to sort of set out the groundwork, the Grand Jury, acting with and on behalf of the DOJ, will seek evidence, by whatever means it can get it legally, to get its hands on the evidence. So it will subpoena anyone in the country with relevant evidence, and will send a cover letter with the subpoena, asking for preservation of documents elsewhere and asking subjects of the subpoena to bring documents from abroad voluntarily. And if that is not happening, then it will work with its counterparts around the world to do assistance requests and search warrants at its request and see if it can obtain evidence located abroad that way.

But once in a while we have become aware that documents that were at the time of the issuance of the subpoena not in the country come into the country, and sometimes as in the scenario envisioned here, they come in for purposes of preparation for the civil case. If and when we become aware of that, we will subpoena those documents and seek them.

That happened recently in a case in California, and there was a recent court order. I can't talk about all the details of the case, but what was in the order, which is public, is called *In re Grand Jury Subpoenas Served on White & Case, et al.*, and the Court agreed that the Grand Jury could subpoena documents brought to the United States for the purpose of review by counsel in connection with the civil case. And the Court stated that no authority prevents the government from closing its grasp on what lies within the jurisdiction of the Grand Jury. And it particularly noted in this case there was no evidence of bad faith by the government; that the government had not sort of been in cahoots with the civil lawyers or anything to try to draw it in improperly or impermissibly. It just happened it had come in, and once it's in, it's fair game.

So we are pleased with that precedent, and I think it is the right one. So you need to be aware that, for whatever reason, if a document moves into our jurisdiction, we will seek to obtain it for the Grand Jury to review, assuming it is relevant to what we are doing.

MS. SCHAEFFER: Mike, do you want to comment?

MR. HAUSFELD: And that is a very good indication of the new world that we are in with regard to competition enforcement. Because as was just discussed, there was the fact that the information was obtained first by the civil plaintiffs in broad based discovery that they had. And there's absolutely every effort to share that, because it makes sense. But here you have the civil plaintiffs getting information that otherwise was unobtainable by the public enforcers, so that maximizes the pressure on companies operating globally to understand that there is a combined strength between the public and private enforcers, kind of in reverse to what usually existed. And that as well exists outside the United States. For example, if there is access to Commission decisions from the European Union. In that situation, the European procedures have divided competition and private enforcement into two categories: Stand-alone and follow-on. If you have a follow-on action, it derives its basis, its foundation from the existence of the Commission decision. It seems almost inevitable that if that is going to be the essence of the Court's jurisdiction, that the Commission decision has to be placed in the Court so that all procedures can then progress from that point forward.

So these are all new concerns that have to be factored in, in terms of competition enforcement on both the public and private side.

MR. MARTIN: In fairness, David and I were having a little side bar here. And from time to time—

MR. OGDEN: Subject to joint defense privilege.

MR. MARTIN: From time to time, hypothetically, things will fall off the counter onto the floor in my home and my German Shepherd and I have a disagreement over who owns it, but we respectfully disagree on that.

MS. SCHAEFFER: The scenario you're just raising, Michael, also raises the predicament that Snow White is in the U.K. And I think you talked a bit about how the Commission decision ought to be used, at least evidentially, with binding effect in U.K.

David, what are the obstacles or problems with that from a legal perspective?

MR. OGDEN: There are various challenges, but I think it depends how aggressively you want to use it. You can't realistically expect to plead guilty and have no effect in some other jurisdiction. One of the great challenges and interesting aspects of this practice is thinking through how the step in civil litigation somewhere or a step in the criminal process somewhere will affect your client's situation elsewhere.

There isn't going to be I don't think—I mean Michael will try and he is very creative and accomplishes all sorts of things one would think couldn't be done, but it will be a challenge to get flat out res judicata and maybe

even collateral estoppel effect for an EC determination in the United States or probably even for a guilty plea in another jurisdiction. But I think you can expect there to be some fairly significant evidentiary value, potentially admissions if it is a plea, it can be used in evidentiary fashion in other jurisdiction possibly collateral estoppel effect if a jurisdiction recognizes that there are challenges for that.

But I think from the point of view of somebody managing some of these cases, as Scott does, Fiona does, as I do, when representing a defendant enmeshed in proceedings across the globe, really every step has to be thought through as to how it is going to affect the rest of the puzzle.

MR. HAUSFELD: For the most part, outside of England, Scotland and Wales it is very difficult to get discovery on the continent. However, there are procedures available, for example, to get discovery or intervene in the discovery in the United States in a global cartel that obtained documents involving the European Union activities. So although you may not be able to get it within the Union, you may be able to get it in the United States.

There is an issue that is not necessarily pointed out here, but one that has possibly dramatic consequences outside the United States. And that is in the European Union there is umbrella liability, so unless the cartel comprises the entirety of the market, the cartelists are responsible not only for the damage caused to the market by those participating in the market but is as well by those nonparticipants in the cartel who price under the market. So your liability outside the United States, depending upon market share, could be far larger than it would be even in the United States, putting treble damages aside. And likewise, despite the fact that treble damages are always pointed as the boogeyman for U.S. legal excesses, the financial situation outside the United States with regard to competition violations is much greater. Prejudgment interest runs from the date of the beginning of the cartel. Most cartels are protracted. So when you deal with a ten- or fifteen-year cartel and then you add the Appellate process, which may take another five or ten years, you're looking, if there hasn't been a resolution before that time, tacking on 20 years' worth of interest, which will make treble damages look small.

MS. SCHAEFFER: Much to Scott's chagrin, I am going to skip over Japan, but he will tell you all about it at cocktails tonight.

I want to get to the last part of the hypothetical, which in one form or another really deals with the access by private plaintiffs to documents produced to a competition agency, whether that be the Department of Justice, Canadian Competition Bureau, the EC Commission or otherwise, and also access by private plaintiffs and defendants to documents produced by those authorities. And specifically, here I am talking about the SOs in the EC of which really all these authorities we are discussing today is the most comprehensive.

So firstly, looking at the access to documents by private plaintiffs, Melanie, can you tell us, is there a distinction between the leniency applicant and others?

HON. M. AITKEN: Generally we would take the position that however the request comes, whether it comes directly to us or perhaps a defendant is seeking to fulfill his obligations in the context of a civil proceeding to the plaintiff, if it involves information that has been provided to us, we will always resist disclosing any of that information, for obvious reasons. We will not disclose voluntarily leniency applicants or otherwise. We will do so if compelled by court order, but we will resist the court order. If it is a request made to us, we will notify the person who provided us with that information so that they are aware. We will resist and go down fighting, and if we are unsuccessful, we will seek appropriate protective orders for that information in terms of it being kept confidential within the particular proceedings.

We have confronted this, and in particular we just had a relatively recent example. We had a gas price-fixing cartel in Quebec, and there are a number of class actions that are proceeding. In that case one of the defendants was seeking to fulfill its disclosure obligations to the discovery obligations to the plaintiffs and was purporting to hand over our disclosure, which was quite extensive under our charter requirements, and we were resisting that. The judge came up with a filtration process, so-called, which is a new term to me. Basically it required a document by document review. But to my relief, it put that power really within the DPP, the prosecutors, to take care of. So it was sort of like they got a fresh ticket, if there was any document over which they had a concern, they would have an opportunity to resist it which would have to be successfully challenged and adjudicated by the case management judge. Wiretap evidence was specifically excluded from this. So there was no way in which that was going to be shared. The other thing that we had to deal with, and it is not clear whether we have to pay for it yet, which is a bit concerning, but this whole review of the record by the DPP, whose fees we pay. It is unclear that we may be adding to some of that, but we had to disclose all the public information that was otherwise in our possession as well. You can imagine these investigations, they go for several years. And remember, we have to prove a market effect, so it went on even longer. There's an awful lot of information to be going through. So it comes up and is coming up more.

We've had, as some of you might be aware, U.S. plaintiffs seeking information from our files. So far mixed suc-

cess I guess would be the best way. At the end of the day nothing harmful. In the *Vitamins* case I think is a sense required to be shared, but that was a notable compromise. We will continue to resist these to the extent we think it is going to interfere with the identity, disclose the identity of an immunity or leniency applicant in particular or interfere with our investigation or prosecution.

MR. HAUSFELD: I think what Melanie just described illustrates vividly the tension between the public and private enforcement in certain instances.

There are occasions when the amnesty applicant would like to share information in the civil proceeding. What happens when the amnesty applicant says to the private claimants: I would like to resolve my civil exposure. And the private claimant says: Well, fine, what did you do and show me what you have. There becomes a dance between the amnesty applicant and the public enforcer as to what the amnesty applicant can share with the private civil plaintiff and when they can share it.

One of the principal examples, particularly in U.S. litigation now, is when litigation is started, there's almost a mechanical reaction by defense counsel to file a *Twombly* plausibility motion to dismiss. Well, if there's an amnesty applicant that wants to cooperate, are they free to share the information that they have about the cartel with the private plaintiffs before the private plaintiffs respond to the motion to dismiss? Well, even if they don't voluntarily want to do it, the issue is are they obligated to timely cooperate in that instance.

There's also the instance generally and the tension between the practical and the policy perspective. Why should it be the position of public enforcers that if we have evidence and we have it first, you as the civil plaintiff, who basically was the victim of that conduct which we are seeking to impose enforcement sanctions against, not be able to receive it as well.

MS. SCHAEFFER: Good point.

HON. M. AITKEN: The public interest also is trying to protect those who are victims, so I think something gets a little lost. Are there competing public interests there? But the one does override, and again, only in very surgical ways and only when necessary to my mind. I spoke very personally and passionately about that. That is the public interest of the two public interests that must prevail.

MR. MARTIN: I only want to utter one thing. Lisa is going to slug me. *Stolt-Nielsen*. It is not always clear that the leniency applicant incentives are pure.

MS. SCHAEFFER: I want to give David the last word, because he suffered a power failure last night and having to get up in the darkness this morning to come here.

David, what about access to the EC Commissions' documents, specifically the SO?

MR. OGDEN: In general the basics are that the EC is not receptive to the idea of having a road map to what they have been doing and what they are going to do disclosed and places very, very severe legal and practical limits on the participants in the process, be it the leniency applicant or others who come forward in terms of sharing the documents that have been produced in connection with that process, either by the EC or other participants in the process.

And from the standpoint of the leniency applicant, whether in the EC or United States or any other country that is also dealing in the civil litigation, the single most important thing, almost invariably, is preserving your leniency status with that investigative entity, be it the EC, United States, Canada, be it Australia, wherever it may be. So the pressures, if they are created by U.S. litigation where there is an order to disclose the stuff, in contrast with European law in the way that may happen, or in any other context, the bottom line is almost invariably that staying on the right side of the enforcement authorities is going to be the most important thing.

And the good news I think for many litigants is that I think, as a general matter, the enforcement authorities and civil enforcers share an interest in accommodating reasonable compromises or accommodations on these informational issues. They have an interest in making a leniency applicant status not an intolerable status. And so it is possible to work these things out, but I think the great challenge, when you're the possessor of the information and you're trying to essentially use that information to resolve problems that you've got across a wide spectrum, accommodating these competing concerns in a way that satisfies everyone is basically a full-time occupation.

MS. SCHAEFFER: I've been told we have no more time. But if anyone hasn't had enough porridge yet, I am sure we can continue tonight over cocktails.

In the meantime, I would like you to join me in thanking our fabulous panelists.

(Applause.)

(Refreshment break.)

The Antitrust Temperature in the Supreme Court: Permanent Climate Change or Seasonal Variation?

MR. HIMES: We will begin our final panel of the day. Our moderator today is Bill Rooney. Bill is a member of our Executive Committee. He is Vice Chair, which means that I am going to shed these responsibilities, and he can take them over. And I guarantee you that is not without any regret on my part. He has also been the outgoing Secretary of the Executive Committee in the Section, and did a fine job there.

Bill put together our *American Needle* Program at the end of last year, which I am sure we will be working to replicate in some form next year, a different subject, of course.

His practice involves complex antitrust M&A transactions, complex litigation—investigations criminal and civil.

Like just about everybody else who has been here today, he is an active participant not only at the state level but at the ABA Antitrust Section as well. Bill has chaired the City Bar's Antitrust and Trade Regulation Committee. I had the privilege of being on that committee for several years while he was in charge.

Bill, please go ahead.

MR. ROONEY: Thank you very much, Jay. And thank you all for your patience, as we are getting organized here.

Welcome to the last panel of the day, addressing Supreme Court issues and having the quirky title: The Antitrust Temperature in the Supreme Court: Permanent Climate Change Or a Seasonal Variation?

Now the format of our panel will be a little bit different, and I want to explain the course we are going to take this afternoon. We will have four segments, each of about—well, we are starting a little late, but we plan each to have 15 minutes, and then a final segment a bit shorter than that, in which we address the marquis question: Is there a trend in the Supreme Court, and is it a variable and flexible trend or a permanent trend?

But instead of addressing that question in the abstract, we thought we would address two substantive developments in the Supreme Court and two procedural developments. The procedural developments may not be specific to antitrust, but they certainly bear directly on antitrust. The manner in which we'll address these segments is that each panelist will take five to seven minutes or so and present his or her thesis on this area, and then the panel will engage the main speaker with some questions and at the same time we will invite the audience to participate as well.

Now, Jay, you didn't think you would be called on again after you turned this over. How will we get the audience to participate; is there a microphone?

MR. HIMES: They'll have to yell, I am afraid.

MR. ROONEY: They will have to yell. Raise your hand, you'll be called upon, and project, and we'll have an exchange in the middle of the program, rather than waiting until the end for your views and the views of those who are up here.

Now, I have to warn you a little bit in advance that from our preparatory sessions I can assure you that the panelists have deeply felt views. They are also relatively similar views from the perspective of whether the Supreme Court is doing a good job or not doing a good job. Some of you may have deeply felt views that are quite different from those of the panelists. And that makes for a fun session, so you've got to express those views. I will do what I can to be a devil's advocate and prod and poke, but I would really appreciate some help from the gallery. So this is really meant to be a bit of a free for all. What else would keep us awake at the end of the day.

So now, let me please introduce our esteemed panel. To my far right—and this is the order in which the panel will go, so you can just read across the page. We first have Kevin Arquit, a partner at Simpson Thacher & Bartlett. Kevin focuses on antitrust litigation; he has a strong transactional practice and addresses the most challenging counseling questions.

Prior to his private practice, Kevin was general counsel of the Federal Trade Commission and then the Director of the Bureau of Competition, perhaps the place that many of us first got to know or hear of and know of Kevin Arquit. Kevin will be addressing single-firm conduct in the Section 2 realm and commenting on trends he sees there the Supreme Court has taken over time in the Section 2 context. That is one of the two substantive areas that we will address.

David Copeland, to my immediate right, is of counsel at Vandenberg & Feliu, where he practices antitrust litigation and counseling. David will address the first of our two procedural segments and the now famous *Twombly* case, followed by *Iqbal* and sort of elaborated by a number of circuit court cases, the most recent one of course is from Judge Posner in text messaging.

To my immediate left is Bernie Persky, a partner at Labaton Sucharow, where he serves as co-chair of the firm's Antitrust Practice Group. Bernie has played a key role in antitrust class actions, and as a result has obtained mon-

etary recoveries for many class members, for our better or for our worse, which includes consumers and businesses. And Bernie has taken down well over a billion dollars, and so he has been at it for a while and quite successful.

To my far left is Professor Eleanor Fox, the Walter J. Derenberg Professor of Trade Regulation at NYU Law School, where she teaches courses in antitrust law and notably torts. There may be some questions every once in a while about whether Professor Fox confuses the torts with the antitrust law.

She has served as a member of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust under President Clinton. Professor Fox will be speaking in particular about her recent article on the Efficiency Paradox—not the antitrust paradox but the Efficiency Paradox.

So with that, I'll turn it over to Kevin for his introduction of his main thesis.

MR. ARQUIT: Well, five to seven minutes is really not very long, so I'll jump right into it.

I will be talking about Section 2 cases before the Supreme Court. To my mind I think clearly the recent high water mark for plaintiffs has to be the *Kodak* case. Now, since that was decided in 1992, I obviously am using the word recent fairly broadly. But with all that we have seen, the talk recently about theory in Supreme Court cases, you have to think back about how anti-theory that case was.

The entire decision, looking at bundling practices and refusals to deal, not a theory, but how conduct and practice disagreed with theory. And that was a case you had to look at the actual behavior and the market imperfections and the actual effect of those on consumers in terms of making the determinations as to whether something was actionable under Section 2.

In the time since then, and I think there has been something like 14 Supreme Court cases between *Kodak*, which was a plaintiff decision case, to the recent *American Needle* case, which was a plaintiff decision case, the other twelve were all decided in favor of defendants. This gives you some idea of the Supreme Court's bent during that period. I think another point that is interesting, given the administrations that existed during that time, is that in each of those cases the Solicitor General was asked whether certiorari should be granted, and in each case the SG said yes. In other words, it was really the SG making the determination in many cases. The Supreme Court relied heavily on the SG in those cases.

Now, since that time, to my mind, there's been a constant backtracking of the Supreme Court in Section 2. And on the question, is it something that is still anecdotal or something that is here to stay? And my point will be that it's here to stay for a number of reasons. As we'll see, many of these cases that decided in favor of defendants have involved really obscure questions. And the Court used these decisions not to make just the small point it needed to render that decision—one wondered if these cases were even accepted by the Court to make these broad philosophical types of observations that if one were to really take them literally, it would have left, I think, very little for Section 2 to cover.

Perhaps it was this kind of thinking that encouraged the Justice Department in 2008 to issue the Section 2 Guidelines for enforcement in the area. It was in the waning days of the Bush Administration, and to my mind the biggest waste of antitrust regulatory resources since at least the cereal cases or the oil cases; but fortunately again this depends on your point of view. From my point of view, these were essentially stillborn. They were done at the end, and the FTC immediately rejected them. And one of the first things Christine Varney did upon taking office was to withdraw them. And at the time they were withdrawn the Justice Department issued a call saying we are going to go back and apply Section 2 and bring the types of cases that are consistent with the case law out there, *Aspen Skiing*, *Lorain Journal*, things like that.

So I think the way I am looking at this question from the Supreme Court's standpoint and the way to focus here is will the Justice Department be able to do that, assuming they bring cases that are fully consistent with those prior Supreme Court decisions? To my mind I think it is going to be a pretty steep challenge.

For one thing, when you look at all these cases that were decided, these weren't close decisions. We think that there is populace on the Court and free-market types, but most of these were not close decisions. Even in those where it wasn't unanimous, the other points of view were concurring opinions; it went to whether or not the plaintiff had standing, whether or not the plaintiff should be allowed to replead to allege predatory pricing cases. It wasn't broad philosophical differences; it was what was said by the majority.

You look at the *Trinko* case, for example, and this involved a very obscure question whether or not an incumbent carrier violates the Telecommunications Law of 1996, whether they are able to use that refusal to provide the network elements that was the basis of a law as a foundation for a Section 2 monopolization claim. And the Court, I don't think surprisingly, said no, since that type of refusal to deal was created by statute, but the Court went way beyond that in Justice Scalia's opinion. It talked about the fact that monopoly prices are actually good, because it is monopoly prices that stir innovation, because it encourages people to take risk. That monopoly is what everybody strives for; therefore, we should encourage it. Some of us would have thought the word competition should have been put in there instead of monopoly. And the *Trinko* case stands for that in a broad way, classic Chicago School kind of stuff.

Now Commissioner Rosch has been known to say that, at the least at the Federal Trade Commission, the Chicago School is on life support, if not dead. And that may be the view there, but if you go up past Pennsylvania Avenue, behind the Capitol, it doesn't seem to have stuck very much at the Supreme Court, where the decisions are very much based now on theory and with the Chicago School.

I think that what you take from cases like *Trinko* is that if a monopolist is able to raise the barest efficiency justification, it isn't completely contextual, that it is going to be seen as we worry too much about false positives in terms of the sense we don't want to get it wrong, and so we are going to give the benefit of the doubt to the one with the monopoly and market power.

Of course, if you go back to the *Kodak* case, Kodak hadn't even taken the steps that they could raise a claim that it was anything other than pretextual because the efficiencies weren't even brought up, or so the opinions say, until after the case was brought.

So in any event, I think that *Trinko* is broad language, without a lot of philosophical opposition to it among any members of the Supreme Court. It is something which presages what can happen with monopolization cases going forward.

Now, if you look on the price side—what I talked about now was non-price types of conduct, exclusionary conduct, such as refusal to deal or exclusive dealing, contracts and the like.

If you turn to the price side, of course, we have had *Brooke Group* in place for a long time. It says for something to be predatory pricing in the Section 2 context there has to be a showing that you sold below cost, some measure of cost, and there is a dangerous probability you'll be able to recoup those losses down the road.

Now the Supreme Court first of all took the case involving Weyerhaeuser. And the claim here was the flip side of predatory pricing, something called predatory bidding. Weyerhaeuser owned a bunch of sawmills, and it bought all their logs and turned it into all their lumber. I was involved in this case, so I tried to stay objective but we are all victims a bit if we stand where we sit.

The less efficient mills were upset because as Weyerhaeuser became more efficient, it could afford to pay more for logs, it wanted more logs in order to reach the capacity of its mills, so that sent the price of input up. The less efficient mills, the ones that weren't able to make the same margins downstream, weren't able to keep up. So they brought a case against Weyerhaeuser, where the jury instruction essentially was that if the jury found that Weyerhaeuser bought more logs than it needed or paid more than necessary such that plaintiff couldn't get a fair price, that that could be a violation of Section 2. In any event, that is what got to the Supreme Court. I think given that kind of jury instruction, it is not surprising there was a unanimous decision that said, no, no, this is just like *Brooke Group*, as long as Weyerhaeuser was making money buying below their price, they were making a margin so it couldn't be predation.

The other case that is mentioned along those lines is the *Linkline* case. A lot of similar types of situations in the sense that this was a price-cost squeeze. The provider of the DSL infrastructure was selling both at wholesale to Internet service providers but also at retail. And the claim was you're charging the wholesaler, the independent service providers, so much money and you're charging so low at the retailer level, the wholesaler can't make a fair margin. And again, the Supreme Court found in a defendant's-oriented decision that basically, you got rid of price-cost squeeze cases, saying there was no duty to deal with the wholesaler at all. Since there is no duty to deal with the wholesaler, why should we care what price we charge? And at the retail level, since they were making a profit, it wasn't a predatory pricing case either. The notion was that you couldn't take two bad causes of action and transform them into a good cause of action. The Supreme Court disposed of the case.

So the bottom line that I would like to make is I think these are cases that really suggest that the Supreme Court is not likely any time soon to return to really robust enforcement of Section 2. And part of it is this obsession with false positives and not wanting to chill the behavior of efficient companies. I am not going to say much about that, because I think Eleanor will cover that.

I think there's a more fundamental reason, and it is really my final point, as to why a lot of courts really get anxious and are unwilling to take aggressive positions in favor of a plaintiff when it comes to Section 2. It is really that the dog catches the bug problem. Let's say you find that somebody has violated Section 2. This is usually about the structure of an industry; it's not about conduct. It is not about saying stop your price fixing. It is about structure.

So what's the relief that you take? You found as a violation, the conduct remedies are not often going to work, because the problem with the company is too big. If you want to break up a company it is disruptive not just to the company, but in the kinds of cases where these people have monopoly power, you disrupt the entire economy. And I think in the short run, things like predatory pricing are helpful to consumers.

So to my mind it really has as much to do not so much with the philosophic leanings, although that may be where people like Justice Scalia come from, but to others who look beyond the finding of liabilities, that even if we find the problem here, this is just the problem we have with oligopoly or monopolies in the market. So I think this is global warming, not just seasonal change.

MR. ROONEY: Thank you, Kevin. In your explication of the cases, do you see an error in the rules of law that the Supreme Court has developed with regard to single-firm conduct? Is there a particular error in the rule of law, for example, for low prices or for recoupment or for duty to deal that you think is misstated or could be altered in a way to make Section 2 enforcement more robust and properly so?

MR. ARQUIT: Well, on the predatory pricing side I think they have it right. I think Judge Easterbrook said it very well in the *A.A. Poultry* case, when he said predatory prices today, followed by a competitive price tomorrow, is a boon to consumers. In other words, a failed predatory pricing scheme actually helps consumers, because they got low prices followed by competitive prices. If there is recoupment, it is only at the time of recoupment that the antitrust injury actually occurs. So I think that that got it right.

Now, there are instances of price predation. Tom Campbell wrote about something called spatial predation, which meant that you only predate for certain short periods of time to discipline your rivals, and that can have the effect of causing others not to predate that causes prices to go up in the market. But I think that is pretty hard to evaluate, so I think they have it right.

On the refusal to deal side, especially where there is a course of dealing, I think the Supreme Court is way too far in one direction. There are times, and especially in paradigm-shifting industries where there's an inflection point, that companies do have choices as to what road they go down. If they go down the road of dealing with somebody who is an incumbent that provides some needed input and it then becomes much more expensive down the road to replicate it than it would have to have done that in the first instance, and a monopolist then cuts them off, I think that the distinction many make about *Aspen Skiing* is a good one. And I think the suggestion in *Trinko* and some of the other recent cases, and in the DOJ Guidelines, there is absolutely no duty to deal really with a monopolist, I think that is dead wrong.

MR. ROONEY: Any comments from the gallery?

Any questions from the panel?

MR. COPELAND: One question. Kevin, if you had your old job back and you were faced with this line of precedent, and leaving aside the Section 5 variation, are you in a box? What can you do in a meaningful way to promote enforcement of Section 2?

MR. ARQUIT: That is a hard question. I think that what you need to do is to find those cases where it's the behavior where it's just clear, no matter how much papering the monopolist did at the conduct, that its primary reason for doing it was to exclude rivals. Where a monopolist acted a certain way for a period of time and then an entrant comes in, and suddenly the monopolist behavior changes. I think in those circumstances that is pretty powerful circumstantial evidence, absent something really compelling. The change was really done to impair the opportunity of a rival. I think if you start with those types of cases and get the Court to accept that not everything a monopolist does is to maximize their output, then you may be able to move a little further down the line. But on the pricing side and things like that, I think it's time.

MR. ROONEY: Let's move on to Dave. And if you would please address and review for us the *Twombly* rule, its extension in *Iqbal* and some of the circuit court cases.

MR. COPELAND: Thank you.

When the subject of this panel was decided, I was very attracted to discussing the *Twombly* case because the last several years, when people engage in discussions either in forums such as this or the cocktail parties and the discussion turns to what's happened in the antitrust, was *Credit Suisse* a bad decision, what about *Leegin*, it always seemed to me that *Twombly*, or at least the over application of *Twombly*, posed the greatest threat to the viability of private antitrust litigation that I could think of.

It is helpful to remember that from both perspectives, with the benefit of hindsight, the *Twombly* decision looks less like an effort by the Supreme Court to cut back on antitrust per se and more like a broader effort to limit the perceived adverse effects of civil litigation on defendants, the sprawling document discovery, the spiraling costs by making it easier for a district court to grant a motion to dismiss. And any doubts on this issue I think were dispelled after *Twombly* was decided—and we will get to the legal standard that applies in a second—after *Twombly* was decided there was a great deal of debate, gee, was this case only intended to apply to antitrust cases, etcetera? The Supreme Court dispensed with that discussion when it decided *Iqbal*, an action involving claims against high government officials for their anti-terrorism policies. They applied exactly the reasoning of *Twombly*, and they made it clear as a bell, in case anybody had forgotten and did not notice it the first time, that they used the word retiring the precedent of *Conley v. Gibson*. That was such a shock to the system in some circles that there was actually a bill introduced by Arlen Specter, the sole text of which was henceforth all Rule 12 motions in the United States Supreme Court shall be cited with the precedent of *Conley v. Gibson*, full cite, end of bill. I don't know what the current status of that is.

But just to review the legal standard, basically the Supreme Court cited to the accepted rule in *Conley v. Gibson* that a complaint should not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. Now, there is a discussion in the *Twombly* decision about how that legal standard may have been misinterpreted over time, but the Supreme Court takes it as a matter of faith, in one way

or the other, this wrong reading of *Conley* has survived and sort of become the law, and it replaces it with a legal standard. And to come up with that legal standard—I just went to the *Iqbal* decision itself, because sometimes when the Supreme Court restates to amend the prior decision, that becomes more important than what they said the first time around. To survive a motion to dismiss the Supreme Court now says: A complaint must contain sufficient factual matter accepted as true to state its claim of relief that it is plausible on its face. The claim has facial plausibility when the plaintiff pleads factual context that allows one to draw a reasonable inference the defendant is liable for the misconduct alleged. There is more on this plausibility and probability, and things like that, I really would—we don't have the time to get into that. It's in the opinions and some of the literature, but certainly there has been a lot of widespread discontent, a lot of alarm actually in the legal community about whether this is an extreme change. Even a huge Law Review article by Arthur Miller, the venerable, explaining why *Twombly* and *Iqbal* are basically the end of civilization—excuse me, civil litigation.

(Laughter.)

So where are we now? One place we are—you know Judge Posner comes to the rescue of private antitrust litigation. That is how bad it's gotten. In the text messaging antitrust litigation, which is an opinion certainly worth reading December 29th, Seventh Circuit, two things worthy of note. For one thing, he lays it right out why you can get Rule 1292(b) interlocutory appeal of a denial of a motion to dismiss, which I know is a controversial area we looked at several years ago in another litigation. However, he then goes on to say basically—you know, he says a lot of things, but I think that he points to certain things in the complaint that he thought were enough to get over the hurdle. And some of them are pretty interesting. The whole idea about when price changes, where there is an industry where prices hike up where they otherwise would not under basic economic principles. But listen to this, the first thing he starts out with is, he talks about the fact that the industry is one in which you have an oligopoly for competitors and that tends to be one in which you are more likely to find collusion. But wait a minute, does that mean that notwithstanding *Twombly*, if I allege an agreement in the industry that all we have are only four competitors, am I safe? It doesn't quite mean that, but it is very interesting to note that he surfaced with a reason—I won't say superficial, but it is not that deep. And I look at that, and I look at also the *Star v. Sony* decision in the Second Circuit, which cites a similar economic principle and then cites the highly relevant fact that there is a government investigation of the conduct ongoing. Well, that ain't a lot.

What I think you're seeing is a certain lack of comfort among district judges and appellate judges with the over-application of *Twombly*. So what they are saying is the plausibility standard articulated in *Matsushita* perhaps now has been transposed to the Rule 12 conduct context, thanks to the retiring of *Conley v. Gibson*. But we are not going to get carried away here. We are not going to require that much on the face of the complaint to get to the plausibility standard. Wait for the summary judgment motion to get to a protracted economic discussion of plus factors. I think that is more or less where we are.

I guess an over-application of *Twombly*, what's wrong with that? If over-applied, I think you can get to a circumstance where the only way you're going to have vigorous enforcement of the antitrust laws is if the enforcement agencies are doing their job and then the private plaintiffs basically play catch up.

So here's the question that my fellow panelist Bill Rooney might ask me. If there are cases where there is no non-conclusory allegation that trumps a competing inference of independent conduct and those cases are dismissed, what's so wrong if those cases are dismissed before discovery? And I reached back in my memory to an anecdote given to me by my mentor, Mike Molina, who was a former President of this Executive Committee, and he told me this story about fifteen years ago. Back in the day when Milton Handler was representing plaintiffs in conspiracy cases, he had an executive on the stand in a deposition in a courthouse as big as this room and grilling the guy on the fact there were meetings. In this case there was actual evidence of meetings in which price was discussed. And it was a very brutal cross-examination, the guy threatened to take Milton outside, which is a smart thing to do when you're being cross-examined brutally by a man who is five foot tall and you are a former Navy Commander. But it was a contentious proceeding, and when it was over, as they were leaving, Handler's associate, young Molina, actually sidled up to this man and said, "I hope you don't mind me asking you this question." And he said, "You were in a company that had a dominant market share and the lowest cost in the industry; you could have picked any price you wanted to. Why did you do this?" And the story, as was told to me, was that the gentleman turned to Molina and he said: "I just wanted to be sure."

It seems to me that if you start throwing out cases without the benefit of at least some threshold of discovery, you're going to miss those cases. And those are cases, at least in my opinion, that should not be missed

MR. ROONEY: So you think *Twombly* is wrong?

MR. COPELAND: No, I think the over-application of *Twombly*—

MR. ROONEY: How can there be over-application?

MR. COPELAND: Well, I think once you—

MR. ROONEY: The rule is what the rule is. What is the Supreme Court supposed to say?

MR. COPELAND: No, I think the question now is—

MR. ROONEY: Here is the rule, but don't over-apply it.

MR. COPELAND: What do you need to do to show—I have to live with the world as I now know it. I don't think *Twombly* is going to get overruled overnight. I don't think the Specter bill is going to pass, unless it is presented by Joe Lieberman.

I think that the world in which we live is one where we now have a plausibility standard. And the question becomes how are you going to satisfy it? If you can take a few non-conclusory allegations, as the courts do in text messaging and the courts seem to do in *Star v. Sony*, and say that is it, everybody go home, move on, motion denied, I am okay.

MR. ROONEY: How many in the gallery think *Twombly* is, well, rightly or wrongly decided is hard to say, but how many think it was a good decision, raise the hands.

(Show of hands.)

How many think it was poorly decided?

(Show of hands).

I think the majority, maybe that reflects the profile of the people in the room. But most people seem to think that before *Twombly* complaints could start big class actions on insufficient factual allegations. So those who think the answer to that question is yes, that is *Twombly* is right, because our experience was that class actions could be started on insufficient factual allegations to the great cost and inconvenience of all involved.

Well, the point seems to be that *Twombly* was responding to the need for non-conclusory allegations that are in the spirit and you did not mention.

MR. COPELAND: What you are just sort of going over is the outright rejection of alternative methods such as concentrating short-term discovery, and the other thing, case management. It is all discussed in *Twombly* and *Iqbal* and rejected out of hand. I don't think we had to go to the extreme we did. I think the extreme has been tempered, and that is probably a good thing.

MR. HIMES: And I would say, Bill, that *Twombly* seems to reflect a real cynicism about the ability of district court judges to deal effectively with the kind of case you describe and an inability to distinguish that "abusive class action" from one that has a colorable merit.

MR. ROONEY: That may well be true. It is a very interesting theme that is an undercurrent in these comments, which hopefully we can bring to the surface. To what extent is the Supreme Court worried about sort of practical realities? And to what extent is it interested in articulating rules that it thinks will correctly inform a body of law?

So was *Twombly* really about cynicism of district judges, or was *Twombly* more about trying to formulate a rule that was consistent with the themes of *Monsanto* and *Matsushita*, decided many years before in different contexts of the litigation process, in order to say at the pleadings stage the Sherman Act does limit the inferences that one can draw from certain facts, and you've got to plead facts that are not equally consistent with independent behavior if agreement is a particular issue. So some might say, and we can get into this on the tail end, that what the Supreme Court is really trying to do, even in duty to deal cases, is to articulate rules that will promote the sort of consumer welfare that the Supreme Court has at least on its face embraced since the late 70s.

Yes, Bruce.

AUDIENCE MEMBER: I think you might see it going back to what Kevin was saying, which is this fear of type one and type two error that pervades, and that the Supreme Court is drawing its line here for all cases in saying we want to avoid forcing litigants through the process and expense of discovery unless there's more than just bald assertions at the pleading stage. And I think that if you parse that, it clearly leaves the opportunity for there to be cases that if put into discovery, the plaintiff would be able to demonstrate a violation of law but has no way to gain access to actual facts, as opposed to hypotheses, at that pre-discovery stage.

MR. ROONEY: Right, so that would be the false negative.

AUDIENCE MEMBER: Right.

MR. ROONEY: And if they are fundamentally erring on the side of if there are some anticompetitive activities that go unchecked, presumably the market will correct them. If there are a lot of activities that are procompetitive that get burdened, then that is not such an easy thing to correct, at least in the rough and tumble of the marketplace.

AUDIENCE MEMBER: Yes, if you go to *Twombly* itself, the Court didn't say that the assertions of agreement were implausible. They just said that independent decisions not to deal were no less plausible.

MR. ROONEY: Right, equally consistent. But that is consistent with the *Monsanto-Matsushita* theme. They basically squared up the rules of factual inferences throughout the litigation process.

MR. COPELAND: I want to zero back on that, because you and I have had this conversation. There is no question the discussion of parallel conduct in *Twombly* mirrors the plausibility language in *Matsushita*. No question.

The difference that we have to remember is under the *Conley v. Gibson* mode of deciding Rule 12 decisions, you didn't apply *Matsushita* at that stage. And now that they've retired *Conley v. Gibson*, you're just back to square one.

MR. ROONEY: Eleanor.

PROFESSOR FOX: I want to say that the Specter bill is a really long distance from where the Supreme Court came out on *Twombly*. I think the real question is how the plausibility standard is to be applied.

David, I am going to put a proposition to you. This is my proposition. That Judge Posner would never have dismissed the *Twombly* complaint. The market was highly concentrated. The market was deregulated and no incumbent went across its historic border, although it could easily have done so. An executive said: "I could have made money by going across the border, but that wouldn't be nice." Posner has always had a view that is different from say, Scalia. Was this mere interdependence, or was there an agreement or understanding? Posner is much more likely to draw an inference of agreement or understanding. Posner is more suspicious.

MR. COPELAND: Ironically, sometimes discovery ends up vindicating the defendant's point of view. I lived for fifteen years with a case known as *Brand Name Prescription Drugs Litigation.* We brought a Rule 12 motion, which was essentially a *Twombly* motion before its time. It was rejected under the current law at the time. We always thought there was no liability there. We've been vindicated; the industry has been vindicated. But it really did take, at least from my subjective experience, it took a little time of the parties getting their hands dirty with the facts to understand why the allegations were really wrong. And the vice of that case to me, the unfairness of that case was not the bringing of the lawsuit and the initial round of depositions, it was the fact that the district judge didn't have the courage to go through the 3,000 pages of transcripts and really look at what was in the record, because summary judgment should have been granted at the outset. So the rules that existed at the time, Rule 56, *Matsushita* were adequate to solve that problem. It's just the court missed it.

MR. ROONEY: I agree with Eleanor, that Judge Posner would not have sided with the majority in *Twombly* probably, or at least—

PROFESSOR FOX: On the fact of plausibility.

MR. ROONEY: Now who else agrees that Judge Posner, as Eleanor described it, is inclined to look at market structure and draw inferences of that sort of behavior? A show of hands.

PROFESSOR FOX: *High Fructose Corn Syrup*.

(Show of hands.)

MR. ROONEY: Now, to affirm those who are willing to go with Eleanor, listen to this verbal formula that Posner ends *Text Messaging* with: "The complaint must establish a non-negligible probability that the claim is valid." Non-Negligible, now how is that different from the conceivable that the Supreme Court rejected in *Twombly*. Because the last line in *Twombly* was: "The plaintiff failed to nudge his complaint from the conceivable to the plausible."

Although Posner has got to embrace plausibility in *Text Messaging*, he does use economic evidence, as he did in *High Fructose Corn Syrup*, and he did again in *Text Messaging*, and he even noted trade association participation to conclude that there was plenty in the complaint to sustain it and concluded that there was a non-negligible probability.

So it is a messy world, and I think that the real dirt is in how the plausibility standard is in fact going to be applied. But I mean I do think that there is something to be said that, again in *Twombly*, the Court was trying to clarify rules, not necessarily decide a single case.

So let's now go to the arbitration world. Now, I am going to ask Bernie if he would also try to give a brief overview of the basics in arbitration, as you describe the relevant cases. But the real point of Bernie's focus on arbitration and his passion for how these rules are going to come out is that it really does bear on the viability of commercial class action practice in the federal courts. And if particular cases come out in one way or another way, I think we will see that, at least for retail consumer class actions, they will become much more scarce and that solo arbitration will become the means of dispute resolution.

But Bernie, why don't you shed some light on that.

MR. PERSKY: Well, I hope that that doesn't happen.

MR. ROONEY: I can understand why you would say that.

MR. PERSKY: Let me give you some background on some recent developments involving class arbitration in the Supreme Court.

In April of last year the Supreme Court decided the *Stolt-Nielsen* case. Its holding was that class arbitration was not permissible, based on a broadly worded arbitration clause that is silent as to class arbitration. Generally, according to the majority opinion, an arbitration clause must expressly permit class arbitration. Although the case involved sophisticated parties in an international maritime industry setting, the language of the case may be deemed to apply generally to all arbitration clauses. We will have to see. But the basic reason given by the majority for its decision is that a class proceeding fundamentally changes the stakes involved in the dispute, so that such a drastic change can't be implied from mere silence or based on public policy concerns imposed, according to the majority opinion, by the arbitrators.

The parties have a fundamental right, the Court said, to choose with whom they'll arbitrate. The Court, however, left open the issues relating to the applicability of that

case to unsophisticated parties, to contracts of adhesion or unconscionable contracts, such as consumer contracts.

But the big issue that is before the Supreme Court now is the enforceability of class arbitration waivers. Specifically, there are a couple of federal cases that have dealt with the issue, the *Christian* case in the First Circuit; the *American Express* case in the Second Circuit, both of which refused to find enforceable a class arbitration waiver, because, at least with respect to negative value claims such as the vast majority of antitrust claims, a class arbitration waiver was deemed to interfere with the enforcement of federally secured rights. The class arbitration waiver was held to be not enforceable.

Now, for other reasons state courts have often found that class arbitration waivers are unenforceable. The leading state case is the *Discover Bank* case. The unenforceability of class arbitration waivers was based on state law concepts of contracts of adhesion and unconscionability.

Well, this issue is now currently before the Supreme Court in the *Concepcion v. AT&T* case that was argued in November. The direct issue before the Supreme Court is whether the Federal Arbitration Act preempts the state law of unconscionability. The Ninth Circuit, based on that state law, had declared a class waiver unenforceable.

I read the oral argument, the transcript of the oral argument, and it appears as if the FAA preemption will not be held to occur, but we'll see.

MR. ROONEY: That is a prediction.

MR. PERSKY: That is a prediction.

MR. ROONEY: Note that prediction.

MR. PERSKY: Let's talk about what would happen if, hypothetically, the Supreme Court were, contrary to my prediction, to hold that class arbitration waivers are enforceable and that the Federal Arbitration Act preempts contrary state law. Well, then you have a mandatory arbitration clause, which means you can't go to federal court. So then you're sent into arbitration, but the class arbitration waiver is now enforceable, so you can't aggregate your claims. Well, I think that would have a major adverse, deleterious effect on the private enforcement of the antitrust laws. And indeed, in the private enforcement of very many statutes, many claims, at least under the antitrust laws, consumer protection laws, are negative value claims. What is a negative value claim? A claim involving a relatively small amount of money compared to the amount of money and investment involved in litigating the case. So if you can't aggregate your claim, you're not going to get a lawyer, and it's not going to be litigated. So in that sense one can view an arbitration clause with an enforceable class arbitration waiver, in my opinion, as an exculpatory clause. It's an advance exculpation under the antitrust laws and other statutes.

Now, what if the Supreme Court affirms the Ninth Circuit and finds that the Federal Arbitration Act does not preempt contrary state law, which had held the class arbitration waiver unenforceable. What then would be the result? One conceivable result would be well, the class arbitration waiver is severable, unenforceable. What are you left with? An arbitration clause that is silent. Oh, it is silent, well, under the *Stolt-Nielsen* case you can't impose class arbitration on these parties to a silent arbitration clause. Then you'll be left with bilateral arbitration. Once again we think it would have a very major deleterious effect on the private enforcement of antitrust laws.

On the other hand, another possible result is the result that occurred recently in the Second Circuit, that was the *Fensterstock* case, a case decided a few months after *Stolt*, in July of last year. The Second Circuit upheld the lower court decision that had invalidated a class arbitration waiver as being unconscionable based on state law principles. It then said well, now we are left with an arbitration clause that is silent. Under *Stolt* we can't impose class arbitration. So the Second Circuit ended up agreeing that the entire arbitration clause was unenforceable and remanded the case to the trial court, where presumably the plaintiff can pursue a class action. And that, I hope at least, is the ultimate result. If you end up with a situation where plaintiffs can't go to court to pursue a class action and plaintiffs, if they go into arbitration, can't aggregate their claims, that would be a major adverse result and in my opinion against public policy.

One thing that people should bear in mind is that when the Supreme Court, some years ago, held that a dispute between parties involving an international cartel could be sent to arbitration, the Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, also held that so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions. They weren't dealing with a negative value claim.

In my view, if you're sent to arbitration, and you can't aggregate your claim, an arbitration isn't a sufficient forum.

MR. ROONEY: So Bernie, I have two questions at the top of my mind. One is do you believe that a company cannot impose on a consumer an arbitration clause full stop?

MR. PERSKY: Well, if the consumer is involved in a contract of adhesion, if he chooses to do business with the company he has no choice whether or not to sign, he has no choice as to terms pursuant to which he would be dealing with the company and it's imposed on him, I think that a mandatory arbitration clause such as that…

MR. ROONEY: Well, just any mandatory arbitration clause.

MR. PERSKY: In the consumer context?

MR. ROONEY: In the consumer context.

MR. PERSKY: If it would prevent the enforcement of claims involving small amounts of money—

MR. ROONEY: Well, no, you can't go there. Because you could have a paper arbitration clause or a telephonic arbitration, some of the scenarios in the *Concepcion* case, that there are all kinds of very minimal ways to enforce what you believe to be your claim, and you can even have a reimbursement of attorneys' fees.

MR. PERSKY: Right, in the Ninth Circuit—

MR. ROONEY: So it sounds like the criteria then is negative value, and the hard question is how do you define a negative value claim?

MR. PERSKY: Well, certainly the vast majority of antitrust claims and consumer deception claims would be negative value claims. Bear in mind also that currently Congress has passed the Dodd-Frank Act, and in that statute it granted the new Consumer Financial Protection Bureau the authority to conduct a study. And in the next six months it is going to come out with its report, and the statute is giving the agency the authority to ban *in futuro* mandatory arbitration clauses in certain consumer financial transactions. And I just think that is going to be the way that the public interest can best be served.

MR. ROONEY: So a gallery question. How many think that companies should not be able to impose mandatory arbitration clauses on consumers in any circumstance?

(Show hands).

How many think that companies should be able to include in form contracts that are not negotiated mandatory arbitration clauses that stick?

(Show of hands.)

MR. PERSKY: The facts of the *Concepcion* case sort of lend character to this. I think it was an AT&T phone, and they said it was free, and then it turns out you had to pay sales tax of about twelve to fifteen dollars. Now, that is not a classic class action.

MR. ROONEY: No, but what did the wireless telephone company say in response? It says you can bring that claim for the sales tax that you had to pay by telephone to an arbitrator, and we'll pay your costs.

MR. PERSKY: So here AT&T must have cheated three or four hundred thousand people, and the seven or eight people who go to the trouble of collecting their twelve to fifteen dollars may get paid. But AT&T succeeded in cheating 300,000 people out of maybe several hundred million dollars. I don't think that is appropriate.

MR. ROONEY: Well said, Bernie.

Let's move on to the Efficiency Paradox. And maybe Eleanor can give her paper some context, and obviously it draws off Bob Bork's Antitrust Paradox in 1978.

PROFESSOR FOX: Thank you.

In 1978 Bob Bork wrote this very important book, *The Antitrust Paradox*. The paradox was that antitrust is supposed to be for competition, but the law was actually suppressing competition; therefore, it had to be changed in a major way. One way, he said, was to require that the plaintiff always show that the activity or the transaction harmed consumer welfare plus producer welfare, which is total welfare, and which is one way to think about efficiency.

For a number of years after 1978, the Court was getting the law in order. It formulated rules that prevented the law from protecting inefficient rivals. The Court solved the problem that Bob Bork said he was trying to solve. Antitrust no longer hurt competition; it helped competition.

So the pendulum swung; but it didn't stop swinging. And it kept swinging and swinging and swinging. So that, whereas our law once protected inefficient competitors, it now protects the dominant firm; and often it protects dominant firm strategies to squeeze out rivals that added dynamism to the market. So the law is protecting inefficiency. That is one part of my thesis.

The second part is about ideology.

Take a look at the cases of the Supreme Court over the last ten years, excluding *American Needle*, which is a different kind of case. In each of those cases, I show in my article *The Efficiency Paradox*, there is at least as good an efficiency rationale supporting the plaintiff who lost as there was for the defendant who won.

Why are the plaintiffs losing all these cases? Is it because of economics and efficiency? Is it because we finally found sound economics? No, clearly not. It has to be something else, because the plaintiffs have at least equally good efficiency arguments. Obviously when a case gets up to the Supreme Court there is a pretty good argument on both sides. The thing that tips the balance is premises. On the one side, if you want to put a face to it, it could be Scalia. The premises involve: Do we really trust the market, and do we trust even the dominant firm? Or do we trust government intervention to help cure market failures? It comes down to political philosophy; trust the market or trust the state, within the range at play. We are well beyond the era of the 1960s when we had to save the law from protecting inefficiencies.

MR. ROONEY: Yes.

AUDIENCE MEMBER: Eleanor was talking about the impact of political philosophy. This is a perfect question for the New York State Bar Association, the question about two New York ladies, Justices Kagan and Sotomayor; do you think they will have any impact on the Supreme Court going forward?

PROFESSOR FOX: It will be very hard for either of them to change the balance of the court for some years. They stepped into the shoes of someone who was a little more liberal than they, or possibly more pro-plaintiff than they. We have to wait and see what their antitrust philosophy is. My own view is no, I do not expect a change with their appointments; I do not expect a move of the pendulum.

I agree with everything Kevin said earlier about this Court's philosophy, it is pretty much here to stay for a long time.

MR. COPELAND: One interesting thing about *Leegin* is that although the case, if you think of it as pro-defendant in the case that it shifted *Dr. Miles*, it is written in a way that is very even-handed. It is certainly one of the few cases that suggest that the plaintiff might be able to win a Rule of Reason vertical case. I would like to see more of that kind of writing in the opinions, more of that kind of approach.

PROFESSOR FOX: I agree with that. What was at stake in *Leegin* was brought out by Justice Breyer's dissent. The *Leegin* controversy was trivial. For those who wanted to overturn *Dr. Miles*, it was a great case, because who really cares about a "right" to get Leegin fine belts at a discount. What was really at stake was the importance of freedom and flexibility to discount in general. Breyer's point was, when we observe retail price maintenance, we usually observe a situation where the firm using it is overcharging by—he cited a study, 19 percent or 24 percent. The question is whether you think freedom to discount is good for markets, or whether you think free riders are everywhere and discounting is not important to protect.

MR. ROONEY: But you don't really think that if there's anything—you don't think this Supreme Court is subject to the criticism that it doesn't protect low prices?

PROFESSOR FOX: Oh, it doesn't. It doesn't protect low pricing by mavericks and firms without power. It protects low pricing—even strategic, sharp-shooting low pricing—by dominant firms charged with predation.

MR. ROONEY: But why can't one say that it has built a series of rules that are designed to protect the independent self-regarding pricing strategy of firms, so that a firm will not run the risk of antitrust liability unless it both prices below cost and then later raises its price, or that in a case without market power, a company can decide at what level it wishes its goods to reach the consumer.

So what *Leegin* was really about, when you got a two-bit manufacturer of belts that has no market power at all but says I want my products to reach the consumer with a certain brand equity and not for half the price that I think they should be. I want to position them where they ought to be positioned, and that is the way I want to put my stake down in this competitive market. What the Supreme Court might have been saying is: We do believe that consumer welfare is advanced by having unfettered price discretion and rock 'em sock 'em competition that is permitted and defined by those who manufacture and conceive a business strategy for the goods.

PROFESSOR FOX: Sure, that is why this was a great case for the defendants to go up to the Supreme Court.

But let me move it over to *CalDent*. That is another case in which the Supreme Court did not protect low pricing; the Court did not protect discounting. The members of the dentist cartel got together—or maybe it wasn't a cartel—the members of the dental association got together, and they said, we think we ought to have ethical rules against dentists' advertising discounts.

MR. ROONEY: But not just discounts, across the board discounts. But you could discount a filling.

PROFESSOR FOX: Yes, you could.

MR. ROONEY: Or you could discount a crown.

PROFESSOR FOX: Right. But the point was that the most practical way to discount was to advertise discounts. The ban on general discounts was not prohibited, either per se or on a quick look. The Court said, we have to take a much more "sedulous" look. It said, astoundingly, even in a case like this, the plaintiff has to show there will be an output limitation of dental services, and it went on to say: This dental association probably thought that there was so much deception in the market. In deception-filled markets people will buy fewer dental services. Limiting advertising will limit deception and increase output.

MR. ARQUIT: I think for your thesis to be true you've got to accept a theoretical construct that the Court is very willing to, that I don't think everybody would agree with. Remember in *Trinko* they said monopoly prices are good, so obviously they are not just out for low prices for consumers. Now why do they say that?

MR. ROONEY: No, they said the prospect of monopoly prices is good, not price itself. The prospect of earning monopoly prices.

MR. ARQUIT: No. It says in the short run monopoly prices are good, okay. And the theoretical assumption they are making, and a lot of people would challenge it, is a pure Chicago School thought that all entry barriers are transitory and monopolies are short run. It is only if you believe that that you can honestly think that allowing high prices for any period of time ultimately protects consumer welfare, because you've got to assume that other entries will not come in. There are some pretty durable monopolies out there, and I think that is the answer to a very theoretical view by the Supreme Court and one that I think they are not consistent in, in favoring lower prices.

MR. ROONEY: I'll ask last word from the gallery.

Okay, segment five. Five minutes for segment five. So is it permanent climate change or seasonal variation?

The real question, the marquis headline is what is it that is supposedly changing? Is this a plaintiff versus defendant? Is this a dominant firm versus new entrant preference? What is it the Supreme Court is developing?

Kevin.

MR. ARQUIT: I think it has developed it, and it is building a big wall around the teachings of the Chicago School, and I think if there is going to be change it is going to have to come from the wider antitrust community. Because I think the Supreme Court has often trailed behind some of the thinking that has gone on at the antitrust think tanks and in terms of practice sessions like these and so on. And I think that that voice, that their case is no longer in the mainstream. So I think it is in settings like this and writings like Eleanor's that ultimately will bring change.

MR. ROONEY: David, what is changing and is it permanent?

MR. COPELAND: The thing I am taking away from this is that the problem is when in particular areas the law changes and calcifies, and I think Kevin has a good case that has happened in Section 2, and I think that is what Eleanor is getting to when she talks about the pendulum swinging too far in the other direction.

It would be nice if the Supreme Court were more sensitive to the organic nature of antitrust and didn't overwrite opinions and didn't go out of their way to create absolute doctrines, such as, for example, with Justice Scalia in the two opinions that I can think of following *Aspen Skiing*, basically tried to write that opinion out of existence.

I just don't think that the writers of these opinions need to go that far. If they were a little more judicious in having decided these opinions, we wouldn't have to deal with all the struggling that we are trying to figure out. We have got a capable administration, with terrific antitrust lawyers and enforcement, where do you try cases, and they obviously can't figure out how to try a case, given the precedence they have to overcome. That is just my opinion.

MR. ROONEY: Bernie, what's changing, and is it permanent?

MR. PERSKY: Well, I hope it is not permanent, but it appears to me to be a pro business and pro dominant business. If the business interest is dominant, it is going to be given leeway.

And also, some decisions are manifestly anti-class action. And I thought that in the *Stolt-Nielsen* case particularly, having been there and seen the argument, I thought that some of the Justices, and particularly Justice Roberts, was very much anti-class action.

MR. ROONEY: Eleanor, what's changing, and is it permanent?

PROFESSOR FOX: Well, there are only two things changing: One is the law and the other is the procedures, and they are changing in the same direction. The Supreme Court is making the law shrink, and it is making it much harder for a plaintiff to stay in court, and this law is relatively secure.

MR. ROONEY: Those are the comments from your panel. Any further comments from the gallery? Agreements, disagreements?

Then applause and thank you.

(Applause.)

MR. HIMES: Thank you, Bill, for leading this very engaging panel. I thank all the panelists as well.

We are now going to break. We have, as you know, evening events a block away at the University Club, One West 54th Street. The cocktail reception begins at 6:00 p.m., and the dinner will be served about 7:00.

Assistant Attorney General Varney will be there to deliver the keynote address. And we have the devilishly delicious dessert buffet at the end, for those of you who still think you have a need for more food.

Now, before you go, I am going to pitch the book again, because a lot of hard work went into it. I am going to say this again, this is not a replacement for the earlier volume. So don't throw them away. It is a complement. And if nothing else, the second version has Jack Greenberg's study of the Donnelly Act done in the mid-50s for Milton Handler's Committee. It is by far the most definitive exposition of the background and history of the Donnelly Act. There is nothing else that is even close. It's kind of like the 1955 Report of the Commission of the Attorney General. For the time period that it was done it is simply definitive. So don't throw it away.

One final thing. I mentioned to you that we did something today which was to fit six panels into the time allotted for five, which is what we did last year. And you will see, you get yourself seven CLE credits this year. Last year you got seven and a half. Now, if you can go ask the State Bar to explain that to you, that would really be great. Vote with your feet on that one. Write your Congressman.

Thank you very much everybody.

(Applause.)

(Recess.)

The 2011 NYSBA Antitrust Law Section Dinner

MR. MADSEN: Good evening, everybody. Keep enjoying your appetizer. Don't stop eating just because I am talking.

I want to welcome you all. I am Steve Madsen. Until about 12:07 this afternoon I was the Chair of the Antitrust Law Section. And now I've been sent packing, and I am a former Chair. But I still have the very pleasant duty of welcoming all of you to the Section's Annual Dinner.

I have to say, the State Bar's Antitrust Law Section has had a terrific day today. I know many of you participated in the substantive programs we had over at the Hilton. Notwithstanding weather most inclement, they were very well attended, and substantively they were spectacular. There was a little touchy moment right at the beginning; when we began at 8:05 we had three or four panelists and only two or three audience members, but the numbers picked up dramatically after that. In fact, we had a pretty much full house, notwithstanding the weather.

Jay will offer more and specific thanks for those who made that happen. Jay is our program chair. He was the driver.

I also want to express my thanks to a lot of people who made this dinner what it is. Not only was the day great; the dinner is great. I believe we have record attendance here tonight, which is fabulous. And for that I have to express thanks to our dinner co-chairs, Ilene Gotts and Michael Weiner.

(Applause.)

And also, we have to say thank you to The University Club and its staff for the very professional job they do. What a nice place to have a big function like this. I think she's no longer here, and many of you probably do not know this person, but I must say a particular thank you to Lori Nicoll from the New York State Bar Association, who is the guiding spirit, the go-to person who actually brings our Annual Meeting Program and Dinner off.

I must also thank our sponsors. We have a number of sponsors this year, and I want to particularly thank our Platinum Sponsors: The Garden City Group, Kurtzman Carson Consultants, Lexis Nexis and NERA. Thank you so much for supporting us.

And I express to all of you here that if you can, please find a way to support them.

Now, I need to introduce the distinguished folks sitting up here on the dais. And I'll tell you, we have so many distinguished folks here tonight, I can't introduce them all. And if I tried, I'd probably get run off the podium here, because we want to get on with the rest of the program. But I have some important introductions to make.

I am going to go to my left, starting with Ilene Gotts, who is Past Chair of the Section, our Dinner Co-Chair, as I mentioned, and who tonight will receive the William T. Lifland Award for Distinguished Service to the Section.

(Applause.)

You may want to hold the applause, because it will go a little quicker if you would.

Next to Ilene is Michael Weiner, Dinner Co-Chair. We thank him as well as Ilene for this dinner tonight.

Next, Leonard Gordon, Chief of the New York Regional Office of the FTC.

Next to him is Richard Schwartz, Acting Antitrust Bureau Chief of New York State Attorney General's Office.

Then our Keynote Speaker, Christine Varney, Assistant Attorney General of the Antitrust Division of the United States Department of Justice.

Next to Ms. Varney, Eric Stock. Eric has served as the Section's Financial Officer for three long years. And, glutton for punishment that he is, he is now our Secretary. So when we are done with him a couple of years from now in the officer capacity, he will have served probably longer than anybody else in the history of this Section.

And now, Jay Himes, your new Section Chair. Jay, well, I am not going to sing his praises now; I am just going to introduce him. But all the excellence that you saw in the substantive program today came on Jay's watch as Program Chair. Just a tremendous job.

Next Bill Rooney, our Vice Chair. Bill has been serving as Secretary of the Section and now the Vice Chair.

And next to him, Lisl Dunlop, our new Financial Officer. So we thank Lisl for stepping into this arduous three-year term as Finance Officer.

Next to her we have the Honorable Melanie Aitken, Commissioner of the Competition Bureau of Canada.

Next to Commissioner Aitken we have Deirdre McAvoy, who is Chief of the New York Field Office of the Justice Department.

And next to her is Ralph Giordano, Past Chief of the New York Regional Office of the New York Department of Justice.

Okay, I have more people to introduce, but let's pause for a little applause.

(Applause.)

Now as I said, we have other distinguished people here, and it is a wonderful thing. I understand that Honorable Louis Kaplan, Judge of the United States District Court for the Southern District of New York, is with us, as are Deputy Assistant Generals Molly Boast, Rachel Brandenberger and Katherine Forrest, from the Justice Department.

I feel like I am doing an infomercial. But wait, there's more! We also have not one but two Commissioners from the Federal Trade Commission here tonight. We have Commissioner Julie Brill and Commissioner Thomas Rosch, along with Mrs. Rosch.

And I understand that William Sorrell, Attorney General of Vermont, is with us. So let's have another round of applause.

(Applause.)

We thank you so much for joining us, and we hope that you enjoy dinner and have a splendid evening.

Now, it is my pleasure to introduce your new Section Chair, Jay Himes.

Jay, the podium is yours.

(Applause.)

MR. HIMES: Thank you, Steve.

I want to congratulate Steve and express the appreciation of the entire Section for his having guided and carried out the good work of this group for the past year, and I'll say more about that in a moment.

I do think though that I have to put to rest a rumor that I understand was circulating on the Internet over the course of the day. Steve assures me there is no truth to the notion that he tried to arrange a snowstorm to extend his term. Now, as I said, I will speak a bit about Steve, but I also have to recognize the individuals whose tireless efforts have made today's program a success.

When, at an Executive Committee meeting in the fall, I asked for volunteers to help put together the day program today, from the time I left Steve's midtown office until I got back to my downtown office, I had a dozen e-mails from people offering either to organize panels or to participate on panels. And I think almost without exception I took them up on it, and it was a good decision indeed.

Now, despite the storm, I am very pleased to say that with but two exceptions, everybody who was on a panel made it here today. One exception was Peter Carstensen, who was snowed in in the midwest where the planes weren't taking off. We had him participate on the first panel by dial-in phone. He got up 7:00 in the morning, or he actually got up earlier than that and participated at 7:00 in the morning Central Time. And I think everyone agrees that he contributed a great deal to that fine kick-off panel.

The other individual who was unable to make it was Barbara Hart, who was in Chicago on business, and again the planes simply weren't flying. She was to moderate one of our panels. David Marriott, Steve's partner, was on that panel, and he agreed last night to take on the role of moderator as well. And I think that honestly it was seamless; no one could tell any difference.

Now, the individuals that I do want to thank, some of them aren't obvious from the program flyer, so let me just name them: Stacey Mahoney, Meg Gifford, Elai Katz. Barbara, who I mentioned and who actually kick-started another panel and then moved over to the expert issues panel. David Marriott, Chul Pak, Scott Martin, Fiona Schaeffer, Bill Rooney, Bernie Persky and Greg Asciolla, a colleague at my firm.

Meg could not join us here tonight, but we all extend our heartfelt best wishes to her.

Now, Steve mentioned our Co-Chairs already, and I just want to say that you could not pay me to do Ilene's job. I tried to get off the emails for this dinner, and it was impossible. I saw them. You couldn't pay me to do what she did. Michael has been mentioned as well, but I also want to thank him, because he enlisted his IT folks to burn the DVDs or CDs of the 1,100 pages of material that the State Bar had to publish in hard copy. And there were many piles about six inches thick that remained in the room at the end of the day, but I saw very few CDs that remained.

Eric Stock also put together the program with the assistance of people at Bill's office, and I thank them for that.

If you look at the Dinner Program, if our attendance increases next year at the same rate, we may ask Michael to put that on CD as well.

Now, the success of today's events is really no accident. Individually and collectively, there is not a finer, more dedicated or hard-working group of antitrust attorneys anywhere, and I am very grateful to everyone. So this brings me to Steve, and I pay particular thanks to him. Having himself performed so ably as last year's Program Chair, Steve patiently explained to me what I needed to do, and he made sure that I got it done, and that is no small feat.

Those of us on the Executive Committee and in the Section generally know Steve to be a first-rate antitrust practitioner at the Cravath firm, but he is really much more than that. Steve is something of an endangered species. He is a generalist litigator, and with the intellect, skill and judgment that allows him to handle the most complex litigation, regardless of the area involved—

securities litigation, patent litigation, trade secrets litigation, bankruptcy litigation, maritime disputes, plain old commercial litigation, arbitration domestic and international. That is what he does, besides antitrust.

He is also active in civic and charitable affairs, all of which I suggest to you confirms the adage that if you want something done and done well, ask a busy person.

Probably more importantly, however, Steve is a genuinely decent and gracious man. Honestly, I don't know how anyone litigates against him. I hope I don't have to. For those of you joining us from outside of the City tonight who may have a particular view of New York City litigators, I can assure you that it does not apply to Steve.

Steve, it has been my honor and my pleasure to serve as your Vice Chair this past year, and it is with no small amount of anxiety that I pick up where you left off. I know that you will still take my calls and respond to my emails, however half-baked or obvious my questions may be. And with a little bit of luck, I will avoid major screw-ups in the upcoming year.

Steve, if you would please come to the podium. It is my privilege on behalf of all of us in the Section and the Executive Committee to offer this gift to you in recognition of your work for the Section and with all our best wishes.

(Applause.)

MR. MADSEN: Thank you so much, Jay. It has really been a privilege to work with Jay and with the other leaders of the Section and the other members of the Executive Committee.

When I stood at the podium, filled with trepidation last year, saying oh, my goodness, I've got to run this organization for a year, I had no idea how much fun actually it was going to be, and it has been fun. Made so largely by the fact that we have had a great team of officers and we still have a great team of officers. We have a very rich and diverse and able Executive Committee, with Jay, as Chair, Bill Rooney, assisted by his colleague, Robin van der Meulen, and our Secretary and Finance Officer, what can go wrong?

As I look back on the year, all I really set out to do was to make sure that the enterprise kept going, and I think it did. We continue to have really excellent substantive programs. I hope you all know that every time the Executive Committee meets it has a substantive presentation to which all Section members are invited. We are doing a better job of getting that information up on our web site. And we also have our Annual Meeting every year.

There was some unfinished business, though, that I did want to get done, and lo and behold today, like about five minutes before my term expired, a gentleman from the State Bar brought in to me a copy of the book. The book is entitled *New York Antitrust and Consumer Protection Law*, Third Edition. This project was conceived some time ago and then fell a little bit by the wayside, but it is done and in print, and now you can order it.

We have also decided to do a few new things. We have expanded our programming to members. This summer Jay organized a great presentation concerning the new Merger Guidelines. Then in November under Bill Rooney's leadership we had our first Annual Fall Forum, talking about the economic ramifications of the Supreme Court's *American Needle* decision. We also launched an academic competition, a writing competition for law students either New York residents or attending law schools in New York, to award a very handsome prize, $5,000 for the best piece. Under Ned Cavanagh's leadership, we awarded first prize to Amy Marshak from NYU. Amy, where are you? Oh, there she is. Congratulations.

She was so surprised when I called her up and said I wanted to send her a big check for her wonderful essay. That was great.

We are launching a new initiative, and unfortunately, it won't get to be my privilege to actually make it happen. We created a new group of committees that offer to members of the Section an opportunity to really get involved in substantive things and take on projects. These are three committees on substantive areas of interest to antitrust practitioners, and we have appointed specific members of the Section to act as the chairs of those committees. First, a Committee on Class Actions which will be headed by Hollis Salzman from Labaton Sucharow. As I mention these people and if you are here, please stand.

Next a Committee on Vertical Restraints which will be headed by Dan Anziska from Troutman Sanders. And lastly, a Committee on Horizontal Restraints, which will be headed by Robin van der Meulen from Willkie Farr.

(Applause.)

We are going to send around a flyer letting people know how they can get involved. It is going to be a great opportunity, and it will give Section members a great way to get more involved.

Now, the last thing I need to do is to congratulate you all upon your new leadership. Your new Chair, Jay Himes, I have to say for some extended period of time now really has been an intellectual driver in the Section. He has been the one responsible for developing the programs that we offer at our Executive Committee meetings every month. And it's clear to me that Jay knows absolutely everybody who is anybody in the field of antitrust. And they all seem to owe him favors, because when he asks, they come and make a presentation to us, which is just really wonderful. So again, Jay will be

a terrific chairman for the Section, and it will be a great year for us. I have to say I've become very fond of Jay. He is a really splendid guy, not only a great leader.

Bill Rooney will also be a terrific Vice Chair. The Vice Chair has the heaviest lifting of all, because the Vice Chair is also the program chair, which means this time next year it will be Bill sitting there saying oh, my God, I survived it. And then he is off to a great start, having organized our fall forum.

And our other new leaders, Eric Stock and Lisl Dunlop will also be terrific as well.

So I want to thank you all for the opportunity to serve the Section. It really has been fun, and I congratulate you all on your new leadership.

Now, it is my pleasure to invite to the podium my friend and colleague, Saul Morgenstern. Saul.

(Applause.)

And I am going to tell you why I want him up here. Saul tonight has the very pleasant task of conferring on Ilene Gotts the Section's William T. Lifland Service Award. It's all yours.

MR. SAUL MORGENSTERN: Thank you.

Well, as Steve said, it's my honor and pleasure to introduce Ilene Gotts, who is the recipient of this year's William T. Lifland Award. As many of you know, this award is named for Bill Lifland, late of Cahill Gordon & Reindel, who was a giant in the antitrust bar for many years. I say that not because he was a head taller than I, and I had to look up to him for many a year. Those of us who had the pleasure of knowing Bill and see him in action know the standard of excellence he set as an antitrust lawyer, person and member of the bar.

This award is intended to recognize those who, even though they may have busy practices, rewarding and sometimes hectic personal lives and a number of extracurricular commitments, still dedicate a significant portion of their time and efforts to our little community either by serving this association or educating others about antitrust, and other methods of advancing the interests of the antitrust and competition law community. Sometimes we have somebody who rings every one of those bells, and that would be Ilene.

First, let me say that there is no truth to the rumor that we are giving this award to Ilene solely because several years ago she moved this dinner from the Marriott to The University Club. She also accomplished a nearly impossible task of making this dinner and the Section profitable, and she continues today to perform the thankless and challenging tasks of doing the seating, arranging the flowers and making this dinner happen. So for my money, those things would be enough. But there's more.

Ilene plies her trade, as many of you know, at Wachtell, Lipton, a well-known firm of slackers.

(Laughter.)

In truth, they are obviously known for their excellent work and Ilene's work ethic and the quality of work that comes out of her. And while doing that, she cherishes the time she spends with her family, and will happily regale you with stories of what she and they are up to, demonstrating the time and care she devotes to their well-being. And tonight I know, because she told me, she is pleased to have her husband, Michael, and son, Sam, here for these ceremonies.

(Applause.)

Work and family are enough for most of us, but while Ilene has been carrying those loads, she's been chair of that Section, Chair of the ABA Antitrust Section. She has organized more programs and activities for both organizations than she would permit me to tell you about tonight. I am under fairly strict instructions.

The remarkable thing about her, besides her famously warm personality and her willingness to do anything to help her colleagues and friends, is the remarkable quality with which she does all of those things. Several years back, when she took the reins of this Section, she noted her objective during the coming year will be to not crash the car. Those of you who were here a year later, when she handed over the reins, may recall, and I noted then, that she had not only achieved that goal but she had increased the Section's horsepower, efficiency and process. She left us with a turbo-charged Section.

So we respect and love Ilene for all of those qualities, and we are pleased to honor her tonight with the William T. Lifland Award. We know that Bill would be proud for you to have it.

(Applause.)

MS. ILENE GOTTS: Well, I've learned one thing, if you have to get up to come up here to the podium, don't seat yourself at the end, because it is very hard not to fall off the dais.

Actually, I am not from New York. To paraphrase *The New York Times* Pulitzer Prize writer Meyer Berger: "Each woman reads her own meaning into New York." And for me, New York has had different meanings at different stages of my life.

I first started to visit New York once a year with my father, when I was ten. It was a business trip for my dad, and truly the highlight of my year. Every year, I so much looked forward to watching him work, staying at the Warwick Hotel, which is right by my office today. These trips to New York for me really were a time of elation and awe. And just like my father, the City was bigger than life.

So fast forward fifteen years ago, when Wachtell approached me with an opportunity to join the firm as a partner. I never even spent more than a few nights at any time in New York City. Frankly, I couldn't even tell you where Fifth Avenue was. Although I was moving to New York City mid-career, and this job would provide me with great growth opportunity, it was also more than a bit scary to transplant my whole family here. I had no family here and very few friends. But I soon discovered that New York was, as Thomas Wolfe said, "one belongs to New York instantly. One belongs to it as much in five minutes as in five years." And thanks in part to people like Bob Joffe—who I am delighted is getting recognized tonight for his lifetime of good deeds—I immediately found I was not alone. I would run into Bob at the Fairways. He lived in my new neighborhood and invited me to have lunch with him, and we regularly had lunch together. Meg Gifford and Pamela Harbour Jones got me involved in this organization; my longtime dear friend Eleanor Fox invited me to family events; Paul and Ellen Victor, and Irv and Amy Sher were ABA friends who made me feel at home. Very definitely I found what Thomas Wolfe said to be the case.

My involvement in certain activities outside the firm, such as this organization, is really what helped me to establish roots and made me feel like I feel today. This is the place where as I look out at this room today, the meaning that New York has for me is one of "being home" and among "family."

Thankfully, I have Sam and my husband here tonight. I have my friends and my colleagues. But to be honest, I still have the same feelings of elation and awe and excitement about waking up every morning here in such an exciting city as New York as I did when I was just a teenager. And I don't think that will ever die. I truly love being in New York and being here with my friends in this organization.

I really want to thank you tonight for recognizing me and giving me this award. It is something I will always cherish. Thank you.

(Applause.)

MR. MADSEN: Congratulations, Ilene.

Now it is my job to present the Antitrust Law Section's Award for Distinguished Public Service. This is an Award that the Section does not present every year. In fact, we have not presented it for several years. It is meant to honor an antitrust lawyer who has made large contributions to the field of antitrust but has also served the public in a most distinguished way. And tonight the Section bestows that Award on my late partner and friend Robert D. Joffe.

As most of you know, Bob was for a number of years the head of my law firm, Cravath, Swaine & Moore. He was my partner for many years and mentor in the early part of my career, as well as a friend. Bob was a distinguished antitrust lawyer, and also a truly tireless servant to the public good.

There is a little bit of interesting background to the Award tonight. In fact, the Awards Committee had been seeking to bestow this honor upon Bob for a couple of years during his lifetime. When I first became an officer of the Section, the head of the Awards Committee suggested to me that Bob would be a great choice; would I see if he would accept the Award? I asked him, and he really wanted to do it. But he consulted his calendar, and in fact, on the date of the Annual Dinner that year, which was two years ago, he was supposed to be at a board meeting on the west coast, so he told me he couldn't do it. Rather than giving the Award to someone else, it wasn't given that year.

Then last year the Awards Committee again identified Bob as the person upon whom the Section's Award should be conferred. At that time, this is about a year and a half ago, Bob had become gravely ill. I did not know how gravely ill. I called him, talked to him, and he just said he didn't think he could make the dinner. And then, as it happened, on the very day when we had this dinner last year Bob passed away.

The news reached this group during the course of our substantive presentations over at the hotel in the afternoon, and you could see a little ripple of news in the room. I was up front, because I was the Program Chair, and somebody gave me the news. And it was remarkable and touching how palpable the sadness was. People at the dinner spontaneously were remembering Bob. Ilene was one of them. He in fact had really touched, professionally and personally, an awful lot of the people in this room.

Now, Bob's accomplishments as an antitrust lawyer are well-known. He was longtime outside counsel to Time Warner; he counseled them and represented them and their diverse businesses in litigation. He helped them navigate a number of significant regulatory challenges in antitrust, in litigation brought by competitors, and in investigations by federal and state regulators. I met many of the state regulators here tonight while working with Bob on those matters many years ago. Bob also worked on government reviews of important M&A transactions, and of course, participated in the much less public but no less important activity of counseling his clients behind the scenes. Time Warner was certainly not Bob's only antitrust client. He represented a number of other major companies in that regard as well.

As I was thinking about making my remarks about Bob tonight I asked one of the fellows in our office to pull together a quick high-level summary of the antitrust cases Bob handled, and it was many pages of paper. I worked on some of them, particularly the earlier ones, so it is sort of a walk down memory lane. But it was an eye opener; it was so diverse, from really big, big cases. For example,

Viacom v. Time Warner in the late 1980s, to a dispute with a gentleman whom some of you will remember by the name of Ugly George. Anybody remember Ugly George? He was a character on the local public access channel many years ago—well, never mind what he did. It wasn't really very polite. But Bob litigated with him as well. So it was really a remarkable career.

But antitrust was never the sole measure of Bob Joffe. As a lawyer he was well-known and very much sought after as an advisor to the directors of a number of major companies, especially in times of great crisis. He was a longtime counsel to outside directors of Fannie Mae and companies like General Motors, CitiGroup, Merrill Lynch and many others.

But actually, antitrust and board room service weren't the full measure of Bob Joffe either. He was in a very fundamental way personally committed to public service. You'll see a short write-up about Bob in your program. And it mentions that after a short period at the beginning of his career at Cravath, he left the firm for two years on a Ford Foundation grant to serve in the Ministry of Justice of the Government of Malawi, where he helped rewrite and enforce the country's laws. That is an interesting and unusual thing to do; not too many people do that. But that was characteristic of him.

Later in his career he won a major decision in the Supreme Court of Delaware, *Paramount v. Time*, concerning the duties and prerogatives of corporate directors. During the same year he also argued in the United States Supreme Court an important pro bono civil rights case, *Martin v. Wilks*. He served as Director of organizations like Human Rights First and the After-School Program, and he held a number of other important directorships.

Bob's personality was really as exceptional as his accomplishments, both personal and professional. The thing about Bob that eventually one figured out, he was a supremely self-confident individual. Think about it, this is someone who came into Cravath, Swaine & Moore and after three months said, excuse me, folks, I am going to go to Malawi for two years, but you'll take me back. And, of course, the firm did. He was in every sense a legal superstar, but notwithstanding that, he was also very human. He was unassuming, he was quiet. He never expected drum rolls or salutes when he came in. And particularly with those junior to him, he was always kindly, approachable, and open, and he took people under his wing.

He was also a devoted family man. He made time for Dinnie and their children. I watched him do it over and over again. He was really a kind and lovely fellow even as he was a total powerhouse of the law. So he is, I submit, a most worthy recipient of the Section's Public Service Award. And it's really quite fitting that our Section now at last confers that Award upon him. I am just so sorry he is not here to receive it from us.

However, we are honored tonight to have Bob's brother, Richard, who is here to accept the award. I ask Richard to come up to the podium. Richard will receive the Award on behalf of Bob and his family. So come on up.

(Applause).

Richard, it is a great honor to present this to you on behalf of your brother. Please accept it with the great wishes of everyone here.

(Applause.)

MR. RICHARD JOFFE: As you may know from your own personal experience, Bob loved his work, and he was very proud of his colleagues in the New York Bar. He would have been very pleased by this Award.

On his behalf and on behalf of his family, thank you from the bottom of our hearts.

(Applause.)

(Dinner was served.)

MR. HIMES: I know that you are not finished, but we are going to move on. You can eat quietly, please.

It is my privilege as Chair to introduce the keynote speaker, the Honorable Christine A. Varney. She is of course well-known to all of you. She was nominated by President Obama as Assistant Attorney General for Antitrust in April of 2009.

Under her leadership the Antitrust Division in criminal enforcement has resulted in over $1.5 billion in fines. Meanwhile, the Division has brought numerous successful challenges to anticompetitive mergers and business conduct. But equally important I think, there is a new energy level at the Antitrust Division. Collaborating with the FTC, the Agencies held merger workshops over an extended period, leading to the Horizontal Merger Guidelines issued two months ago. The Division partnered with the Department of Agriculture in joint workshops addressing competitive dynamics in that particular sector of the economy. You will also recall that, shortly after assuming the position, Assistant Attorney General Christine Varney withdrew the controversial Section 2 Report and announced her intention to continue enforcing Section 2 according to existing judicial decisions.

Now on the litigation front, the Division has joined the FTC to urge enhanced judicial scrutiny of probably the hottest issue in health care antitrust, the settlement of a patent litigation under the framework of the Hatch-Waxman Act. There is also ongoing litigation against Blue Cross Blue Shield involving cutting-edge issues relating to that insurer's MFNs. The DOJ also investigated

and secured settlements arising from no-solicitation agreements among Silicon Valley high-tech firms that restricted employee mobility. And very recently, the DOJ prevailed in the Ninth Circuit in an interesting subpoena enforcement proceeding. The Court of Appeals upheld a Grand Jury subpoena that was issued to secure discovery obtained in civil litigation for use before the Grand Jury. And I would predict to you that that particular circumstance is one that we are going to hear about going forward in the future.

Now all of this and much, much more in less than two years in the position. Prior to taking charge at the Antitrust Division, Ms. Varney distinguished herself in both the public and private sectors. She served as Assistant to President Clinton and as Secretary to the Cabinet before being nominated and confirmed as an FTC Commissioner in 1994. She left the Commission in 1997 and became a partner at Hogan & Hartson in Washington, where she was a member of the Antitrust Practice Group there and headed its Internet Practice Group. She continued in private practice work, until rejoining the public sector in the Obama Administration.

Besides competition law, Ms. Varney has long been active in privacy and technology issues. While an FTC Commissioner she spearheaded the Agency's Internet Privacy and Internet Policy initiatives. She also pioneered innovation market theory analysis to high-tech and biotech transactions. She practiced in similar areas while with the Hogan & Hartson firm. I would also add that she was one of Netscape's lead lawyers in the landmark litigation by the Department of Justice and the States against Microsoft.

Now, recognizing Ms.Varney's interest in that particular area, I prepared all my notes tonight using an open-source word processing system, running on my Linux laptop. And Steve Houck will tell you that is totally true.

Ms. Varney has deep roots in New York. She grew up and graduated high school in Syracuse. She received her B.A. degree from the State University at Albany and an MPA degree from Syracuse. She is a law graduate of Georgetown Law Center. With both Christine and Ilene, the Georgetown Law School is well represented here this evening indeed.

Finally, before I turn the podium over to her, I want to pay special thanks to Ms. Varney for the strong support the Antitrust Division has given this Section. As many of you know, as Steve mentioned, two senior level officials, Molly Boast and Lisa Phelan, participated in panels this afternoon. The FTC, I must add, was equally supportive, and as Steve also said, Commissioners Brill and Rosch were panel participants as well, and they are both here at the dinner.

Now, all of us in the Section recognize and value the tradition of support from the federal agencies that has developed over the years with this Section. Both Agencies have regularly provided not only keynote dinner speakers at this event, not only annual participants in our panels, but also presenters on topical subjects at monthly Executive Committee meetings. So we take this opportunity to say thanks. And contrary to what Steve said, Assistant Attorney General Varney owes me no favors.

Ms. Varney, please.

(Applause.)

HON. CHRISTINE A. VARNEY: Thank you so much, Jay.

Good evening. It is a pleasure to be here in New York, my home state and my home bar, for your Annual Meeting. I am particularly honored to be a part of this event recognizing the tremendous contributions of my friend Bob Joffe. As a lawyer and counsellor, Bob's skills, judgment and humanity were unparalleled and are legendary. Like many of you, I miss his wise presence every day.

I am also honored to be up here with the other honorees this evening, Steve and Ilene. On a personal note, to give you a glimpse into what you heard about Ilene, more than a decade ago, when Ilene and I were in Disney World in Florida for a Bar meeting—a perfect place for a Bar meeting—Ilene was running panels, counseling clients, making dinner arrangements and getting tickets for us to take our kids on a special early morning ride. So I am a testament to Ilene's boundless energy.

You do inspire us all. You give us a tremendous goal to achieve.

So you chose well your honorees this evening.

Now, I know that the best after dinner speakers are both brief and humorous. Since this is technically not after dinner, I will be neither. I couldn't pass up this opportunity, as all of you are counsel to some of America's leading corporations, to talk to you tonight about a few things that I hope you'll keep in mind as you counsel our country's great companies.

Let me start by talking about the Antitrust Leniency Program. Cartels operate in secret, which means that cooperation from inside is the best way to break open a cartel. Through the Leniency Program the Division has uncovered numerous price-fixing conspiracies. Investigations that began in one market have led to prosecutions in adjacent markets.

The Leniency Program provides many significant benefits. Under the Leniency Program corporations

that successfully apply for leniency can avoid criminal convictions, substantial fines, and individuals can avoid prison terms. To take advantage of these benefits, an applicant must be the first in the door to report the legal conduct to the Division. We call it putting down a marker. The applicant also must meet other conditions, including acknowledgment of the wrongdoing, ongoing cooperation, and where possible restitution to injured parties. In practical terms, this requires that when a company uncovers a possible antitrust violation, you must contact the Division immediately. Time is of the essence in laying down a marker, because the Division grants only one corporate leniency in a conspiracy. Once we uncover a conspiracy, you are in a race with your co-conspirators, and possibly your employees, to get the one grant of leniency.

The Division understands that a company may need time to gather more information, and our marker system holds an applicant's place in line for a limited period of time while the applicant gathers more information. Even if the leniency spot is taken, there are benefits to early cooperation. While full immunity is granted only to the first in the door, a company that has an effective compliance program may be able to secure its place as second in the door and reap other benefits, including a reduction in corporate fines and more favorable recommendations and treatment for culpable executives.

To assist companies in taking advantage of the Leniency Program, our web site provides program guidance, including copies of our corporate and individual leniency policies, model leniency agreements and a list of frequently asked questions, as well as application information.

Every corporation you counsel should have a robust and real antitrust compliance program. The first in the door requirement speaks volumes about the importance of a real compliance program. These programs should educate employees about the antitrust laws and set up internal controls to protect against cartel activity. Of course, the most effective corporate compliance programs may be ones that we never know about, because the conduct was prevented at its inception.

The Sentencing Guidelines also credit effective compliance programs. That said, a company that is not first in to report criminal conduct and loses the leniency race will have an uphill battle arguing that their compliance program was effective.

The Leniency Program also benefits applicants in private antitrust lawsuits. The detrebling provision in the Antitrust Criminal Penalty Enhancement and Reform Act, commonly known as ACPERA, can limit civil damages from a corporate antitrust leniency applicant to actual damages attributable to the applicant, commerce and the affected product or service. Applicants achieve these benefits under ACPERA if they provide satisfactory cooperation to plaintiffs.

To determine whether an applicant's cooperation is satisfactory, courts must consider the timeliness of the applicant's cooperation. In addition, ACPERA currently provides that once a stay or protective order obtained by the Division expires or is terminated, the applicant must provide without unreasonable delay a full account of all potentially relevant facts known to the applicant and all potentially relevant documents covered by the stay or protective order.

The Leniency Program can also help applicants in the international agreement. There are over 50 jurisdictions with leniency programs. Over time the requirements and operation of these leniency programs have diverged. This makes it easier for companies to simultaneously seek and obtain leniency in the United States, Europe, Canada and other jurisdictions.

The Division's ongoing municipal bond investigation is a recent example of the importance of the Leniency Program in our criminal antitrust enforcement. This particular investigation reflects our ability to address antitrust violations in complex markets and the Division's versatility in working with other federal and state agencies. Because this is an active and ongoing matter, I can only speak about this investigation in limited terms and on the basis of what is already public.

In December of last year, the Bank of America agreed to pay a total of $137 million in restitution and disgorgement to state and federal agencies for participation by its employees in a conspiracy to rig bids in the municipal bond derivatives market in order to fulfill the restitution requirement under the Leniency Program. As part of this global restitution, Bank of America entered into several agreements with the SEC, the IRS, the OCC, the Federal Reserve Board and 20 States Attorneys General.

The resolution was significant for several reasons. First, Bank of America was the only entity to come forward and report its wrongdoing before the Division opened its investigation. The Division's ongoing investigation has resulted in pending charges against nine executives, one corporation, and guilty pleas and federal prison sentences for eight executives for antitrust and related federal violations.

Leniency applicants, like Bank of America, have helped us uncover anticompetitive conduct in instances where criminal investigative tools might not have detected the full scale of activity until much, much more damage had been inflicted on our economy.

Second, the Bank of America settlement reflects the benefit of what must be a carefully weighed decision about the collateral consequences of self-reporting illegal

behavior. We do understand the perils perceived by a corporation that considers self-reporting. There will always be the concern that in choosing the path of a good citizen, a corporation may stand alone in acknowledging its wrongdoing. Firms in the financial services industry or other regulated industries are also concerned that self-reporting illegal activity may adversely impact relationships with regulators, as well as pose significant implications for its employees, investors, pensioners and customers.

In this instance, the Bank of America was the first in the door. As a result, the bank does not face criminal charges, nor do its employees who continue to cooperate. Beyond leniency, Bank of America has also benefited from the Division's ability to coordinate several potentially competing federal and state agencies. We believe we reached a global fair settlement of all the parallel investigations.

The Division was assisted in this investigation by the FBI and the IRS and coordinated its efforts with other federal and state law investigation agencies. The New York State and Connecticut State Attorneys General have been particularly valuable members of that team.

Bank of America was the first entity to reach a global resolution to pay restitution and disgorgement, monies that will in substantial part be returned to the municipalities that were harmed by the conduct. The federal and state agencies involved understood the importance of the bank's decision to self-report, and as a result, the civil settlements with these agencies did not and will not impose any penalties.

Agency coordination of investigations involving the same subject can promote fairness in the exercise of discretion in the use of enforcement tools to address particular instances of unlawful conduct. In this case, Bank of America acknowledged its conduct, paid restitution and is moving on.

The municipal bonds matter also is part of a broader collaborative effort. President Obama has established a Task Force on Financial Fraud. We at Department of Justice are very active in that Task Force, and I am particularly active in the areas that I've just discussed.

The Division's other recent criminal enforcement activities demonstrate our priorities. In the last fiscal year we brought 60 cases on the criminal side, charging 84 defendants and obtaining over $550 million in fines, more than $24 million dollars in restitution and prison sentences totals over 71 years.

In these and other cases the Division has focused on prosecution of large price-fixing, bid-rigging and market allocation cartels that raise prices to both businesses and consumers, restrict supply, reduce innovation and act as a drag on the entire economy. The Division's criminal investigations have focused on a variety of industries important to American businesses and consumers, including air transportation services, freight forwarding and liquid crystal display.

On the criminal side, generally when I see criminal defendants they are represented—and there are some notable exceptions, but they are represented by members of the white-collar bar; they are not generally represented by members of the antitrust bar. I would encourage you all to become very familiar with the department's Leniency Program and to get your clients to pay particular attention to what we are doing on the criminal side. It will benefit them; it will benefit their employees, their customers and it will certainly benefit our country.

I would like to turn for a moment to three areas of our civil enforcement work that may be of interest to you and your clients.

First, as was mentioned, we entered into two consent decrees resolving our concerns around agreements certain high-tech companies had made to not solicit each other's employees. These agreements we believe diminished the competition overall and limit the employees' access to better job opportunities. Under the settlement, the companies agreed to end these practices and establish robust compliance policies.

I am concerned that similar agreements may be in place at other companies. Legal counsel may recognize the problems with these agreements, but I suspect that these hiring practices may be created and implemented in human resource departments, which do not know the antitrust laws. I encourage you to ask your clients to review their HR practices, provide legal guidance to their managers, and again, initiate and maintain robust antitrust compliance.

The Division is also continuing to look at the anticompetitive use of Most-Favored Nations contract clauses. In October, as was mentioned, the Division filed a civil antitrust lawsuit against Blue Cross Blue Shield of Michigan, alleging it used its dominance to impose anticompetitive MFN provisions in its agreements with approximately half of Michigan's general care hospitals.

In health care MFN provisions generally refer to contract clauses between health insurance plans and health care providers that essentially guaranty that no other plan can obtain a better rate than the plan wielding the MFN. Some of the MFNs guarantee an even better rate than any other plan or purchaser.

Our lawsuit alleges that these anticompetitive MFNs are used to raise hospital prices to any competing health care plan. This reduces competition for the sale of health insurance and it inflates costs. The Division is reviewing MFN clauses broadly. Where we uncover those with market power using anticompetitive MFNs to thwart competition, we will challenge them.

Finally, the Division is actively monitoring board memberships for violations of Section 8 of the Clayton Act. Section 8 prohibits directors and officers of one corporation from serving on the board of another business if the corporations are competitors and meet certain size and sales thresholds. These prohibited boards interlock harm competition by enabling competitors to directly or indirectly share competitively sensitive information and engage in other anticompetitive conduct. If we find them, we will act.

Before I end my remarks, I want to introduce you to some of the staff at the Antitrust Division who will be bringing all of this to your doors. First, as was mentioned, Deirdre McAvoy is the new Chief of our New York Office. She joins us from the United States Attorney's Office from the Southern District of New York and most recently Department Chief of the Criminal Division. She has significant experience in high-profile complex securities and other fraud cases. And we will see great work from the New York Office under Deirdre's leadership.

I also want to thank Ralph Giordano, who is here, for his many years of service in establishing the New York Office as the crown jewel it is today. Ralph, you have made me one of the stellar lights in the Department of Justice system, and we thank you for all of your years of service.

(Applause.)

As you heard, the Division also has two new deputies who are here tonight, Katherine Forrest and Joe Wayland.

(Applause.)

Katherine came to us from more than 20 years at Cravath, where she too was mentored by Bob Joffe.

Joe Wayland joined us from Simpson Thacher, where he handled some of the firm's most significant clients in federal and state court litigation. Both Katherine and Joe spend time in the Division's D.C. and New York office.

Also here is Rachel Brandenberger, my Senior Advisor for international matters. Some of you may know her from her work in private practice. If you've ever done a transaction in Europe, you know Rachel.

Lisa Phelan, as you've heard, is our Chief of the National Criminal Enforcement Section. She is also here and has been instrumental in our criminal enforcement work, and you'll be hearing more from her.

And of course, you all know Molly Boast, who delivered the keynote remarks at last year's dinner. After serving the Division since the beginning of the Obama Administration, Molly is now leaving. I am grateful to Molly for her dedication and the expertise that she brought to the Division. I am grateful to Molly for her many years of public service, both at the Division and at the Federal Trade Commission. And I am grateful to Molly and her family for the sacrifices she made to the Obama Justice Department Antitrust Division.

Thank you, Molly.

(Applause.)

When I first took this job, I thought it was crucial during these difficult financial times, where markets are increasingly vulnerable to collusion, that the corporations and the Division remain vigilant in their effort and to prevent, impact and bring anti-cartel and other violations of the antitrust laws that harm businesses and consumers.

My remarks tonight I hope illustrate the importance of robust corporate compliance to achieve this vigilance. Thank you all. Go out there, teach your clients, and do not let me see them.

(Applause.)

MR. HIMES: I am mindful that I am the only thing standing between you and the dessert buffet or, perhaps even better, calling it a day and leaving. But as Chair I get the concluding remarks. I won't keep you very long, but I want to share a brief email exchange which I think will illustrate the single-mindedness and intensity that all of the individuals in the Section brought to the assignment of bringing this program to a successful conclusion today.

Back in December, as the program details were starting to fall into place, we turned our attention to recruiting the law firms needed to bear the expense of the dessert buffet that awaits you in the next room. I unveiled my plan of action in an email to Ilene, Steve and the other Section officers. It's very short, and I am going to read it. The subject is dessert buffet sponsors. "We could offer sponsorship levels and let the firms give away promotional items along with books on nutrition, mention them from the dais during a noisy part of the dinner." Within minutes Ilene, bless her, wrote me back. "I think this would make it too complicated. If we really get eight to ten firms to sponsor the costs, it is manageable." Thank you, Ilene. The voice of wisdom in these matters prevailed.

I thank you all for coming. We are now adjourned.

(The proceedings adjourned at 9:07 p.m.)