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Introduction and Welcome

MR. PRAGER: Good morning. I am Bruce Prager. I am the Chair of this Section for about another four hours. It has been a pleasure, and I will say more about that this evening. We have a great program for you this year. I think it is going to be interesting, educational, and our Program Chair Steve Madsen assures me it is going to be entertaining. I pointed out to him that that should be easy with all of the Conan staff available out on the street with a lot of good jokes. They were easy to buy this year.

Steve will go through the logistics of the day in terms of CLE credit and the like. I want to start by thanking you, first of all, particularly those of you who were here on time at 8:00 o'clock and awake and smiling. A few of you have disclaimed responsibility for your actions before 11:00 o'clock. But we won't tax you too much; you can sit quietly until you wake up.

Today's program will have a morning and afternoon session. For those of you who are not members of the Section Executive Committee, you will be on your own for lunch. A reminder to those of you who are part of the Executive Committee, we will be having our first meeting under the chairmanship of Steve Madsen, starting immediately after the business meeting. I will remind you at that time, and that meeting of the Executive Committee will be on the fourth floor in the New York City Suite, and I will remind you of that as well.

So we are going to start with the first part of our program. There will be a break somewhere around 10:30 for 10 or 15 minutes. The Business Meeting of the Section will be held immediately before the lunch break, and I would really ask that you all stay. It is very brief. Basically, it is your opportunity to elect the new members of the Executive Committee and the officers for next year. There will be no campaign speeches. It is not a hotly contested election, but it is important nonetheless.

So again, thank you for joining us, and without anything further, Steve, if you would tell us what we are in for today. Thank you.

MR. MADSEN: Thanks, Bruce. I am Steve Madsen, and I am the Program Chair this year. I will tell you what you've gotten yourself into. You've gotten yourself into, I think, a really spectacular morning and afternoon of higher learning in the field of antitrust, for which 7 and a half CLE credits are available. But that's only if you remember to sign in at the front. If you did not sign in, please do that. You should also get your handouts. They are voluminous, but well worth it, and you'll want to have those. You will also get the program evaluation forms that you'll have to fill out at the end of the day.

To tell you a little bit about what we have in store for you, we have five panels. We begin with the Annual Review of Antitrust Cases and Developments, which, instead of being a lecture as it sometimes has been in the past, it is now a multi-participant interactive panel discussion. I am told they have great graphics and all sorts of exciting things to tell us about. That will be followed by a panel led by Steve Edwards talking about Developments in the Analysis of Dominant Firms. Now, I have never represented a firm that was actually dominant, of course, but it is a term that people sometimes throw around. That panel is called "Section 2 and the EU, Too," and they will be looking at developments in monopoly analysis.

We then have a panel led by Jay Himes. Now I have to say the moderators and their panelists are not responsible for the titles of these programs. I am responsible. If you say that is so corny, I can't believe the state bar actually put something like that on paper, blame me, not them.

Jay's panel, "When Worlds Collide," talks about the current and interesting issues that arise when you have parallel public and private antitrust litigation. For those of you who sue and are sued, that's a pretty interesting set of issues that they will be discussing. We have some terrific panelists there.

We then have the Section Business Meeting, and then we have lunch. After lunch the first presentation is a panel on "Antitrust Issues in Healthcare," led by Fiona Schaeffer. Then at the end of the day we have a great panel on antitrust sports law, specifically on the BCS championship series and controversies surrounding it, led by Barry Brett.

Barry, as you'll see, has a very definite point of view about this. I told him that the panel had to be fair and balanced, and both sides must be presented. I am sure it will be, but we have a very high power, star-studded and interesting panel to conclude the discussion about that. If any of you is a college football junkie, I think that's where you want to be.

So that's the day's program.

Merger Guidelines Revisited and Beyond: Annual Review of Antitrust Cases and Developments

MR. PRAGER: Stacey is the moderator of our Antitrust Developments panel. She really does not need much introduction. She is a past Chair of your Section. She is a distinguished partner at Gibson, Dunn & Crutcher with extensive antitrust litigation counseling, experience, a lecturer, a writer, and someone that I have grown to admire and like very much as a result of our mutual involvement in this really interesting group of people known as the Antitrust Law Section. So I turn it over to Stacey and her panel. Thank you all.

MS. MAHONEY: Well, thank you, sir.

We are going to talk about the annual developments, as we discussed. Because we tried to be as up to date as possible, the written materials for this program are not in those voluminous books but are attached behind your evaluation. So there are three separate papers.

We decided to do this as a panel this year, because we thought it might be a little bit more engaging if we had multiple voices instead of a speech for an hour first thing in the morning. So I would be more than delighted to get your feedback to see if this format seems to be more engaging.

But to move on, we want to let you know that the slides and the paper really have a tremendous amount of information. It may have seemed like it wasn't such a busy year in antitrust, but when you try to put it down in one place, it turns out that it actually was. So if we flash through things, we are going to allow for questions at the end. In addition, if you want a copy of the slides, just e-mail me, and I can get those to you. They do to some degree supplement what's contained in the papers.

I want to introduce our panelists today, and this will be the order in which they will speak. Elai Katz is a partner at Cahill Gordon & Reindel. He practices principally on antitrust, mergers, acquisitions, litigation counseling, government investigations.

Elai is a '92 graduate of Yale University and graduated from Columbia Law School in 1996. We probably all know Elai, in addition to his work in the Section, as writing a monthly column for the *New York Law Journal*. So we figured we'd capitalize on his up-to-date knowledge on what's going on in the world of antitrust and have him kick off the panel for us.

Steve Tugander is a former Chair of the Section and is presently a trial attorney for the New York City Field Office of the U.S. Justice Department's Antitrust Division, where he has been since 1989. Steve graduated undergrad from SUNY Stony Brook and graduated Hofstra Law School in 1989, where he was a member of the *Law Review*. Steve, in addition to having been a Chair of this Section, is also an active member of the New York American Inn of Court.

And Suzanne Wachsstock, to my far left, is Chief Antitrust Counsel at the American Express company here in New York. She is responsible for that company's antitrust counseling and compliance, merger and acquisition analysis, and advising in antitrust litigation. Before joining American Express in 2007, Suzanne was a partner in the Stamford, Connecticut office of Wiggin & Dana and co-chair of that firm's antitrust and trade regulations practice group. Suzanne graduated from Harvard College and Harvard Law School. Suzanne is currently a co-chair of the Insurance and Financial Services Committee of the ABA Antitrust Section.

So I would like to go ahead and let the panelists begin.

MR. KATZ: Good morning, everyone. I appreciate your coming in so early on this cold morning. In addition to thanking everyone for coming, I especially want to thank Lauren Perlgut who helped me put these materials together.

I think the biggest news in 2009, whether we are talking about antitrust or just generally, is the transition to the Obama Administration. This administration came in with promises on a lot of things, but with regard to antitrust, there were specific promises to reinvigorate antitrust enforcement after the Bush years. We will talk a little bit about what they have done and what they haven't done. I will be focusing this morning on the civil non-merger side. And I think we will be hearing about this topic throughout this morning. In addition to that, we will talk about some Supreme Court developments, the price squeeze decision, the upcoming joint venture decision, some legislative proposals—there were more of those in this past year than we are used to seeing—enforcement actions and other decisions in the lower courts.

With the new administration there is a lot to talk about, but I am going to focus on three things. I include in the administration, although it is not very precise, both Department of Justice and FTC actions. That's not entirely correct, but I think you'll agree with me that the differences have something to do with the change of the executive branch.

First, the Section 2 report. As you recall, towards the end of the Bush Administration in September of '08 a report was issued on monopolization law in Section 2.

And fairly early on in the Obama Administration it was withdrawn. And it is worth reading this quote: Christine Varney, the Assistant Attorney General for Antitrust, said: "Withdrawing the Section 2 report is a shift in philosophy, and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers."

Now, as many of you recall, this report when issued, even before the new administration came in, was controversial because the FTC did not on sign onto it. So it wasn't just with Christine Varney coming on the scene, but there were issues with the report. The thing I want to mention about the report—when I first heard this news it was being withdrawn—I had had this report on my shelf as something to refer to, and I literally went and pulled it off the shelf and threw it in my recycling bin and thought I don't need that anymore. Just a few days later, not long enough for my recycling bin to have been cleared out, a client called up with a complex question on what kind of discounts they could or couldn't come up with as part of their marketing plan. And, of course, my clients, none of them are dominant but in case somebody thought they were dominant they asked, what should we do? When I started looking at materials I have on my shelf, I thought you know what, that report I recall had some good stuff in it. I went back and looked at it, and what I am trying to say is that it was a very thoughtful report and had a lot of good analysis. Regardless of whether you agreed with it or your clients' needs and interests agreed or disagreed with the conclusion of that report, I thought it was an interesting report. Nevertheless it is withdrawn, and that's an interesting development.

Next I want to talk about reverse payments, which is a hot topic for a variety of reasons and a topic that we had spoken about recently. Just last year we had a very interesting panel on this topic. I think most of the people in this room know, but I will spend just a second reminding you when we say "reverse payments" or "pay-for-delay," what we are talking about is when a branded drug company and a generic drug company have a patent dispute over whether the generic company can sell the generic drug. This all comes under the Hatch-Waxman Act, which is a complex regulatory scheme. And then they settle that patent dispute, and the settlement involves a payment from the patent holder to the alleged infringer, and that's why it is called a reverse payment. Those have been very controversial at the FTC in particular, and a lot of private lawyers as well have been very upset about it.

Several years ago the Department of Justice did not agree with the FTC when the FTC wanted to have an Eleventh Circuit decision that went against the *Schering-Plough* case, they wanted to have the Supreme Court review that case. Department of Justice, in an unusual move but maybe not that unusual in light of the relations between the FTC and Department of Justice during the Bush Administration, did not agree. In what seems like somewhat of a reversal of course in the *Cipro* case here in the Second Circuit, the *Arkansas Carpenters Health and Welfare Fund* case, the Second Circuit requested the Department of Justice to weigh in, and they weighed in with somewhat of a different view. They said these kinds of payments should be treated as presumptively unlawful. There is a lot more around that that I don't have time to get into, but suffice it to say there is a change. And this change is not only I think to do with specifically one's views on reverse payments and the administration's views on reverse payments, but also the distance between the FTC and the Department of Justice seems to be far smaller than it used to be. They seem to be on the same page on a lot of things.

Now turning to the FTC, which has always, so far as I am aware, had very strong interest in trying to challenge these kinds of settlement agreements, Chairman Leibowitz said that FTC is going to use a two-pronged approach, in light of many court decisions—the *Schering-Plough* decision I mentioned is one, the *Cipro* decision in the Federal Circuit is another and there are others—many Appellate Court decisions went against the FTC's view. And the FTC is continuing to bring cases, but I think their strategy is to try to create a circuit split, but at the same time they are also advocating for a legislative solution, which we will speak about in a little bit.

I will spend a second on one of the cases they brought, a case against Watson Pharmaceuticals. They first brought the case in federal court in California, but the case was transferred back to the Eleventh Circuit, so at least on that one I don't think they are going to get the split that they are looking for.

The next topic is the *Intel* case. So the FTC, as many of you know, brought a case against Intel. A couple of things are interesting about that. Intel has been the subject of private lawsuits and enforcement actions throughout the world, but in recent times not here, despite many people's efforts to try to persuade the Government to do so, and now the FTC has brought this case.

What is most interesting about that and tells us perhaps a little about where the FTC is going in terms of their civil enforcement, that they brought this case mostly under stand-alone Section 5 of the FTC Act claims, rather than sort of what is more common, which is a mix of Section 2 of the Sherman Act and Section 5 of the FTC Act blended together. This was not done accidentally, because the statements that were issued together with the filing of this administrative complaint said that there are two reasons, if I can interpret why it was brought this way under Section 5. One because there are difficulties under Section 2—I will spend a little bit of time on this, and later on today you'll hear a lot more detail about the development of monopolization law, to the point where the FTC felt it would be hard to bring this case directly under Section 2. The second and interesting point that was made was that FTC wanted to limit the likelihood of follow-on treble damage suits. They viewed a Section 5 claim to be a way of airing out the issues but not bringing a lot of follow-ons.

Now I am far behind, so I am going to try to move fast.

Next I will talk about the *LinkLine* case, which is the only Supreme Court case we have. I say the only, there were years we had no antitrust cases, and we had four a couple of years ago, and now we seem to be on schedule for about one a year. We will see how that continues.

This case is really just a follow-on from *Trinko* in many ways. It was an ISP (an Internet Service Provider) competing with an incumbent telecommunications provider. The telecom provider was both a wholesaler to the ISP and also sold directly to consumers. It was a pretty difficult price-squeezing claim. Justice Roberts, writing for the Court, said that if you have no duty to deal, which the *Trinko* case in 2004 set forth with some relatively small exceptions, then you don't have a duty to deal on convenient terms to your rival. I just want to point out the concurrence that Justice Breyer had written. He raised some doubts about whether bright-line rules are always appropriate. He said the means of elicit exclusion are myriad, and therefore, we shouldn't have such bright-line rules. I think it is an interesting conclusion to some of the things he had said previously.

I want to talk briefly about a case that has not yet come down, and it isn't exactly a 2009 development. The way we shoed this into 2009 is cert was granted in 2009, but the argument was just last week or two weeks ago. It was interesting and the case is basically a case where the NFL teams have a joint venture through which they license logos for hats and things like that. The company that had been selling their hats for many years had been told at some point, well, we are not going to license you to sell NFL caps anymore. We are going to have someone else do it. And that company, American Needle, was unhappy and brought an antitrust suit.

I would say typically it is not such a great antitrust suit to bring, but in any event it has turned out to be a big case that the Supreme Court is spending a lot of time discussing. The reason they are discussing it is because the Seventh Circuit said that the reason the case should be dismissed is because the NFL teams were really a unitary actor, and that under the *Copperweld* doctrine they couldn't have conspired with one another.

The briefs are interesting, the oral argument is interesting. I don't know where the Court will go. I would say the Court spent a lot of time thinking about all sorts of unusual joint ventures that you might think the NFL teams might come up with. If the NFL teams decided to start a new business building homes, did that joint venture get *Copperweld* protection? I think how the direction of the discussion went shows exactly why this case shouldn't even be there. But there it is, and we will have some sort of decision, and we will see what comes of it.

One thing that I think is worth spending a few minutes on is where trends seem to be going. The courts have been for some time now, especially the higher appellate courts, the Supreme Court and many of the circuit courts, have been restricting the kinds of claims that can be brought. One example is the *LinkLine* case that I just spoke about, where a price-squeeze claim, traditionally a type of claim under monopolization, is substantially narrowed or eliminated. There is a leveraging case out of the Ninth Circuit that I have spent time on and that also does some similar things, again following along from a line of cases.

So you have a trend of the courts siding with defendants, and at the same time you have, on the political side of things, you have a change in the administration, a change in Congress, so that we see some proposed legislation that's meant to counteract what the courts have done. So you have all these bills I am going to talk about are just bills; they were proposed and may never get enacted. So it only says so much, but I think it still says something. There's a bill to reverse *Twombly*, the case that made it harder to survive the 12(b)(6) motion. There's a bill to reverse the *Leegin* case, the case that said that resale price maintenance is no longer per se but should be judged under the rule of reason. And I should say that in one state, Maryland, there actually was a law passed to basically overturn, at least to the extent that that state's antitrust laws are concerned with that decision.

In addition, there has been legislation on reverse payments, which is part of what I had said earlier that the FTC had in mind. And also legislation to repeal, at least in part, the McCarran-Ferguson Act.

So I don't know which way the pendulum is swinging, if it is moving this way or that way, but I can see that there are different trends in different directions. The thing that I would like to say that I find interesting in all of this, is that this is the year that we learned that Richard Posner, Judge Posner from the Seventh Circuit, who is one of the intellectual engines behind many of the trends that we are discussing in the courts, he declared himself to be a Keynesian now, in light of what happened in the market. So that, too, tells me that things are in flux, and I don't know whether in a few years we will be able to say that things have stayed the same or moved on the legislative front in terms of statutes enacted or whether judges have ruled.

I will end here because I have run out of time. There are still many fascinating things to talk about, but Steve has great things to say as well, and I would be happy to send along the slides if you want to look at the rest of the slides.

* * * * *

MR. TUGANDER: Thank you.

Good morning, everybody. I am going to spend a few minutes just briefly reviewing the past year of criminal enforcement at the Antitrust Division.

Like all DOJ attorneys, I have to begin my presentation with some disclaimers. First, any views expressed today are my own and do not necessarily represent those of the Antitrust Division or the Department of Justice. Second, to the extent that any of the cases that I speak of today are currently ongoing, my remarks have to be limited to restating what has been issued in a press release or filed publicly in a court proceeding.

Some of the ground I am going to try to cover today, a little background on the programs, statistics and trends from 2009. Since we are in New York, some New York Field Office case highlights, highlights of cases brought by other field offices around the country and some records and firsts that occurred in 2009 with the Division's program. I will also cover a couple of enforcement initiatives that took place in 2009.

These are a couple of questions that come to us fairly often from people that are not necessarily all that familiar with the criminal program at the Antitrust Division. Which offenses are prosecuted criminally? It is your per se offenses, price fixing, bid rigging, market allocation and customer allocation.

We are asked sometimes which offices have criminal enforcement responsibility? There are seven field offices located around the country, and New York is one of them. And there is also a national criminal enforcement unit in D.C. So those eight offices together are the ones that prosecute criminal cases. There are a number of other offices in D.C., but they all bring the Division's civil matters.

What is the role of OCE? OCE stands for Office of Criminal Enforcement, and that's the criminal program's headquarters down in D.C. We report to them, and they guide us. For the last several years it has been headed by Scott Hammond, who is the Deputy Assistant Attorney General, and Marc Siegel, who is the Director of Criminal Enforcement.

Another question that has been coming up more and more frequently is when does the Division bring non-antitrust charges? The answer is pretty frequently. Section 1 is the main weapon in our arsenal, but we do have others, and we will use them as necessary to protect the competitive process, which is our mission.

Moving on to some statistics and trends from 2009. Now, these statistics are all from fiscal year 2009. The Division compiles its statistics on a fiscal year basis, so we are actually talking here about the period October 1st, '08 to September 30, '09. So in fiscal 2009, 72 cases were filed criminally, and that is against 65 individuals and 22 companies. That marks the most filed in the Division since 1993. In 2009 the Division also obtained $1 billion in total fines, which is the second highest fine total in Division history. The courts also imposed 25,000 jail days in Division cases, which is the second highest in Division history. The average sentence in the Division criminal case in fiscal 2009 was 24 months. Finally, at the close of fiscal 2009, there were 144 pending grand jury investigations, which is the most in the Division since 1992. So we were pretty active in fiscal 2009.

Since we are starting a new decade I just want to give you a sense as to where the trends have been over the past ten years. So this first chart graphs the yearly totals of fines obtained by the Division. You'll see in fiscal 2000 fines totaled $152 million. By the end of the decade that number was increased to over $1 billion. So you can see some very steady increases from 2005 forward if you look at that chart.

This next chart graphs the yearly totals of jail days imposed on Division defendants. You'll see the total jail days served by Division defendants in fiscal 2000 was approximately 5,600, and that's compared to over 25,000 in fiscal 2009. The peak year was 2007, when jail days imposed totaled over 31,000. You'll note that the 1990s average, for the entire decade the average then was approximately 3,300 days. Which is a small fraction of the 2009 figure.

Now this next chart graphs the average sentence imposed on defendants in the Division's cases by year. So you'll see in fiscal 2000 the average sentence imposed was ten months compared to the 24 months average sentence by the close of the decade. Peak year again was 2007, where the average was 31 months. And in 1990 you'll see the average for the decade was eight months. So sentences are certainly increasing over time.

Finally, this last chart shows the percentage of defendants in Division cases that were sentenced to jail. In fiscal 2000, 38 percent of defendants sentenced received a sentence that included jail time. You'll see by 2009 the percentage is 80 percent. And again a peak in 2007 of 87 percent.

So just to basically conclude, it is clear that sentences in Division cases have become more substantial over the last decade, and that is both in terms of jail time and in fines that have been obtained.

Just briefly, a quick overview of some highlights from the New York Field Office over the past year. We had one investigation involving New York City hospitals, and that relates to contracts administered by purchasing officials at New York Presbyterian and Mt. Sinai Hospital. The investigation has uncovered bid-rigging, fraud, bribery and tax-related offenses. In the past year the New York office filed four cases, and the most recent filing occurred earlier this month in the Southern District of New York. And in that filing, a guilty plea was entered by a New York Presbyterian Hospital purchasing official who was charged with bid-rigging and accepting kickbacks in the award of contracts. In the plea the defendant admitted that he designated which company would submit the low bids on the contract and which companies would submit higher complementary bids. In exchange for awarding the contracts to the designated bidder, the purchasing agent received cash kickbacks from a co-conspirator. Now, to date in this investigation, seven individuals and three companies have pleaded guilty, and the charges have included Section 1 and various other violations.

The New Jersey Superfund investigation relates to the award of contracts associated with the cleanup of two Superfund sites. One is in Manville, New Jersey and the other in Newark, New Jersey. In 2009 New York filed five informations and obtained guilty pleas, charging five subcontractors with conspiring to defraud the EPA and a number of other related offenses. And in this case the conspirators subverted the competitive bidding process by paying kickbacks to employees of a prime contractor in exchange for the award of subcontracts. There were also two sentences in this matter in 2009. One subcontractor was sentenced to 20 months in prison, and in October of '09 the owner of a landscaping company that performed subcontracting work was sentenced to five months in jail. Also filed in this case, was a twelve-count indictment returned in Newark in August against three individuals; the trial against one of those individuals is currently scheduled for March.

Just to summarize, to date in this investigation three companies and eight individuals have pleaded guilty.

Moving on to the New York Power Authority. In early 2009, a former employee of the New York Power Authority was sentenced to 30 months in jail. This defendant was responsible for purchasing and awarding contracts for millions of dollars of goods and services annually for the Power Authority's plants and offices. His sentence resulted from his guilty plea to conspiring to defraud the Power Authority and to tax evasion by accepting $167,000 from a vendor. And again, this scheme subverted the competitive bidding process and resulted in substantial overcharges to the Power Authority.

Finally, the municipal bonds proceeds investigation. In 2009 our office brought the first filed charges in our ongoing antitrust investigation into the municipal bonds industry. In October a nine-count indictment was returned in the Southern District against one company and three individuals. This indictment charges bid rigging and fraud conspiracies related to contracts for the investment of municipal bond proceeds and other related municipal bond contracts. A trial is currently scheduled in this indictment before Judge Marrero in the Southern District for February 2011.

So just to conclude in the New York cases, I think it is notable that in each of these investigations the New York field office went beyond charging Section 1. There was Section 1 and there were a number of other charges. I think it is also worth noting that in each of these cases the Division worked closely with other law enforcement agencies, such as the FBI, the IRS and the EPA's Office of Inspector General.

Moving to some cases around the Division. We had the very highly publicized air transportation matter, which has uncovered price-fixing conspiracies that have affected both passenger fares and prices for shipped goods. Six airlines were charged in 2009; these were airlines located around the world. The airlines combined were sentenced to fines approximating $339 million.

The LCD panels investigation relates to multiple criminal price-fixing conspiracies, and is being run out of our San Francisco office. These are among the largest and most far-reaching conspiracies the Division has ever detected, because they harm millions of American consumers every day who use computers, cell phones and other household electronics that use the panels. The conspiracies have involved price fixing for panels sold to Dell, Apple, iPods, panels to Motorola for mobile phones, so it is quite extensive.

Another area that we have been active in within the Division is procurement fraud. The War Zone investigations have involved guilty pleas involving related contracts for goods and services provided in Afghanistan, Iraq and Kuwait. Again, the Division is bringing multiple charges in these cases.

There was a levee reconstruction case brought in New Orleans, which again involved substantial bribery and kickbacks. There was a sentence there of one individual receiving a sentence of 70 months in that case.

Procurement fraud investigations have really covered a wide area, including defense department contracts, FCC's E-Rate program, Department of Veterans Affairs contracts and fraud against the Small Business Administration.

Real quick, some records and firsts from 2009. The Division obtained the longest prison sentence ever imposed for a single antitrust count, and that was 48 months. This was the first time an individual has been sentenced to more than three years in a single antitrust count since Congress raised the maximum in 2004 from three years to ten years. There also was the longest prison sentence in Division history coming out of one of these War Zone cases. A U.S. Army major, who was charged with receiving kickbacks, received a 17-and-a-half year sentence, which is the record.

Also in 2009, I think it is the first time in history there was a major motion picture made about the Division's criminal enforcement program, "The Informant." And reviews from both movie critics and antitrust lawyers was mixed on this one.

Personally, I enjoyed it.

Just one thing real quick. In 2009, the Division launched a Recovery Act Initiative. Basically, we are training officials, federal-state procurement officials and grant officials who are receiving money under the stimulus program, specifically the 2009 $787 billion Recovery Act. The Division has been training thousands of officials literally to help them uncover fraud and collusion that may result from stimulus projects, and so that's continuing.

The revised model leniency letters. I just want to point out that that is something that happened in 2008, but the Division set up a specific site on its Web page to answer questions about the leniency program.

So that's the Division's 2009 criminal enforcement program in very abbreviated form.

I will turn it over to Suzanne.

MS. WACHSSTOCK: Thank you.

I am going to try to very quickly go through merger developments in 2009. I am going to talk, as you heard a little about from Elai, about signals from a new administration, whether we are really going to see change or whether it is more of the same. Merger Guidelines, that is part of our title, so obviously I will talk a little about that, although I can't promise a whole lot of insight as they are not yet publicly available. I am going to give a very high level overview of the types of mergers that happened and the industries in which we have seen challenges. And I will highlight a few developments I think are important; they are not necessarily the most significant or high-profile cases, but they are developments I think are worth noting. And then I will talk a little bit at the end about convergence or divergence; in addition to the old and new administration, other areas of convergence and divergence.

Also I want to follow on Steven's disclaimer. The views I am going to express are my own and not those of my company, the American Express Company.

So first of all, signs from the new administration. We have heard very clearly from both DOJ, AAG Chair Varney and FTC Chairman Leibowitz that they are intending to vigorously enforce the merger laws. In her nomination, Christine Varney wondered why the prior administration hadn't challenged and cleared XM/Sirius and Maytag/Whirlpool. In various speeches she has made clear she is going to look seriously to any deal where somebody comes to her and complains, and particularly when small companies come and complain about either a consummated or pending merger. She's mentioned possibly being interested in vertical mergers; she said she is not looking for them, but if somebody comes to her and complains, she is looking to consider those. She's made clear that she's focused on actual competitive effects, rather than labels or structural presumptions. But as the quote on the slide makes clear, she is looking to bring new rigor to the economic analysis that underpins any prosecution, essentially making it easier to prosecute impermissible merger activity.

Similarly from FTC Chairman Leibowitz, while he said he agrees with about 95 percent of his predecessor's agendas and initiatives, he has pledged a very vigorous enforcement agenda. Again, he said, "even in down markets, it is very important to hold the line against industry consolidation that may threaten competitive markets far into the future." So we have seen so far clear signals that the new administration is looking to be even more active than the prior administration.

On to the Merger Guidelines hearings. As everyone knows who has been reading any antitrust news recently, there have been hearings going on since early December 2009—the last hearing just this week—to explore whether the Merger Guidelines, which have been in place in their current form since 1992, need to be updated. Both Christine Varney and FTC Chairman Leibowitz have made clear that this is something they have been thinking about for a while. We had the 2006 Commentary which clarified many of the actual practices and how they differ from at least the words of the Guidelines. But their thought is this may be time to actually update the Guidelines themselves. There are a number of key areas of focus, and there have been hearings on each of these issues, but as Christine Varney said in her speech on Tuesday summarizing where the hearings have gone, one area that seems clearly a target for revision is HHI thresholds. She basically said that there is a misstatement as they currently exist in the Guidelines. The thresholds and the presumptions are not at levels that they are actually enforced. So it seems pretty clear those are going to be revised.

In addition, it looks like they will be fleshing out and making clear there isn't a linear progression to the four steps or the five steps, starting with market definition and concentration analysis and then moving on in specific steps. It is a much more flexible analysis. And again as Christine Varney said from the beginning, it seems like she'd like to get clarification that the analysis is much more about actual effects, direct effects, rather than any kind of structural or absolute fixed presumption. It is not going to be a wooden application of these rules but rather flexible. And she's also suggested that there will be clarification in the areas of unilateral effects, price discrimination and other areas.

I think there is some controversy in terms of where people think this is going to end up. Some say that the revisions are really just intended to codify where the agencies have been. Others suggest that this really is an opportunity for the agencies to rewrite the rules in the way they'd like to see them and encourage the courts to go in that direction. I can't say much more than that. We'll see where it goes.

So in what areas have we seen action? At a very high level, these are the key industries where merger review was particularly active in 2009: healthcare/pharmaceuticals were a very big focus, with cases involving cryogenic treatment of cancer, blood plasma, drugs involved in the treatment of congenital heart failure, premature babies, Parkinson's disease and medical devices. High-tech, Internet, electronics, telecommunications; there were a number of challenged mergers there. Agriculture, cases involving beef packing. And this one I found interesting, involving anhydrous ammonia fertilizer in the Pacific Northwest, East Dubuque, Illinois and Marseilles, Illinois, so there was a very, very narrow and specific geographic market. Construction/industry case involving aluminum sheeting for high frequency coaxial cables. Semiconductors for military application. Dry cast concrete; that was a case where the alleged market was limited to sales to national home centers, again a relatively narrow market. Cases involving refinery desalters and deicing salt. And then I included funeral homes—actually only one case, but every year there seems to be one case involving death, so I thought I would put that on the list. That case involved cemeteries in Las Vegas. That was very high-level review of the key industries of focus in 2009.

On to developments of note. Again, these are not necessarily the most high-profile cases, but ones that I thought interesting. Two cases, one sort of a series of cases relating to FTC process and FTC standard of review. *FTC v. CCC Holdings* was decided in 2009 and continued a line of cases—*Whole Foods* was one of them—that essentially established that the FTC faces a less strict standard for preliminary injunction than mere mortals do. So in *FTC v. CCC Holdings* the court essentially said under 13(b) of the FTC Act, injunctive relief is meant to be broadly available to the Commission, so all they need to show is there is a reasonable probability that the acquisition may substantially lessen competition in order to get a preliminary injunction and move the case through the administrative process, rather than the standard showing of a likelihood of success on the merits. And the result of those cases typically is the parties abandon the deals. Really, what I think this focuses on or what this makes clear is there may be different standards depending on which agency takes the deal. If it is the DOJ, you'll be in the courts, and the traditional legal standards apply. Whereas, the FTC seems to be subject to a more lenient standard.

The next one is called *Endocare*. It is an interesting case because it was a very small merger. The FTC challenged the deal and went through a pretty extensive process. Ultimately, the parties abandoned the deal, and Commissioner Rosch issued a statement in response to the abandonment, chastising the FTC, saying it "simply must be do better," and challenged that the agency failed to timely conduct its investigation and reach a determination on the merger's legality. He's essentially chastising his colleagues, who issued separate statements defending themselves. But it is interesting to see internally at the FTC a sense that the process may not be as efficient as it should be.

Next, there were a number of challenges to non-reportable transactions, always obviously a focus, but there were a number of examples this year of very small transactions that were challenged both post-closing and pre-closing. So anybody who is advising clients, a word of advice, even if your deal is below the threshold, particularly in this new active administration, certainly doesn't mean they are below the radar.

The next, impact of post-merger conduct, is really derivative of the last point. The *Ovation* case involved the acquisition of a drug NeoProfen, which is a drug for treating premature babies' heart defects. The case was brought in response to an increase in price post-merger of 1,300 percent. Obviously, this was a very significant increase. So again, if you're advising clients, and you close a merger under the radar, probably good to advise them not to raise prices by more than 1,000 percent.

But what was particularly interesting in that case also was the fact that again Commissioner Rosch issued a separate statement. He noted that the same company, Ovation, had previously acquired a different drug from Merck; both Merck and Ovation essentially had a monopoly on that product. But again, Ovation raised prices substantially following the acquisition. And Commissioner Rosch noted that Ovation lacked the reputational constraints that Merck had faced (that prevented Merck from raising prices to anticompetitive levels), and suggested that the agency should have challenged that earlier acquisition on this basis. So it is interesting to see what factors are looked at. But again, raising prices significantly after a merger is a clear red flag for the agencies.

I also included Scott & White Healthcare here. It is not really about post-merger conduct. This was a challenge to a hospital merger post-consummation (something we've seen before), but I thought it was notable that the FTC in that case publicly praised the acquirer's creative approach in trying to address competitive concerns, trying to find a buyer. Ultimately it failed to find a buyer, but the FTC allowed the deal to go through, with praise for its creative approach.

The last case I wanted to flag relates to conduct remedies. This week (so it was in 2010 rather than 2009) the Ticketmaster/Live Nation deal was cleared. This had been looked at very, very closely. The resolution raises some interesting issues regarding divestitures, but I found most interesting the fact that one of the elements of the resolution was a ten-year court order preventing Ticketmaster, or the combined entity, from retaliating against venues that choose to sign ticket selling contracts with competitors. Specifically, we don't see a lot of conduct remedies, and that, again, to me was an interesting point.

Just a few quick additional points. There were a couple of gun-jumping/information sharing cases in 2009. The first, Omnicare, was a litigated case where a customer challenged the merger between two insurance companies for alleged gun-jumping and information sharing, and the Court found in favor of the merged parties. They had confidentiality provisions in place in their contract, and the information was shared in a careful enough way, so there was not an issue.

The opposite conclusion was reached in *Smithfield Foods* against Premium Standard Farms; again, that's in 2010. In that case the agency imposed a $900,000 fine for gun-jumping, in a case that involved hog acquisition contracts. I think it is worth reading the materials in that case; essentially the Court said that too much power was ceded to the acquirer before consummation. I think it is a little bit controversial.

I mentioned in the materials and I am not going to talk about it in detail, but there was a private Section 7 challenge to the Pfizer-Wyeth merger. The plaintiff lost but again, it is worth noting there was some private sector litigation. Another development worth a brief note was a failure to file HSR fine, $1.4 million. What's interesting in that case was that it was really a second offense. The chairman of Liberty Media and Discovery Holdings, he failed to file in 2005, and filed a corrected filing in 2008. And then two days later, long before the 30-day waiting period was up, acquired more shares, and that was what he got fined $1.4 million for.

And, a moment on Clayton Section 8. I have to say I have seen my share of those matters, but a lot of people have never dealt with a Clayton 8 issue. This year it was clear that the agency is looking at interlocking directorates, and the Google/Apple is a clear example.

Finally, convergence or divergence. Again, back to the beginning, the first question is whether there is diversion or conversion between old administration and new. It looks like we will see some divergence and more aggressive enforcement today.

Some other areas convergence and divergence. We already talked about the DOJ and FTC—while they appear to share an aggressive approach to merger review, there is clearly divergence on the process or arguably divergence from process. With respect to the standard of review that I mentioned, FTC may be facing a less strict standard for preliminary injunction than DOJ.

Another example of inter-governmental divergence is between DOJ and the Department of Transportation. We have seen a very interesting public spat between Department of Transportation and DOJ with respect to airline alliances applications for antitrust immunity. (DOT has statutory jurisdiction over these applications, but typically consults with DOJ for its view of the competitive implications of the proposed immunity.) DOJ came out with a pretty strong position against granting immunity to the Star Alliance and also came out with serious concerns about the OneWorld Alliance. And the DOT so far hasn't ruled on OneWorld. But on Star Alliance, it ultimately granted immunity; it did require some carveouts, but it offered what I think was a pretty harsh rejection of the DOJ's position.

Finally, conversion or diversion between or among the U.S., the EU and the rest of the world. Oracle/Sun Microsystems could have been more interesting. It ended January 21st. But at one point it looked like it could have been a hint of GE/Honeywell. The U.S. cleared the deal quickly; the EU had an extensive investigation, and there were some similar types of questions about a horizontal merger. Again, they cleared it, so it is less interesting now.

Finally, on the rest of the world, I mention China here. We have had, I think, a broad international convergence on approach to mergers. The International Competition Network's Eighth Annual Conference covered a lot of these issues, shared best practices on information collection and process. But there remain examples of global divergence. The slide notes one example in China under the new anti-monopoly law. The Chinese Ministry of Commerce blocked the acquisition by Coca-Cola of the largest Chinese juice company. This was a conglomerate merger, so the U.S. probably wouldn't have raised an issue. In the EU it could have been challenged but there is a pretty high standard. But in China, the merger authority was concerned that the merger would have given the buyer control over two major juice brands and would have hindered small and medium sized businesses' ability to compete, and therefore blocked the merger. It is therefore worth keeping an eye on the rest of the world. While there is broad global convergence, there clearly are differences in process, enforcement and substantive review. It is important when looking at a merger that may have impacts around the world to make sure you've got local experts who really understand how the local administration will look at that merger.

MS. MAHONEY: Fabulous. This is like speed dating. Interesting. I apologize in that there were quite a number of things in addition that we would loved to have addressed.

Let me take some time to throw it out there for questions to the audience to pose to our panelists. And if you don't have any, I have a few. But I will let you go first.

Wow, it must be early. I have never seen this crew so quiet.

Steve, I wanted to ask you, because we had an impression, I think, that the DOJ was fairly active criminally last year. But it seems that based on the certain number of firsts that occurred this year that actually the enforcement, or at least the successful enforcements, may have seen an uptick. Is that your impression, and if so should we expect the same thing to occur in 2010?

MR. TUGANDER: I think its enforcement has been very aggressive and consistent criminally since 2000 going forward, and even before that. Some of the firsts, such as the 48-month sentence, result from the fact that Congress increased the maximum sentence from three years to ten years, so that was the first time such a sentence was imposed. You had *ex post facto* issues that prevented that from happening earlier.

The largest sentence in Division history also relates to the fact that the Division is bringing multiple charges, by bringing antitrust and other charges in particular cases, and I see that continuing. So I think criminal enforcement is going to remain vigilant going forward for the foreseeable future, and I think the Division is definitely committed to it in the international cartel arena and domestically and pretty much anywhere there is fraud or collusion.

MS. MAHONEY: Staying with you for a minute. On the international side—I am picking up on Suzanne's last point—how much does Department of Justice in the criminal sphere work with your colleagues around the world, recent criminalization in foreign countries as well?

MR. TUGANDER: There's been a significant effort really for the Division to reach out to other nations to come up with criminal programs, and I think they have been very successful doing that. There has really been a lot of work and a lot of convergence with other countries, and they are seeing that criminal antitrust laws are important. And again, I think that's only going to increase in the future.

MS. MAHONEY: All right, to the panel then. Suzanne touched on the arguably different standards that are now facing the Federal Trade Commission and the Department of Justice on preliminary injunctions. Assuming for the moment that there are in fact different standards, what's your impression about whether that is good enforcement policy in the United States, to have different standards for preliminary injunctions for mergers, depending on who wins the clearance?

Suzanne.

MS. WACHSSTOCK: I think it is really a concern. And this is a little bit of a softball. Depending on the industry in which you operate, you can really face a criminal sentence and have a higher or lower likelihood of an extended litigation process depending on which agency takes your matter, so I think it is a concern.

MR. KATZ: I have to say it is also just embarrassing. I have been on the phone with clients from outside the United States in industries where it is not a hundred percent clear which agency would end up reviewing a potential transaction. And I would go on to explain to them what we have just been told about how the standards seem to be different. And they stop me and they just don't understand how that could be, and how I can't even tell them what standard of review the proposed merger is going to be judged under, because I can't be certain whether the FTC or DOJ will take it (even though in many industries one knows in advance), but view it as problematic.

Although to be fair, there are historical reasons why we ended up where we are. But when you sit there and try to respond to someone asking you why that should actually be the case, it is a little bit hard to justify and defend.

SPEAKER FROM AUDIENCE: So I wonder, Elai, would you suggest that Congress ought to reduce the standard for the DOJ? I say that seriously.

MS. MAHONEY: I think DOJ is making efforts on the hill.

SPEAKER FROM AUDIENCE: But isn't that the rational response?

MR. KATZ: Well, I suppose there are two responses. Either raise it for one or lower it for the other, and that's a debate that people could have.

SPEAKER FROM AUDIENCE: But these are the public enforcers after all.

MR. KATZ: Right. I think it is a fair question and a legislative one. But not one I think that should be developed in the way it has been developed recently. I don't think it is a healthy schism. I think even if it is healthy to have separate agencies and different standards of review, there's a place where one should be fairly close.

MS. MAHONEY: I mean as a practical matter, though, hasn't it been different anyway; because Department of Justice typically combines the preliminary injunction, permanent injunction hearing, and then of course you always had the FTC Part 3 administrative process that is supposed to serve as a full fact-finding environment as opposed to the purely preliminary injunction environment.

MR. KATZ: And the FTC can bring an administrative action even if they lose in the federal district court. So it is very different.

MS. MAHONEY: Yes.

MR. PRAGER: I was going to respond to Jay's observation that to the extent that there is any justification for a different or lower standard at the FTC, it is based upon what Stacey was just observing, which is that the FTC has the administrative expertise and the ability to bring an administrative proceeding. And so the concept is that the federal court acts only as a sort of gatekeeper to say, okay, let's maintain the status quo while the FTC goes ahead and does its thing. And that is at a lower level than the normal injunctive standard. Whereas, that justification doesn't seem to even apply, if what you're talking about is the Justice Department going forward in federal court; why should the standard in one type of case be so different than traditional injunctive standards? So I don't know that the Justice Department gets very far if it tries to push that argument.

SPEAKER FROM AUDIENCE: Elai, are you troubled by the fact that, as Bruce and Stacey said, the theory of the lenient standard for the FTC, putting aside some ambiguities in the statutory language of 13(b), is based on the idea that you're just preserving the status quo so the FTC can have this administrative process in Part 3, while at the same time, if you look at the FTC cases in the preliminary injunction phase in the federal district courts, many of them get, as in the CCC case, an 8-day trial; in the Arch Coal case they had a multi-day trial and several other ones had a multi-day trial, and doesn't that raise the question: What are we doing here? We are giving the FTC in essence two bites at the apple with a lenient standard under the first. Whereas, the Justice Department gets one bite at the apple; that's the way we normally do things in our judicial system. Is that really fair? Does it make any sense? Is it a waste of resources? Does it overrate the Part 3 proceeding?

MR. KATZ: Well, first, John, I thought you had a lot of fun litigating these cases. But I agree, and I think one of the reasons that this comes up uniquely here and you can't just import regular injunction law is that mergers are special and unique, and they fall apart if they don't get accomplished relatively quickly. I think that means that the power to enjoin ostensibly temporarily the merger from closing in fact in many cases causes it to be abandoned. I think that's what puts the pressure on things the way they turn out. But it certainly is interesting and challenging, and obviously we have a lot of views.

MS. MAHONEY: So we have the *American Needle* case pending, and we have now read the transcript of the oral argument. The Supreme Court in the last several cases has arguably circumscribed the ability to bring claims. Based on the recent history in the Supreme Court, is anybody willing to throw out an opinion about where the Court is going to go with *American Needle*? Nobody?

MR. KATZ: We can't predict, but I think this case may be different than the ones we have seen before.

SPEAKER FROM AUDIENCE: Wasn't it decided on a motion to dismiss?

MR. KATZ: There was a limited summary judgment. Limited to the *Copperweld* question.

SPEAKER FROM AUDIENCE: But did they have a lot of factual development?

MS. MAHONEY: There was some discovery on that point.

SPEAKER FROM AUDIENCE: That may be a wrap for the Supreme Court to kick it back.

MS. MAHONEY: Well, the panelists have been great. Thank you so much.

And I was remiss initially by not thanking Ben Serotta, who helped me put together the presentation in the final week. So I have to thank him.

MR. MADSEN: Thanks, Stacey. What a great interesting discussion. It was busy year after all and plenty of things to talk about. So thanks to all of you who made that such a terrific presentation.

Next we have our second panel. This is the one on allegedly dominant firms and the developments in the analysis thereof.

Section 2 and the EU, Too: Developments in the Analysis of Dominant Firms

MR. MADSEN: Our second panel, "Section 2 and the EU Too: Developments in the Analysis of Dominant Firms," is led by Steve Edwards. I picked people who needed no introduction so as to keep my task light here this morning.

Steve is a distinguished civil litigator and antitrust practitioner. He's a partner at Hogan & Hartson; he is a former Chair of our Section, past President of the Federal Bar Council, recipient of many honors, and he's going to collect another one tonight when we bestow our Distinguished Service Award upon him. He has one honor that I at least was wholly unaware of until I was scanning his resume for inspiration last night. He is a member of the Iowa Rock & Roll Hall of Fame. So with that, we know we are in great hands, and it is going to be a great presentation, looking at this terrific panel. Thank you.

MR. EDWARDS: Thank you, Steve.

The subtitle of our panel is "Section 2, is it really coming back?" When I graduated from law school, the law in Section 2 cases seemed to be that bigness is badness unless it is thrust upon you. If the defendant had a market share greater than 65 percent and it intended to have that market share, it violated Section 2. As the *Alcoa* case taught, expanding capacity to meet demand was enough to violate Section 2.

Now, armed with the weapons provided by the cases, the Government was very aggressive from an enforcement standpoint. We had *United States v. AT&T* and *United States v. IBM*, suits by the Government against two of the most successful companies in America with mixed results. We had the cereal cases in the 1970s, which was an effort by the FTC to go after the cereal companies for what the FTC called shared monopoly. There was a DOJ case that went off on a similar theory against the television networks. And there was extensive civil litigation, cases like *Aspen*, which suggested that an alleged monopolist had a duty to help its competitors.

In the 1980s, with the Reagan Administration and Bill Baxter, enforcement activity went way down. In the 1990s there was the *Microsoft* case but not much else. And most importantly, bigness no longer seemed to be badness. The courts had created certain narrowly defined rules, like pricing below marginal cost as a litmus test for whether you violated Section 2. In *Trinko* the Supreme Court held that an alleged monopolist did not have a duty to help its competitors. And the Court in *Trinko* also proclaimed that it is okay to charge a monopoly price; in fact, what's the point of being a monopolist if you can't charge a monopoly price?

By the turn of the century there were almost no Section 2 cases. In fact, the administration of George W. Bush brought no Section 2 cases. The Bush Administration also issued a report on Section 2 enforcement in which it cautioned against over-deterrence and provided certain safe harbors.

Now, with the election of President Obama there is a new administration. And my former partner, Christine Varney, has vowed to stir things up as head of the Antitrust Division. In May of last year she gave a speech in which she formally withdrew the Bush Administration's Section 2 report, and she said she liked cases like *Microsoft* and *Aspen*. She promised reinvigorated Section 2 enforcement. But we are now a year into the new administration, and there are no cases. Why is that? Is it because there weren't a lot of good candidates for Section 2 enforcement to begin with? Or will the new administration have to argue for a change in the case law in order to take a more aggressive approach to enforcing Section 2?

To discuss that issue we have a distinguished panel today. We have Steve Houck, who many of you know. He was the lead lawyer for the states in the *Microsoft* case.

We have Doug Richards, who if you do a Westlaw search, his name comes up on practically half of the reported antitrust cases. His most famous case was the *Twombly* case, which he took all the way to the Supreme Court. His firm is also involved in the class actions against Intel.

Next we have Riccardo Celli, who is with O'Melveny & Meyers in Europe, in Brussels; he will give us a little bit of an EU perspective.

We have Ted Snyder, who is the former Dean of the Chicago Business School. Or are you still the dean? I know you're former Dean of the Virginia Business School, about to leave Chicago. You're going to be Dean of the Yale School of Management. The guy obviously can't hold a job.

Then we have Thomas Graf of Cleary Gottlieb, who also practices in Brussels. He's going to give us an EU perspective.

To lead off the discussion we'll start with Steve Houck. The question that we are discussing in this panel is: Are we about to return to a regime in which bigness is badness, or do enforcers and plaintiffs have to do a better job of rooting out wrongdoers? We will start with Steve Houck who is going to talk about the *Microsoft* case and maybe whether he would bring another *Microsoft* case.

MR. HOUCK: Maybe it is the fact that we just passed through the holiday season, but I feel like I am in an antitrust production of Dickens *A Christmas Carol*. IBM is the ghost of Section 2 past; Microsoft is the ghost of Section 2 present, and Intel is the ghost of Section 2 yet to come. In many ways *Intel* is the most interesting and is the latest newest thing. *Microsoft* is still happening, and most of you know a lot about it. So I am going to be relatively brief and exit stage right so these guys can take over.

Steve has asked me essentially to talk about two issues. One is why the case was brought, and then also what the lessons learned from the case were. I am going to try to fit it to some extent in the continuum between IBM to Intel.

Why was the case brought? From my perspective at that time as Chief of the New York State Antitrust Bureau it was pretty easy. It was obviously a very important case for consumers, and as a litigator to me it seemed eminently winnable. Why was it important? It involved a very significant consumer product and one that was used by almost everybody and one that could also be used by the monopolist to control access to the Internet, which was important. Microsoft acted to stifle innovation and to restrict consumer choice. So it seemed a very important case to bring.

I don't want to be accused of understatement here, so I will give you another reason. Quoting the great antitrust theorist, Karl Marx, one of the goals here was to save Section 2 from the ash can of history. What do I mean by that? I mean the IBM case. Many people at that time had thought the IBM case—and the great job Steve and his folks did at Cravath,—essentially killed forever Section 2 enforcement. IBM was a very long tedious case; it consumed enormous government resources and ended in a whimper. Nothing much happened. Many people thought it was just impossible to bring a Section 2 case in a reasonable amount of time, particularly applying it to high-tech industries where everybody thought events moved very quickly. So one of the real challenges was to bring a Section 2 case and do it in a way that you could bring it to conclusion fairly quickly and apply it to rapidly moving high-tech industries.

A lot of people asked me why the states were involved. Well, the states got involved for two main reasons I would say. One is because at the time we started investigating, it wasn't clear the DOJ was going to do anything. And then also we wanted to be involved in the remedies aspect of the case, which turned out to be a quite prescient decision, because as many of you know, the states now alone enforce most of the judgment. DOJ not only let a big part of their judgment expire, but they filed an amicus motion supporting Microsoft's effort to keep us from extending the judgment. But we prevailed with the judge; it continues on. We enforce it, and we even talk directly these days with folks in the EC, which is pretty unusual.

Why was it winnable? Well, it is a monopoly maintenance case, and the issues were market power and anticompetitive acts. The market power was pretty easy. It wasn't just 70 percent; it was over 90 percent, and it had been persistent over decades. And there were all sorts of potential anticompetitive acts, including contractual tying, technological tying, exclusive contracts, efforts to divide markets and very blatant threats against Microsoft's partners and rivals. So it looked like a pretty good case.

What did we accomplish, and how did we do? I don't want to claim too much credit here, but it made antitrust cool again. What do I mean by that? There was a lot of attention paid to the case. It captured the public imagination, and more importantly, it sent a signal to companies that Section 2 would be enforced. I think part of the problem before was that a lot of companies came to believe—since there hadn't been much Section 2 enforcement and the IBM case failed so miserably—that they wouldn't have to pay too much attention to their conduct, even if they had a dominant position. I think they have learned that isn't true.

In terms of speed and efficiency, I thought we did a pretty good job. The trial, from filing of the complaint to the end of trial, was about two years, which is probably pretty much as fast as you can do something like this. A lot of credit goes to the federal judge. And we were talking at dinner last night, one distinctive difference between our system and European system is we have a trial with witnesses. So to some degree they have an advantage in speed. But I would say the trial was very, very important. Sometimes we talk too much about the law, but a very important reason the case wound up the way it did is the judge's assessment of the credibility of the witnesses.

I think we were less successful at the appellate level. It took a year to get an appellate decision, and then it got remanded. But that encouraged enforcement in the EC for two different reasons. One is that we were successful on liability, and so the EC saw that could be done, and they had the advantage of being able to use our case as a template. Another reason was I think they were very dissatisfied with the remedy we got here in the U.S., which encouraged them to go ahead. So I think we can take some credit for reviving enforcement in EC. The cases also led to private actions in which Microsoft wound up paying billions of dollars.

What about the specific remedies? In our case, my clients thought they were weak. I think a lot of people thought they were weak, but they have accomplished some things. They prevented Microsoft from recommitting acts that they committed before. I think it has opened up Microsoft to being more accepting of interoperability. It is very hard to assess, but there is a woman named MaryJo Foley, who is a very close Microsoft watcher; she writes a blog, and she wrote a book called *Microsoft 2.0* a couple years ago. She wrote that in her opinion the case on the litigation had a bigger impact on Microsoft than the Internet or anything else. Her point is, if the case hadn't happened, just think of all the other things Microsoft would have done to maintain its monopoly power.

So if the case was so successful, why haven't there been more Section 2 actions, as Steve said? I think one main reason was the 2000 election, where we brought into office antitrust enforcers who did not think too much of Section 2. I think the reason for that is a couple of assumptions they had, which I think are factually erroneous. One is that markets always self correct, and the other is that monopoly profits are essential to spur innovation. While there is some truth in each of those, I think they are considerably exaggerated. Markets are not always self correcting. Indeed, in cases like Microsoft the whole purpose of the anticompetitive act is to prevent the market from self correcting. It is to maintain the monopoly.

It is also true that while technology may change rapidly, market shares don't necessarily do that. Microsoft has had a 90 percent market share in the relevant product market, PC operating systems, probably for 25, 30 years now. So it isn't necessarily true that the markets are self correcting, particularly where there is anticompetitive activity.

Monopoly profits, how much is enough? Enormous amounts of money are earned, particularly in software where marginal costs of production are close to zero. One of my favorite quotes from Judge Jackson's decision is his final finding of fact 412; this goes to innovation. And I will just quote from it; he says: "Most harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential to innovate in the computer industry." He goes on to say: "Microsoft's past success in hurting such companies and stifling innovation deters investment in technologies and businesses that exhibit the potential to threaten Microsoft." He's talking here about Netscape, IBM, Compaq and Intel. "The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest." So while there may be some innovation, it is skewed innovation and other innovation is repressed.

Looking forward. My prediction is the new administration will not be so ideologically bound by presumptions like these. They will be bringing more Section 2 cases, and they will take a harder look at the facts, and you'll find more activity in this area going forward.

MR. EDWARDS: Let me just ask you, Steve, why didn't you bring anymore Section 2 cases when you were in charge?

MR. HOUCK: Surely you jest.

Well, we had about 20 lawyers in our office, and as you know—how many lawyers did you have working on the IBM case?

MR. EDWARDS: So are you saying you were resource constrained?

MR. HOUCK: Sure. And we had other cases as well.

MR. EDWARDS: Are you saying there are other Microsofts out there waiting to be sued, and you just didn't have time to sue them?

MR. HOUCK: No, I am not saying that. We did not really take a hard look at other cases. But the reality is that these cases did consume a lot of resources. And particularly for a state like New York, we have one of the bigger antitrust offices, and we had maybe 20 lawyers. So I had a significant component of my office working on this and other cases we were bringing. There is just a limit to what you can do.

MR. EDWARDS: Do you think the new administration is going to have to push for a change in the case law if it is really going to expand enforcement under Section 2?

MR. HOUCK: I don't think so. If you read Christine Varney's comments, as she said, she likes Section 2 cases. As you know, there are certain decisions that make those cases difficult. Obviously she's going to have to live with those decisions, but I think she may end up bringing some cases that may push the envelope.

Realistically the federal district court level certainly is full of judges that President Bush appointed, so I think it is going to be difficult, at least early on, pushing the envelope in terms of the law.

MR. EDWARDS: Why do you think the new administration hasn't brought any cases yet?

MR. HOUCK: Well, it is relatively new. You have to study these cases; they are factually complicated. I am confident we'll see some. Exactly when, I can't tell you that. I know they are looking at a number of companies with a lot of market power, and I'd be surprised if they did not eventually bring a case.

MR. EDWARDS: Why don't we move to at least one new case that has been brought by the FTC, and that's the *Intel* case. Doug Richards is going to talk about the *Intel* case, not only the FTC case but the New York Attorney General's case and the private litigation as well. Doug.

MR. RICHARDS: Thanks, Steve.

I will preface my remarks by saying that the views I am expressing are my own, not necessarily those of Cohen Milstein or any of its clients.

I don't know that the *Intel* case has yet made antitrust cool again, the way the *Microsoft* case actually did. But we really have to keep in mind that in this country the Government action has really only just recently begun, and I would expect that there is going to be an awful lot more controversy in the future about the *Intel* case. So understanding what the case is basically about will be very helpful to everyone as they follow that controversy unfolding.

There is a lot of confusion in the public about what the case is about. A lot of people think it is about bundling. If you approach the case thinking of it that way, you'll never understand it. What I am going to try and do is boil it down to something simpler, that is really the core of the case. There are actually several cases. There is the AMD private case; there is the case in the EC; the Federal Trade Commission case; the New York AG case; and there are the class action cases. They are all different. Every one of them has some qualities that are different from the other ones. But they all have a common core, which boils down to something pretty simple, which is something that is referred to sometimes as loyalty discounts and other times as first dollar discounts.

Now what does that mean, what is a loyalty discount, what is a first dollar discount? The loyalty aspect discount stems from the fact that it is tied in some way to exclusivity of that supplier's product. For example, in this case there is a loyalty discount applied to Intel's X86 central processing units, or CPUs. The idea is that in one way or another, and there are lots of different ways that this has been done, but in various ways all of these discounts were tied to exclusivity of use of Intel chips rather than AMD chips.

And then the other aspect is the first dollar discount, which is the discount is applicable to all of the product purchased, not just the product purchased over the threshold limit to the discount case. That's a little bit more of a technical way of describing these kinds of discounts, but it is an element in the analysis.

Now, first, I think to wrap your mind around the case and understand how it is controversial and some of the more interesting legal issues about it, you really need to look at the law applicable to loyalty discounts and first dollar discounts. The Supreme Court has never addressed these issues in a case. There has been no case in the Supreme Court that has really dealt with loyalty discounts and first dollar discounts.

To echo some comments made earlier today by Elai Katz, if you look at the Bush Administration's Section 2 report, there is still a very worthwhile discussion in that report of what the different views are with regard to what the law should be on these loyalty discounts and first dollar discounts. Putting aside the conclusion, the tentative conclusion that the DOJ reached in that withdrawn report, there's really a very good and very thorough analysis of what these views are. To simplify them, they boil down really to two different views: One view is that this is a form of exclusive dealing and should be analyzed as exclusive dealing. The rule of reason should apply. Certainly no per se rule, but you should just apply rule of reason. It is an exclusive form. It is a type of discount calculated to achieve exclusivity, and you should therefore apply exclusive dealing analysis to it.

The other view, which got traction with the Bush Administration DOJ, as reflected in the report, is that it is too difficult under the rule of reason to distinguish discounts of this kind that are anticompetitive from discounts of this kind that are procompetitive. In light of the difficulty of making that determination and the importance of not chilling pricing behavior, discounting behavior, it is more appropriate to basically adopt a certain hands-off rule that says the only way we'll scrutinize these discounts is under a below-cost predatory pricing type of approach. We will not view this as exclusive dealing.

MR. EDWARDS: Let me interrupt you for a second. I take it the discounts that we are talking about in the *Intel* case are not below-cost discounts.

MR. RICHARDS: There are some allegations of some below-cost discounts, but for the most part below cost is not the thrust of the allegations. The thrust of the allegations is the tying them to exclusivity. So I would say it would be an overstatement to say there are no allegations in there that there were ever below-cost discounts. But that's not what the case is about. The case does not rest upon the assertion that these were below costs.

MR. EDWARDS: Well, does the exclusivity have to be explicit? What if it is sort of a de facto exclusivity, that the discounts are so good that certain OEMs are just going to buy from Intel? Is Intel home free under those circumstances?

MR. RICHARDS: If you look at the single firm conduct report, you'll find many, many commentators that say you have to look at whether it is on a de facto level tied to exclusivity. So it is not that you have to find in black and white in ink, black and white on paper, an agreement that it is conditioned on exclusivity. You just have to find that that was in fact the way it was working and the way it was structured.

In this case there's just an overwhelming body of evidence, I would submit, clearly indicating that that's the way it was perceived; that is the way it was intended, which causes a lot of people to say it is actually kind of a mundane case, because the evidence seems pretty clear-cut. And a lot of people don't recognize that there is that bit of tension in the law about what the standards should be that apply to this. I think it is important to recognize that difference, because I think it is really illuminating of Intel's strategy in the case. I think what Intel is really trying to do is tap into the line of thought that says there is too much danger in false positives here; you really have to stand back, and you should only analyze these things under a sort of predatory pricing below-cost approach. If they can ultimately succeed in the courts in getting someone to take that kind of approach to this case, then they have a fighting chance.

So how do they do that? They emphasize that it is about pricing. The case is about pricing. It is sort of don't look at that man behind the curtain; don't look at the exclusivity. Let's look at every other conceivable dimension and talk about those, and let's not really talk about exclusivity. So they emphasize pricing, and they try to analogize it to ordinary volume discounts. They argue that any volume discount has conditionality, because it is implicit in the volume discount that you don't get the discount unless you buy the volume. Well, that's fine. But it is not about conditionality; it is about conditioning on exclusivity, which is just a different thing that they really don't talk about very much. They point to a lot of trends in the industry; the fact that prices have come down during the relevant period of time; the fact that AMD's market share has gone up during the relevant period of time. They say, well, that's all not indicative of any real effect.

MR. EDWARDS: Well, let's pause on that for a moment, because isn't that a very telling fact? If AMD's market share is going up while this is going on, doesn't that suggest that it is not so exclusive that AMD is being foreclosed?

MR. RICHARDS: I don't think it does. Because this is a perfect example of a marketplace involving rapid innovation where you would expect under any circumstances to see prices going down. Really, the question is what would have happened in the absence of this conduct, and the fact that you have a very dynamic market and the market makes very different kinds of changes doesn't tell you very much about what the changes would have looked like had they not engaged in this kind of conduct.

But it is true that Intel, by pointing to these kinds of dynamic aspects of this industry, has, I would say, a fighting chance of not so much persuading the court that these discounts were not intended to lead to exclusivity, but more just leaving the court uncertain; leaving the court thinking that it is not a clear case. And if they can get a court to that point, then in comes all the rhetoric about false positives and the danger of getting it wrong. And then they have the possibility of the Section 2 DOJ report analysis of getting a court to say, well, the relevant analysis here and the only analysis that applies to the legality here is below-cost pricing, in which case there would be a real problem with the case.

Now, another aspect of that is I think a lot of the FTC's strategy in its complaint is designed to blunt the risk that the case could go into that zone of false positive discussion and uncertainty. First, they brought their case administratively; that way the case is first being heard by an expert agency; the people who are making the fact finding are considered to be the experts, and that might blunt the dialogue and rhetoric about false positives and the danger of false positives.

Second, they bring the case under Section 5 of the FTC Act. There will be an appeal to the courts, but to the extent that their decision rests on Section 5 of the FTC Act, there should be Chevron deference given to the FTC's findings, which could help them tremendously in defending ultimately what they decide to do on appeal.

Then the other thing that they have done is they have fast-tracked their case, saying they are going to bring it to trial within nine months, which is very aggressive, especially in light of the some of the additional theories of that case. And I think what we are going to see is that's going to put them out in front of all the other cases, and the FTC's case is going to be the one that everyone sort of hangs back and watches to see how things ultimately go.

So you asked at the outset whether more aggressive enforcement of Section 2 will require changes in the law. It will require a change in the law, but it will be very subtle. The Bush Administration was concerned with false positives. There was a presumption in favor of the defendant, and the below-cost pricing standard provided sort of a safe harbor. In the *Intel* case, the presumption is more in favor of the plaintiff—or more importantly, the ultimate consumer—and there is a greater willingness to consider all of the facts, including the degree of foreclosure, under the rule of reason.

That brings us to some of differences between the cases. Because that's the core of all of the cases, but they still have radical differences, and there is sort of a range on the spectrum. The EC's approach was really to focus on loyalty discounts pretty much alone. That made for a clean case, a very strong case, a very powerful factual case without a lot of confusion. The New York AG has modified that, I think, a little bit in that the AG emphasizes more of these various threats that were made, not just the discounting but also some kind of threats, disengaged from joint ventures and from common projects with their customers and things like that. But then at the far end of the spectrum you get the FTC case, which has thrown in a kind of kitchen sink type of monopolistic conduct. You can almost take the Section 2 report of DOJ and compare it to the FTC complaint and find a counterpart in the factual allegations of the complaint to every monopolization theory discussed in the Section 2 report. There are deceptive conduct allegations, somewhat analogous to the FUD, or fear, uncertainty and doubt, aspect of the *Microsoft* case. There are standard-setting allegations analogous to *Rambus* and Unical cases. And there is an entirely additional market that is alleged to being monopolized.

MR. EDWARDS: So let me just interrupt you, Doug, because we are going to have to wrap up on this topic. But I just want to know, assuming the FTC is successful in Intel, and I am advising my client, if I advise my client, "Don't let your people write stupid e-mails, don't use the exclusivity word, but you can lower your prices to eliminate your competitors so long as your discounts are still above cost," am I okay?

MR. RICHARDS: I think whether it is documented in an e-mail or reflected in a written agreement or regardless of how it is done, if someone takes one of these first dollar discount structures and applies it in a way that is calculated to freeze out the competitor, I think you will be in rule of reason land and that may be investigated, analyzed as exclusivity. So you better be careful.

MR. EDWARDS: But aren't all discounts calculated to freeze out a competitor? That's why you give a discount.

MR. RICHARDS: No, when you say freeze out, it means kind of largely eliminate them from the market. If it makes a difference in the volume of sales, of course that is an incremental sale, but it is not freezing them out.

What clearly was going on in this case was targeting the actual amounts of sales by the customers and structuring the discounts to require that the customer buy all or nearly all of its chips from Intel. So the entire structure was calculated around exclusivity, so it is tied to exclusivity in that way.

MR. EDWARDS: We will probably debate this question a little bit more, but why don't we turn now to Ted Snyder, who is an economist. We all know that Carl Shapiro has joined the Administration as the Chief Economist of the Antitrust Division, and he will probably be the architect of any Section 2 litigation. So Ted is going to tell us what Carl Shapiro is really thinking.

MR. SNYDER: Thank you.

And my views do not reflect the views of my colleagues at the University of Chicago nor my future colleagues at Yale.

I have a couple of initial observations: I think it is quite unprecedented that the two chief economists at the agencies, Carl Shapiro and Joe Farrell, are such close colleagues and they have done so much work together. So the question "What does Carl Shapiro think?" is highly related to "What does Joe Farrell think?" And the answers are highly correlated. Second, from their joint work it is evident that they are very careful economists, and they do a lot of tailored theoretical work in context, and they are also extremely empirical in their work.

I have assessed what Carl said in his writing and in his testimony. So taking his CV broadly defined and trying to answer the question what does he think and what are the ramifications for Section 2, I have five main points. First, there are areas of continuity, and this picks up on some of the issues I identified at the outset concerning *Trinko* and predation. Second, there are areas where I would characterize his thinking as he would like to put the thumb on the scale in favor of certain types of enforcement actions. Third, when you actually look at his writing and get into the specific areas that are complicated for economic analysis, he would favor what I would term an economic rule of reason analysis without many bright-line types of guidance. His language is almost judge-like in the way he talks and opens up a lot of areas of inquiry. Fourth, and related to one of the comments made earlier, Carl has made it clear that bad economic times don't constitute a rationale for lax economic enforcement. Fifth, when it comes to the remedies for Section 2, he has staked out a position (not with a lot of data, because there haven't been a lot of cases) that the remedy should be forward-looking. So rather than try to fix the past, focus on the path, the competitive path going forward.

I am going to just quickly go through these points, starting with the areas of continuity.

Market definition: There is no indication that he thinks there is a need for a new approach to market definition, even when it comes to innovative firms. He states "different standards or benchmarks for market definition or market power for innovative industries are neither necessary nor desirable." [Carl Shapiro, "Antitrust, Innovation, and Public Policy," Testimony before the Antitrust Modernization Commission, November 8, 2005, p.6.]

On above-cost predation theories, he says, "they should continue to be viewed with skepticism." [William E. Kovacic & Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking," *Journal of Economic Perspectives*, Winter 2000, p. 55.] I don't know if you would say that he provides a complete protected safe harbor; you can draw your own conclusion from the following:

> Despite the theoretical possibility of above-cost predatory pricing, in my opinion it makes good sense to require plaintiffs in predatory pricing cases to show that prices are below cost. The safe harbor for above-cost pricing provides valuable clarity to the business community and reduces the number of false positives which would otherwise discourage pro-competitive discounting. [Carl Shapiro, "Exclusionary Conduct," Testimony before the Antitrust Modernization Commission, September 29, 2005, p. 18.]

He even goes so far as to talk about providing some protection for below-cost pricing in the context of network industries. So he goes pretty far in that direction.

Another continuity: Carl says that there is a strong presumption that discounting of single products is okay. And unconditional refusals to deal are okay even by dominant firms. He states:

> I am dubious that antitrust law can effectively and helpfully control vertical unconditional refusals to deal by dominant firms. Imposing a duty to deal in this situation would effectively overrule a firm's decision to serve its customers by using a strategy of vertical integration. As explained, the benefits of antitrust intervention in this area are unclear, and

> the potential erosion of incentives to engage in pro-competitive risk taking and innovation is very real. For all these reasons, I favor an approach whereby vertical unconditional refusals to deal never trigger antitrust liability. [Carl Shapiro, "Exclusionary Conduct," Testimony before the Antitrust Modernization Commission, September 29, 2005, pp. 12–13.]

However, he qualifies his point elsewhere. "My main arguments against imposing antitrust liability in case of vertical unconditional refusal to deal are significantly weaker when installed base opportunism is involved." [Carl Shapiro, "Exclusionary Conduct," Testimony before the Antitrust Modernization Commission, September 29, 2005, p. 16.]

This will be my segue into the second point, which is that he has identified areas where I would say that his thumb would be on the scale in favor of certain types of enforcement actions. And clearly related to the earlier discussion, he is concerned about exclusionary tactics by dominant firms and innovative industries based on the belief that innovative gains often are realized by smaller firms that leapfrog dominant firms:

> Yes, innovation is king and true, firms rarely obtain market dominance without having been innovators at some point in time. But it does not follow that antitrust laws limiting the returns to the dominant firms are undesirable. Furthermore, major innovations often come from lean and hungry firms introducing disruptive technologies, hoping to topple current leaders, rather than from dominant incumbents, who profit greatly from the status quo. So to promote technological progress, we must prevent dominant firms from abusing their power to hold back smaller, innovative rivals who would overtake them. [Carl Shapiro, "Antitrust, Innovation, and Intellectual Property," Testimony before the Antitrust Modernization Commission, November 8, 2005, p. 3.]

MR. EDWARDS: So at this point, Ted, I can't resist a question. What do you think Carl would do with the *Intel* case; would he support the FTC's theory?

MR. SNYDER: I would be surprised if, again, I think it is unprecedented that these two guys are such close colleagues, and so it is hard to believe—I have no basis for saying it, but it is hard to believe that Joe and Carl are not talking about these issues. And when you think about the graphics component of the *Intel* complaint, which is different from the EU complaint, that emphasis on the emerging competition and functionality between GPUs and CPUs, that would be the kind of thing that you could imagine Carl talking to Joe about and Joe talking to Carl about.

Another area where the thumb would be on the scale, antitrust authorities should be wary of market power obtained through deception tactics involving patents, strategic postponement of new technologies and the potential harm done in the context of cooperative standard-setting efforts. And Carl Shapiro's toughest comment on this concerns the FTC's *Rambus* decision:

> At least in cases involving conduct that is clearly misleading or deceptive, we see more danger in too lax rather than too stringent remedy. Because patent holders have an excellent recourse if courts generally enforce too stringent remedies, they can refrain from misleading standard-setting organization members. In this regard it is distressing that to support its reasoning on remedy, the FTC resolved in *Rambus*'s favor the uncertainty about whether *Rambus*'s conduct caused the Joint Electron Device Engineering Council to adopt the particular standard where causation was established. [Joseph Farrell, John Hayes, Carl Shapiro and Theresa Sullivan, "Standard Setting, Patents and Hold-Up," Antitrust Law Journal, vol. 74, no. 3, 2007, p. 660.]

The basic point here is that Shapiro is interested in how market power is obtained. And he's trying to make a distinction between market power being obtained from innovation and market power being obtained by deception driven holdup, after one has gained position of market power through innovation.

Let me turn to the third point and just give you a sense of the economic rule of reason analysis that Shapiro, and I would say Farrell also, really liked—this kind of detailed, close to the facts, tailored theory approach. Regarding tying, bundling and exclusion—his words are so striking—he states:

> I believe that significant changes by a dominant firm in the terms on which it will deal with downstream rivals, suppliers of components or interconnecting rivals, should not be covered by a safe harbor. I consider this area a difficult one in which a fact-based inquiry is necessary, since there is no clear way to define a safe harbor that would not generate many false negatives, and since there are no simple rules known to be highly accurate. However, establishing antitrust liability should require a detailed, disciplined and fact-based inquiry, taking into account the factors I have indicated

> above. I do not favor a presumption that such changes are anticompetitive; rather, I favor a neutral inquiry to determine why the dominant firm found it profitable to significantly change its policies, when it did it as a way of determining whether the change is a sword that can be expected to generally benefit or harm consumers in the long run. [Carl Shapiro, "Antitrust, Innovation, and Public Policy," Testimony before the Antitrust Modernization Commission, November 8, 2005, p.10.]

That is ambitious, if nothing else. On related technological and physical tie-ins, he says, "antitrust can potentially play a major role in defining the limits on the ability of the dominant firm to block compatibility or extend its power by controlling interfaces." [Michael L. Katz and Carl Shapiro, "Antitrust in Software Markets," in Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace, Jeffrey A. Eisenbach and Thomas M. Lenards, eds. 1999, pp. 29-81.]

Regarding the fourth point about bad economic times, I'll be brief. Shapiro says:

> Antitrust enforcement is important during periods of economic distress. History suggests that reducing antitrust enforcement does not promote economic recovery. Again, small newer firms may be particularly vulnerable to exclusionary tactics during periods of economic distress. [Carl Shapiro, "Competition Policy in Distressed Industries," remarks prepared for ABA Antitrust Symposium: Competition as Public Policy, May 13, 2009, p.23.]

I looked for but did not find in his writings particular reference to the rationale, whether it's because of weaker market demand and tighter credit markets, but I think that's what he has in mind.

Lastly, on the remedies issue, again, there's not a lot of data, and of course he was an expert in the Microsoft litigation. But he has emphasized that in Section 2 settings, remedies should not focus on fixing the past:

> My analysis points to an additional challenge to the law, the need to fashion forward-looking remedies in cases where liability has been found. As explained, the *Microsoft* case filed primarily because it looked backward, that at the technological threats facing windows in mid-1990s when Microsoft's violations occurred, and not forward to the technological threats facing Windows five to ten years later. The key issue is, restoring competition in a monopoly maintenance case where the illegally stifled threat came from nascent technology. Restoring competition requires affirmative steps to lower the barriers to entry. Merely prohibiting the illegal tactics already used would not be sufficient. [Carl Shapiro, "Microsoft: A Remedial Failure," Antitrust Law Journal, Vol. 75 (3), 2009, pp. 743-744.]

Wrapping up, I would say that in addition to saying fashioning remedies in such settings is a challenge for the law and, I would say, for economists. Trying to figure out why did a particular firm do something, what is going to unfold going forward, and what are the effects going to be on competition is very tough work. And if you look back on the *Microsoft* case, and I don't claim to be an expert on that case, the emphasis on middleware platform and Java and so forth, in hindsight, one can ask, was that as important a factor competitively as maybe what people thought? And what he thought at the time I don't know. As an economist I rarely try to predict the future.

MR. EDWARDS: So Ted, I am wondering if this is a good time to segue into our other speakers. I don't mean to cut you off.

MR. SNYDER: I am basically done. Just one closing comment. I think that the most striking thing for me is—and this reflects maybe a confidence of Carl, that he's willing to look at both static and dynamic efficiency. And one of the basic insights from economics is that Riccardo and I are both thinking about dynamic investments; there's no way to have both of our incentives maximized. It is just impossible. So it takes a very smart person to figure out how do you maximize joint incentives, but he's willing to take that on.

MR. EDWARDS: Do you think we'll see any radical new economic theory coming out of the Obama-Varney Administration?

MR. SNYDER: No. I think based on Farrell and Shapiro, my reading is they are not going to push a new doctrine. I don't think that's it. I think they are going to push these kinds of fact-based inquiries within gray areas. I don't see them arguing a new theory like shared monopoly that was referred to before.

MR. EDWARDS: Why don't we turn to our colleagues from the EU. There was a discussion a moment ago about the *Microsoft* case and how one of the problems was the remedy was backward looking, not forward looking.

Thomas Graf and Riccardo Celli are going to talk about the *Microsoft* case and the *Intel* case in the EU or the European Commission.

Why don't we start out by posing the question: How did the *Microsoft* case in the EU differ from the *Microsoft* case here?

MR. GRAF: Good morning. Before I answer the question, in the interests of disclosure, I should say that I and my firm represented a number of complainants against Microsoft in the European proceedings, but I am here speaking just on my personal behalf.

So to address the question of Steve, I think one first difference to note is that in Europe there were a larger number of *Microsoft* cases than in the U.S. You had in 2004 the first *Microsoft* decision of the Commission, and that was really two separate cases. One concerned tying of Windows Media Player to Windows, and the other concerned the refusal of disclosing interoperability information for work group servers. That decision was then confirmed by the European court in 2007. On the strength of that precedent, the Commission brought new investigations against Microsoft at the end of 2007, one concerning the tying of Internet Explorer to Windows, and the other concerning other refusals of interoperability information in other technology areas, such as for example, Office. Those cases were settled at the end of last year.

Now, if you look at these cases I think the difference can be explained in my view more by differences in enforcement policy rather than differences in substantive analysis. If you look first at the tying side, it is true that the court of appeals annulled the tying part of the U.S. case, but it did not hold that there was no infringement. Instead it remanded the case back for further review. And the reason why it annulled the original judgment is essentially because the district court had relied on the per se rule. The U.S. court of appeals said what was appropriate here was a rule of reason analysis, where U.S. authorities should have analyzed in more detail the effects of the conduct and the possible justifications. And that's exactly what the European Commission did in its case.

As Steve said, they sought guidance from the U.S. precedents, and they did engage in this kind of effects analysis. And to come back to the question that Steve asked a few moments ago, how do you go about analyzing effects, essentially the Commission relied on two main elements. One was an analysis of the quality of the products at issue. There was strong evidence that the Windows Media Player was a qualitatively inferior product compared to Real Networks Media Player. Indeed, for a while Microsoft had in fact shipped the Real Networks Media Player, until they realized it was developing into a competitive threat.

The other element was the evolution of market shares. And there you had a very clear picture that before Microsoft tied Real Networks Media Player, the shares of the Real Networks Media Player were going up and up. And virtually the moment that Microsoft started the tie, these shares went down. So it was quite an intuitive picture. In the Internet browser case the picture was more complex. You saw the same kind of pattern where after the tie shares of Netscape fell, and eventually Netscape was forced to quit the market. But later on, new browsers emerged and started gaining share. And Microsoft said, well look, there is no restriction here. Firefox has impressive shares in Europe particularly, so it argued that there is no restriction on competition. But if you go a little bit deeper and you combine this with the quality analysis, you saw that once Netscape left the market, Microsoft in fact stopped developing Internet Explorer. For five years there was virtually no development in Internet Explorer. In the IT sector that's really a long period. And they only started to innovate again once they felt the competition growing from Firefox. And still, despite its lack of innovation and despite the quality issues that Internet Explorer had, they still commanded by far the majority of the market share. So there I think you have to engage in this kind of analysis of asking yourself, well, how would the market have looked if competition would have taken place on an equal, level playing field? And the answer was fairly clear, that if you don't innovate for five years, and everyone is saying your browser is qualitatively inferior and has more security problems, you probably would not command the lion's share in the market.

MR. EDWARDS: So Thomas, let me just stop you there for a moment. The notion of a court deciding an antitrust case based on its perception of the quality of the products involved sounds very different from what would happen here in the U.S. Is that a fair observation?

MR. GRAF: Well, it was not the perception of the Commission about the quality. In fact, in the media player case, most of the quality evidence actually came from Microsoft. They submitted a lot of industry analyst reports to prove another point, and we looked at these analyst reports and we made our own analysis. And you saw all these analyses rating Windows Media Player significantly inferior to the Real Networks Media Player. In addition, you have the conduct of OEMs. The OEMs were the key element in the Commission's theory because they serve as a gateway. They assemble the whole product, computer and operating system, and they preload application software; that was the important thing. And these OEMs were preloading the Real Networks Media Player before the tie. And after the tie, of course, they did not have any choice because the Windows Media Player was already preloaded. So the objective evidence from analysts and from market behavior pointed in a very clear direction.

MR. HOUCK: Actually, in the case here as well there was evidence of quality differences. The rapid drop in Netscape's market share, plaintiffs were saying it was due to anticompetitive acts, and Microsoft was putting in evidence saying theirs is better, that's why people were flocking towards it.

MR. GRAF: This is part of the consumer harm theory. How are consumers harmed? They are harmed because they get stuck with inferior products, and because the OEMs cannot serve their normal gateway role of selecting software. In a multi-source market, they would presumably select what they think is the best way or what would satisfy consumer demand. These kinds of processes get distorted through tying.

MR. EDWARDS: Well, just to sort of cut to the chase here, do you think the EC is ahead of the U.S., behind the U.S. or in parity with the U.S. in terms of its antitrust enforcement, as illustrated by the *Microsoft* case?

MR. GRAF: I think on the tying side they are fairly parallel.

I think it is quite consistent with the U.S. court of appeals case. Of course, the other component of the *Microsoft* case is the refusal to deal side, which I think in terms of the analysis was perhaps the more controversial part. But it is interesting to know the consent decree provides for quite similar relief for the disclosure of server interoperability information, interestingly, without a finding of liability. But the concern is a similar one, one about leveraging, because as a server operating system supplier, you are dependent on being able to interoperate with Microsoft's monopoly PC operating system.

In Europe the Commission actually went through the whole exercise of conducting a very detailed infringement analysis based on collection of a lot of facts and understanding of how customers view interoperability, what role it plays, what's the nature of these technologies, what's the incentives in play, how would a disclosure impact on Microsoft's incentives to innovate. So there was a very detailed analysis, but perhaps most interestingly and what not many people are aware of, the Commission also drew a very clear line in terms of what needs to be disclosed. Because originally the complainant in this case, Sun Microsystems, had really two demands for Microsoft. One was disclosure of interoperability information, and the other one was that they wanted to recreate the Microsoft APIs on their operating system, on Solaris. And the objective was that they could then run programs written for the Windows operating system on Solaris operating system without needing to adjust these programs. Now, this was a very interesting theory, because it would have gone directly to the barrier to entry which protects the Microsoft monopoly. This is a barrier that results from the fact that a lot of programs get written to the Windows APIs, and therefore, other operating systems become less attractive. But the commission realized that if they would force Microsoft to allow this kind of recreation of the Windows APIs on other operating systems, then they would really expropriate the essence of what the Microsoft platform is about. They would take away the competitive elements of the platform, and that would then be true expropriation, and that would go too far.

So actually, they had this in the first statement of objections, which is where the company gets an opportunity to defend itself, they have this saying Microsoft needs to disclose this too; Microsoft defended itself against this demand, and they dropped this part of the case. They limited themselves to the interoperability part of the case where they found that the kinds of interoperability information that Microsoft was required to disclose, would not amount to this kind of expropriation of the competitive essence of the product. This interoperability information concerned technologies which were at the periphery of the product, at the edge of the product. And where in fact, if you are a rational operating system manufacturer, without a monopoly where you can play strategic games, you would actually have an interest in disclosing, because it increases the attractiveness of your product. Because the more other complementary products that can interoperate with you, the more attractive your platform gets. So it was actually rational for Microsoft to disclose these things, except for its monopoly, which enabled it to play leveraging strategies.

MR. EDWARDS: Well, leaving aside for a moment the point that the EC is willing to draw the line on an obligation to deal someplace, do you think it is nevertheless the case that the EC would recognize an obligation of a dominant firm to deal in a situation where a U.S. court would not?

MR. GRAF: That's a difficult question, because you also need to look into the heads of the U.S. courts. One thing to notice is that in Europe there have been really only two cases where the Commission and the courts recognized a duty to deal in IP cases. Both very exceptional, such as the *Microsoft* case, and there was another case involving a TV guide publisher.

But in the *Microsoft* case, if you look at the consent decree, it may have been if these cases would have been brought in the U.S., the courts would have reached the same conclusions.

Now of course you have the *Trinko* judgment of the U.S. Supreme Court, and the question is how do you interpret that? One way to read this is that really the focus was this was a regulated industry; and therefore, it made no sense to impose a duty to deal. I think that played an important role. Another point is there was an emphasis on short run profit sacrifice, which was also emphasized in the *Aspen* case. And if you look at the *Microsoft* case, you could present this as a kind of profit sacrifice case for the reasons that it would have been rational for a non-dominant company to disclose this information because it is good for its products.

So I'm not sure the doctrine in the EU is that different from the US, but the Commission may be willing to engage in more of a fact based analysis, which is where US law may be evolving as demonstrated by the *Intel* case.

MR. EDWARDS: Let's turn to Riccardo and talk a little about the *Intel* case in the EU. Is it fair to say, Riccardo, that the EC's decision in the *Intel* case in Europe could be viewed as bigness is badness, unless you can demonstrate that it was thrust upon you?

MR. CELLI: The answer is no. But let me first say in the interest of disclosure that I represented AMD in the case, so my comments will be completely unbiased and objective.

No, I don't think so. Both in the *Microsoft* case and the *Intel* case you can clearly see that the Commission does not criticize the fact that you are a dominant company. What the Commission is looking at is whether the action and the behavior of the dominant company are infringing the law. And if you are a dominant company and you are acting abusively, you need to face the consequences. And that is not just what the critics say about the Commission, especially after the *Intel* case, they say that the Commission is going crazy on the amount of fines and that the Commission enforcement is clearly an attack on a successful U.S. company.

I think one has to look at the fact that, first of all, in 2009 there have been probably two interesting developments for the enforcement of what now is called Article 102. For those of you who follow the developments of EU competition law, the article dealing with the abuse of a firm's dominant position was originally known as Article 82, and it is now being re-numbered as Article 102; but it is exactly the same thing. The enforcement of Article 102 regarding pricing practices and exclusionary conduct has seen some interesting developments.

First of all, there was a publication by the European Commission of a guidance paper on what the Commission believes will be their enforcement priorities in applying Article 102 to abusive conduct. And secondly, of course, there was the *Intel* case decision which is the first case where the Commission applied in practice some of the economic analyses which were described in the guidance paper. The *Intel* case was the only Article 102 case which was decided by the Commission during 2009. There have been few other cases involving possible infringements of Article 102 but they were resolved by a settlement. One was the *Microsoft* case which very recently settled by resolving the concerns about tying of Internet Explorer with Windows. Then the *Rambus* case also settled very recently, and there have been also some settlements on some European energy companies. And in addition, the Qualcomm investigation was dropped very recently by the Commission.

I think what is important is to look at the significance of the *Intel* decision; and I think the *Intel* decision is an important precedent for the way which, I believe, we are likely to see the European Commission using the enforcement priority regarding pricing practice. I would even say that I believe the *Intel* case is a good improvement for dominant companies. And I know probably some people will raise their eyebrows when I say that. But if you look at what we had in Europe on the existing settled case law at the European Courts, cases like *Michelin* or *British Airways/Virgin*, basically you have cases where the Commission and the courts applied effectively a per se prohibition to such practices. So moving into an effect-based economic analysis, away from a purely form-based approach, I think it can only be a positive development for companies which feel they are in a dominant position.

Clearly, in the Intel decision you can see that the Commission tries to bridge the gap between the settled case law of the EU courts and the more economic analysis established in the Guidance Paper. So while the Commission in the decision considers that based on the settled case law, it needs not to show foreclosure, nevertheless the Commission applies an "as efficient competitor test," acknowledging that this is one possible way of determining whether the conditional rebates imposed in this case by Intel are capable or likely to cause anticompetitive foreclosure. And I think this is a very important development.

MR. EDWARDS: Isn't that a radical departure from what we have here in the U.S., where discounting is usually viewed in terms of whether the prices are above or below some measure of marginal cost? What you have in the EC is the Commission applying an efficient competitor analysis for discounting.

MR. CELLI: Well as I said, the Commission is saying this is one of the ways to show that the conditional rebates—and I use the same wording that Doug uses—the conditional retroactive rebates here are capable of creating a foreclosure effect for the rivals. I don't think there is any specific predation price theory applied to discounting. This is something which in the EU is only applied for predatory cases, and they use the measure of cost established in the *AKZO* case, which is a below average variable cost.

What the Commission is trying to do with the "as efficient competitor test" is that they conduct an economic analysis and they use a hypothetical competitor, which is deemed to be as efficient as the dominant company. So they're using the same cost analysis as the dominant company. And what they are looking at is they try to estimate what price the rivals would have to offer in order to compensate the customer for the loss of the conditional rebate if the customer would switch part of its requirements away from the dominant company. And I think there is nothing different from what Doug was saying, because here we are looking at retroactive rebates, so rebates which are imposed on the totality of the procurement of a customer. And obviously, there is a leverage on the fact that there is a non-contestable share of the market where the customer would need to buy in any event from Intel. We are talking about a very sophisticated product. We are not talking about a product that can be taken out of a computer and put in another computer. We are talking about platforms where they need to be operated either with CPU from Intel or CPU from AMD.

So in practice in this case there is a very clear quantity, a measurable volume of market which could be said to be non-contested. And clearly, in carrying out the economic analysis of the anticompetitive behavior, the Commission looks at different factors such as the size of the conditional rebate, a relevant time horizon, a relevant measure of variable cost, and they look also at the contestable share of the market. If the rival is not able to compensate for the totality of the loss of the rebates in the small amount that the customer is able to switch, and if that price will be below the average avoidable cost of the competitor, then there will be anticompetitive foreclosure.

MR. EDWARDS: Let me ask you this question. If Intel had been a little bit nicer in the way it went about discounting, and did not write nasty e-mails, and instead of having these structured discounts, it just had a smooth curve, do you think the EC would have found a problem if there was de facto exclusivity as a result of the discounting?

MR. CELLI: Well, you know, the question will be what is a rebate which will be allowed in Europe or a discount? I would say that if the rebate was incremental, the element of volume that you would be looking at would be just incremental volume from one of the thresholds of rebate to the next threshold of rebate. And most likely, the economic analysis, the as-efficient-competitor test analysis, would show that the rival would be able to offer within that small amount of volume above average avoidable cost. But what I am saying is that it is much more complicated and difficult to look at a company who has 80 percent market share, with a very high non-contestable share of the market, which is imposing very high thresholds for rebates, where the rebates are retroactive and will disappear in totality if the customer cannot reach that threshold.

MR. EDWARDS: But leaving aside the mechanism of the discount, is de facto exclusivity a problem in the EC?

MR. CELLI: Yes, I think it is the same as what Doug was saying before. The issue is not looking only at whether there is proof of the conditionality; clearly the European Commission will look at whether there is a de facto foreclosure effect of these rebates. But they make an economic analysis for that. I think here it is quite interesting, because Intel has always claimed that they don't have conditional rebates, they have never imposed conditions on their customers. They say there has never been anything in writing. Unfortunately, for them, in this case there is plenty of contemporaneous evidence which shows actually that there were those conditionalities. Interestingly, you also have the Japanese Fair Trading Commission that in 2005 decided that Intel imposed conditional rebates on customers in Japan. In 2008 the Korean Fair Trading Commission decided that Intel had also imposed conditional rebates on two Korean OEMs. The European Commission decision describes conditional rebates on five OEMs, and now you have the New York Attorney General and the U.S. FTC: All have found there were conditional rebates or conditions imposed by Intel for providing rebates to the OEM.

MR. EDWARDS: I want to pick up on something else you said a moment ago. Is it the case that the Commission did not explicitly measure the degree of foreclosure, if any, as part of its analysis of the Intel situation?

MR. CELLI: No. As I said, with the *Intel* decision, the Commission is trying to create a bridge between the existing case law and the new economic analysis set out in the Guidance Paper. They have to bring the case, and it has to be reviewed in court. The Commission has a very strong favorable case law which actually says very clearly that what Intel has done was illegal. And in the decision the Commission says that they have proved that the case law was satisfied in this case, but nevertheless, because now they are trying to move to an economic analysis, they say we have also made an economic analysis on whether those conditional rebates have the workability of bringing foreclosure effect. And they have done that analysis on each of the individual conditional rebates that they found Intel has carried out.

MR. EDWARDS: Let me ask you a question that I asked Doug earlier. You represent AMD. Isn't the fact that AMD's market share has increased during the time that these practices took place inconsistent with any conclusion that there's been foreclosure?

MR. CELLI: Well, you have a case law in Europe which says that it is not relevant to see what is the situation with the rival, whether the abusive conduct is creating a possibility of foreclosing. What would it have been without that type of restriction in the market shares of the rival? In this specific case you have plenty of evidence showing that the OEMs were willing to buy and to buy more from AMD. So when you look at the market share you also need to look at what happened in reality: I don't think Dell bought anything during a certain period, so the market share with Dell did not improve, and this also applied for the type of conditionality rebates enforced on HP.

This was also the case for every conditional rebate which was applicable to the other OEMs, and there was no opportunity for AMD to increase market share with those OEMs because there was a specific limit that was imposed on them by Intel.

MR. EDWARDS: Well, I think our time is up. We have touched on a lot of issues. I think the question is still up in the air as to whether we are really going to have a resurrection of Section 2 in the U.S.

Thank you.

MR. MADSEN: Thank you, Steve. That was really an interesting subject. A great subject, and we had a very distinguished and lively panel. So I am very grateful to you for arranging that.

We have reached the stage in the proceedings where we will take our morning break. We have ten minutes, and we will resume again with the next panel at 10:45. Thank you very much.

When Worlds Collide: Current Issues Affecting Parallel Public and Private Litigation

MR. MADSEN: Let us reconvene and get started with our last panel of the morning covering the subject of parallel public and private antitrust proceedings.

Our moderator is Jay Himes. Jay is the co-chair of the antitrust practice at Labaton Sucharow. Previously he was for many years the Antitrust Bureau Chief in the New York Attorney General's Office. He had a very distinguished career there. And in about an hour and 15 minutes, if his luck holds, or maybe if it doesn't, he will become the Vice-Chair of our Antitrust Law Section.

So now I give you over to Jay Himes. Jay has been a major contributor to the educational programs that our Section runs, and his latest contribution begins today.

Thank you, Jay.

MR. HIMES: Thank you all for coming. This part of the program has the dramatic title "When Worlds Collide." I hope the discussion lives up to the title, but that's a high bar here. We propose to talk about civil litigation characterized either by parallel criminal and civil proceedings or multi-case litigation. And by the latter I am talking about civil litigation that may have the involvement of government enforcers, typically the DOJ or the states, as well as various private plaintiffs; they could be direct purchasers, they could be indirect purchasers, they could be competitors. And it is against this general backdrop that the individual panel members will present their remarks.

Now, we've decided to try to do this with individual presentations followed by at least a brief question and answer session. I hope that we can do that. But just as a disclaimer, we haven't practiced this.

Nobody has exchanged their remarks, and nobody knows what anybody else is going to say. So you may have to cut us some slack on this one.

I want to introduce these panel members very briefly. Starting down at the far end we have John McReynolds; he is the Assistant Chief at the DOJ's Regional Office here in New York, where he's been since the year 2005. He, of course, prosecutes criminal antitrust violations, principally bid rigging and price fixing; he also prosecutes the kinds of related violations that Steve talked about earlier today, typically mail and wire fraud, tax evasion, obstruction of justice and the like.

He's handled major national cases, including a conspiracy to fix prices in iron and silicon alloys that involved American, German and Norwegian companies. He successfully prosecuted a 35-member bid rigging and tax fraud conspiracy that involved foreclosure of residential homes in New York, an effort that earned him the nomination for the Department of Justice's highest award.

Before joining the Antitrust Division, he was an assistant U.S. attorney in the District of Connecticut.

Next to him is Chuck Diamond, who comes to us from O'Melveny & Meyers in Los Angeles, where he's practiced for more than 30 years now. Chuck gets involved in antitrust, commercial and intellectual property cases, with an emphasis on big case jury trials. He is also the attorney that represented AMD in the matter that was mentioned in passing earlier today. He's the fellow that secured the $1.25 billion settlement on behalf of AMD and also initiated the proceedings that resulted in the EC's record fine and in the sanctions around the world and in the cases now brought by the FTC and the New York Attorney General here in the United States.

He has litigated major cases both on behalf of plaintiffs and defendants. And by brief example, he defended Exxon Mobil in the Exxon Valdez grounding up in Alaska several years ago in jury trials. He has prosecuted patent fraud cases on behalf of plaintiffs, one of which resulted in $192 million successful plaintiff's result. He is certainly one of California's outstanding commercial litigators and a member of the American College of Trial Lawyers.

MR. DIAMOND: And I should add, I am currently unemployed, if there are any potential plaintiffs.

MR. HIMES: That's the only reason we got him here today. We told him he had to settle that case.

Next to him is Steig Olson. Steig is a partner in the New York office of Hausfeld LLP, one of the nation's preeminent plaintiff's class action law firms. He practices in the areas of antitrust and the complementary area of human rights law. He is currently one of the lead counsel in the Rail Freight Surcharge antitrust litigation and the Flat Glass antitrust litigation, both of which are national price-fixing cases.

Besides that antitrust practice, as I mentioned, he maintains a pro bono practice with particular attention to child rights, and he is a coordinator of the firm's pro bono practice in general.

Next to him we have Larry Zweifach, who is a litigation partner in the New York Office of Gibson, Dunn. He's a former Assistant U.S. Attorney in the Eastern District, where he headed the criminal division.

He has extensive experience in civil and criminal antitrust activity and complex litigation more generally.

Currently, he is one of the attorneys in the Air Cargo antitrust litigation that Steig mentioned, that's resulted both in the criminal pleas and in the ongoing civil litigation. He is representing UBS in litigation in California that involves charges of conspiracy by banks to fix the rates of return that public entities earned on municipal derivative instruments.

Larry lectures regularly in litigation programs, including those involving antitrust. And he is also a recent recipient of the City Bar's Thurgood Marshall Award for his pro bono defense of capital cases during the past ten years.

I come then, finally, to Elinor Hoffmann. She is an Assistant Attorney General in the New York Antitrust Bureau, which she joined in 2005. She also teaches at the Brooklyn Law School. Prior to joining the New York office, she practiced antitrust and complex litigation for many years, including 16 years as a partner in the law firm of Coudert Brothers.

As an Assistant Attorney General, she is a recognized state enforcement leader. Her most recent success was in the multistate litigation against Abott and Fournier, involving the drug TriCor; that settled a few weeks ago for $22.5 million. And that's the state piece of a much bigger litigation. She conducted the investigation of Bristol-Myers Squibb, which led to a $1.1 million settlement for the company's violation of two injunctions previously entered in a multistate litigation.

Elinor has written extensively on antitrust and litigation generally. She's on the Board of Editors of *Antitrust Law Developments*, Sixth Edition, the ABA's flagship antitrust treatise.

So we are going to start with John over there, and he's going to talk to us about the DOJ's intersection with civil litigation in a couple of areas.

MR. McREYNOLDS: Thank you, Jack.

As Jay mentioned, I want to talk about how, why and when the Antitrust Division gets involved in parallel civil proceedings. I am going to focus my remarks on two particular instances. First is a follow-on civil case arising out of the same facts and circumstances as a pending criminal investigation. And secondly, when a civil plaintiff has moved the court to force the identification and immediate cooperation of an amnesty applicant.

I will start with the first and most common kind of intervention on our part, and that is when the plaintiffs have filed a civil follow-on case which is identical to the criminal investigation that we have pending. The Antitrust Division usually, but not always, intervenes in follow-on cases to seek a stay in discovery. There are no bright lines or rules as to when and how we decide these issues. We base our decision primarily on whether to seek a stay on the unique facts and circumstances of each case.

Obviously, our primary concern is to ensure that there is no interference with the Grand Jury investigation. If the various discovery tools run the risk of interfering with our Grand Jury, we will seek a discovery stay specifically tailored to the particular concern we have in the case. We want to make sure that non-cooperating companies and individuals do not have a road map to our case by improperly using civil discovery as a tool to assist in the defense of the criminal investigation.

We typically do not want witnesses deposed before we have had an opportunity to either interview them or examine them in front of the Grand Jury. With regard to document stays, that is typically much rarer. We typically do not ask for document stays, but that's not to say that we have not done it. We will do so if in a particular case the documents are obvious on their face and would give the non-cooperating companies and individuals a road map to our case. For example, a list of attendees at a conspiracy meeting.

When we seek a stay, obviously we have the burden of establishing that a stay is justified. Procedurally we have to intervene in a civil case to become a party. The district court has enormous discretion on whether to grant the stay, and there is no explicit threshold that the government must meet. Typically they look to whether particular circumstances and competing interests involved in the case in deciding whether to grant a stay, and most courts have adopted a five-factor test in deciding whether to grant the stay. First, the interests of the plaintiffs in proceeding expeditiously with the litigation and the potential prejudice to the plaintiffs. Second, the burden on the defendants if a stay is granted. Third, the convenience of the court in the management of its cases and the efficient use of judicial resources. Fourth, the interest of non-parties to the civil litigation, and finally, the interest of the public in the pending civil and criminal litigation.

Now, most cases say the last factor should be given the greatest weight and that significant deference should be given to the government in its request for a stay. However, given the broad discretion of the district court, it really comes down to the judge you get and the district in which you practice. Our experience, however, has been generally that courts grant limited stays, meaning we have asked for stays in our interrogatories and depositions; no document stays, and typically we ask for that stay for a limited amount of time. We almost always submit an in camera declaration in support of our request for a stay. Typically what we do in the declaration is we outline the history of the investigation; we identify how many criminal cases have been filed, if any, and finally, we try to give the court some sort of indication of a timeline in terms of how many conditional targets the Grand Jury is investigating. Usually we ask for a stay for six months with a notice to the court that if circumstances warrant, we will come back in six months and ask for an extension.

Lastly, what we have found recently is that it is not uncommon for the judge to ask the parties, the Government and civil plaintiffs to meet and try to reach a stipulation as to the scope of the discovery. As I mentioned before, most of the time we try to tailor our request for a stay to the specific facts. In certain circumstances we will ask to stay all depositions and interrogatories with no documents. In some other instances, we will identify certain individuals and ask that those depositions be stayed. And as I said, in rare cases we will ask for certain documents to be stayed.

Now, the second circumstance that I mentioned—it has only happened once, but I would imagine going forward this would be much more common, and that involves ACPERA, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

Last May, in the Northern District of California, San Francisco, in the LCD Flat Panel litigation, the plaintiffs moved for an order requiring the amnesty applicant, which they speculated was Samsung, to identify itself and provide cooperation that they claimed was required under ACPERA. They asked the court to find that if the amnesty applicant refused, for them to find that they would lose the benefit of the statute and be subject to treble damages and joint and several liability.

The Antitrust Division intervened and opposed their motion. We really made two arguments. First, we argued that it was solely up to the amnesty applicant to decide if and when they chose to disclose its identity. Secondly, we argued that it was premature to decide this issue as to whether the amnesty applicant had satisfied the requirements of cooperation under ACPERA, since that determination happened at the end of civil cases and only after the amnesty applicant sought detrebling under the statute. The court essentially adopted DOJ's position.

Jay.

MR. HIMES: Let me ask you a question. Because you emphasized a couple of times that in seeking stays the DOJ tends not to ask for stays of document discovery. Have you talked recently with the Regional Office in San Francisco?

MR. McREYNOLDS: I have.

MR. HIMES: I ask that.

MR. McREYNOLDS: Remember, I said in rare cases.

MR. HIMES: Because really, at the outset of the Grand Jury investigation, and in that case that I have in mind, the private case preceded the Government investigation by a goodly number of months, the DOJ came in and did ask for a stay of the document production. And all that was involved there was the production of material to the Grand Jury, so it wasn't as though anybody was asking for an isolated subset of materials. The plaintiffs would have had to do their work in the way the DOJ was going to have to do their work I suspect, except you guys had an amnesty applicant.

I am curious whether others on the panel have experienced document stays at the DOJ's inception. Anybody?

MR. OLSON: I am going to discuss the municipal derivatives case, and Larry may know the details actually more than I do. But I understand in that case as well there was a stay of the document discovery.

MR. HIMES: We can't blame that on the left coast either.

MR. ZWEIFACH: There was a stay in that case, but it was not a total stay. The court broke up the document production, so it precluded discovery of documents that in any way could be used to suggest that there was any agreement in the case. But they allowed document production to go forward on class certification questions and the like. So it was a somewhat nuanced stay, but the core documents that really went to the key center of the case, DOJ came in and requested that they not be produced.

MR. HIMES: That's all the good stuff that got stayed.

We actually argued in our case that the documents produced to the Grand Jury ought to be produced to the plaintiffs and not necessarily produced to the defendants. The defendants, if they wanted to, could enter whatever joint defense arrangement they had, share whatever documents they wanted. But that seemed to us to be a reasonable approach to assuring that the integrity of the Grand Jury proceedings weren't impaired. The judge did not buy that.

Has anyone else encountered that? Okay, hearing no comment, we'll move to ACPERA.

MS. HOFFMANN: I will just make a comment. In an investigation a few years ago, not a litigation, the DOJ had a Grand Jury, and we kind of worked out an arrangement where we could get documents, and they asked us to defer talking to any potential witnesses, which we did.

MR. OLSON: Jay, I did have a question if now is the time?

MR. HIMES: I guess now is as good a time as any.

MR. OLSON: I guess the question that the presentation raises for me is when the DOJ considers the scope of the stay that it is going to seek and tries to tailor that to the facts of the case, what are the considerations given to the impact of the stay on the potential viability of the private enforcement action?

MR. McREYNOLDS: I think generally we would take the position normally the civil plaintiffs have—and you may disagree with this—the civil plaintiffs, I think by and large, like to see the DOJ do the heavy lifting. And they like to see us particularly early on make a case and bring those criminal cases and file these criminal cases.

Now, in the situation that I can sympathize with you about is when DOJ has either not begun really a formal criminal investigation or has been languishing and has been taking quite some time to bring that first case. In which case you've been out there for a year, year and a half or two, as Jay mentioned, on the West Coast.

We are sympathetic to the rights of plaintiffs and victims, but I think that we would take the view that the criminal prosecution takes precedence over that. And at the end of the day, I think, generally speaking, we don't think that the civil plaintiffs will be prejudiced by a limited stay.

MR. HIMES: Steig, why don't you go ahead generally, because you're next up, and you can talk some more about the interaction on plaintiff's side with the enforcers.

MR. OLSON: Sure. I think that that's an excellent introduction to the points I wanted to make.

The broad point is I think hopefully we can all agree that the challenges of coordinating private and public enforcement should not jeopardize the viability of the private enforcement action. And I want to discuss a case in which my firm is co-lead counsel where we feel that that has been the case. And then try to raise, hopefully, a couple of lessons that we learned from that case.

That case is the municipal derivatives case I alluded to, pending in the Southern District of New York. It is a case brought on behalf of state, local and municipal governments around the country who allege that they were ripped off for years, even decades, by a pervasive scheme to fix prices and rig bids in the municipal derivatives market. And that's a billion dollar market that essentially involves special vehicles where the proceeds from municipal bonds can be invested until they are ready to be spent by local governments.

The private action was the outgrowth of a pioneering agreement between the private plaintiffs and the ACPERA leniency applicant, which in this case was Bank of America. The case represents, to our knowledge, the first time that there has been a formal cooperation agreement with private counsel and the ACPERA leniency applicant. We agreed essentially to waive treble damages in exchange for the bank's adequate cooperation in the prosecution in the civil litigation.

ACPERA, which has been alluded to, itself provides that if a leniency applicant cooperates sufficiently with private plaintiffs, that treble damages can be waived by the judge. But there is very little case law on this, and on both sides of this case law, it would be more prudent to negotiate a separate private agreement allowing for that.

MR. HIMES: Steig, there is also an exception for cases in which states sue for injury to themselves rather than a parens patriae capacity.

MR. OLSON: Right, absolutely.

So that's how the process was supposed to work in theory. In practice, however, at the time the private action was filed, there was a DOJ proceeding ongoing, as well as an IRS investigation. And then shortly after we filed the case, an SEC investigation was launched.

So as we sat down to begin our cooperation with Bank of America, the bank reported to us that its ability to cooperate had been severely constrained by the DOJ, which insisted that instead of providing the broad and thorough cooperation that it would under ACPERA and under our agreement, it was limited to providing only attorney proffers, which were themselves severely constrained. So the bank couldn't give us key documents. It couldn't give us witness interviews. It couldn't give us access to audiotapes of the collusive agreements being reached. That's what we believe are on the audiotapes, that everyone says exists.

Unfortunately, at the time we had difficulty establishing dialogue with the DOJ. They didn't have, it seemed, an interest in talking to us about this, so we were forced to rely on the bank's representations about the limitations on its ability to cooperate, without discussing those with the DOJ. And, of course, the bank had its own interest in limiting its cooperation.

So we were essentially limited to our factual investigation and some curtailed attorney proffers when we put together our consolidated amended complaint. In spite of that, we felt that we filed an extremely detailed complaint, one of the most detailed I think that there has been in the history of antitrust MDL cases.

But the district court judge, Judge Marrero, operating under the cloud of uncertainty that *Twombly* has brought to the bar, adopted a very, shall we say, expansive view of *Twombly*, and dismissed the complaint essentially against every defendant, except Bank of America, and finding that—and I am speaking very generally—that the conspiracy alleged was implausible, and this was despite the fact that Bank of America, by being a leniency applicant, has essentially admitted to being a part of the criminal conspiracy.

Now fortunately, this type of expansive interpretation of *Twombly* was rejected by the Second Circuit in the *Digital Music* case, which came down approximately a week to ten days ago.

As many of us have seen on the plaintiff's side in recent years, when a private case is filed in a matter where there is a pending DOJ investigation, we feel the Government almost always comes in to intervene and stay discovery. We are seeing this more when there are international enforcement actions as well. In the Construction Glass case that I am co-counsel in, the EC has intervened to stay the discovery. And in the chocolates antitrust case, it has happened similarly.

As I said, in the municipal derivatives case, this is what the DOJ did, and it stopped the plaintiffs from getting the facts that we needed to convince the judge at that time that our case could go forward on the merits, so the case was dismissed.

We were allowed to replead. We undertook some further factual investigation; we were able to get a little bit more cooperation from the bank, but there was a stipulated stay of any discovery that could take place based on the DOJ's intervention. So we were getting constrained. We feel the second amended complaint we filed is, again, extremely comprehensive and lays out in detail the conspiracy, but the motion to dismiss remains.

So what's happened in this case, in our view, illustrates the very serious difficulty faced when private enforcement and government investigation and *Twombly* and ACPERA converge. In a case where the leniency applicant was willing to cooperate, and the DOJ had limited that cooperation and put a lid on that information that could be critical to the state, local and municipal governments pursuing their actions and getting redress and compensation that we all know they desperately need in these times. This could lead to the dismissal of an important meritorious action.

Some means must be established where we can have the simultaneous prosecution of Government actions and private enforcement actions, especially of this importance, that is sensitive to the Government concerns but also doesn't risk the viability of the private action. So very quickly, let me just sketch out what I think are three potential lessons.

One. The first hope is that judges will actually take a reasonable view of *Twombly*, which would go a long way to alleviate this situation. As I said, the Second Circuit in the *Digital Music* case recently ruled that the mere fact of a government investigation into price fixing in an industry is itself supportive of the fact that conspiracy is plausible; therefore, in a case where there's actually a leniency applicant admitting to a criminal violation, one would hope that alone would allow the case to survive *Twombly*.

Second. We would hope that we could establish channels for a more productive case-sensitive dialogue with the Government in these cases about the amount of cooperation it will allow in light of the risk to the plaintiffs of losing the viability of meritorious cases.

And thirdly, one specific idea along those lines is the Government may consider a willingness to provide status reports to courts, especially when the investigations have run many years, about the course of its investigation, and those status reports themselves could be facts that the court would consider when evaluating the plausibility of the alleged conspirator.

MR. HIMES: John, having heard those now for the first time, any nonofficial response?

MR. McREYNOLDS: Let me just address the last point that you made first, in terms of status reports. We essentially do that when we go back in court and ask for an extension or renewal of a stay. And obviously, it is an in camera declaration, but the court is looking for exactly that. They are looking for a status report. They want to know what we have been doing in the prior six months; have we been expeditious in moving this investigation along. And they want to see some indication that we are not dragging our feet and will be back every six months for the next three years asking for an extension. So in essence, we are giving to the court a status report in any event.

As far as the municipal bonds investigation is concerned, obviously that is an ongoing criminal investigation, and I can't speak about some of the merits or some of the issues that you've raised, other than to say that the issue of whether or not—and I will say in general terms, not specifically Bank of America—we take those responsibilities seriously, and we weigh very heavily whether or not we should ask—and I am not saying that we have in this case or in any case, but I wouldn't rule it out—having some unique circumstances that if we feel that the civil litigation will interfere with our criminal investigation, yes, we will consider going to the amnesty applicant and asking them to hold off for a period of time.

MR. HIMES: Thanks. I think we may circle back to this, if we have some time at the end. But let's go to the next speaker.

These days civil litigants in the U.S. can find themselves encountering not just the DOJ but indeed the EC with increasing frequency, and I suspect perhaps in years forward other enforcers from abroad.

Chuck, would you talk a little bit about the global picture and how it played out in the AMD matter.

MR. DIAMOND: First, I want to thank Jay for putting me in the middle of this. Fortunately, I did not get hit. With due respect to Steve and who named this panel, "When Worlds Collide," when you start talking about foreign competition authorities, a better subtitle for my remarks would be "When Worlds Collude." I am going to talk about harnessing foreign competition investigations as a tool in U.S. discovery.

For those of us who litigate plaintiff's antitrust cases, increasingly there is a conundrum, because we are dealing increasingly with markets of intangibles. Though not intangibles in the case of microprocessors, very small things that can be shipped by hundreds of thousands in

FedEx boxes. And in Section 2 cases it is incumbent upon us to marshal evidence that an antitrust violator has, in fact, restrained competition throughout the relevant geographic market and that is significant.

The difficulty, of course, is though we litigate about global markets, the law that governs us is national. And the subpoena power of the United States courts is markedly limited. Granted, one can get worldwide discovery from a defendant, but when you're dealing with defendants who have as an essential pillar of their antitrust compliance program rampant document destruction as an ordinary day endeavor, that's not a fertile source of material. The best source of material, of course, is to go to customers. And increasingly, we find ourselves unable to do that, because of course, in the global markets many of the customers are beyond the U.S. subpoena.

In *Intel* it was estimated, depending upon how one counted it, that 70 percent of the processors shipped by the two companies involved in the x86 chipsets would ship to foreign purchasers. Now granted, some of those were multinationals based in the United States. We could get discovery from the HPs, the IBMs and the Dells of the world, but we could not get discovery easily from the Japanese, who are a very major component in the market, the Koreans, who are very significant, and from some of the European OEMs. Therefore, it becomes incumbent to look to other devices.

The Hague Convention really is a failure in international diplomacy. Because under the Hague Convention, as applied to the subscriber states, you basically have to know exactly what the document is that you want before you can ask for it. So you can't ask a foreign company to produce all of their correspondence with the antitrust defendant about purchases and sales or conditions, because that won't fly in foreign courts. You instead have to ask for the memo dated January 3, 2003 between X and Y, otherwise you get nothing. And of course, unless you know that it exists, you can't ask for it. So you get nothing under the Hague Convention. Even in those states that subscribe to it, and significant ones don't, you can't get Korean or Taiwanese discovery through the Hague Convention.

For an antitrust plaintiff in the United States, really one of the best sources of information about an antitrust defendant's foreign conduct is to sort of kickstart foreign competition authorities around the world into conducting their own investigations. And the Japanese, the Koreans and, of course, the Europeans have become very aggressive and much more receptive, in our experience, than the U.S. authorities in launching investigations into Section 2 dominant firms conduct.

The powers of the competition authorities are really wonderful and really would be the subject of rampant and unbridled jealousy by most class action lawyers. Because they show up, they kick down the door at 8:00 o'clock in the morning, when the folks show up at work, and they proverbially pull a gun out of the holster and say step away from that computer. And they get a peek at the defendant's documents or customer's documents, other third-party documents without the interference of obtrusive defense lawyers, who like to invoke relevance and privilege, to prevent you from getting to the facts of this case.

MR. HIMES: You know that this meeting is being transcribed.

MR. DIAMOND: I was about to say that the views that I am about to express are solely mine and those of any right-thinking antitrust practitioner.

But they are not necessarily those of my O'Melveny partners who mostly represent defendants.

You can get some wonderful stuff, but you can't get it by asking the competition authorities because, of course, they are bound under their foreign law to maintain confidentiality. However, at some point in most investigations there is something in the nature of a statement of objections or ultimately a decision that the antitrust defendant has an ability in a foreign venue to defend against. And at that point the defendant gets access to the case file, or at least portions of the case file. In our view, when a defendant's foreign lawyers get access to documents, the defendant has access to documents, and bingo, the subpoena power of the United States comes into play, and you can thereby get foreign materials.

Now, even if you only get access to the materials that the foreign competition authorities seized from the defendant's foreign offices, that really can be a motherlode. Because it is incredible how the documents that did not exist when the defendant produced documents to the private plaintiff, suddenly exist when the foreign authorities knock down the door, and you ask the defendant openly, give me everything that the foreign authority seized. You get a cold collection, and they tend to be the smoking guns, and they frequently tend to be the smoking guns that somehow did not show up in your document production.

Third-party statements are very important. Under the ever-changing articles—I think it is Article 14 of the EC Treaty—the EC staff has the ability to issue what are essentially interrogatories to both targets and customers and get written responses about what happened in the marketplace. And those are really wonderfully revealing, to the extent that you can get them through the defendant. And ultimately, the statement of objections in unredacted form or final decisions, if you can get them out of the defendant's files as they get them, are not only a chapter and verse, if any of you have looked at the EC's *Intel* decision, it is 400 pages. Sort of the Bible of a decade's worth of misconduct. It is not only as a road map of what you ought to be looking at, but beyond that it may be admissible evidence under Federal Rule 803, which allows any kind of report by an agency, including a foreign agency with respect to a factual matter can be received into evidence.

So this is almost too good to be true. And in fact, it is a little bit too good to be true, because increasingly, our friends in Europe and to some extent the Japanese have been interfering in our playpen and preventing us from getting access to all of the relevant material. Specifically, in Flat Glass, in Intel, in the Visa and MasterCard litigations, the EC has intervened and said, look, to the extent that something is in our case file, it is subject to an undertaking under EC law that it can only be used in connection with Article 81 or 82 proceedings. You guys in the States, as much as we love you, are not proceeding under Article 82; you're proceeding under Section 2, and that's not a use for which this is blessed, and we think that is not appropriate to ask a defendant to produce those documents, because that would be a use that was not intended. They have taken the same position with respect to statements of decision; they have taken the same position with respect to third-party materials that may be in the defendant's folders.

All is not lost. There is still great utility in EC discovery. The EC has not taken a position against the discovery of documents that a defendant voluntarily or compulsorily produces to the Commission, to the Commission's Article 14 requests or responses to that. But beyond that, ultimately what you get, even if in redacted form, is exactly what you need under the Hague Convention. Because at the end of the day, if you can get the statement of decision or a final decision, even in redacted form, it tells you pretty much chapter and verse what documents you need to ask for of foreign defendants. And we found that all we had to do was initiate Hague Convention proceedings, and before too long, most of the foreign players were willing to come to the table and negotiate with us. And thereby we hopefully got produced to us virtually everything that those companies had turned over to the EC or had turned over to the Japanese. It is really the only way one can close what is otherwise an insufferable chasm between what you need to be able to prove when you're dealing with global markets and what the U.S. discovery subpoena power allows you to prove.

MR. HIMES: Yes, I think for U.S. lawyers who haven't yet encountered EC proceedings, this point should not be lost. The EC competition system runs with a level of secrecy that we are very unaccustomed to in the U.S. The charging document, the statement of objections that Chuck mentioned is considered to be a confidential EC document. The EC's decision, while publicly released, will be redacted, and indeed, the decisions as given to the individual defendants in the EC case will be redacted as well to eliminate information from other parties, not third parties typically, but other defendants. And even the papers filed with the Court of First Instance are non-public documents. So you can ask in civil discovery in this country for the EC materials from one of your defendants, and you may well be met with that kind of objection by the defendant or indeed by the EC itself.

Anybody want to comment anymore about EC involvement in U.S. litigation? Because that's something we will try to circle back to.

Larry, do you have anything?

MR. ZWEIFACH: I will pick up on that one.

MR. DIAMOND: I should say there is an issue that the Cohen Milstein firm will be litigating, since we are out of the case, but that is the discoverability of the final EC decision.

The EC has taken the position that comity concerns ought to trump the viability of the U.S. fact-finding process, and I think there are some very good arguments to be made that we ought not to show that much deference to our EC brothers, particularly when you're dealing with protective orders, as we had in our case, that were stringent and well respected for the five-year duration of the civil case. There is no reason to keep things totally under wraps and keep jurors from foreign facts that are really indispensable to fair fact-finding. But that yet has to be litigated before Judge Farnum.

MR. HIMES: Okay, Larry, shoot. Tell us something about the defense side here.

MR. ZWEIFACH: Sure. I would like to pick up on the theme that Chuck laid out for us, which I think is really apt, "When Worlds Collude." Because it really does apply when you're thinking about a defense perspective, and how do you represent a client that is a subject of multiple proceedings, enforcement investigations, both abroad and in the U.S., and also facing private antitrust action. So what are the most important things that you want to think about.

First of all, to sort of tee up that issue, I think it is important to just highlight some of the trends that we are seeing. Chuck mentioned them, but I think they are worth repeating, because it really begins to underscore the dilemma that you're facing on the defense side.

First of all, as Chuck pointed out, there's been increased enforcement worldwide. There really has been a globalization of enforcement efforts where you get to see countries that had either statutes on the books with regard to cartel enforcement that were really not being used, you have countries now that are putting those statutes on the books and are serious about it. But you really do have an increased enforcement effort worldwide.

A second important trend is you have increased coordination among enforcement authorities. You begin to see conferences taking place all the time, where you have enforcement officers talking to each other, they are cooperating, they are sharing information under treaties, MLATs, bilateral, multilateral agreements; there is a lot of cooperation going on. And the U.S., the Department of Justice, has really been a leader in these coordination efforts. If you look at the way the Air Cargo cases were initiated and then prosecuted, as Chuck pointed out, dawn raids going on in Europe and then shortly thereafter coordinated uses of subpoenas and then search warrants in the U.S., and then similar activity in the Far East. A message was sent loud and clear that we are in an era of coordinated national global enforcement efforts.

Another important trend, more criminal proceedings being brought in cartel cases by a variety of entrants. There was a time that that was very rare. You now see Canada, Japan, U.K., Ireland, Brazil, it goes on and on. There are now criminal proceedings brought by a variety of countries besides the United States. You've heard earlier that U.S. enforcement is as vigorous as ever. And more countries have developed leniency programs. If you go back to 1993, I think it was just the United States and Canada that had a leniency program on their books that provided a carrot and stick approach to incentivizing cooperation and trying to get parties to win the foot race to the door of the Justice Department or the Canadian authorities to get amnesty and begin to cooperate. Today you have a wide number of countries, it goes on and on, Australia, Japan, South Africa, Switzerland, Germany; they all have one form or another of these leniency programs. So you have a lot of incentive out there for parties to go in and cooperate early.

So the question then becomes: What are the implications of all of these trends for a defendant or a potential defendant in these proceedings? Well, the most important point I think to remember is that if you're facing a cartel investigation today, and you have a client that does business cross-border, as many of our clients do, you cannot defend these proceedings as stand-alone proceedings. You cannot take a proceeding, whether it starts in Australia or it starts in Japan or it begins in the EC, you cannot begin to think of that as a stand-alone proceeding. Similarly, if the first inkling you get of an investigation is a subpoena from the Department of Justice, can you not assume that you're not going to be facing cross-border problems.

So what that means is that you have to begin to approach all these matters by developing a global defense strategy and beginning to think through what that means for every decision you make. And when you make those decisions, I think one of the most important things you have to think about is what type of liability do I face in a private action in the United States? Because you're going to have to go through something of a three-dimensional chess calculus to begin thinking, yeah, I could go in and run in and possibly get amnesty in country A, but that probably also means that I have to run in and get amnesty in other countries also at the same time and begin cooperating there, lest I wind up getting amnesty in one country and getting prosecuted in other countries. And I may well face the very evidence that I produce in country A that comes at me from countries B and C. So you have to begin to make these decisions, thinking about how the evidence is going to be used, and what are the implications of cooperating. Similarly, you could wind up seeing a reduced fine in country A, country B and country C, but the damages you're going to face in the United States in the treble damage action are going to be enormous. So it may well be that your decision might be that it might not be a good idea to cooperate in an investigation overseas. But the decisions have to be made very, very quickly, and you have to begin to take into account the downside risks of what is going to come with the damage action in the United States.

An important question is what can you do to minimize the risk. And I use the word minimize, not eliminate, because if you do begin to think of cooperating either as an amnesty recipient or a second in the door or even third in the door company, what type of steps can you begin to take to try to minimize the risk you're going to face? That's a very, very big topic, but let me give you some examples of things that you want to begin to think about.

The first thing you have to do is if you're dealing with enforcement authorities abroad, you have to start becoming very, very familiar with their rules and procedures very quickly, because they have been changing over time. If you wanted to apply for amnesty in the EC under the 1996 Leniency Notice, you are probably going to have to put in a written submission. Today there has been a revision to that policy under the 2006 Leniency Notice; oral submissions are okay. So if you want advice on what steps you might want to think about taking to minimize your risk in the United States, think of making oral submissions, if they are proffered. Now, they are going to be recorded, and you're going to have to attest to the authenticity of the recorded statement. But if you could avoid putting a copy of that statement in your briefcase when you leave the enforcement office, if you could avoid taking documents with you or creating verbatim notes that are going to come back to haunt you in a private action, you're going to do much better.

As was pointed out earlier, the case law is somewhat split in terms of where you see plaintiffs attempting to try to obtain materials that were submitted in connection with amnesty applications. In the Northern District of California, the EC did intervene in the *Methionine* litigation. The court denied discovery there. The EC was not successful in the *Vitamins* litigation in the District of Columbia. There discovery was granted both with respect to submissions to the EC as well as to Canadian authorities. In the Rubber Chemical case, there is a different decision; again, Northern District of California, 2007, the court denied discovery of submissions made in connection with amnesty applications.

So you really have to take steps to be very, very careful. And you have to assume that the plaintiffs are going to attempt to obtain the submissions you're making to enforcement authorities abroad.

I know I am running out of time, but very quickly, when dealing with Department of Justice, you likewise have to think very, very carefully about the information that you're proffering or you're producing. You don't want to do an internal investigation and begin taking witness statements and handing them over to the Department of Justice, because invariably those statements will wind up in the hands of plaintiffs in the private actions. Again, you want to try to use oral proffer techniques as best you can, or set up interviews for key witnesses. But try to avoid the production of written materials.

Finally, you should be mindful of Federal Rule of Evidence 502, which is relatively new, but it does provide for orders for the court to sign where you could have in effect a binding order, so to the extent you're providing information that could be privileged either from a work product perspective or attorney/client perspective, you can get a court order that there is no waiver of the privilege under Rule 502. And that rule will apply to other jurisdictions.

Those are my quick tips for the day.

MR. HIMES: Let me ask you a quick question, and then we are going to do our final speaker.

The EC's position is that when access is afforded to the administrative file, the attorneys for the defendants are obligated to use the information that they learn solely for the purposes of the EC proceeding. Should that information come into the hands of a U.S. attorney, is the U.S. attorney in U.S. civil litigation at liberty to use any of that information?

MR. DIAMOND: In our case, if I recall the history correctly, before information could be disclosed beyond European counsel, we had to give the same undertakings in the United States as did European counsel.

MR. HIMES: In other words, they could not use the information for U.S. proceedings, is that right.

MR. DIAMOND: Correct.

MR. HIMES: We are going to actually finish by returning home. We have been abroad. Elinor is going to talk about what happens to the poor district judge who gets assigned one of these multidistrict proceedings or a case where Government enforcers and private parties, and this individual actually has to manage the case. So that in itself involves challenging considerations.

Elinor, go ahead.

MS. HOFFMANN: First things first, disclaimer. My comments today are my own. They don't reflect the views of the Attorney General or any member of his staff or any past or future Governor.

In listening to these comments, one thing that I wanted to start out with and I think that it came out clearly in these comments is that if you've got a set of facts or a complaint before you that prompts you to start an investigation or a litigation, you can just bet that someone else has those same set of facts or the same complainant or different complainant raising the same issues. So I think in the five years that I have been with the AG's office, I can think of maybe one out of about ten or twelve investigations or litigations that were solely New York AG investigations. Usually there's been one other—at least one other party involved, sometimes multistate, sometimes another federal enforcement agency, and sometimes private litigants and sometimes all of the above.

Coordination is a big issue. Hopefully, it is not just a collision of worlds, but hopefully we are all trying to get to the same place if we are on the same side of the "v," more or less, but the process may be more difficult.

We can help each other out a lot, and we can also drag each other down. And obviously, government enforcement agencies and private plaintiffs may have different goals in litigation, but it is important to get the greatest benefit out of this process that we can. Importantly, very often our remedies can be complementary, and we can achieve a lot if we cooperate.

There are kind of three dimensions to multiparty or inter-agency investigations or litigation. One is substance. Are the legal theories the same, the way the allegations are framed and the kind of relief that is sought, and does it really matter in trying to coordinate or cooperate? The second one is process, principally time and deadlines. There are reasons government investigations or litigation should proceed more quickly than private litigation in some cases. And then the last one, and maybe the most important, are case management issues. What can the parties and the courts do to minimize duplicative discovery, to minimize the expense that comes from duplicative expert reports and that kind of thing. And a good judge really can make all the difference.

So let me just talk briefly about substance. It is possible for even two enforcement agencies in the United States—let's put aside the international stuff for a minute—to take different approaches towards the legal theory they want to bring based on the same set of facts. In one case I was involved in, involving the drug Ovcon, defendants were Warner Chilcott and Barr; we filed a complaint alleging both a per se and rule of reason theory. The FTC filed a complaint that alleged solely a kind of structure rule of reason based on the Polygram case. It did not really matter. Discovery is a process whereby you elicit facts, and the facts that we wanted to elicit were basically the same. It can make a difference I think if the facts one elicits are quite different. For example, if one party alleges a relationship based very specific event-by-event type conspiracy, another party alleges an umbrella kind of conspiracy. This happened in the insurance litigation, I think, in the class actions that were brought in New Jersey, as opposed to the kind of investigation we did of the insurance and brokerage industries.

Process is also very important, and mainly I am talking about timing here. The enforcement agencies, New York and other states and the federal agencies, have very broad pre-complaint investigatory authority. We can spend a long time looking at an issue before we even decide whether to proceed. Because we are not knee-jerk prosecutors, we actually don't proceed every time we look.

Private plaintiffs, on the other hand, don't have the luxury of very broad investigative authority, and they have to go ahead and file a complaint and may want to file a complaint once they have good ground to do that, and then of course, conduct discovery. And there are advantages and disadvantages.

A government agency can come to a case with a much greater store of knowledge about the facts. The private plaintiff, though, may get there first. The parties that get there first have the ability to negotiate the protective orders, to educate the judge, to kind of set the stage. So by the time an enforcement agency gets there, the stage is set. Perhaps the judge has already ordered some sort of bifurcation of the issues. This can be unhelpful in some cases; in other cases it speeds the process along. So I think time limit is an important issue from an enforcement standpoint.

The third dimension here, I think, is case management. Let's assume for a minute that you have enforcement agencies and private plaintiffs filing at about the same time, and there is going to be overlap in discovery; a judge can issue an order where you have an MDL proceeding perhaps and an enforcement proceeding going on at the same time, to minimize the kind of duplication and expense that is associated with the discovery process. Documents can be filed electronically in multiple actions, where appropriate. All parties can be given notice of discovery, can be given the ability to attend depositions, and the case can be moved along that way. It doesn't necessarily mean everyone is on the same timetable with respect to getting to trial or filing expert reports or anything like that. But a lot of substantive discovery, especially now where class and substantive discovery kind of bleed into each other a lot, can be conducted simultaneously.

MR. HIMES: I think we can ask the floor if there are any questions of any of the panel members. I know that many of you are anxious to break for lunch, but we have just a few minutes. So if there is any burning question, please, come forward. No? We really want lunch.

Do panel members have a particular question they want to raise, Larry?

MR. ZWEIFACH: I have a quick question for John. In the area of parallel SEC enforcement and Department of Justice prosecution of securities fraud cases, if you look back ten years ago when the SEC brought an action at around the same time there was either a Department of Justice investigation going on or there was an indictment, the Department of Justice would come in, ask for a stay, and routinely district courts were granting those applications. If you look today, more and more there are district courts that are taking a closer look at the stay issue in the securities area. There are some courts that are either outright denying the stay, which means that potential witnesses in a Department of Justice case will be deposed in the SEC civil action, and then there are some judges that are taking a more nuanced approach in having partial discovery go forward.

But again, I recognize this is a different area than antitrust, but these are the same district judges who are hearing your applications in antitrust cases. Are you beginning to see any pushback these days in the Southern District of New York or the Eastern District of New York when you're going in and asking for stays of discovery in private antitrust actions?

MR. McREYNOLDS: Well, certainly you're familiar with the most recent controversy with the Magellan case, the securities case, where the U.S. Attorney's Office had asked for basically a stay of the civil proceedings, the SEC proceedings and let the criminal proceeding go first. The judge I don't believe has ruled, but at least is entertaining the possibility that since the SEC is a quasi independent body, and they chose to file the case, you're going to have to live with it going forward. Obviously, appreciating the forces on the U.S. Attorney's Office, that is going to obviously present the U.S. Attorney's Office with a very difficult situation if the SEC case is permitted to go forward.

There have been instances, Larry, where we have seen in our office judges pushing back. One case in particular was the *Auction House* case. And in that particular case, the judge was very concerned that we had been investigating this matter for a number of years, and he was concerned that given the length of time that we had been investigating and we had not filed a case, he was very reluctant to grant much of a stay. My understanding and my recollection is that he did grant a limited stay and then the class settled. So we don't know what the judge would have done if we had gone back and asked for an extension. But clearly, in his comments he was concerned about that.

MR. HIMES: Let me ask a question, I wanted to circle back to ACPERA. For some of you who don't stay up nights reading the ACPERA statute, that act was passed in 2004 and had a five-year duration. So it sunset in June of last year, and Congress, in its wisdom, extended the statute. And when the ABA asked for another five years so that the courts and parties could get more experience operating under the statute, Congress decided one year was good enough. It comes up sunsetting again in June, which is not many months off.

John, how do you think the statute is operating from the DOJ's point of view? And I realize this is just your personal comment.

MR. McREYNOLDS: It is difficult to tell. Certainly from the statistical standpoint, we can look at the number of amnesty applications and conditional grants of amnesty. If you look at the five-year period before ACPERA and the five-year period after ACPERA, amnesty applications and conditional grants of amnesty have gone up 20 percent.

MR. HIMES: Have you done a regression analysis, by the way?

MR. McREYNOLDS: I think that, frankly, the people in this room and on this panel would have a better sense of whether or not ACPERA is accomplishing all of what it has set out to. It may, from conversations that our people down in Washington have had with attorneys, it appears that it may have some positive benefits on the fringes in terms of one additional factor that attorneys can use to analyze whether or not they should recommend someone coming in and applying for amnesty.

MR. HIMES: I am curious, and I am sure I know Steig's point on that, so no need to go into that more.

But from a defense side, Larry and even Chuck, do you know of any circumstance where you think or you heard that a potential amnesty applicant decided not to approach the DOJ and instead thought that it would be better to rely on all the coconspirators not to turn them in?

MR. OLSON: If we did, we wouldn't tell you.

MR. HIMES: Well, I don't want names. But that's sort of the premise of ACPERA, that if you reduce the civil damage exposure, then that will encourage cartel participants to come forward. They get relief from treble damages, and they are no longer subject to joint and several liability. And the underlying premise is that you will get more people coming in. And I am skeptical that when you are actually a defense attorney in the room with the person who has discovered this cartel going on at their company, and they know that if they get to the DOJ first, they get off scott free criminally, and all their employees can get off if they cooperate, whether they in fact sit there and analyze their potential civil exposure and decide that they are better off taking their chances that no one else will run in first. I'd be curious of any anecdotal evidence to support that.

MR. ZWEIFACH: I do think—this is a somewhat different point, but I do think the future of ACPERA is going to rest in part on what we see non-U.S. enforcement authorities do with their potential witnesses. In other words, with criminal proceedings being brought abroad with enforcement proceedings being brought, whether it is in Asia, Canada, in the EC, they don't want their cooperating witnesses to be deposed and cooperate, wherever that might be, including the U.S. So we've had situations where pressure has been put on amnesty applicants abroad to do everything they can to avoid being deposed in the United States. ACPERA notwithstanding.

So I do think it begins to raise some of these very difficult policy issues of how are countries, other than United States, going to respond to statutes like ACPERA, which are trying to incentivize amnesty applicants to cooperate with plaintiffs in private actions. How is that going to play out when the enforcement authorities abroad are trying to avoid discovery being taken of their witnesses. So I do think that's going to be a difficult question and I am not sure if we are going to see actual litigation in it, but certainly in discussions behind the scenes with DOJ, enforcement authorities and ultimately private plaintiffs lawyers, I do think that that's going to be an area where there is going to be a lot going on.

MR. HIMES: Good ending. I want to thank everybody.

MR. PRAGER: Thank you, Jay and all of the panelists. We have seen collision and collusion with fascinating results. I think it was both entertaining and very informative and educational. So again, thank you all for participating, and thank you to all of the panels and moderators this morning.

With that, I convene our business meeting of the Antitrust Section for 2010.

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

MR. PRAGER: The first order of business is to approve the minutes of the meeting held in 2009, just about a year ago today. I believe those meeting minutes from the Annual Meeting were available out on the table, and I will ask if someone would move the acceptance of the minutes.

SPEAKER FROM AUDIENCE: So moved.

MR. PRAGER: We have a motion, and I will need a second.

SPEAKER FROM AUDIENCE: Second.

MR. PRAGER: We have a second. All in favor of approving the minutes of last year's meeting.

(Ayes voted.)

MR. PRAGER: The meeting minutes are approved.

Now, the primary purpose of our business meeting this year, as every year, is to elect the new members of the Executive Committee and the new officers of this Section for the upcoming year. And I will ask the chair of our nominating committee, Meg Gifford, to join me and to present the report of the nominating committee and to take the vote.

Meg, I don't even remember how many years you've been doing this. But you have managed to get us a wonderful Executive Committee. I will talk more about them and it and our activities tonight. But let's see what kind of new people and new blood you have to offer us.

MS. GIFFORD: Oh, Bruce, you know who I have to offer. Thanks, Bruce.

With Bruce's consent and your patience, I am just going to take one moment to talk about what the Nominations Committee does and why we do it because I have an appeal to make to the membership of the Section. If you are a member, please stay and vote.

The Nominations Committee every year recommends new members for the Executive Committee, reviews those individuals who are already on the Executive Committee with an eye towards whether each of them should remain on the Executive Committee, and we are actually very rigorous about this, and also nominates officers, as you know.

What is our goal? Our goal is to have an Executive Committee that is composed of a high percentage of very active participants, preferably with some regularity of antitrust practice, but not necessarily exclusively an antitrust practice. We are looking for people who will be active ongoing members, either publicly in programs such as this, or behind the scenes where we have quite a lot of program work and other Section and State Bar work to do.

We look for diversity very importantly in making our recommendations and our nominations, and I want to take a moment and explain what that means to this Section. First of all, it means practice background diversity, and in that regard we may be somewhat different from some or many of the other sections of the State Bar. We look to have a fair representation or a good representation of lawyers from the defense bar, the private plaintiffs bar, government agencies, in-house practice and yes, diversity also includes trying to get upstate members, from any of those backgrounds, to serve on the Executive Committee. And with respect to most of those areas, we have actually made significant improvements in the last ten, eleven, twelve years, with the exception probably of our upstate and in-house membership, which we would very much like to improve further.

We also, as I said, want an active committee. And so with regard to that, we try not to let the Executive Committee grow without constraint. Because the larger it gets, there is a point at which people do not have an incentive to be active, and we lose the collegiality and the effectiveness of the Executive Committee. So roughly we try to limit membership in the Executive Committee from any one firm to one person, except we do have exceptions and especially those that further our other goals. There are also historical accidents, mergers of firms and looking for people who just have particular abilities to bring to the Section, but as a general rule of thumb we try to observe that.

Also in terms of diversity goals, we have tried to improve the diversity in age. And I think that is fairly obvious. We have made some good improvements in reducing, if you will, the average age of the active participants of the Executive Committee.

We have tried to improve the gender representation on the Executive Committee, and in that regard I am afraid that we have made only moderate improvements, but some. Last but by no means least indeed, in the view of some of us, the most important goal at this point, the improvement of the Executive Committee's representation with minority lawyers or lawyers of color who have an antitrust practice, we have made only very limited improvement.

So I tell you all this because the Executive Committee and the Nominations Committee invites members of the Section and members of the bar who are not yet members of the Section, first, to be active members of the Section; to make yourself known to us if you have an interest in participating at a higher level or more involved level with the Section. You can do that by coming to the Section's regular monthly meetings. They are not just limited to the Executive Committee. We generally have a program every month. Make yourself known to us. Volunteer to run a program, to be a speaker at a program, or to get involved in the non-speaking activities that the Section runs. In that way we are looking to identify people who have not been active but who we can look at now or in the near future as new members of the Executive Committee.

Thank you for your patience in listening to me on that point. And now let me get straight to the strict business of the Nominations Committee. Each of you should have had a copy of the report that was available out at the front. I will not read the names of those individuals who are remaining on the Executive Committee for the second year of their term. I will also not read individually the names of those members who are current members and who are being re-nominated to the Executive Committee for a new term. Those names are also on the report.

The Nominations Committee proposes five individuals for election as new members for a two-year term on the Executive Committee. And those individuals are: Lisl Dunlop from Shearman & Sterling; Elinor Hoffman, you just heard, from the New York State Office of the Attorney General; David Marriott, Cravath; Scott Martin from Greenberg Traurig, and Ben Sirota of Debevoise & Plimpton.

I would like a motion and a second to elect those five individuals and those individuals who are currently members and up for re-election for election now to the Executive Committee.

SPEAKER FROM AUDIENCE: So moved.

SPEAKER FROM AUDIENCE: Second.

MS. GIFFORD: All in favor.

(Ayes voted.)

MS. GIFFORD: Thank you.

Finally, the Nominations Committee nominates the following members of the Executive Committee for election to one-year terms in the three open offices of the Section:

Steve Madsen our current vice chair, as chair; Jay Himes, who just ran this wonderful panel, as vice chair, and he will be in charge of next year's entire annual meeting program. He already knows that; this is not a surprise to him and he said yes anyway. And Bill Rooney as secretary.

May I have a motion and a second to elect those individuals?

SPEAKER FROM AUDIENCE: So moved.

SPEAKER FROM AUDIENCE: Second.

MS. GIFFORD: Thank you. All in favor.

(Ayes voted.)

MS. GIFFORD: Thank you.

And congratulations to the new members.

MR. PRAGER: Yes, congratulations to the new members of the Executive Committee, congratulations to our new officers, and yes, I think they all knew what they were getting into.

Those of you who are members of the Executive Committee or were just elected, our meeting will be held in the New York Suite, which is on the fourth floor.

We will reconvene back here at 1:15. That's quarter after 1:00, one hour from now, to re-commence our sessions. Thank you very much.

Current Antitrust Issues in Healthcare: A New Dose of Competition or the Same Old Prescription?

MR. MADSEN: Good afternoon, everybody. We are now ready to resume our session, and I have now met and I hope surmounted my first challenge as your brand new Section Chair, to wit, although there was electricity here this morning, there was none this afternoon. And there's another complication that you will not hear about in a moment, and you'll see why that's funny when you do not hear about it.

But I want to introduce the moderator of our next panel, Fiona Schaeffer. Fiona is a partner at Weil, Gotshal & Manges. She has extensive antitrust experience with an international orientation. And she has put together a panel on antitrust issues in healthcare. I have to say the task that we have set for Fiona and her colleagues who organized this panel was really quite daunting, because it really amounted to, well, healthcare reform is coming, isn't it? There's got to be antitrust issues there. And it looked for a time as though perhaps there would be, just like it looked for a time as though there probably would be healthcare reform, and who knows. But Fiona, who is truly game, and just how game she is, you're going to find out in about 30 seconds. She persevered. She put together a terrific panel, and now I place you in her care.

You are going to have to read.

[VIA SLIDES ON SCREEN]

MS. SCHAEFFER: Thank you. Last night I lost my voice, just like healthcare reform. Fortunately, Lawrence has agreed to extend his voice, and I will beam up some slides to move our conversation along.

MR. WU: Thank you, everyone, for coming. We have a great program for you, and we won't do this whole thing silently.

My name is Lawrence Wu. I am an economist with NERA Economic Consulting, and I play speaker and moderator today. I only mention that because, one, there are going to be times when I will be asking myself a question; and, two, I wanted to warn you not to be too shocked that after I give my answers, I may ask myself a follow-up question!

We have a great panel for you today. We have Rich Feinstein, who is the Director of the FTC's Bureau of Competition. He started his current term at the FTC in May 2009, and we are pleased to have him on our panel.

We have Josh Soven, who is Chief of the Litigation I Section in the Antitrust Division. He supervises a number of areas, but healthcare and health insurance are among his primary areas.

We are also very happy to have Sharon Selby on our panel. Sharon is Senior Corporate Counsel at Pfizer, and her responsibilities include antitrust.

What we are going to do today is to start with some remarks from Rich and Josh. After that, we will go into a panel discussion, and it should be fun.

Rich, would you start?

MR. FEINSTEIN: Thank you, Lawrence.

I think most of what we have to say today will wind up being said in the form of dialogue amongst the panelists, so I am going to keep this pretty brief.

I appreciate the opportunity to be here. I guess I need to liberate myself with the standard disclaimer that whatever I say I am only speaking for myself and maybe only for today. But I am not speaking for the Commission or for any Commissioner.

First, and for those of you who may be less familiar with the Commission than some, just a quick word on the current state of the Commission itself. I think there was a perception that President Obama's election was going to bring a sea change in antitrust enforcement. At the Commission, for reasons that are fairly straightforward, that's probably less likely to have been the case, because the same four Commissioners who are in place now have all been at the Commission for the last four years. The only thing that changed following the election was that Jon Leibowitz, who was serving as a Commissioner, was named Chairman. Of course, that's not an inconsequential change; among other things it gave me the opportunity to be Bureau Director.

The Chairman obviously has some influence over the agenda and is sort of first among equals, but ultimately the Commission operates by consensus, and so a lot of what's going on at the Commission, as we sit here today, I think reflects continuity more than dramatic change.

There will be, at some point, two new Commissioners. Julie Brill and Edith Ramirez were nominated last year, and had their confirmation hearings in December and were voted out by the Senate Commerce Committee, which has jurisdiction over the FTC. There was some hope that they might be confirmed before the holiday recess; that did not happen. I will leave it to people who know the nuances of the Senate better than I to predict when it will happen, but at some point I expect they will be confirmed by the full Senate, and we will have a full complement of five Commissioners.

In the meantime, Commissioner Harbour, whom I am sure is known to many of you here from the New York

Attorney General's Office, is staying on and continues to be very active and very insightful, as she always is.

For a long time the Commission has devoted a very substantial proportion—probably the largest proportion of its resources—to the healthcare sector. And when I say the Commission, I guess I am speaking now for the Bureau of Competition, rather than BCP, although they certainly are active in their own way in the health care realm.

I haven't done the math recently, but I can confidently say that more Bureau of Competition enforcement resources are devoted to healthcare, broadly defined, than any other sector. I say broadly defined to include not just the traditional healthcare arena of providers, such as hospitals and physicians, but also to include the pharmaceutical industry.

I think the reasons for that are fairly straightforward. We try, as much as possible, to focus our efforts on areas of the economy where there is a lot of consumer impact. Healthcare obviously is a perfect example of sort of a sweet spot where consumers have a huge interest in the benefits of competition to deliver goods and services as efficiently and at as high a quality as possible. So that's why we are there.

We have within the Bureau three different divisions of the six litigating divisions who focus on healthcare, to a large degree. There's one shop called the Healthcare Division, which I had the privilege of being the head of, from 1998 to 2001. And just parenthetically, literally the first day I showed up for that job, in October 1998, the first meeting I attended was—I am not making this up—was about what became the first of the "pay-for-delay" agreements in the pharmaceutical sector. These are the agreements settling patent litigation where there's consideration flowing from a branded firm to a generic firm and there's delay in entry by the generic. If somebody had told me on October 1st, 1998 that eleven years later (A), I would be the Bureau Director and (B) the FTC would still be in that fray, involving that theory, I would have been very skeptical on both counts.

Needless to say, our track record, recently at least, with those cases has been less than we would hope. We have two cases pending right now in the federal courts. The *AndroGel* case, which was filed in California and transferred to Atlanta; the *Cephalon* case, which is in Philadelphia. Both have motions to dismiss pending. The *Cephalon* argument was held in October; the *AndroGel* argument was held in January. We are quite interested to see how those decisions come out.

Also, apropos of the opening remarks—or I shouldn't say remarks but I guess the opening slide about health reform, there was a very strong effort led by the Chairman, in addition to our litigation challenges, to address what we perceived to be problematic conduct legislatively. Both the House and the Senate had versions that would have in different ways restricted these kinds of settlement agreements. The House bill actually made it into the version of the health reform legislation that was passed by the House; it would have been something close to a per se prohibition. On the Senate side, it got out of committee. It wasn't a per se prohibition; it was a burden-shifting approach. And my understanding is that they were very close to agreeing upon language that would have been in the final bill, had the final bill advanced. And of course, a couple of weeks ago it looked like it was about to. Where that will go is anybody's guess. Going forward, I expect the Commission to continue to challenge these pay-for-delay arrangements both through litigation and through legislation. If the legislation were to pass, it would presumably be a much more efficient solution than attempting to turn the courts around. Not that that's an impossible task, but at best it is a task that will occupy a fair amount of time.

We have also, of course, been quite active with respect to mergers in the pharmaceutical sector and the medical device sector, and I have no reason to think that that is going to change. There were several examples of that during the past year which we'll be talking about a bit later on.

On the provider side, the Commission for decades has been active in challenging collusive activity in physician markets, and that continues. That is, the challenges continue, and unfortunately so does the activity to some degree, and we remain active there.

I suppose one thing that has changed a lot in the ten years since I was running the health care shop is with respect to hospital mergers. In the late '90s, after a sustained losing streak, both agencies became somewhat "gun-shy," for lack of a better term, with respect to hospital mergers. As we will discuss later, that has turned around pretty dramatically. So the FTC is definitely back in the hospital merger game, and we continue to have hospital mergers on the radar screen. The vast majority of them are not problematic, but some are. And of course, the more consolidation that occurs, the more likely over time any particular merger in a market that's already experienced some consolidation may be the subject of some scrutiny.

Then one other thing I would just touch on, going back to physicians momentarily, is we do have some active investigations right now—none of them are public yet—involving consummated physician mergers. Most of the activity in the physician sector historically has involved conduct and joint venture analysis and questions about integration and that sort of thing. There are a couple of places around the country where, particularly in specialty practices, there have been mergers of substantial groups that arguably have conferred market power in those locations.

Why don't I stop there. It is a very brief overview of what we have been doing and what I am confident we will continue to do, and we will pick up more of the details along the way.

MR. SOVEN: Thank you very much. I appreciate the opportunity to be here.

Like Rich, these are my own views and do not purport to reflect those of the Department of Justice.

The Antitrust Division and the Federal Trade Commission share jurisdiction in the health care sector. Over time, the clearance process has resulted in the bulk of the healthcare resources at the Department going to reviewing health insurance mergers. Many health insurance markets are very concentrated and the amount of commerce at stake is substantial—about 15 percent of GDP flows through the insurance sector. Consequently, we look very hard at potentially anticompetitive mergers and practices among health plans. That scrutiny has produced challenges to some transactions.

In 2009, working closely with the Nevada Attorney General's Office, we challenged United HealthCare's acquisition of Sierra Health Services, on the ground that the transaction would reduce competition in the sale of Medicare Advantage plans in the Las Vegas area. The parties entered into a consent decree that required United to divest its Medicare Advantage business to Humana and we are happy that Humana's Medicare Advantage business is going strong in that market, a market in which the company previously had virtually no presence before the divestiture. In previous years, the Department challenged the United-Pacificare and Aetna-Prudential deals, both of which were resolved by consent decrees that required divestitures. But as many have observed, there are hundreds of mergers that the Antitrust Division has not challenged. Why is that the case? The reason for the relatively small number of merger challenges is that most mergers in the health insurance sector have not violated the antitrust laws. This is largely because many mergers have involved one company moving into an area where it would not have competed in the absence of the merger. And more recently, there have been a number of health insurance mergers that involve acquisitions of health plans with very low market shares or plans that have been declining rapidly.

Now, all that is still not a good story from a competition perspective, but it does not indicate that a significant fraction of the concentration in the insurance market has been due to unchallenged anticompetitive health plan mergers, which leads to an important question—if there are not a lot of missed antitrust violations, why are these markets so concentrated? We'll talk about this topic more in a minute, but the brief answer is that entry in these markets is brutally hard. On the one hand, entry shouldn't be that difficult. You don't need a factory to run a health insurance company. You're not building a rocket ship that requires a lot of manufacturing infrastructure. Many people and firms know how to sell health insurance. And there are roughly the same numbers of large well-capitalized national health insurance competitors as there are manufacturers of personal computers or as there are of mid-priced automobiles. Everyone, I suspect, when they go out and buy a car or PC knows pretty well that those markets are bone-crushingly competitive. That is not the case in the health insurance market, because those five or six companies do not compete in every market and a primary reason that they do not do so is because entry is hard.

The Antitrust Division also devotes substantial resources to protecting competition in the healthcare provider markets. That's an area where we share jurisdiction and work closely with the FTC in devising sensible enforcement policies. As Rich discussed, concentration on the provider side of the market is very significant and can also cause substantial consumer harm. As with health insurance mergers, there have been many, many hospital mergers. Most of them have not violated the antitrust laws, and consequently have gone through. But nonetheless, there's been a substantial trend toward consolidation in the hospital and physician markets. And if you go around mid-sized towns in America, there is a decent chance you're going to see a hospital with a 50 percent market share that controls many primary care physicians. That has occurred in a creeping fashion over time, and it makes sense for efficiency reasons in many contexts. But it has, nonetheless, left many markets where the provider groups can exercise substantial market power.

The third area where we spend a fair amount of time these days is looking at vertical arrangements between dominant health plans and dominant provider groups. Their dominance is related. We, of course, attempt to prevent concentration through merger enforcement work. But what we are now spending a lot of time analyzing is how a dominant hospital and a dominant payer tend to reinforce each other's market positions. A dynamic can take place where the dominant provider is worried about offending the dominant payer, and the dominant payer is worried about offending the dominant provider group, and they enter a long-term contract that is mutually advantageous, but which tends to leave competitors squeezed out. That may or may not be illegal, but it is a significant issue that merits antitrust attention. The next time someone tells you the health plan market is very concentrated in a mid-sized town, look closely to see whether there is also a dominant hospital market.

Lastly, as I suspect you know, antitrust enforcement alone cannot protect competition in the health care markets. Consequently, we think hard about whether there are things we can do in our competition advocacy program that may make for better informed policies.

One brief example of the Division's competition advocacy is our work concerning certificate of need (CON) boards. Both the Antitrust Division and the FTC have said for years that CON programs likely harm consumers. CON regimes can require that those who want to build a new hospital or new clinic or new imaging center have to go to a state-authorized board that may be influenced by incumbent providers in the market. The agencies have looked critically at CON arrangements because of the entry problems that I referenced a few minutes ago.

MR. WU: The competition mission of the agencies is obviously very important. Next we want to talk about how that mission might change and the challenges ahead in light of the prospect of health reform. I will start.

That's a great question, Fiona. Thank you for that!

As an economist, I have a couple of perspectives. The first is that competition is important, but when we talk about the big picture and about what drives healthcare spending, competition itself is not directly viewed as one of those key major factors that matter in reducing costs or increasing costs. The key major drivers of healthcare spending are the adoption of new technology and the expansion of health insurance. Both of these factors, of course, feed on each other. More insurance tends to lead more people to access and use the healthcare system, and that raises costs. And that of course fuels the drive for new technology and the adoption of new technology, which encourages even more people to buy health insurance, which gets even more people into the healthcare system. Even with health reform, those key drivers of healthcare spending will not go away.

The competition mission is important, though, because it affects the way health plans and providers are likely to respond to health reform and to other changes in the market. Let me go back to 1992 and President Clinton's proposed health reforms when he first became President. Health reform did not pass, but what it did do is cause everyone—health plans and providers—to take a closer look at their businesses and to figure out how they can cut their costs and improve their quality.

In that respect, health reform led to a lot of experimentation. A lot of things worked and a lot of things did not work. A lot of hospitals tried to collaborate with other hospitals. Sometimes it worked, sometimes it did not. Hospitals tried to buy physician groups. That was a hot thing for a while, but many hospitals now realize that that just did not work.

So there was a lot of experimentation and great interest in collaboration back in the early '90s. And collaboration, especially among competitors, is something that is of concern to the antitrust agencies. I don't think it is an accident that the FTC and DOJ issued healthcare statements in 1996, soon after President Clinton's health reform efforts.

Going forward, I see this kind of experimentation continuing, and competition policy will continue to be important as it was after health reform in the '90s. In my recent experience, and based on discussions I have had with clients I have worked with, hospitals and health care providers generally are taking a very close look at their businesses and thinking about what kind of collaborations and ventures might work to help them improve quality or reduce costs.

I think it is important to balance and appreciate what providers and health plans are trying to do. I hope the antitrust agencies appreciate that. But at the same time, I think there is a need to recognize that sometimes these experiments work, and sometimes they don't. I hope that innovation isn't stifled by antitrust enforcement.

I hope that sets the stage for our discussion of these issues, and I want to turn next to Rich, Josh and Sharon to talk about how the prospect of health reform may affect the competition mission going forward.

MR. FEINSTEIN: I will take a quick whack at that and then be quiet.

From 30,000 feet my sense of it is that the goals of health reform, broadly speaking, are entirely consistent with the goals of the antitrust laws and competition policy. I am thinking there are three goals, broadly speaking: cost containment, promotion of quality, and access. There are, of course, other sub-goals, but I think those three sort of capture most of what we were trying to accomplish with health reform.

I don't view antitrust enforcement or antitrust policy as an obstacle to achieving any of those goals. I wouldn't want antitrust enforcement to be perceived to be stifling innovation or experimentation. Some of the features that were being widely discussed are, for example, the accountable care organization, which to me looks a lot like what used to be called PHOs, physician-hospital organizations. Some of those were quite successful; others weren't. They were established without needing special treatment under the antitrust laws. It would seem to me if that notion of accountable care organizations were to advance, which it could with or without the implementation of health reform legislation, I suppose it could advance separately, you know, that's something to pay attention to. But ultimately, through antitrust, it becomes a question of kind of looking at the local marketplace in which the accountable care organization is established and trying to understand the effect that that will have on competition. There's no obligation or suggestion that there could only be one accountable care organization, I suppose, in a particular market. If there were only one that had market power, I suppose that could be something that might be problematic. But I don't think these are cutting-edge concepts that the antitrust enforcement agencies or the private bar haven't already had some time to think about.

MR. SOVEN: I agree with Rich that from an antitrust perspective, the healthcare reform debate has been good. A focus has been on how to improve competition in the health insurance markets and a central feature of healthcare reform about which there was a fair amount of consensus was the setting up of health insurance exchanges. Those are devices designed to eliminate some of the entry barriers in the health insurance markets that I mentioned by allowing or facilitating health insurance companies to compete on a more apples-to-apples basis, where consumers can make more informed decisions about their choices.

On the provider side, as Rich said, there's been a lot of thinking about how to integrate doctors much more efficiently. All of that is consistent with the objectives of antitrust. While there was not a direct focus on provider price competition in the health reform debate, there was a general focus on efficiency and quality.

MS. SELBY: From a pharmaceutical manufacturer's perspective, I think promoting access, promoting patient outcomes, and better access to information in the system are all things that are great. And improving quality and cutting costs are things that we are always looking at. I think that reform needs to make sure there are strong incentives for innovation; as we said, those are important to look at. And as Lawrence alluded to in terms of collaboration, more collaboration or not, right now there is a good deal of collaboration because we are so competitive. So it is something that could lead to more, but it is an interesting aspect.

So that's all.

MR. WU: In general, I also anticipate more joint ventures and consolidation going forward. One of the things we want to think about going forward are the implications of the Supreme Court case, *American Needle v. NFL*. This is not a healthcare case, but I think it has implications for joint ventures and how we think about and evaluate joint ventures. So here is just a very short description of the case, and it is great reading if you haven't read about it.

Basically, the Supreme Court heard arguments on this case earlier this month. What preceded that was a unanimous Seventh Circuit ruling that professional sports leagues can be single entities under *Copperweld*. Basically, the Seventh Circuit said, yes, with respect to the licensing of trademark logos for headwear, it was alright for the NFL to essentially have voted and agreed, as a single entity, to an exclusive license with Reebok. That essentially was a key event in the case. The NFL voted to enter into a ten-year exclusive license with Reebok. Thus, the question for the Court is whether the NFL has single-entity status such that the collective decision to do that (i.e., enter into an exclusive license with Reebok) was a violation of Section 1. Now, many circuits have ruled against single-entity status for sports leagues; the Seventh Circuit did not, and that, of course, created the issue.

One question is whether *American Needle* changes anything for the way we think about healthcare joint ventures. To me, I think the question *American Needle* really raises is this—what's the real problem here? Is the real problem, in the case of the NFL, that the teams could have competed and signed different agreements with headwear manufacturers? Or is it that the NFL collectively decided to license things collectively?

I bring it back to the healthcare context in the following sense. When it comes to a physician IPA, what is the issue? Is the issue that physicians could negotiate individually with different payors, and that's the kind of competition that we want to preserve? Or is it that that an exclusive IPA basically has negotiated on behalf of its physicians on an exclusive basis? I think exclusivity is intertwined with all of this. And when I think about *American Needle*, I think the interesting question is, "Would we have this case if the NFL decided that, yes, it would sign an agreement with Reebok but it was not exclusive?"

In the healthcare context, we have a lot of IPAs that engage in collective negotiation, but a lot of those agreements are on a non-exclusive basis. To me, that begs the question, what's the real issue here—collective negotiation or exclusivity? I will tee that up as a question for the panel here, which is: "How do you see the issue of collective negotiation, and do you see exclusivity as being a key part of that question or not?"

MR. FEINSTEIN: Actually, your observation that in the absence of exclusivity there might not be an *American Needle* case, I hadn't previously thought about that, but I think that's right. I think that's really the source of the competitive problem in that case.

I also think that there's a factual distinction that may or may not make it fully applicable to joint ventures among physicians, for example. Because with physicians it is ultimately the same product that is being delivered, whether it is being delivered jointly or individually, it's physician services. Now, there is an argument, of course, that the network is offering a different product than the product of the individual physicians. And frankly, if the network is integrated successfully and efficiently, that's probably true. But I think that is a bit of a distinction from the NFL situation, where maybe that they are a single entity for purposes of putting on games, but they don't necessarily have to be a single entity for licensing or purchasing uniforms or that sort of thing. So I am not sure whatever comes out of it will necessarily be fully applicable.

But to get to the precise question about exclusivity and the *MedSouth* model, of course, that was the first of the advisory opinions which gave a yellow light, at least—certainly not a red light, not a green light, but a yellow light, and probably a greenish/yellow light—to a clinically integrated physician joint venture.

I should note that my views here are based not only on my experience as an enforcement official who has examined numerous physician collaborations, but also based on my experience in private practice, where I represented physician networks, including one that worked out a clinically integrated arrangement that was allowed to go forward by the FTC.

So I very much see both sides of this issue.

By the way, let me echo Josh's opening remark, that I don't really see this as a field where we are talking about villains. But to go back to physician joint ventures, exclusivity is often a key consideration from the standpoint of the enforcement agency, because it allows you to have some comfort about the possibility of competition continuing outside the joint venture, and the idea that no health plan will be forced to contract with the venture unless it wants to. Unless it sees some benefit in the form of quality or price or whatever or both, the fact that it remains free to negotiate contracts individually with members of the joint venture substantially reduces, I think, the risk of harm or harm to competition.

On the other hand, particularly when you're talking about clinical integration, where you are encouraging physicians to collaborate and develop practices and protocols and data tools that will allow them to monitor their own performance and their peers' performance and discipline outliers and as a result of all that deliver what is hoped to be better service, I think there's a fairly persuasive argument that those goals would actually be served by exclusivity, where you had the members of the joint venture fully committed to achieving the objectives of the joint venture. So there is some tension there.

But I think under current analysis of clinical integration, non-exclusivity is going to continue to be a factor that gets some weight at the enforcement agency. Part of that is because there's a little bit of a leap of faith being made about whether the goal of the joint venture will be achieved. When you have financial integration, if you can get your arms around that from an enforcement perspective, you can more confidently predict that the participants who are taking on financial risk have incentives that are going to cause them to keep costs down and not to over-utilize. And you can measure it in a sense.

So in my experience, the physician networks that have had experience with risk-based contracting, that then try to export that experience to the non-risk sector or setting through clinical integration have a major head start, because they already have the tools in place to collect information and measure outcomes. Let me stop there.

MR. WU: But, Rich, how do you evaluate whether collective negotiation is reasonably necessary to achieve either a reduction in cost or improvement of quality? How do you go about evaluating that?

MR. FEINSTEIN: That's where the leap of faith comes in. For example, arguments have been made that in the absence of joint negotiation, you may have free-riding. It may lessen the commitment of the participants to the collaboration. That's an intellectually coherent argument, but it is real hard to prove. And in the instances where it has been accepted, there has usually been the backstop of non-exclusivity and the absence of market power or a substantial enough share of the market to threaten market power, which allows the enforcement agency to be more willing to make the leap of faith.

That's how I see it.

MR. SOVEN: Let me approach it from a slightly different angle. Rich is completely right in the core analysis, and he's being modest in the amount of expertise that the FTC has on these issues. The FTC's advisory opinion letters on clinical integration over the past decade have been spectacular in terms of the amount of work that went into them and the depth and the precision of the analysis.

I think about the exclusivity issue along these lines. Doctors want to jointly negotiate prices with health plans for two reasons. First, some are unhappy facing health plans with large market shares that are pressuring them to lower reimbursement rates to levels below what they think are necessary to maintain quality. If they get together to fix prices, where the central focus or the primary focus is simply to bump up reimbursement rates, that's illegal, and whether they enter into exclusive contracts or not with providers does not matter.

Second, where it gets complicated, and this is along the lines Rich was talking about, is that there is considerable consensus that the provider market is too fragmented. Your primary care physician doesn't talk to your cardiologist or your rheumatologist in a way that many experts seem to think makes sense. And a lot of the work in the healthcare field over the last decade and a half has been to try to figure out how you put physician practices together in a more coherent manner. Further, it is clear there are potential efficiencies and synergies and improvements in clinical protocols that can come from more integrated care organizations.

In a city like New York, such organizations may not raise antitrust issues, because you can probably have at least five of them and maintain robust competition, while getting the benefits of integration and synergies. The real challenge, and some of the FTC letters have addressed this issue, is in smaller markets, where you can only support one or two such integrated care organizations. Consequently, in smaller markets you may end up with an integrated care organization that's both providing the latest and greatest medical care but that also has a 70 percent market share. And over the past few decades of antitrust enforcement we have learned that healthcare companies do not behave significantly differently when they set price than companies in other sectors in the economy. If they have a 70 percent market share, they tend to utilize market power produced by that share. Consequently, from an antitrust perspective, integrated care facilities can create a difficult balancing problem that I think Lawrence is going to address further in some of his other questions.

MR. WU: Let's turn to issues of consolidation. Part of what we want to talk about is this: What lessons can we learn from the agencies' activities in evaluating hospital mergers, health insurance mergers, and pharmaceutical/medical device mergers?

With respect to consolidation going forward, many of us see hospital mergers on the rise, or at least, a number of hospitals are contemplating transactions. Rich, maybe I will start with you. Where do you think the key issues are and what are the tough questions in hospital merger enforcement going forward?

MR. FEINSTEIN: Should I ignore the question as to whether we are already in the driver's seat? I am going to choose to answer that one first, and then I will get to your question.

I would say at least the FTC is back in the car; whether or not it is in the driver's seat remains to be seen. But there's no question that, as I noted in my opening remarks, there is a renewed willingness to challenge hospital mergers. Not irresponsibly. Most hospital mergers don't cause any problems, and we'll take a quick look and go away. But there certainly are locations where that isn't the case.

It is also a really telling example of the value of retrospective studies of consummated mergers. Former FTC Chairman Tim Muris deserves enormous credit for commissioning back in 2002 a study of a number of consummated hospital mergers around the country. The FTC and the Justice Department had a difficult time, to say the least, in the mid-to-late '90s going into federal court to challenge hospital mergers. If it is not a consummated merger, you're ultimately making a prediction and you're asking the judge to agree with your prediction that the merger likely will lessen competition. The judges weren't buying it, for a variety of reasons, not exclusively, but often based on arguments that the geographic markets were much larger than had been alleged in the complaints. The FTC went back and looked at the results in several markets where mergers had gone forward, including Evanston, Illinois, and found what appeared to be supra-competitive price increases. Obviously, the fact that prices went up—standing alone—doesn't tell you anything. There are lots of reasons why prices could go up that have nothing to do with reductions in competition. But they looked at it and concluded that in that market in particular, there was evidence of supra-competitive price increases, and there was also evidence that it was a relatively small geographic market, which was somewhat surprising to a lot of people, given that it is a densely populated metropolitan area in the suburbs of Chicago. But following the retrospective study, the consummated Evanston merger was challenged retroactively, and the FTC issued a very thoughtful decision which explained why there was substantial evidence to support a smaller geographic market and substantial evidence to support supra-competitive price increases. And the effect of that was not only a victory in that case, from the FTC's perspective, but the ammunition the next time the FTC or the Justice Department wants to go into court with that prediction, and we can say in effect, "Your Honor, we are not making it up, look what happened in Evanston, it can happen." And that, I think without any question, certainly strengthened the resolve of the FTC to go forward.

They then challenged a merger in the suburbs of Washington, again a densely populated metropolitan area, where you had what was alleged to be a dominant hospital system (Inova) picking up a relatively small player. There was a showing of unilateral effects to the competition between the parties to the merger. That was challenged in federal court in the Eastern District of Virginia by the FTC and the Commonwealth of Virginia. I want to emphasize that, at least while I am serving as Director of the Bureau of Competition, given the local nature of hospital competition and all of the local issues that arise in hospital merger litigation, I find it difficult to imagine that I would recommend a challenge to a hospital merger in federal court without having the Attorney General of the affected state at the table with us. There might be circumstances where I would recommend that a hospital merger be challenged without the Attorney General of the affected state as a party—in Part 3 administrative litigation, for example. But even in those circumstances, it would be important to know that relevant Attorney General supports it. I certainly wouldn't want to be in a situation where the Attorney General actively opposes the challenge, which has occasionally happened in the relatively distant past.

So the bottom line here is that some of the arguments that had been generally accepted about the willingness of patients to travel great distances, for example, for hospital services, or the possibility that such traveling patients might serve as a tool for defeating any supra-competitive price increases post-merger have been called into question. The empirical support for challenging hospital mergers has been advanced considerably. And I can predict with a high degree of confidence that we are going to continue to look closely at hospital mergers where appropriate. That doesn't mean there will be a boat-load of cases, but we have active investigations now, and I expect that will continue.

MR. WU: Let me just add a comment on hospital mergers from an economic perspective. I think about prospective merger review differently from a consummated merger. On a consummated merger, such as the *Evanston Northwestern* transaction, that's the ultimate natural experiment, right? There is a transaction, and then there is an evaluation of actual pricing versus what you might think pricing would look like if there were no transaction.

Just stepping back a bit, I think that raises some very interesting questions about market definition and the need for market definition. Is evidence of a direct competitive effect enough, even if you haven't defined a market? The FTC defined a relatively narrow market in the *Evanston* matter, but there is a basic question whether the FTC really needed to do that. I think this is an issue that we'll talk about in a little bit in the context of the *Merger Guidelines*. Can we rely on direct effects evidence, and if we can, does that mean that the market definition analysis is not necessary?

My one comment on the market definition point is that even if you are looking at the effects of a consummated merger or trying to get evidence on direct effects, you still do need to go through the process of trying to identify the benchmark. In the case of *Evanston Northwestern,* are we talking about a benchmark comprised of hospitals throughout the Chicago area, or just the hospitals near and around Evanston? Are we talking about comparing the price increase to the price increase at tertiary care hospitals, the larger full-service hospitals, or are we going to look at all community hospitals? Even though it is easy to say that we can just disregard market definition, the reality is we still need to go through the process of thinking about supply and demand factors and thinking about what the right benchmark is. And, fundamentally, that is the process of market definition.

Okay, let's talk about healthcare payers, and that will lead us into a discussion of the *Merger Guidelines* and what is happening there. Josh?

MR. SOVEN: As I said at the outset, a majority of the Department's resources for healthcare work go to reviewing health insurance mergers. In these cases, we generally define markets and analyze competitive effects through the lens of standard unilateral effects analysis in differentiated product markets. And what that means in English is we look to see whether the merging firms are close competitors in the market. If you have a merger of firms that both focus on managed care products, such as HMOs, that transaction is likely to draw scrutiny and may be more likely to be challenged than if the merger is between one firm that focuses on private fee-for-service plans, while the other offers primarily HMO-centric products. The reasoning is simple—in the latter case, all else being equal, the merging firms are less likely to constrain each other in the market.

Now, some argue, perhaps with some justification, that this is an overly rigid way of thinking about how these markets work, and that we should go back to basics and think about the market shares and the level of concentration and the number of players in the market, with less focus on the amount of differentiation (or lack thereof) of the merging parties' products. Some would argue that there should be more bright-line market share cut-offs for precluding mergers among health insurance companies. And as the health insurance markets have become more concentrated, we are giving more thought to whether such an approach would work. For example, instead of focusing on product differentiation among health insurers, an alternative approach might be to examine whether, as the number of firms reduces, the "gravity" of the market moves things to a higher price point, simply because there are fewer bidders in the market who are less aggressive in cutting prices.

No one to my knowledge has really come up with a clean bidding or coordinated effects model to replace the unilateral effects approach, but for those of you looking to make a reputation in the field, the opportunities are there. The bottom line is we are considering moving beyond the traditional way of doing the analysis and using alternative analytical frameworks.

MR. WU: So the focus is mostly on the output side. What about negotiating with physicians?

MR. SOVEN: The focus is on whether health insurance mergers will reduce output. Provider groups sometimes say that this approach is too narrow. Their argument is the following: health plans with 20 to 25 percent shares and up can have a huge amount of leverage in negotiating reimbursement rates, and consequently a merger that produces such a firm should violate Section 7.

My response is that there seems to be widespread consensus, and I certainly share it, that at the end of the day, what we are looking at is whether conduct reduces output, and causes harm to consumers, not to producers. And the fact that the price or the reimbursement level for an input into an end product goes down by itself is not a Section 7 violation. Now, that said, if a merger causes the reimbursement level to go down to the point where it is affecting the quality or quantity of patient care, then the providers have a good argument that the merger violates the antitrust laws. Such output reductions can occur because physicians will leave the market and go somewhere else, or they will increase the number of patients they see in the day, and reduce quality. All of that is a plausible, and a sensible argument. What we look for are instances of, for example, a hospital leveraging the two merging parties against each other when they negotiate in terms of obtaining higher reimbursement rates. We actively communicate with providers to try to find examples of these types of events.

MR. WU: Before we turn to formularies, I do have a comment on the last topic. That health plans are not capacity constrained is, by and large, true. That's one key issue. There is also a big debate about the ease with which health plans can expand in markets. We also can evaluate or question the value of looking at market shares to evaluate the competitive effects of health plan mergers. In some of the work I have done, it is easy to find shifts in shares. It is easy to find new entry taking share away from a larger company. So the hard question that Fiona has asked Josh is this: How important is market shares when you think about healthcare?

MR. SOVEN: Market shares matter in the health insurance markets, but not always for the traditional reasons.

A traditional approach to market share analysis is to look at market shares in physical terms; for example, how much capacity do you have or how many cars are you churning out. In health insurance markets, the analysis is somewhat different. When a health insurance merger will produce a concentrated market, the standard argument is, "I know it looks bad, we have a 70 percent share, but three large companies, such as CIGNA, Aetna and United, are on the fringe of the market with a four percent market share, and those are Fortune 500 companies who are not capacity constrained. So if the merged firm raises price, those companies will come in and undercut the price increase." And that argument is available in almost every market. It is rare that you will not have at least one or two national competitors on the fringe of a market.

Nonetheless, the argument is usually wrong. Market shares matter for a number of reasons, including that hospitals charge completely different prices for the exact same service to different health plans based on the market shares of the health plans. This often is legal and efficient, but it fundamentally affects the fringe competitors' ability to compete because they often have a substantially higher cost structure than the larger competitors in the market.

A health plan with a two percent share can often literally pay 100 percent more for a tonsillectomy than a dominant plan with a 65 percent share. In short, shares are important because they relate to cost structures and the ability to expand rapidly. I should also note that if the merging parties have high market shares, that can indicate that they are likely close competitors.

To go back to where I started, if it were true that the company with the two percent market share could compete effectively with a dominant player, there would be many fewer problems in the health insurance markets. There are plenty of competitors. But you have this huge problem of equalizing the cost structure in order for firms with low market shares to be able to compete.

MR. WU: Okay, what about pharmaceutical and medical device mergers?

MS. SELBY: So Pfizer and Wyeth announced their deal around this time last year actually; closing the beginning of the fourth quarter last year. You have read in your materials, the analysis did look at both human health and animal health products and then focused on remedies in the animal health products side. A lot of the analysis was in a specific area and specific products and was limited to that.

I thought it might be interesting to talk a little bit about innovation markets, because this has been written about and discussed a lot. But through this process there could still be clear guidance on what we talk about when we talk about innovation markets and understanding and using the same vocabulary. How are we dealing in the pharmaceutical area with the low probability of drugs that are making it to market?; how are we looking at innovation markets?, and how are you protecting innovation? An innovation market is not just limited to large pharmaceutical companies and startups, but also includes universities and other entities. And obviously, innovation is not limited to just a geographic area.

So that is one area I thought was interesting to discuss and it sort of leads to what can we do to clarify for parties involved, what we talk about when we discuss innovation markets.

MR. WU: What about innovation markets? Are we on the same page?

MR. FEINSTEIN: Innovation is obviously something that is valued and it is desirable that it be fostered and stimulated. It is very challenging, in my experience, to define innovation markets, in part for the reasons that Sharon was suggesting. The closer you come to innovation with respect to a particular type of product or device, the easier it is in some sense. But the further you get from that towards innovation generally, I think the harder it is in some ways to apply traditional antitrust analysis because it is very difficult to identify the contours of the market. Innovation is essentially a value, but innovation could be going on in many different places with respect to different products that may or may not be competitive. And I think in order to apply traditional antitrust analysis to innovation you need to be a little bit closer to time when you can see new products on the horizon. That's just my personal view. But I think it is also the case that in the pharmaceutical and medical device sector you actually have the ability to do that a little bit more concretely because you can examine—and we do very closely—you can examine the pipelines. There is obviously no certainty that products that are in particular phases of development or the approval process are ever going to make it to market. But if you have a company that is a leader currently with respect to a particular product or therapy acquiring a company that isn't quite in the market yet but appears likely to get there relatively soon, that has implications for current innovation and for incentives to innovate in the future. It also I think verges into traditional potential competition analysis, which, of course, is not something that has been explicitly identified as the basis for very many challenges in recent years.

There was a case that Lawrence was involved with personally in the medical device sector this year, the *Thoratec* matter, where that was an important issue. But I don't have a silver bullet on innovation, except to tell you that I think—I guess you could hypothesize a circumstance where you have the leaders of research into particular therapies that weren't yet available but were being developed and think of that as innovation market. But it seems to me in that circumstance the distinction between innovation and the product itself gets a little blurry.

MR. WU: My own view is that I don't think we are on the same page on the innovation market issue for a couple of reasons. One, just to equate innovation with R&D is tenuous at best. Also, I think that innovation is hard to analyze, and the *Guidelines* don't really talk about innovation, right? There's also a lot of focus on price competition. But what I think innovation markets ought to encourage us to think about is what we really care about, which is output. If you think about consumers getting access to new therapies—that is so important—and that's probably where the action is, as opposed to price. Price is something that I think should be focused less on, but the *Guidelines* focus more on price than on output.

MR. FEINSTEIN: Competition clearly can and should, when it is working properly, stimulate innovation. But conversely, the elimination of competition can in some circumstances retard innovation.

I think the challenge—and I would ask this question, the biggest challenge in some ways is how do you quantify innovation?

MR. WU: Right. So as an economist, the way I think about innovation is the same way I would think about mergers, in general, which is that I focus on consumers and on output. Whether we see output expanding as a result of a transaction or not could be due to expanding demand for the product; it could be due to wider distribution. That's where I think the innovation is. Sometimes it is easy to think that all you need is a great idea. But there are a lot of great ideas that never make it, because, practically, you've got to get that idea into the marketplace; you have to sell that idea; you have to have people understand how to use that product and why it is so valuable. The work that you need to do to actually bring a new product to market is really important. Sometimes I think that gets underestimated in merger analysis, but that's where complementary assets come into play.

Again, I think of innovation in terms of output. Are we seeing more patients getting the therapy or not?

MR. FEINSTEIN: But again, I mean if the output isn't occurring yet, but it is something that may lead to increased output, I mean it is sort of one step removed, and therefore a little more speculative by definition.

I think. Not to mean it should be ignored. But it is hard to measure.

MR. WU: Right, so the potential complications are really challenging.

What we want to turn to next is conduct issues, before we open it up to the audience for questions. By conduct, I mean physician price-fixing and agreements by and between payers and providers.

Josh, what are your thoughts on the challenges here?

MR. SOVEN: If you go back the last 15 years, there have been probably 50-plus consents in physician price-fixing cases, the majority of them done by the FTC.

This record produces the question of whether the standard "go-forth-and-sin-no-more" or "don't do it again" decrees are sufficient to create the optimal level of deterrence.

The conventional wisdom has been no and that the agencies need to go further and seek various forms of monetary relief. I'm not sure that this conventional wisdom is correct. For the most part, I think the agencies' enforcement programs in the physician markets have worked by detecting many instances of physician price-fixing. The payers know to call an antitrust enforcement agency if they think they are being boycotted. While there have been a lot of cases, there are also a lot of doctors out there, and by and large I think the program probably is working.

Finally, and quickly, because I have talked about it already, but it bears repeating, concentration levels in the hospital markets and the health plan markets probably are linked. All else being equal, the hospital would prefer to have many health plans with which to negotiate. But all things are not equal. What a dominant hospital sometimes is worried about when it sees a big plan facing it on the other side of the table is whether that health plan is going to sponsor entry by a fringe competitor. Because the last thing that a big hospital wants is for the big health plan all of a sudden to move ten percent of its membership over to the competitor. The mirror concern exists for large health plans. To partially address this concern about the linkage between concentration in the hospital and health plan markets, we are looking at whether provisions of contracts between large hospitals and health plans can restrict entry, including the length of agreements and most-favored-nations clauses.

MR. WU: We have talked about the enforcement mission, and we now want to turn it over to the audience and take any questions that you might have for the panel in general.

MR. EDWARDS: The example you just gave of a large hospital and large plan in the same market, it sounds like the concept of a bilateral monopoly. Doesn't that usually produce competitive result?

MR. SOVEN: It can, and Lawrence is more qualified than I am to talk about the economics. The economists I think would tell you in such cases that the equilibrium price will be indeterminate and you can get some pro-competitive solutions.

But the facts on the ground, at least in the healthcare markets, give rise to concern. We have seen repeated instances of very favorable bilateral contracts between the dominant plan and the dominant provider group, and much less favorable contracts for the fringe competitors both at the health plan level and the provider level. And the worry is that such contracts will increase the odds of hospitals and health plans with durable 70 percent market shares, without a realistic possibility of entry.

MR. FEINSTEIN: I was going to add—I understand the argument that bilateral monopoly can lead to a competitive outcome, but I think, as Josh said on the ground, there are lots of examples where the dominant players on each end of the equation work out an accommodation, which isn't necessarily in the best interest of consumers, notwithstanding the theory.

MR. WU: Notwithstanding the theory?

MR. PRAGER: I think it is pretty clear that economic models will tell you that in some instances price discrimination can be very effective for increasing output. It seems to me that in healthcare it often has the opposite effect; the fact that the uninsured individual payer pays far and away the highest prices for healthcare, seems to me to diminish rather than to increase output. I think economists are pretty well agreed on that.

My question is: Is there a role for antitrust in trying to somehow address that price discrimination? I am not suggesting Robinson-Patman. I know it doesn't apply, and I don't know if there's anyone in this room that would foster more application of RP (Robinson-Patman). But is there any other application of antitrust that might be brought to bear to address that inefficiency that results from price discrimination?

MR. SOVEN: I think it is likely that competition advocacy will play a significant role alongside enforcement. In the instances I have just talked about, where you can show that the anticompetitive effects outweigh the efficiencies for long-term favorable contracts, then there probably is a winning antitrust enforcement action. But those cases may be relatively rare because the rule of reason analysis is very complicated.

What you have to do is figure out ways to sponsor entry that can eliminate the harmful types of price discrimination. The exchanges might be a way to do so.

At the end of the day, I think antitrust has a role but it can only go so far, and there is a need to look critically at alternative aggressive ways to promote entrants at both the health plan level and the provider level.

MR. WU: But again, maybe we ought to focus on output, and that, to me, tells the story. That's the distinguishing feature, right? When you've got price discrimination, you're going to have more health insurance coverage.

But again, this goes to what would have happened if price discrimination isn't allowed. That's the right benchmark, to me.

MR. PRAGER: Well, it can't be a positive outcome to say that the big healthcare plans have to pay more than they do today. That would be bad for everybody. So the question is how do you incent the providers to make lower prices available to those that are not power buyers?

MR. SOVEN: You have to deal with the free-rider problem involved in providing the capital needed to promote entry. Because the hospital's response to this story I have been telling you is the following: "Look, I am losing money on Medicare, and that's 40 percent of my business. I might be covering my variable costs when I contract with the dominant plan, so I am doing okay there, but I am really not making any money. I need those sky-high prices from the fringe health plans and from those people who just walk in off the street to buy my MRI machines."

The hospital is saying, "Don't look at me to be the bank to sponsor entry at the health plan level. It is not going to work. I will give them the money; I will take the loss. The dominant plan is going to cut price anyway and crush the fringe." The issue is figuring out a way to share the financial costs of entry, which is hard.

MR. PRAGER: So I think your answer, which is what I expected, is that antitrust probably can't fix that problem.

MR. SOVEN: No, antitrust enforcement can't fix the whole problem.

MR. WU: Well, here is a question from Fiona—is that because you're not willing to impose a remedy mandating contracting?

MR. SOVEN: You're right. I don't know that anyone is willing to say that hospitals have to do what insurance companies do in terms of community rating, meaning that they can't charge more varying prices to health plans than, for example, a ten percent band would permit.

MR. WU: Thank you everyone, thank you very much.

MR. MADSEN: Thank you very much. That was great. It was really interesting. And I think this is a new experience to speak without speaking and have it be a smash.

Take Me Out to the Bowl Game: Antitrust Issues in College Sports

MR. MADSEN: All right ladies, gentlemen, antitrust lawyers, guests, friends, we are about to leap into the final portion of our program, and I want to invite you to grab your seat.

Now, our final panel—it has a corny title, like all our others, and you can blame me—it is "Take Me Out to the Bowl Game."

We have an interesting panel here covering the interesting subject of the BCS arrangement. I want to introduce our moderator, Barry Brett.

Barry is, I think, well-known to many of you. He has been a member of our Executive Committee for a very long time. He's a partner at Troutman Sanders. He is indeed a distinguished antitrust lawyer, a mentor and friend to many other antitrust lawyers. And I have it on reliable authority that he is some kind of sports nut.

I did not bring a whistle, which perhaps I should have done, but I am sitting right in front. If there's trouble, yes, I will do my best.

Anyway, I want to turn you over to Barry who is going to introduce his terrific and very distinguished panel. Thank you.

MR. BRETT: Thanks, Steve. My first task as moderator is to set out some disclaimers. I was going to first disclaim any responsibility for the title, but Steve beat me to that.

Second, contrary again to Steve's title, we are not going to discuss college sports generally, but we are rather going to focus on the BCS system.

Third, I am not speaking for the Mountain West Conference, and neither I nor Troutman Sanders represents the Mountain West Conference. All the views that I am going to express are mine alone.

Fourth, not surprisingly to anyone who knows me, is that I am not going to be a moderator, and I am anything but moderate in my views as to the issues that we are going to talk about.

Now, on a positive note, what we are going to do is address the subject of great current interest, which has significant antitrust implications. We have set up this panel to be a little different from most of those earlier in the day, in that our panelists consist largely of people who have lived the matter and know exactly what happened and have been affected by it and can tell us by it both anecdotally and by virtue of their own experiences and the implications of the events exactly what happened and how these matters work. In fact, there are as many Ph.Ds on this panel as there are antitrust lawyers, and the only two of us that are antitrust lawyers are really here to set the stage for a lively discussion. And I can tell you that in our preparatory meetings it has been quite lively and controversial. And I hope we did not wear ourselves out. Let me first introduce our panel.

To my immediate left is Trip Monts who is a partner in Hogan & Hartson antitrust and competition group in Washington. He's a graduate of Yale, and he studied law at the University of South Carolina. He has long served as counsel to the Bowl Championship Series and has guided that group through many challenges and helped them survive.

He and I both testified this summer at Senator Hatch's hearings of the Senate Antitrust Subcommittee addressing the antitrust issues of the BCS, and the proceedings there are available for review and are quite interesting.

To Trip's left is Neal Pilson. Neal is currently president of Pilson Communications Inc., that's a sports television company headquartered in Chappaqua, New York. And Neal has great experience and knowledge of what we are going to be talking about. He was formerly president of CBS Sports, and he has been an active participant in creating the structure of televising of college games, and he's intimately familiar with the history and rationale of the BCS and related matters.

Now, again, in our conversations and in every conversation for some reason, Neal has made it very, very clear to remind me that while he is a graduate of Yale Law School and was admitted to the bar, he is a recovering lawyer, he is not functioning here, not appearing here as a lawyer and is not going to speak from a legal point of view.

To Neal's left is Dr. Stephen Weber. Steve has served as president of San Diego State University for the past 15 years, and he's a former chair of the Mountain West Conference and a member of its President's Commission at this time. The Mountain West Conference is one of the victims of the cartel we are here to discuss.

Actually, having come as a moderator, I want a striped shirt. Again, not being a lawyer, Steve has an interesting perspective. He has a Ph.D in philosophy from, coincidentally, Notre Dame. And his thesis there is something directly related to what we are talking about today; it was proof of the existence of God. Steve has been on the NCAA Division I Board of Directors, its Executive Committee, and he has been on the Presidential Oversight

Committee for the BCS. So he is, again, quite familiar personally with the things we are going to be talking about.

And at the far left of the group is Dr. Evan Schouten who is vice president of CRA, which has now again become Charles River Associates. She has a Ph.D. in economics from the University of Chicago. Evan specializes in antitrust economics, and particularly with involvement in sports and has been involved in many sports cases, including *American Needle*.

So as I say, I think it is a particularly interesting program, and again, a little bit different in structure than the ones earlier in the day, and hopefully it will be of great interest to you.

Now, I am not talking solely as a moderator; I am taking the prerogative of moderator. I am going to speak first on an issue that is of great interest to me, obviously, as an antitrust lawyer, and as Steve mentioned, a confirmed sports junkie.

When one looks at what's going on in the business, you see the recent activity in *American Needle*, which as most of us know, was argued about two weeks ago at the Supreme Court level. There was recently a NASCAR decision out of the Sixth Circuit, and a lot of other cases which illustrate how frequently my two disciplines of sports and antitrust connect. There's a full program we could do on the NCAA, a full program we can do on professional sports, but as I said, we are going to today focus on just the BCS aspect of it, the Bowl Championship Series, which affects college football.

Now, here in New York, it is obviously not as key an issue as it is elsewhere. In New York we have Columbia football which is probably an oxymoron, and across the river we see Rutgers trying to break into major college football. So it is not a particularly hot topic here most of the time. But if one travels the country or reads local papers or sees what's going on in large parts of the country, college football is a matter of religious fervor. And the determination of who makes the various bowl games, who gets the national rankings, the competitive success are matters not to be tampered with easily and go to the heart of many of these communities. It is big business.

Anyone who has been out in Columbus, Ohio on a Saturday or Ann Harbor, Michigan on a Saturday knows what's going on. There is nothing else that is of any great significance at that point. The national championship is worth millions of dollars to the teams that succeed. The participation in bowl games is vitally important for recruiting among the colleges going after the high-school students.

Major universities pay millions of dollars to keep or recruit big-name coaches, at the same time as they are cutting academic budgets and firing personnel. And you saw just a little bit of a furor out in the University of Texas when they gave the coach a new contract for four or five million dollars a year, just at the same time the university was cutting a lot of their budgets and getting rid of members of the faculty in other areas.

The President of the United States has spoken out on the subject, and he has criticized the current system as inappropriate and urged the creation of a playoff system to determine the national champion. After the hearings which Senator Hatch had this summer, he referred the matter to the Department of Justice for investigation of antitrust violations by the BCS.

What's the fuss about? I will tell you a little bit, without going through everything in great detail. We'll start with the proposition that there are 89 sports, men and women, called Division I schools which compete under the administration of the NCAA. In 88 of these sports the champion is determined by a playoff sponsored by the NCAA. In all of those competitions and in all of those playoffs all of the competitors and conferences compete on an equal footing for the title and the revenues. In effect, everybody has an equal opportunity to get in, win the title, win the championship. We have all seen and know what goes on with the basketball tournament when 65 teams from big and small schools compete. And it is always interesting to see who is going to come out there, and the big revenues and dollars involved are particularly significant.

But in the most lucrative of these sports, the 89th, the NCAA is totally uninvolved in the determination of the national champion, and the so-called champion is decided and set up by a system set up by a group called the Bowl Championship Series. The widely known BCS.

BCS was formed in 1998 by an agreement among six ostensibly competing conferences; it represented the Big Ten, the Big East, the Pacific Pac-10, the SEC, the ACC, the Big 12, they all got together, not under the auspices of the NCAA or otherwise, and they decided who was going to be able to get into the bowl games, how that was going to be determined, who was going to get all of that money and how the national champion was going to be established.

Not surprisingly, the rules that they established mean that the champion of each of these six conferences has an automatic bid into one of the four major bowl games. It doesn't matter how good a team it was, what kind of record it has. It might be a team that won post season tournament or otherwise, that team is going to get into one of the major bowl games, and it means a lot of money for the conference.

The BCS has no formal legal status. It is not an LLC; it is not a legal corporation, and it seems committed to avoid any classification. They all just sat down and agreed how everything would be done and guaranteed to each of them that they would have one of the spots in the bowl, which means at least that every one of those conferences gets a big, big chunk of money each year. No other teams or conferences have similar guarantees. There is a possibility that one other non-BCS school could be guaranteed a slot if it meets certain criteria, but there's only one guaranteed slot left for a non-BCS school. As I said, it leaves a lot of money.

In 2006 this group got together and said, why don't we decide how the national champion will be set up. They decided that the two schools that finish first and second in their very complex but opaque formula created by the BCS would compete in a fifth game played one week after the bowl games, which would be denominated as the National Championship Game. It was further agreed that this National Championship Game would rotate among the venues of the four major bowls. So we have this group of six conferences and four bowls agreeing on how this is all going to get done. And they created very significant barriers to entry and very significant advantages for themselves.

Not surprisingly, since this has been in place only a handful of non-BCS conference teams have appeared in the major bowls. Again, not surprisingly, none has appeared in the National Championship Game, despite some great competitive success among them. And again, not terribly surprising, but again, they have no opportunity to do it and no playoff.

For the 2006 seventh season the BCS decided, gee, maybe we are getting a little aggressive here, we ought to let these other conferences in the door. So they added to the membership or the Executive Committee one representative with one single vote of five other conferences. So five additional conferences had a seat at the table with a single collective vote for all of them. But the major bowls have continued on the same basis, and the results have again not been surprising in terms of the economics.

Just this week they announced the allocation of proceeds from the bowls and television contracts for last year. The five non-BCS conferences shared a total of $24 million, a significant amount of money. But the SEC and Big Ten, which had automatic bids, each received a virtually identical amount for itself. And the other conferences in the BCS all received similar amounts. So five shares, again, one share that goes to the equivalent of what the other conferences get.

This is big business. The BCS just signed a TV contract with ESPN for the next couple of years for half a billion dollars. The statistics as to the division of proceeds at bowl games and related revenues show a staggeringly high percentage of the money goes to the six conferences. The fact that each has guaranteed revenues each year is critically important and a benefit not enjoyed by non-BCS schools.

There are barriers to entry, and the exclusion has significant anticompetitive effects. Price competition among the major bowls for teams, television revenues has been negated by agreement, and it is nonexistent. We have a single television contract. In some there is a system established by an ad hoc group of ostensible competitors which creates barriers to entry and operates a series of exclusionary rules. It sounds like the kind of things we look for and talk about all day in our practices.

Now, the key precedent—I will talk a little bit about some of the legal issues that are involved. The key precedent that will be involved in determining the legality of this, if it ever gets challenged in the court, has to be reviewed. We go back to the NCAA Board of Regents case in which the Supreme Court dealt with the issue of legality of a rule by the NCAA which limited the number of games which could be televised each year. Essentially they had one game a week. Neal can you tell us a lot more about that because I think he was intimately involved.

MR. PILSON: I am ready.

MR. BRETT: It is my bowl. That's what I have to put up with during all of our earlier conversations.

MR. PILSON: He told us ten minutes each.

MR. BRETT: I am moderator. I think that's a signal that I had better speed up.

Long story short, it went through litigation, and they tried to form a competing group. The Universities of Georgia and Oklahoma brought suit against the NCAA. The NCAA fought like hell to preserve its rule and to limit the number of games that were being shown. Obviously, they lost. It is probably the best thing that ever happened to them, because anybody who spends Saturday afternoon at home will know how many games are now being televised and the great proliferation of revenues.

There have been a variety of other cases in the area which deal with legality of NCAA rules. There was recently a case in the New York area involving the tournament by which a basketball champion is chosen. Historically, the NCAA has a tournament which is expanded, now 65 teams, which participate in order to determine the basketball champion. Long ago there was a second tournament run basically out of New York, out of the Garden called the NIT. Well, the NCAA wanted to be sure that its tournament got everyone they wanted, and the NCAA passed a rule that said that any team that's invited must come to the NCAA, and they can't go to any other tournament. The NIT sued them in New York. The NCAA's efforts to get that dismissed on summary judgment were denied, and ultimately it was settled. by the NCAA buying the NIT. The result, of course, is now you can never have any team in both. There will never be a champion of both the NCAA and NIT. The teams do not have a choice.

Now, I am glad about that in one respect, because there is only one team that has ever won the NCAA and NIT in the same year, that's CCNY, my alma mater. That will never be duplicated. It is Bernie Persky's alma mater, and it will never be duplicated. And they it did it with everybody on the team shaving points.

Now, we can spend more time talking about the precedents, but I think suffice it to say that I think, without really trying to determine the legality or illegality ultimately, a good case can be made that there is a violation of Sections 1 and 2. All of the elements of the violation are there. We have a group of competitors; there's no *American Needle* single-entity issue here. There are anticompetitive effects. And I have postulated to Trip that if this complaint were to be drawn, we have all the paradigms of the antitrust violation, the multiplicity of parties, the competitive effect, the size of the business, the effect on commerce. And whether or not that case wins is an interesting one. I postulate that I don't think Trip would move to dismiss that under 12(b)(6), because I don't think he wants an adverse decision. But Trip claims he did not hear that, and that's why he did not respond. So let's give him a chance to respond.

MR. MONTS: First of all, thank you, Barry, for your kind invitation here. As my colleague, Mr. Pilson, from the television industry tells me try to keep to our time frame.

Let me start off with a couple of words. As with Barry, I am speaking here today only for myself, and the views I express are my own and not any of the six conferences, the University of Notre Dame, which I happen to represent outside of these confines.

I am going to focus my presentation on Section 1 of the Sherman Act, and I am not going to focus on Section 2. I think the issues are fairly clear with respect to Section 1, and so we will focus on that. And I am not going to focus on any of the threshold issues, *American Needle* impact on commerce, any of the other thresholds that Barry talked about. I am going to assume for sake of argument that, at least on those matters, Barry is correct, that he can plead a sufficient complaint, and I wouldn't move to dismiss on those grounds. Whether I would move to dismiss on others, well, I guess I would have to wait and see the complaint.

Let me start by saying that you can only understand the BCS by going back and looking at history of college football and tracing it back. Barry mentioned that of the 89 sports in NCAA, 88 of them are decided by playoffs. The fact of the matter is that college bowl games, the one sport where we don't have a playoff at the Division 1-A level, doesn't have one for a very specific reason. Bowl games predated the formation of the NCAA. The first Rose Bowl game was played in 1902. It was wildly successful for that day; it drew 8,500 fans. The game was incredibly lopsided however; Michigan and Stanford played, and it was called in the middle of the fourth quarter with Stanford trailing 49-0. The organizers of the Rose Bowl were so concerned about this that they replaced the game the next year with Roman chariot races, and later on with ostrich races through the streets of Pasadena. And this continued for 15 years until they decided to give college football another try in 1960. As they say, the rest is history.

But the Bowl games predate the creation of the NCAA. College football itself has never, in that respect, crowned a national champion through a playoff. It has always used a system of polling. The most well-known polls are the Associated Press Poll and the Coaches Poll. The polling goes long before that, or rankings go long before that, even to Walter Camp and his days at Yale. So that has been the way in which a national champion has been crowned. At the end of the season, some polling organization has declared a team the number one team in the nation and has given it the national championship designation, usually with a trophy that goes along with it. The crystal football trophy that you see today at the BCS National Championship Game is in fact owned by the American Football Coaches Association. It is simply emblematic of the champion crowned by the American Football Coaches Association, which is the sponsor of the Coaches Poll.

Anyway, the Bowl games themselves are independent events, and they are organized and presented by local Bowl organizations and have been in existence, largely successfully in existence since the mid 30s. They come and go, and there have been many of them over the years that have come and not been very successful economically for whatever reason and gone out of business. But today there are 34 Bowl games, counting the BCS National Championship Game. These Bowl organizations are designed largely as 501(c)(3) organizations to promote charitable endeavors and to generate economic impact for their local communities. They operate on a model in which teams and fans will come to a community and stay for three or four days and enjoy the benefits and the attractions of the community.

They are unique to college football. I can't think of any other sport that has anything quite like it. Essentially two teams being invited to play a game, usually quite a bit a ways from their campus, and in which their fans are expected to travel and stay for three or four days. We certainly don't see that with the professional sports, and I can't think of anything else like it. Maybe NIT at one time, but as Barry noted, that's now been folded into the NCAA.

The other interesting factor about these is the Bowls host the most successful teams, and generally those are the ones that have the longest history. They make their revenues largely from television and then from ticket sales and the sale of corporate partnerships.

Now how else does college football differ? Unlike the NFL, college football has eleven leagues and three major independents: Notre Dame, Army and Navy, and not one league. Over the years with these Bowl games on one side and the leagues on the other, there were certain relationships that developed, and these relationships were very close. Contrary to my colleague's comments, these relationships long predated anybody thinking about BCS. Instead, the Rose Bowl for many, many years, for over 60, has hosted the Big Ten champion and the Pac-10 champion and had a separate, individually negotiated relationship with those leagues. The same is true with the Sugar Bowl and the Southeastern Conference. The Old Cotton Bowl-Southwest Conference relationship existed for a long, long time. And the ACC had a relationship with the Citrus Bowl for many, many years.

So what happened? Well, Barry mentioned the NCAA case, and the effects of NCAA I don't think you can understate on college football. Once the NCAA television agreement was enjoined and colleges were required to sell their television rights or license their television rights individually by conference, there were a number of independent teams—Florida State, Miami, West Virginia, Penn State—who had historically been very, very good and played as independents, not as a member of any league, no longer found that selling television rights on an individual basis was quite going to be that successful. Penn State might have a big fan base, but its fan base is largely confined to western Pennsylvania, and that was not a hugely attractive television market. And not surprisingly, Penn State found itself better off joining the Big Ten conference. Florida State, which had been very successful and at the time was amidst a run of fourteen straight seasons and in the top five, also joined a conference, the Atlantic Coast conference. And Miami, who had won four national championships in the 1980s and early 1990s, joined with a number of other independents to form the Big East conference. So all of these independent teams that historically played in Bowl games and very good joined conferences and became subject to these preexisting conference bowl affiliations, which posed an enormous dilemma both for the bowls and for the conference.

Bowls have never been very good at matching one and two in a Bowl game, and that got tougher when the independents, who were able to go to any Bowl game upon invitation, were now subject to these conference Bowl affiliation agreements. So those who are looking at this and saying if we want to match one and two, how do we do it; what do we do? We have these existing relationships, and nobody is anxious to end those, so how do we pair them up? That led to BCS and its predecessors.

Now, Barry mentioned a few attributes of it. Let me just focus on a couple of them. One is the guaranteed slots. The guaranteed slots are a reflection of—not the cause of the BCS agreement; they are a reflection of what existed before. The Big Ten and the Pac-10 had been in the Rose Bowl for 60 some years; they are not going to give that up and try something new without getting exactly what they were able to obtain on their own. The Big 12 conference, which was an amalgam of the Cotton Bowl, had an arrangement—I mean of the Southwest conference—had an arrangement with the Cotton Bowl, and the Big 8 conference, which had an arrangement with the Orange Bowl, wasn't going to give up the Orange Bowl arrangement or the Cotton Bowl arrangement without having a place for a champion. The ACC isn't going to give up the Citrus Bowl arrangement without something for its champion. So the guaranteed slots today are simply a reflection of what these conferences were and are able to gain on their own.

Now, I am going to be very brief on the antitrust analysis, because I think Barry's focus on the precedent of NCAA is probably where it will start and where it will go. But I think the factors that really matter the most here are (1) no matter how it is structured, no National Championship Game or arrangement is ever going to exist without the agreement of the participants. And focusing on what we consider in the antitrust law, the immediate consumers here are television and Bowl games who buy the product from the selling colleges, if you will. And no conference or institution alone can create a championship arrangement, no matter how it is structured, by itself. So with all of these things, the Bowl Championship Series is in effect a joint venture that creates a new product; a one-two game between the two highest ranked teams in the BCS standing. Now, that can't be created except by full cooperation. And therefore, we have a joint venture which would be subject to the rule of reason analysis.

I think the procompetitive benefits are quite clear; it creates a National Championship Game. It maximizes the number of post-season opportunities; it enhances the value of college football's regular season, which I think is unique, and we will discuss later. And it has some other benefits that we will talk about in the panel session. I don't believe it has any anticompetitive effects; I don't believe it raises any barriers to entry. The institutions and conferences that do not have guaranteed slots in the Bowl games today have never had them and are not able to get them on their own. What they do have today is a guarantee that they never had before. If one is in the top twelve, it plays in one of the games. And if it is in the top 16 and ranked higher, then one of the conferences wins an automatic berth, and it also gets a guaranteed slot. That's an either or. I don't want to suggest that both happen. It gets a guaranteed slot in a National Championship Game if it is ranked first or second.

In terms of revenue distribution, if the BCS were to go away, so would the revenues. They would go simply back to the old Bowl system, where each conference and each Bowl makes its own arrangement individually, and the teams in those games would share the revenues.

And I will give you an example of the numbers of how it is. The last five years—and this is the 2004 to 2008 regular seasons—the Conference USA, one of the five without an automatic berth, earned $31 million in Bowl revenues for the 2004-2008 regular season. Twenty-one of those are from non-BCS games which they negotiated on their own, $9.8 million are from BCS games. Conference USA has never placed a team in a BCS game. Mid-American conference, total of $21.5 million and total Bowl revenue $13.9 from non-BCS games, $7.6 from BCS games. The Mountain West Conference has earned $44 million from Bowl games; $12 million of that comes from non-BCS games, and $32 million from BCS games. Twice in those five years that I mentioned the Mountain West put a team in BCS game. The Western Athletic Conference has earned $32 million, almost 33 from Bowl games; 9 that it negotiated itself, and 23 from the Bowl championships arrangement. For those five years the WAC also placed two teams in BCS Bowl games; that's a subsidy of 252 percent.

In short, I think the antitrust analysis is fairly clear. The BCS creates a product that wouldn't otherwise exist. It benefits all of college football, and it has no output producing effects, and therefore I think passes muster quite easily.

MR. PILSON: I come to you from the world of television, which is related to the antitrust discussions I guess we are having; obviously, an important part of sports in America. The timeliness of this discussion—this is the front page of our journal, our weekly publication, and the BCS big split is this week's topic of discussion. So this is a timely opportunity.

I had originally come here to talk to you about the past, and you remember who else did not want to talk about the past in front of Congress. My two colleagues here have pretty well addressed it, except for two things. I go back, with deference to the members here, I was involved in college football when the NCAA did run the entire program in the early 1980s. I helped negotiate for CBS a piece of that pie; we split it with ABC. It was run by the NCAA. Along comes the Burciaga decision, affirmed by the Supreme Court, and the NCAA is tossed out as the overall arbiter and controller of college sports.

At the time I said that, if this happens, the rights fees will probably decline by 50 percent. And I was wrong; they declined by more than 50 percent. Because what basically happened is you had multiple sellers and multiple buyers in a very confused market. As president of CBS Sports, I made a deal with the Big Ten and the Pac-10 and the CFA, which was composed of the other major schools, made a deal with ABC.

The Burciaga decision is where we are today. This is what the Supreme Court wanted to happen, a free market. And in that free market the colleges banded together, some independents, some in conference groups, and negotiated with television. Contrary to public belief, television doesn't control or dominate college athletics or professional sports. We represent the American public, and we reflect the taste and appetite of the American public when it comes to sports. The American public votes every 15 minutes, and college football is one of the most successful sports on television today. As you know, at one time college football was, along with baseball, basically the only two national sports in America. And the unique thing about college football is, notwithstanding the growth of the NFL, college football remains today a piece of our culture. And I wanted to ask that question, because without understanding the depth of emotion that college football has in our country, without understanding the degree to which it affects vast areas of this country, unlike the northeast, how many of you have actually been to a real college football game? And I mean by real, as we said, we deferred to Columbia, and I went to Hamilton College, and we played football and still do. But if you haven't been to Tennessee with 110,000 people sitting next to you, or the University of Michigan with 111,000, or Alabama or Texas or Georgia or Florida or Ohio State, you have not been to a college football game. And you do not fully understand the importance of this sport in large areas of the United States.

Television picks that up, and we carry college football as a very important part of our schedule. But what we do, keep in mind, is we sell our audiences to our advertisers. That's our business. And we generate very large, very good audiences for college football. The demographics are good: Reasonably affluent people, well-educated people; people who buy expensive toys, financial services. You can tell who is watching a sports event by who is advertising on it. Because that's who they are trying to reach. College football is one of our most successful products.

What television does is sells college football. I know there has been some criticism about seeing games on Tuesday night, a Monday night and a Wednesday night on ESPN. We say to colleges, if you play on Wednesday night, we'll pay you X million dollars because you'll be the only game on at that time period. The colleges are free to accept or reject that money.

For the most part, the smaller conferences do take that money, do take the opportunity to expose their games to the American public. Because if they played on Saturday and Sunday, television has very limited interest in putting them on a national service. And television, in a way, is one of the most important factors that the colleges must consider when they divide up, when they create agreements among themselves.

Television has limited time periods: Saturday afternoon, Saturday night is college football. And we have limited ability to show games on a national basis. It may surprise you, and it is a factor for college sports, that if 100 schools got together under the banner of the BCS, which is part of the anticompetitive message that we have heard earlier, television would not pay any more to televise 100 schools than it would pay to televise 60 schools. That's the problem. The other 40 schools have very little impact on television. They don't generate ratings. Most Americans are not interested in watching, with due respect, Boise State, Utah, San Diego State.

A quick aside, I represented San Diego State, I consulted for them when they were looking to join the PAC-10. I was also involved with the NCAA and advised them in a one-day consult out in Indianapolis not to try to put your nose under the tent in college football. That ship has sailed. The train left the station a long time ago. I don't think the NCAA can get back into an oversight function with respect to college football.

So what happens here, very quickly, is that if 60 schools basically are generating what television is prepared to pay for college football, 100 schools does nothing but diminish the pie for the first 60. And that's the very real economic reason why the big six conferences don't have much interest in growing the pie to serve 100 schools or the 119 former what used to be called Division 1 schools. If you think television controls that decision, it doesn't. It simply reflects what the taste and the public want to see. And that drives the decision on the part of Ohio State and Florida and Texas, because even given all of the huge revenues that they generate, not only from television but from sponsors and from ticket sales, they can't absorb a 20 or 25 percent cut in their revenues to share with the schools that currently don't participate.

So those are the economics. And while you can say, well, the economics must yield to antitrust litigation, antitrust principles, the fact is the politics of this country come into effect as well. And you have Congressmen and Senators not only from the Big 6 conference states, but also from all those Bowl games that exist in 25 or 30 different cities, each one bringing benefit to that city, each one living or dying in a free economy. They are opposed to a playoff system that they feel would diminish the share of monies they currently realize from television.

I will close, just to show you how I am on both sides of this issue. In 1992 as president of CBS, I addressed an NCAA commission that was looking into the creation of a college football playoff, and we recommended an 8-team 7-game playoff, which would include the four New Year's Day Bowl games, would be seeded, you play two more games and then a championship game.

I have since come to consult with the Rose Bowl, which is opposed to that makeup, because they need to have the Big Ten/PAC-10 match-up, because that's what drives the history of that game. I might point out, the Big Ten and the Pac-10 share the ownership of the Rose Bowl management committee. It is owned one third by the Big Ten, one third by the Pac-10 and one third by the Rose Bowl. So Rose Bowl is not going to move over for a college football playoff very easily.

There are some television advantages to the playoff, but arguably they would be offset by disadvantages incurred by the other Bowl games that currently exist. So while there are some very persuasive and very good economic reasons for a playoff, there are also some very good, very strong economic reasons opposed to a playoff. And the issue needs to be settled by the college football community, and not by the Supreme Court.

So with that, I will yield to my distinguished colleague from San Diego State.

MR. WEBER: Thank you, Neal.

The reason so many Americans are so deeply disgusted with the BCS is that we intuitively recognize that it is not just. I will discuss the injustice of the Bowl championships' theories drawing on John Rawls' seminal concept of justice as fairness. Simply put, Rawls asks us to adopt a veil of ignorance, to design a social system without knowing what individual role we might play in it, designing, for example, a national intercollegiate football championship without knowing in advance whether you will be Alabama or TCU or San Diego State. Under such a veil of ignorance Rawls argues that reasonable people would adopt two primary principles. The first requires equality in the assignment of basic rights. Not knowing who you will be, you would want to be sure that there was an equal voice for all. Rawls' second principle holds that social and economic inequalities are just only if they result in compensating benefits for everyone. Because you might not be the winner, you would want to devise a system in which everyone shares in the benefits.

Let's consider what these principles of justice might mean in practice with regard to intercollegiate athletics. The first principle of equality in the assignment of basic rights would suggest that the rules of competition and the process to determine champions should be decided by a convention of competing schools, each with an equal vote, and that all would be free to compete. The second principle of compensating benefits would suggest that while every member of the association is free to compete and win, the proceeds of the competition would benefit not only the winner but all members of the association. I have of course described the NCAA men's basketball tournament. Needless to say, in a championship not everyone can win. Assuming rewards are distributed based on performance, they will inevitably be distributed unequally. There is nothing inherently unfair or unjust in this. Even behind a veil of ignorance, you would want the champion to receive a proper reward for excellent display. But you would not want that reward to be so large that it would preclude others from competing successfully in future years. Here too the NCAA seems to embody Rawls' principle of justice as fairness.

The men's basketball championship produced for the NCAA approximately $594 million in revenue last year. But the conference of the winning team—not the team itself, the conference of the winning team receives only $1.03 million. And even then the monies are not distributed in a lump sum but rather dispensed over six years. In short, the viability of future competitions is preserved; anyone can compete fairly and win the next year. All benefit.

The combined payout to all playoff participants in the NCAA championship is $26 million; about 4.4 percent of the proceeds. The other 95 percent is used to run the NCAA itself, preserving the integrity of intercollegiate athletics in general, and supporting athletes from all intercollegiate sports, including men and women.

Contrast this just competition with that of the BCS. Contrary to Rawls' principle of equal representation, in the BCS only some universities are allowed to determine who competes and the distribution of the proceeds. The BCS Oversight Committee is grounded in unequal representation.

When I served, there were seven members representing the 65 teams of the six BCS conferences and Notre Dame. And there was one member, me, representing 52 teams of the five non-BCS conferences, as well as Army and Navy.

As for Rawls' second principle, that social and economic inequalities are just only if they result in compensating benefits for everyone, there are few benefits for non-BCS teams, and they are surely not compensating benefits. Consider, for example, the revenue distribution for teams in the three conferences that have never played in the BCS Bowl game, and Trip mentioned these earlier, Conference USA, the Mid-America Conference and Sunbelt Conference. In the most recent year for which revenues figures are available, 2008-2009, when Utah participated in the Sugar Bowl, these three conferences received an average of $2.1 million per year from the BCS, an average of approximately $190,000 per member institution. But the lowest ranked team for an automatic qualifying conference, winless Washington, 0 and 12, ranked 113th out of 119 schools, received approximately $1.3 million in BCS revenue distribution from the PAC-10.

My own conference, the Mountain West, has played in two consecutive BCS Bowl games, with both our representatives entering those games undefeated. Our compensation, in spite of being higher ranked nationally, lags far behind that of BCS automatic qualified college team. This year our Mountain West conference champion, TCU, was undefeated and ranked fourth in the final BCS standing. TCU received $9.8 million for the Mountain West Conference and went on to meet sixth-ranked Boise State in the Fiesta Bowl. These two non-BCS schools were forced to play each other, rather than risk embarrassing the BCS cartel, as Utah had done the prior year when it was ranked 12-0 and sixth in the country, and Utah went on to beat Alabama in the Sugar Bowl. So let's not have that happen again.

At that time, Utah received $9.8 million for the Mountain West, while the Atlantic Coast Conference champion, 19th ranked Virginia Tech, 9-4, received $18.67 million for the ACC.

Applying Rawls' veil of ignorance and the resulting principles of justice to the BCS, who in their right mind, behind a veil of ignorance, would agree to a system in which there are automatic qualifiers—conferences that are guaranteed a major Bowl bid and an even more major payout, while there are other conferences that are not. Or a system in which student athletes from one conference could play for a national championship but still athletes from another conference couldn't. Or a system in which a nonqualifying conference had played its way into a major Bowl would still receive more than $8 million less than each automatic qualifying conference. Or a system in which conferences with 54.6 percent of Division 1 teams would receive 87 percent of the revenue.

But of course, the problem with this scenario I have outlined is that no veil of ignorance descended upon the designers of the BCS. They knew exactly who they were, and they designed a system that was totally and thoroughly self-serving. In doing so they colluded with major bowls and TV networks. While there is no doubt that conferences like my own have been economically and competitively damaged by this unjust system, we are not the primary losers. It is collegiate sports in general that have been cheated.

The BCS, in collusion with the major bowls and television, has usurped the revenues of intercollegiate athletics that ought rightfully to be shared with the entire intercollegiate community. In effect, it has taken a club championship and sold it as a national one. To be clear, my concern is not about commercialization of intercollegiate athletics. We will be as successful in decommercializing intercollegiate athletics as we have been in decommercializing Christmas.

What I am fighting for is fairness and open market that can advantage all intercollegiate athletics, the BCS included. The function of universities is human growth and development. The reason many of us value intercollegiate athletics is that it provides an extraordinary venue for that growth and development. A chance to learn what you are capable of. A chance to pursue excellence. A chance to learn lessons of sportsmanship, discipline, teamwork that do not come from textbooks.

In the solitary case of Division 1 football, in that case alone, I cannot tell our student athletes that if their talent and sacrifice are sufficient, they can compete at the highest level of their aspirations. Incidentally, if you think that is an empty hope for conferences such as mine, consider that in 2005 the Mountain West student athletes were the number one draft picks in both football and basketball. And this year we had the number one draft pick in baseball. Part of the human growth and development to which universities are dedicated is a sense of fairness and social justice. Granted, the world is not just, but few would argue that universities ought not to be working to make it more just rather than less so.

The BCS has conspired to sell out the integrity of intercollegiate athletics, compromise the aspirations of student athletes, fix national championships and usurp revenue. When this learned debate is complete, when you have all opined on whether or not the BCS constitutes an antitrust violation, the BCS will remain unjust and unfair. That is why the American people reject it. That is why I reject it, and that is why you should reject it.

DR. SCHOUTEN: Okay, this is a tough act to follow. And I am an economist, so we are known to be boring.

I actually thought about just scrapping all of my prepared thoughts and just going down the line and responding to each, but let me just start with this. I heard the word collusion, cartel, conspiracy, antitrust violation, but I did not hear the word relevant market anywhere.

Now, it happens that I don't actually think you always need to prove what the relevant market is in order to figure out whether or not somebody has violated the Sherman Act or not. But typically the courts tell me that I do. And so here I think what we agree on is: This is a really popular product; the BCS earns lots of money, and it is really good to be in one of the conferences that gets automatic slots in BCS Bowls.

Lots of things that the BCS does are incredibly controversial. It was pretty amazing that we heard President Obama; one of his first talks on 60 Minutes says he thinks we ought to change the BCS. He did not say that it was an antitrust violation. He did say we ought to change it.

We all know there have been lots of hearings. In fact, Orrin Hatch and Representative Joe Barton have criticized the BCS, calling it unAmerican and likened it to communism. I will say I am not quite sure is it communism, or are you suggesting that we something that's not close enough to communism. I will admit that I was very inspired by your talk on John Rawls, and I wrote down, that's a great principle of equality, but the marketplace is not about equality. And I should also mention, I had written Title 9, do we need to level the playing field or show me the money?

MR. MADSEN: Much better title.

DR. SCHOUTEN: So I am struggling with where to go on this talk, because I was so incredibly impressed. And I also sat in on the conference call before this talk and listened to the amazing debates. So I also want to make sure that we get quickly to some question and answer period.

But I want to go back to relevant market. And that's in thinking about whether or not the BCS is anticompetitive, is a violation of the Sherman Act, we need to ask: So in what market does it compete and with whom does it compete? And I guess I heard a little bit about what the networks and television was thinking, but I would argue that, in fact, college football is a really unique product. There is probably nothing like it. However, it competes with lots of other products. What college football provides and what the BCS—most of their money is made in television revenues. And those television revenues, as we heard, are because it attracts a very good audience. It attracts young males who have higher than the average income. This is an audience that, I think you'll all agree, is really hard to find, and it does a really good job of attracting that audience. But if you look at the cost per thousand eyeballs, it is actually there are lots of substitutes. If CBS doesn't win one of the bowls, if ESPN doesn't win it, it could go to the NFL, to baseball, to lots and lots of other sports, to 60 Minutes, to the news, to David Letterman. There are other ways to find these eyeballs. And the prices at which you pay to attract those eyeballs as a network, I believe—my numbers are dated and I haven't looked at college football in a long time—are very similar, so that you have other substitutes. If you have other substitutes, then it is not clear to me that we are talking about collusion, cartel, conspiracy.

So now let's go back. Trip you'll be happy that we'll bring you into this. So what is it that the BCS is trying to do. I notice we all went to the same web sites in preparation for this talk. On the BCS's own web site—I have no reason not to believe them—it said the BCS is a five-game showcase. And it did say it was not an entity, and it seemed careful in that language, and I am not a lawyer. But it is a five-game showcase of college football. It is designed to ensure that the top two rated teams in the country meet in a National Championship Game, and to create exciting and competitive match-ups among eight other highly regarded teams in four other Bowl games.

We also heard that it creates a product that did not exist before its creation. Between 1936 and 1992 the number one and number two teams, if you believe in whatever rankings that existed, played one another eight times. Not very good. And we all know, we actually want to know who won. That's one of the things that the professional leagues do well. They have a Super Bowl, they have a World Series. At the end of the season we have a sense of who the winner was. That is important to fans, and it is something that the BCS—whether you like the way they got number one and number two, it does create a mechanism to have the number one and number two teams play one another.

I will also acknowledge—and I totally agree with you, Steve—the money is not equally disbursed. The teams that are not the favorite, or the conferences that are not the favorite conferences earn much less money. If you believe that how much money you earn this year will allow you to put together a better team, although let's keep in mind the athletes are not paid, but coaches and facilities do cost money, then presumably, once you are in the anointed six, you're more likely to stay there because you get more revenues.

I agree with the question about the fairness, but I have to keep going back, because I am at an antitrust conference, that I don't know that this is anticompetitive, and I don't think this is anticompetitive. But I think that there are two sets of questions: Do we like it? Does it feel good? Does it really feel like we gave everybody an equal opportunity? And are they able to do anything that's anticompetitive? And I think in this group the second question is the key question.

And so with that I actually might sit down, but I want to read one last quote, and I want to sit down because I really did find that Barry did a wonderful job at asking questions that sort of pushed us all on the conference call, and I hope we have time for that to sort of fight amongst ourselves.

One of the other issues that arises, and again this may or may not have anything to do with antitrust or anticompetitive behavior, is, are the rankings fair? Do we really trust the ranking of number one and number two? And are we going to have occasions where, gee, that team looked just as good, they went undefeated, and they had no opportunity at all to win the championship. So the creator of the AP poll said it was the case of picking up ideas to develop interest and controversy between football Saturdays, that's all I had in mind, something to keep the pot boiling. Sports said it is living off of controversy, and it probably still is living off of controversy. And this is just another exercise in group thought.

So again, when we look at the rankings, are they fair, are they just? Do we think it is a good idea to have coaches vote for who they think the number one and two teams are in their voting? How they vote can affect the revenues that they receive. Because if I vote for somebody in my own conference, if they win, I will get more money to invest in my college football team next year. Should the voting take place in secret or in open ballot? And I think that's a good question that in fact, as an economist, we would say that when things happen with open ballot, it actually allows, to the extent and I will use the word, that there was a cartel, it makes it easier to enforce cartel behavior. So should we have secret ballots or should we have open ballots?

So again, lots and lots of controversy. Is it an antitrust problem that we face? Thanks.

MR. BRETT: By the way, we invite anyone who is here who has a point of view or some thoughts or questions to please participate. You get some idea of what the conversations have been before we got the program put together. To put a couple of things on the table—

MR. WEBER: I thought we were pretty civil.

MR. BRETT: Here. We have addressed the issue of relevant market. It was addressed before the Senate committee and that's in some of the prepared materials and those issues are dealt with.

I guess what I am hearing—and I'd be interested in particularly Neal's response because he's lived and dealt with more of the schools than anybody else—is why wouldn't an 8 team playoff be better? It adds output, would add at least one game, maybe two for television purposes, that starts with the Bowl games. If the Rose Bowl wants to have the Big Ten, which is now really the Big 11 and really wants to be the Big 12, but it can't because the Big 8 became the Big 12, let them play in the Rose Bowl as part of that 8 team playoff, but give the Utahs and the Boise States, which are undefeated, a shot at participating. Why is it necessary that the system be preserved? Or to put it into the parlance that we deal with all the time, hey guys, what you're doing doesn't sound so good, it may be a violation. They say, well, we have always done it that way. How can anybody criticize us? This is the way everybody knows in the industry it is the best way to do it. If we did not do it this way—

MR. PILSON: When do I get to answer the question?

MR. BRETT: I got to talk in their terms, haven't we all had clients tell us we have always done it this way? If we did not keep the prices up, we'd all go out of business. It would be terrible.

Isn't that what we are hearing?

MR. PILSON: I think you're assuming facts and issues that haven't been testified to.

No, from a purely television economic point of view, an 18-7 game playoff would generate more revenue than the current CBC formula, for obvious reasons. Every game would be relevant. Now you have two teams playing the national championship, and the other teams simply playing an attractive Bowl game.

So I don't think the college community disputes the fact that there's probably more money to be earned from that specific application. But, there are a substantial number of folks within the college world who feel that the overall impact of having a playoff would cause economic damage in other areas, such as diluting the regular season, such as diluting the long-existing standard Bowl season of 30 or more games. And the feeling is that overall the economics don't support a college football playoff. Even though looking just strictly at those seven games, they would generate more money than the current BCS.

MR. MONTS: Let me add to that, because I think not only is that the viewpoint, it has also been borne out I think by the NCAA men's basketball championship, which has been wildly successful as a post-season product. But the rights fees for regular season basketball have plummeted over the years, largely because regular season is meaningless. So television networks can buy basketball essentially as a commodity product. And I think a number of the conferences look at this issue, and they realize, look, we have to sell our regular season rights individually as a result of the NCAA judgment on Board of Regents. And why would we engage in something, where we bear the cost, of diluting our own product in order to create another product that at the end of the day leaves us worse off overall? There are lots of other issues that go into this, but certainly they have alternatives. And at the end of the day, the creation of a playoff doesn't guarantee participation. Many of the presidents have philosophical dislikes or educational dislikes for a playoff. So you get everybody to participate if you have one. And if somebody doesn't participate and they have alternatives, if they find those sufficient, then you don't have a product at all.

MR. BRETT: Would you bring the case if you were still AG?

SPEAKER FROM AUDIENCE: I don't want to raise that. I want to ask whether there isn't a significant concern in the college educational community that the arms race that currently exists principally in college football and basketball ought really to be tempered and not fueled, and that a playoff system would clearly fuel that arms race.

MR. WEBER: Knowing something about the collegiate system, let me try to respond. There's virtually no one that wouldn't like to see some way of disarming on that basis. But it is impossible to disarm unilaterally in that circumstance, and hence the problem.

MR. PILSON: And you can't disarm in concert with each other either.

MR. WEBER: Point well taken. But part of the problem here is you might be right, that a playoff would exacerbate that arms race; I understand that argument. But it is awfully convenient that then the argument is for the status quo, and it continues to advantage and perpetuate a self-confirming prophecy that these conferences will benefit and others will be excluded.

MR. MONTS: Let me respond to that also, because it is not a status quo. The choice is between a system that guarantees a one-two match-up every year, regardless of whether you believe it is the best way to choose the one and two teams versus each conference pursuing its own Bowl relationships on its own.

Under the current situation, the five conferences that do not have any automatic berths but are guaranteed access to these games, they have never been guaranteed before, and they wouldn't be guaranteed access to if they were negotiated individually, benefit far more than they would in the prior system. And that is the choice.

So the question, I think, from the fairness perspective, and this is what I am a little bit puzzled by, is those who have invested in their teams and have been able over the years to negotiate on their own very attractive and lucrative Bowl contracts for themselves, have created a system and shared those revenues with those who are unable to do so. That's a subsidy. That's not a lack of fairness. That is magnanimity in my view, and I think it is quite easily defensible in that respect.

MR. BRETT: Talking about guaranteeing number one and number two, it is interesting that earlier this year, until Texas got into the championship game, they were outraged, and some of the Texas Congressmen were leading the charge to have legislation for a playoff system. Because last year, prior to this season, Texas did not make the championship game, but it went to Oklahoma, even though Texas had soundly beaten Oklahoma, and Texas lost one game by one point on a strange toss in the end of the game. So you don't guarantee one or two.

Again, it is interesting to compare to the college sport. Last year you saw a run by a little school called Davidson, and sometimes you see a school like Gonzaga, which makes a run in the NCAA tournament, and boy, does that generate interest and get everyone excited.

MR. PILSON: Let me suggest there are huge differences between how college basketball is played as a sport and the nature of the sport and college football. You can argue that, well, there's a playoff in college basketball, but you can argue that there's a playoff in smaller divisions of college football.

But for example, one of the problems that a lot of the presidents have is that fans follow the college football teams around the country, and they go to the Bowl games. In fact, that's what drives the economics of the Bowl games, having 30,000 fans coming from Nebraska or Texas or whatever. When you get into a playoff situation, a lot of presidents point out that they can't realistically ask their fans to come to the New Year's Bowl. They win that, go the next week to some other city somewhere else in the country, and then go a third week when they win that, and then there's the championship game. So the presidents feel that really playing out 14 or 15 games for one or two teams within the college community is just in their mind asking too much from their fans and from their players.

DR. SCHOUTEN: I might add that the economic impact of the host cities is estimated to be $1.1 billion. So it is not an insignificant amount of money either.

Also, one quick point. I find it interesting that the playoffs here are something that we should clearly aspire to, and yet as the only economist sitting here, I want to point out that the petitioner's economists of *American Needle* actually pointed to the Bowl games as being an appropriate alternative for the NFL to consider, instead of having playoffs. So it is an interesting vicious cycle here.

I was not one of the petitioner's economists that signed the amicus brief on behalf of the defendant's economists. But I do point that out.

MR. MONTS: Well, now that you mention that, I noted that as well in the amicus brief that there were two different groups of economists.

But one of the interesting things, and Barry alluded to it, that Texas had beaten Oklahoma last year. And we had a playoff in the Big 12. We had a round-robin and Texas and Oklahoma, they all ended up with 11-1 records and they all ended up one and one against each other. So somebody in the Big 12 has to make a decision to break that tie, and the Big 12 tie-breaking procedures led to Oklahoma being that team.

In context, there's an underlying assumption always that a playoff is a superior method of choosing a winner, and usually it devolves to some claim like, we'll decide the issue in the field. And I think we could go back—and I will win no friends among all of you here in New York, by pointing out that the New York Giants in 2007 were good enough to go 0-4 during the regular season against the teams they beat in the NFL playoffs. So in other words, rather than deciding the issue in the field, we had a Giant do over. To give you an example, the Giants were 10-6 during the regular season, the Cowboys were 13-3 and beat the Giants twice head-to-head. They played again in the playoffs, the second week of the NFL playoffs. The Giants, of course, won the game, as we all know. God bless them for doing so. At the end of that game they were 12-6 overall and the Cowboys were 13-4. Head-to-head the Giants were one and two. I cannot fathom a logical reason why anyone who was a game and a half worse over a 16-, 17-game season and worst head-to-head moves on, but that is the system the playoffs create.

So just looking at this from a fairness standpoint, I want to emphasize again that, from an antitrust standpoint, the issue is whether there was some collective system such as BCS, or individualized system where each conference negotiates on its own, I think the underlying premise that a playoff is somehow superior from an athletic standpoint is certainly open to question.

MR. PILSON: Trip, I don't think the public agrees with you. I am not taking sides here, but I don't think there's anybody out there in NFL land who thinks that the NFL playoffs reach an unjust result. I think if you win in the playoffs, you go on, no matter what your record is. I don't know if that argument holds water.

MR. BRETT: I think a real part of the problem is that the rules by which all of this is determined were made by a group of six competitors getting together, with no other control and no other portfolio, other than to basically serve their own interests, and these six competitors created a set of rules that keep everybody else out, keep the system to themselves.

MR. PILSON: The market is much, much larger than college football. I testified in the NCAA and NIT litigation, and I am available as an expert witness.

MR. BRETT: Yes, Steve.

MR. MADSEN: Barry, I want to go back to your question. You said well, wouldn't it be better if we had this other arrangement, and maybe there's debate even about that, maybe it would be, maybe it wouldn't. But let's say that the existing state of affairs is subjected to antitrust scrutiny, okay. What kind of scrutiny? Isn't this necessarily a rule of reason analysis? Don't we just toss pretty much everything into the hopper there? And how could a plaintiff bringing that case prevail here?

MR. BRETT: Well, I guess you start the proposition, to use the jargon of our business, there are less restrictive alternatives and less exclusionary ways to get to the same place. You can have the participants in the competition, whether it be for the big money Bowl games or the participants in the competition from the national champion decided by a system which does not create artificial barriers to schools that are not part of the conference.

In the last few years we have seen with some clarity that the Boise States and Utahs can compete with Alabama and Oklahoma. And when they go 14-0 and don't have a shot at getting a national champion and teams with losses do, there are certainly issues as to whether there is a less anticompetitive way of doing it, and whether or not the rules should be made by those whose ox is being gored. Again, whether you go back to the NCAA or some other way of doing it, the unfairness—

SPEAKER FROM AUDIENCE: You want the cartel to admit new members.

MR. BRETT: Or else be open to everyone. But I mean the exclusion is part of the problem.

SPEAKER FROM AUDIENCE: Wouldn't you argue as a plaintiff it would be a boycott with people with market power.

MR. BRETT: Sure. We can talk about whether it is a boycott, rule of reason, per se case. And again, I did not want to make that totally the focus of where we are. I think there's a good case to be made, and certainly the paradigm is there if the case gets to trial.

I think an awfully interesting part of this that we should not leave without mentioning is that college sports is a uniquely American institution. And it doesn't exist anywhere else in the world. For a long time it flourished under the banner of amateurism. It is, I think, the clearest antitrust violation I have seen out there, where the NCAA and all of its members have gotten together and compete for high school athletes each year, and they have all gotten together and agreed we are going to pay them all the same thing. We are going to give them all just one year, give them a scholarship, nobody can give them another cent. If anybody gives them a car to drive, the kids will be disqualified. Wonderful cartel, great case. It is the clearest price-fixing you could imagine. There is big, big money involved.

It gets really obscene when you see what happens with some of the coaches. The thing with USC and trying to move the kids out of Tennessee a couple of weeks ago was absolutely obscene.

Steve, what does this do to the fabric of budgeting, functioning, philosophy and message that you give to try to teach the kids that there is fairness and that these college sports are not designed just for economic purposes?

MR. PILSON: That's called a softball question. Tell us about that.

MR. WEBER: I do think there's a point here that is worth everyone's thinking about. And that is if you are guaranteed that $1.3 million every year for your athletic budget, you can do things with that as a built-in guaranteed revenue stream, that even a great school like TCU or Utah cannot do because they do not have that guarantee. So the cumulative effect of this is to strengthen some programs and to compromise others.

MR. PILSON: Hamilton College doesn't have that guarantee.

DR. SCHOUTEN: But if they wanted to play in the Harvard-Yale game, should they have the right?

MR. MONTS: Let me just give a little sense on the numbers here, because I think it will put them in more perspective. The Mountain West Conference has nine members. It received $9.8 million in 2008 when Utah played in the Sugar Bowl, which is about $1.1 million per institution. I don't know how they divide their money up, but they choose to do it however they wish, and that's their business. The Atlantic Coast Conference has twelve members; it received about $18.3 million. But it also shared Bowl expenses, so its total net take was about $17.5.

MR. BRETT: They knew going in they would have it.

MR. MONTS: Fine, but they would get that money anyway by negotiating a contract on their own. The difference turns out to be about $400,000. To give you an idea of what we are talking about in college athletics, and I am just using published numbers here because I have no particular inside information, but the University of Utah athletic budget is about $27 million a year. The University of Florida, on the other hand, is about $84 million a year. And Ohio State I think is over $100 million a year. We are talking about tiny drops in the bucket to distinguish from schools that are vastly different. So I think the idea that these numbers really play a great role is subject to question.

MR. BRETT: Trip, when you talk about a joint venture, you're not suggesting that the data joint venture analysis gives the BCS any kind of—

MR. MONTS: I am talking if you would analyze it as a joint venture under the ordinary rule of reason. I am not talking about necessarily a Baker-type situation, where it is hard to say. And I guess we'll find out in *American Needle* what Baker truly reads. But a lot of Baker reads a lot like a single-entity approach. I am not arguing that right now.

MR. MADSEN: I am rising because our time is almost up, and I am going to ask if you have a concluding remark or two. I am rising because I don't want a free-for-all up here.

MR. BRETT: I would just conclude by thanking all of our panelists for the preparation work.

MR. MADSEN: Thank you very much, Barry.

I did finally figure out what I should have called this panel. I should have called it "From Rawlsian Justice to the Rose Bowl." And I am just sorry I did not think of that. That would have been so much better than what I suggested.

That concludes our program for the day. I want to thank you all for being here. And I really want to thank all of our speakers, our moderators and everybody that has participated.

We had a number of people who helped put the programs together who are not actually on the panels, but nonetheless did a lot of the work. I want to thank Bruce, the outgoing Chair, for his excellent example and for bringing us through here. And I particularly want to thank Lori Nicoll, from the state bar, who was instrumental in actually making sure that this happened more or less in the right way on time.

MR. BRETT: Steve, just one fact. The ABA Antitrust Section is piggybacking on our idea, and they are running a program on the same subject in about a week.

MR. MONTS: Barry and I now have a road show.

MR. MADSEN: A reminder, this evening we have our Annual Dinner. The reception starts at 6:00. It is being held at the University Club, 1 West 54th Street, not very far from here at all. Our honoree is Mr. Steve Edwards, whom you heard from earlier today. We are going to bestow our Service Award on him, and our featured speaker is Deputy Assistant Attorney General, Molly Boast, who heads up Civil Matters at the Justice Department.

So thank you for participating with us.

I want to add one other thing, and this is totally off our program. It is a piece of news I learned during the course of the proceedings today. I share it with you just because I think it will actually mean something to many of you. My partner and friend Bob Joffe, who was the head of my law firm, Cravath, Swaine & Moore, for a number of years, died this afternoon. He had suffered from cancer, and I don't know any more about it than that. He passed away. I mention it because so many of you knew Bob. He was a very distinguished antitrust practitioner. We talked from time to time about bestowing the Section's award upon him.

In fact, it was he who got me involved in this Section one day about a dozen years ago. He said, you know, Steve, you do a lot of antitrust work, you should get involved in the Antitrust Law Section of the New York State Bar Association. And so I did.

I know many of you knew him, and I thought that's a piece of news that I should share with you.

Thank you all very much for coming. I think it has been a great program. It is nice to see such a terrific turnout for what we are doing here.

We are adjourned, and we will see you at dinner.

The 2010 Antitrust Law Section Annual Dinner

MR. PRAGER: Good evening, friends, colleagues, family, members of the antitrust bar. Thank you so much for joining us tonight.

I am Bruce Prager; I am the immediate past Chair of this Section. Which means that as of about noon today I am out of it. But I am proud to be a has-been, because it has been a great year for this Section. And I will talk a little bit more about that later.

Last year at this moment my friend and colleague and immediate past Chair, Stacey Mahoney, stood up here and said that she had lost her notes or forgotten them. Having noted that in the proceeding last year, I was extremely careful to make sure that all throughout the day today I had my notes in my possession. I came close to forgetting my computer bag, but went back and got it. So I have everything here, which is good, because over the course of this evening there are so many people to thank and introduce that I could not have done it on an extemporaneous basis.

We had a fabulous set of meetings today with excellent attendance. There were about 100 people who attended the program, and I think there were probably about 125 that participated in the program. It seemed like the panels were huge, and they were extraordinarily good. The new chair, our friend Steve Madsen, I am sure will be saying something about that later in the proceeding. So today he is my best friend in the world. But Steve was the Program Chair and is a terrific guy, having gotten everyone to stay awake through the entire program, and found it interesting and exciting throughout the entire day.

As I told my family, I was proud to be associated with the program that Steve put together. So I think that we owe Steve a great debt of gratitude, and his tenure is off to a good start.

I am going to start by acknowledging a few people and a few more later. First of all, for the extraordinary event that you are attending tonight, this wonderful setting here in the University Club, which I can tell you so far exceeds what we would be having if we were back at the Hilton, we have Ilene Gotts, one of our dinner co-chairs to thank. Our other dinner co-chair tonight is Mike Weiner. And we have Michael to thank for the fact that he did an extraordinary job of getting sponsors for the cocktail hour, which you all enjoyed and which is defraying the cost of the event. While we have our wonderful smaller Section in the New York City Bar Association, we are among those who are most financially sound, and we have our sponsors to thank for that. I will say more about that later.

I thank the University Club for always making us feel very much at home, as you all probably do. I have a lot of friends here, and somehow at the University Club everyone seems comfortable.

I want to thank Chris Bowers of Julliard who provided us music during the set. I hope you had an opportunity to hear a little bit of it early in the evening, before the place got crowded. His music really filled the room. Subsequently, a lot of waiters filled the room. It wasn't quite as good.

As Chair emeritus, there are a number of thank yous that I need to give tonight. First, and I don't think she's here at this point, but our liaison from the New York State Bar Association on all the administrative matters is a woman by the name of Lori Nicoll, whom most of you have no occasion to encounter. But Lori is the one who makes possible for those of us who are the leadership of this Section to do what we do, because Lori implements everything.

A small example, today, we ran out of coffee. The Hilton said I am sorry, one has to have approval before we can replenish the coffee. I sent an e-mail to Lori, who was somewhere in there, and within minutes we not only had more coffee but about a dozen more cakes, which all of us need for our waistlines.

This year we were the beneficiary of a wonderful group of sponsors for our event. And I just want to take a moment to acknowledge them all. We are extremely fortunate to have as our platinum sponsor once again this year LexisNexis, a company which each of us uses probably several times a week, makes our job as lawyers much easier, and we are extremely grateful for its continued support for this event year after year. We also appreciate very much our gold sponsors, many of whom you have met during the reception: Analysis Group, Compass Lexecon, De Novo Legal, The Garden City Group and Stratify, and our expanded group of sponsors that have grown substantially, including CRA International, FTI Consulting, NERA Consulting, Rust Consulting and Strategic Legal Solutions. And I promised Susan I wouldn't mention that it is her birthday tonight, because we wouldn't want to embarrass her.

In addition to our sponsors of the evening, after you have completed your dinner and heard all of the wonderful remarks that we have to share with you this evening, we will have a dessert buffet and open bar. And many of the law firms that are represented on the Executive Committee of the Section were kind enough to provide financial support for that event. They are listed in your program, but I beg your indulgence while I mention their names, because they were kind enough to help defray the cost of the evening: Cravath Swaine & Moore, Debevoise & Plimpton, Hunton & Williams, Hogan & Hartson, Kaye

Scholer, Labaton Sucharow, my own firm, Latham & Watkins, O'Melveny & Myers, Sidley Austin, Sullivan & Cromwell and Wilmer Cutler Pickering Hale & Dorr.

We have a full dais here, and I am just going to take a moment to introduce the folks who are sitting in front of you so you have some vague idea as you're sitting at your table and you say who are those people and why are they sitting there. At my far left and at the end is Ralph Giordano, Chief of the New York Regional Office Department of Justice. Sitting next to Ralph is Ilene Knable Gotts who, as I said, is one of our dinner co-chairs and previous Chair of this Section. Next to Ilene is Jay Himes. Jay is the new Vice-Chair of this Section, and I will say more about Jay later in the evening. Next to Jay is Steve Edwards. Steve is our honoree tonight, the recipient of the William T. Lifland Award for Distinguished Service. We will have more say to about Steve as the night progresses. Next to Steve is Steve Madsen, the new Chair of the Section and the Program Chair for our activities today. And his wife is sitting here; she's so proud of her husband, as well you should be. To my far right, again to your left, is Bill Rooney, who is the new Secretary for the Section.

Bill, I can't tell you how glad we are to have a Secretary today. I am privileged to have you in that role.

Next to Bill is Eric Stock, who is the Finance Officer of our Section. Eric is the one who made available the surplus funds that I mentioned earlier and controls our desire—or my desire—to spend them. Next to Eric is Michael Weiner, dinner co-chair and also enabling us to be here tonight. And briefly, next to Michael is Molly Boast, and Molly is our speaker tonight. Molly is Deputy Assistant Attorney General of the Department of Justice.

Now, if I could just ask you bear with me for one more moment, please. We are going to depart from the program very briefly.

Our Section, the Antitrust Bar and the Bar of the City of New York suffered a major loss today. One of the scions of the Bar, dean of the antitrust community, and I am going to ask Ilene Gotts if she would step up to the podium and very briefly say a few remarks about our loss.

MS. GOTTS: I got a call this morning that Bob Joffe had passed away and was quite sad the entire day. I met Bob in 1985 as a young lawyer, so that's 25 years ago. He was a fantastic lawyer. No one can be in Bob's league, but more than a lawyer, he was a fantastic individual. He exemplifies what we all should stand for: Very public service oriented, giving wherever he possibly could, and being a leader, not only within his firm but within the bar. I think he would be particularly proud today to have his younger partner, Steve, become the chair of our Section and follow in the very fine tradition of giving service to the bar.

So with that, Steve, before I totally crack up here, I want to turn it over to you. Thank you.

MR. MADSEN: Thank you Ilene. Thank you, Bruce. It is very sad that Bob passed away. He was a true friend. And about a dozen years ago he suggested to me as a member of the firm that I should become a member of the Executive Committee of the Antitrust Law Section of the New York State Bar Association, and I did. So we all remember Bob as a great antitrust practitioner and friend. And it is sad that he has passed.

I congratulate my predecessor, Bruce Prager. First though, as Program Chair, I have to thank some people. The moderators did an awful lot of the wonderful job putting together the panels: Stacey Mahoney, Steve Edwards, Jay Himes, Barry Brett, Fiona Schaeffer. Fiona served in conditions that would have to be described as hazardous. She walked into the hall with her panelists in tow and said, "I lost my voice." Notwithstanding the complete and utter loss of her voice, she provided Power Points to introduce her panelists, and it was really a hoot.

And Barry Brett, the moderator of our last panel, I thought needed a referee's whistle.

There were other members of the Executive Committee that were also involved in putting the program together, not only those on the panels. Andrew Frackman, Ben Sirota, Jayma Meyer, Patrick Rao, Wes Powell. And we had a terrific group of panelists, too numerous for me to list, many of them here tonight.

Now, I have to say that it was very easy for me to do a tolerably good job here, because all I needed to do was follow slavishly the model set forth last year by Bruce Prager when he was Program Chair. And that's just what I did. I am the world's most successful emulator of Bruce Prager so far. And having thus benefited from Bruce's expertise the previous year, it is very pleasant to me to thank Bruce and to congratulate him on his new status as past Chair, which I am already beginning to surmise is quite a happy thing. I see many smiling past Chairs here. I am smiling too, but I am six hours into my tenure. I was going to say reign, but I will say tenure. If I am lucky it is tenure. So I now want to thank Bruce for his leadership, his friendship. As he was a model Program Chair, so too he has been a model Chair of our Section.

And I want to mention that his wife and daughter are here tonight basking in the glow of Bruce's accomplishments. I congratulate them.

Everybody who knows Bruce Prager knows that he's thoughtful, organized, proactive and, above all, a splendid well-rounded good guy. He has had a great year as Chair of our Section. He has been Co-Chair of the Global Antitrust Competition and Practice Group and has handled all kinds of high-profile cases. He's been a key member of this Section for many years. He has led our Executive Committee with a steady, deft and able hand.

Now, you might think that being the head of a Bar Association Section is an easy job, but all sorts of things come out of nowhere, and he has just done a terrific job. So I am very happy to be able to ask Bruce to rise, while I bestow upon him a very significant gift.

Now, it is not just a nice box. Bruce, this is for you. I understand that it is a Tiffany clock. We give it to you with special thanks. Thanks for everything you've done. It has been a great year. Thank you.

MR. PRAGER: Thank you all so very much.

Okay, I am going to continue for a few minutes with the theme of thanking people. Unfortunately for you, there's no music, there's nobody that could come and escort me off, but nonetheless I will try to be relatively brief.

First of all, I want to tell you all a little bit about your Executive Committee, because I sat through many of these events sitting out there and thought who are these people, why are they up here, why are they talking to me. Who are they? Well, your Executive Committee is a very diverse group. It is a broad cross-section of members of the Antitrust Bar from across the State of New York. We have membership at the Executive Committee level of people who represent plaintiffs, people who represent defendants, people from the private bar, from the government bar, the Department of Justice and the New York Attorney General's Office. We have people from upstate, Albany, Rochester, Syracuse, as well as many members of the Executive Committee from here in New York City. We have representatives from law firms, and from corporations as well as government.

One of our objectives is to broaden the diversity of this group to include more women, more people of color, more people of diverse backgrounds and diverse beliefs. So if you are interested, you should make that known, because the Executive Committee opens that need for more people.

Our Section has expanded its activities every year. Just to give you a sense of what your Section does, other than today's events, or in addition to the events of today, there are monthly meetings to which you are invited that include interesting speakers.

And I want to thank Jay Himes, our new Vice-Chair, for during the past year having organized each and every one of those meetings all year long with great speakers, interesting locations and educational programs. In addition, periodically Bill Rooney, our new Secretary, has organized events as well in the last year. Now, our new Secretary and Jay have done a good job with respect to these activities, but what they may not realize is they have two jobs, because as Vice-Chair and Secretary they would still do programming, and they will continue unless and until we can involve you in our activities and have you take on some of those responsibilities and some of the joy of working for your Section.

One of the other activities that we have focused on this year is membership and outreach. As I indicated, one of our objectives is to increase the breadth and diversity of this Section. In addition, we are dedicated to education with respect to antitrust activities, and over this past year Barry Brett and Steve Edwards were responsible for providing a program, which many of our members participated in, for judicial law clerks across the various courts of our state. In addition, we have implemented for the first time a student writing competition. This was also one of the first times that the Section has been able to provide public comment. As you all know, the FTC and the DOJ solicited comments for revision of the Merger Guidelines, Paul Gitman ran our project to provide comments, and for that we are grateful.

In addition, each year we provide the William T. Lifland Service Award, which as you know tonight will be presented to Steve Edwards, and for that effort I have to thank the Barry Brett, Alan Weinschel and Meg Gifford. In addition, Meg served as Chair of our Nominations Committee.

Finally, I want to thank my friend, my colleague, my partners and associates at Latham & Watkins for their support over the course of my year as Chair. And, as Steve mentioned, my beautiful wife and one of my two wonderful children are here today, Mary and Emily, as the representative of the group, and Madeline thank you for being here tonight and thank you all.

I will now call on Barry Brett to present the William T. Lifland Award for Service for 2010.

Barry, if you can come to the podium, please.

MR. BRETT: My assignment this evening is to say some nice things about Steve Edwards. I know how to do that. I choose instead to use this opportunity to get even with Steve for one of the most unhappy experiences I have had in recent years, a day when I felt totally devastated and Steve, Steve alone was responsible.

Imagine, if you would, put yourself in the position of arriving at an office at 9:45 and reporting for an interview at 10:00 o'clock with a client who has just been served with a heavy antitrust suit. Imagine sitting there until 10:15, 10:30, 11:00, 11:15. The door doesn't open. At 11:20 the door opens, and out walks Steve Edwards smiling, happy with his arm around general counsel he couldn't wait to see, for an hour and a half. Steve, I hate you.

Of all the possible competition, it could not be a more formidable challenge. I did not feel very kindly toward Steve that day. It was all that I could do to appear gracious. And he had taken up all of my time and obviously created an insurmountable competitive advantage. And then I started to laugh hysterically, but no one can figure out why. But it just occurred to me the absurdity of anything involving Steve Edwards and me being called a beauty contest. Well, a lot of time has passed and I dealt with Steve on many occasions, so I really couldn't hold a grudge against a bald-headed guy.

So we are here to honor him tonight as the recipient for the award named in honor of Bill Lifland, who gave great service to this Section over many years, and we want to recognize Steve's service to the Section, the community and the Antitrust bar generally.

Now, it is a pretty prestigious award, I must say, and I acknowledge I received it some years ago, because I had made a major breakthrough for the association. I persuaded one of our sponsors, before we had this wonderful sponsorship and this great group of people involved, I just did it very modestly, and I got one of our sponsors to support the cocktail party, and I turned what had been a cash bar into an open bar.

Now, Steve is being honored for something other than free booze. But clearly, of the many honorees, and I have known all of them, Steve is the most eclectic of those receiving the award. I think he's probably the only awardee and probably the only antitrust lawyer in New York who has been selected for induction into the Iowa Rock and Roll Hall of Fame.

I looked it up, and it exists. Steve, as I say, is quite eclectic. He even wrote a sock hop. And to show my dedication and commitment to this Section and to this task, I listened to the entirety of Steve's recording of his original rock and roll composition setting forth what a good year 1963 was for him. And that is pretty amazing to someone who listens to Glenn Miller.

Steve is a lawyer then only by default as a failed rock and roller. He wanted to be Justin Timberlake, before he even knew who Justin Timberlake was. I have found photos of him, as part of my research, a big rock and roll band and a big head of hair and sideburns that you would not believe.

Once Steve accepted the fact that he couldn't be a rock star, he devoted himself to other pursuits with great fervor. Not surprisingly, Steve's professional achievements were outstanding. His parents were distinguished academicians and teachers at the college level in Iowa. When his flourishing high school music career flamed out, Steve attended the University of Iowa and studied law at the University of Virginia. He was on the Law Review and graduated with academic distinction. Not a surprise to any of us.

He began his legal career at Cravath. He then had the courage to leave there and become part of a group forming a new firm known as Davis, Weber & Edwards, which most of us knew quite well. The new firm quickly carved out an important niche for themselves in antitrust and other litigation, and it was quite successful. About ten years ago they merged with Hogan & Hartson, where Steve has gone on to achieve even greater stature in the profession. He now serves as one of the directors of the firm's litigation practice groups. The list of his successes is impressive but boring. And we are not going to honor him for that this evening.

Instead, we honor Steve for his achievements and commitments in this Section and in the community at large. Steve is a past Chair of the Section, and he continues to be an active member of the Executive Committee. He is past president of the Federal Bar Council, and I think, as Steve mentioned, he obviously had the pleasure of working to put together a program for the law clerks in this circuit. Steve was a key player in the Federal Bar Council formation on its Inns of Court, which plays an important member function. He helped found the quarterly newsletter, for which he remains an active contributor. He's been active in the ABA and the New York City Bar Association.

More importantly, Steve has made all of us look good and brought honor to the Section and the profession by what he has done beyond practicing antitrust law. Steve has served many years as the President of Nazareth Housing. Nazareth Housing is a nonprofit organization which provides housing and care for hundreds of homeless women and children. At any given moment there are perhaps a dozen families being taken care of by the organization. He dedicates himself tirelessly to their work.

Earlier this week, on behalf of Hogan & Hartson, Steve accepted the Volunteer of the Year Award for the pro bono partnership which provides legal and nonprofit organizations with legal advice, and Steve has served on the advisory committee of that group, and again, for many years very tirelessly worked on their behalf. For many years he's been an officer and director of the National Center for Law and Economic Justice; their stated mission, as reflected on their web site, is to help and assist those with disabilities, lacking resources to function on their own.

The Federal Bar Council beat us to the punch, and they honored Steve with its prestigious Whitney Seymour Award for public service by a private individual.

But lest he forget his roots, Steve is the Director of the Jazz Foundation of America, which assists jazz musicians in need. Steve is a very impressive dude and, frankly, is an awfully good guy.

Unless we are adversaries or competing on the same matter, all of us should be grateful that he found his way here from Iowa almost 40 years ago, and that he and his wife chose New York as the place to raise their impressive family.

Steve, it is my pleasure to present to you the Bill Lifland Award with the admiration and gratitude of the Section.

MR. EDWARDS: Wow! Thank you very much.

You know, there's a lot of discussion of my tenure as President of the Federal Bar Council. The best decision I made in that capacity was naming Molly Boast as the Chair of our Winter Bench and Bar Conference in 2000.

It is so nice to get this award, because many of us in this room have literally grown up together. Ken Logan, who is a past Chair and Eleanor Fox, who is very active with this group, and I were on opposite sides in a massive antitrust case when I got out of law school in the early '70s. In the *U.S. v. IBM* case I did battle with Jamie Sirota, Mark Gaffney—who I don't think is here, but comes to these meetings often, and John Greene, who was at the programs today.

When I formed my own firm in 1980, I went to my good friend Bob Joffe, whom we have already heard a lot about tonight, very sad, and I asked him: How do you get business? And he said well, you should become active in the bar associations. And at that time he was head of the Trade Regulation Committee of the City Bar, so he put me on his committee. And it was there that I met people like Ned Cavanaugh and Lloyd Constantine, Larry Sorkin and Bill Lifland, after whom this award is named.

There was a famous heated exchange actually between Lloyd Constantine and Bill in which Lloyd raised his voice and Bill responded with a withering state, but I think they have been friends ever since.

At that time I joined the Clayton Act Committee of the ABA Antitrust Section and Steve Axinn—I don't know if Steve is it here tonight, but I know his firm has a table—he was Chair of the Committee and he put me in charge of the task force to propose revisions to the Merger Guidelines. My group included a young economist, Janusz Ordover, who is here and who has accomplished some things since then; Bill Kolasky I know was here, and he was on that task force, as was our dear friend Bob Joffe. I think Steve Axinn regretted his decision because we proposed that the agencies should consider efficiencies in merger analysis, and that was a radical idea at the time. Some people were very upset with us, but we did get the *Columbia Law Review* to publish our report. And Bruce Prager, who was a young associate at Skadden at the time, did the cite check.

In 1981 or '82, I can't remember the year, I chaired the panel on Merger Guidelines for the Annual Meeting of this group. We had people who were working on the New Guidelines from the FTC and the DOJ, and we even had the person who had written the original guidelines in 1968. After the program that year, we went to a dinner that featured Bill Baxter who had just become head of the Antitrust Division under Ronald Reagan. And this was the high point. I think there were perhaps as many as a thousand people present at that dinner. And at that dinner Bill Baxter said to the defense bar: "Don't worry, we agree with all of your arguments, and we are changing enforcement policy." Well, we worried because with this new approach a lot of the antitrust work dried up. The Section became somewhat moribund, and each year the dinners were more sparsely attended. I remember doing panels with Ralph Giordano in which there were like five or six people in the audience. And Jay Himes and I beat each other's brains out in commercial litigation, because we couldn't get any antitrust work.

I think this group reached the low point in 2001, right after 9/11, when we had an Executive Committee meeting that only three people attended, Ken Logan, Pamela Jones Harbour and I. And I pointed out that one of the reasons people don't come to meetings is because they are afraid they are going to be given an assignment. I suggested that instead of creating projects, what we should do is have guest speakers come to our meetings, and people should just talk about what they were doing. Well, it worked. Attendance picked up, the Executive Committee is thriving, and this event is returning to its glory days. I guess that's maybe the one contribution I made to the Section. I came up with an idea that reduced the amount of work that people have to do. I guess you could call that efficiency.

Now, some of you in the audience may be wondering why this old guy is standing up there rambling about how long he's been around.

Well, that's how you get one of these awards; you just hang around for a long time. It is my understanding that I am also getting this award for public service, which includes the pro bono work that I have done over the years. I have done a lot of pro bono work, and I can tell you that there's nothing more rewarding, nothing more gratifying or fun, and you can never do enough. So I say to you, antitrust cases are fun, but sometimes pro bono cases can be more meaningful. If you want to make a difference in the world, then do things to help other people. Make your money in your day job, but don't forget the people who are less fortunate than you are. Helping others can make you feel like the richest person in the world. And I thank you very much.

MR. MADSEN: And now the happy moment we have been waiting for, dinner is served. We'll resume the program in a little while.

(Dinner served.)

MR. MADSEN: All right, everybody, good evening again. You look less lean and hungry. So if I may divert your attention just a little bit from your dinner, which I hope you enjoyed, I now have the very pleasant duty of introducing our dinner keynote speaker: Molly S. Boast, Deputy Assistant Attorney General for Civil Matters of the Antitrust Division of the United States Department of Justice. It is a job that is as easy as it is pleasant, to introduce Molly Boast to you. It is easy because many of you—I venture to guess almost all of you—know her already and have known her for years. You know what a fine and distinguished lawyer she is. My burden of persuasion is most easy.

Molly's career in the field of antitrust has placed her in the path one way or another of many, many other antitrust practitioners. And of course, until her recent elevation to high office, she was a member of our Section's own Executive Committee, and indeed did a stint handling our Annual Review of Antitrust Developments. She knows her stuff.

Now, the press release which announced Molly's appointment to her current post described her as "a seasoned antitrust veteran with extensive antitrust and management experience." I read that and I said, what a gift for understatement and in a press release. In fact, Molly is truly a star. For over a decade she was at the LeBoeuf firm, where she was head of the litigation department and a member of the firm's steering committee. She has argued before the Supreme Court of the United States. She served as Director of the Federal Trade Commission's Bureau of Competition. She spent nearly a decade at the Debevoise firm where she led an antitrust group. And she is now in charge of civil matters at the Department of Justice.

Hers truly is the voice of experience. And also she is, I submit, the model of a lawyer with a successful private practice who has not hesitated to answer her country's call when it asked her to enter the public service, not once, but twice.

I was, therefore, really delighted when she accepted the invitation to be this evening's keynote speaker. And I was especially pleased when she indicated that in her remarks she would focus on the special character of litigating antitrust issues for the government. It is not as simple as you might think.

Now, we are all serious antitrust lawyers here. We know all the lawyers in this room are serious antitrust lawyers. It is actually very hard to think of a better professionally oriented way to spend a winter evening than hearing important insights from an authoritative speaker, who is not only a leader in the field, but also an admired, respected colleague and a very dear friend.

With that, you don't need to hear more from me, I want to turn the podium and our attention over to Deputy Assistant Attorney General Molly S. Boast.

HON. MOLLY BOAST: Thank you, Steve, for the incredibly over-generous introduction. I will part company with you on one point, and that is, I don't think everybody is waiting with bated breath on my every word, because it is probably time to go home.

With these remarks I am trying to straddle a bit of a gap. A gap between Steve, who would have me talk about how the Department or the Division is assessing litigation risks and what our plans are, and Bruce, who would have me defend the recent Smithfield case. And I am proposing to do neither. I hope to keep these remarks really short and just give you some insight, what I call a peek through the other end of the telescope--what it feels like from my perspective to be litigating a case for the government. And in homage to Steve and his questions, I might take a couple of high-level questions afterwards, although that would be totally off script.

It is delightful to be back among so many friends. I can't tell you what a privilege it is. I would like to add the voice of Christine Varney, the AAG, myself, and the Antitrust Division in remembering Bob Joffe. Our sympathies to his colleagues at Cravath and his family. He was a leading member of the antitrust bar, a wonderful lawyer, and, most of all, an incredible humanitarian.

Christine called me today to tell me of his death, and wanted to make sure I conveyed those sympathies.

Before I get into this, let me give the standard government disclaimer. My views here are solely my own, and not those of anyone else at the Department.

Now, just having gained the privilege of service to the government for the second time, the difference in litigation posture has really come into sharp focus for me. And it is quite a bit more challenging than I think folks might think from the outside. But before I get into what some people might call the whine list, w-h-i-n-e, let me talk about some of the strengths we do have.

On the institutional side, we have completely integrated our economists with our litigation sections, and it is a seamless experience. There is almost no meeting I attend that doesn't include one or more members of our economics group. So we start out with an economically well-grounded conversation right from the get-go.

Moreover, there is an incredible breadth of matters to be investigated, as you probably know. Yesterday, we had the privilege of a town hall meeting with the Attorney General, and, as our Section Chiefs were identifying for him the work they did, I think his breath was taken away, because we cut across so many sectors. So if you couple that amount of antitrust insight with the incredible skill and long, long tenures of some of our staff, like Ralph, I would put us up against any other antitrust lawyers in the world.

We also have unique tools that allow us to investigate before we sue. We have the ability to get the information we need. For the remainder of my comments, I want to use the construct of merger litigation to talk about some of the things that I find more challenging.

The first fundamental point, of course, is that in our merger cases we are enforcers. We bear the ultimate burden of proof in a case where we are asking the court to make a predictive decision. We are not telling them what happened. We are asking the court to bear with us while we make a prediction about what will happen. I am not aware of any other statute that requires a party to tell the court essentially the following: This is my best prediction of what the future will hold in terms of competitive harm; now please, find a violation of the law.

We go into the merger process, of course, in the typical instance after a Hard-Scott-Rodino Act filing is made. And, as you probably are aware, 95 percent of those filings lead to nothing. In the remaining minority of cases, we investigate. If we decide there is a competitive issue, our ultimate challenge--and this is something I constantly have to explain to my sister agencies in Washington--is that we don't have regulatory authority. We have to be prepared to go to court. So that's the process. It is actually quite different when you're sitting on my side of the table.

If you're representing a merging party, if you're lucky you have many months, to familiarize yourself with the party's position, review it before deciding to ink the deal. Then you continue working with them. We come in when the deal is inked and after the arguments have been set and framed. Although we have significant industry knowledge that we have developed over the years, and a pretty good understanding of many markets, it is still fundamentally different from the dynamic on the other side where business executives are available to explain to their counsel the motivations behind the deal. Our clients are the United States, consumers and competition. So for the most part we work without having the client actually sitting at our side. We see this difference especially sharply in cases involving complex technologies, for example, where on occasion we feel that we need to bring in industry experts to make sure we have a competent grasp of what's going on.

Of course, some investigations never really veer in the direction of litigation. But in others, our concerns don't diminish as we go along. In those instances, we are essentially running parallel processes as we get ready to litigate and continue to investigate to see whether the concerns will go away. But once we are thinking about litigation, this difference comes into sharper focus.

In thinking about preparing a case, we don't have a client to carry our burden. Having been on both sides of the equation, I can tell you this is a fundamental difference. We haven't got a motivated, knowledgeable executive who is prepared to talk about why there are competitive consequences or the great things from the deal. Yet we bear the burden of proof. We have a related issue sometimes in dealing with documents where, guess what, surprise, surprise, sometimes documents that seem incredibly clear on their face suddenly have a completely different meaning when put in front of a witness in a deposition. So the trial practice point is that we don't have the witness over whom we have direct control who can tell our story, and we are working with documents generated by your parties--nothing of our own, other than our expert work.

So what do we do under those circumstances? Well, we can call witnesses from the merging parties as adverse witnesses for our direct case. We can cross-examination them. We might try to have an expert carry some of the narrative by walking through a series of the documents. But since so many of you here are litigators, I am sure you can appreciate that this is a very imperfect way to think about trying to win a tough, incipiency-oriented litigation. Our other candidates for fact witnesses are customers and competitors. They often provide extremely valuable industry expertise, but they raise other complicating factors.

First, under any circumstances, finding third parties who are willing to spend the amount of time and effort it takes to work with us to develop the kind of testimony that courts these days will accept—the courts having made it pretty clear to the enforcement agencies that they are not very happy with conclusory declarations or conclusory testimony. It requires considerable time and patience on both their part and ours.

Secondly, we are well aware of the fact that the agendas of customers and competitors can be very different from our own. It is not uncommon—I wouldn't say frequent, but we have certainly seen instances where parties to mergers have been able to negotiate very favorable contract terms with some important customers who might be helpful to the government in advance of having their transaction reviewed.

Once their own economic interests are satisfied, it is even more challenging to try to get a customer to spend the time and expense supporting us in litigation. To say nothing of the fact that their testimony might not be worth anything, because they may not be able to articulate a credible theory of immediate competitive harm. We have even had customers use their cooperation with us as leverage to get a good deal with the merging parties.

Finally, some customers are extremely reluctant to work with us, because they fear retaliation from the merging parties, one of whom might be a dominant firm or very prominent supplier. Clearly, this is a very substantial issue for some customers. And customers also worry about dissemination of their confidential business information, because by definition, if they are working with us, it might become a litigated case. Thus, they put themselves at risk of being drawn into discovery in a litigation. So, although we get a few of them, it is a big job to get them on board.

Calling competitors as witnesses raises similar, but somewhat different, complicated issues. The competitors are, of course, motivated by different sets of concerns. They want to tell us about how the transaction will harm them. And they often overestimate what we are capable of delivering. Again, it is surprising to me how many times competitors think that we can do more than preserve pre-merger competition if we win the litigation. Somehow they think if they help us, we can help them improve their competitive position. Once they fully understand the limits of what we can do, their enthusiasm can diminish. And of course, many competitors are simply strategic, and we are quite mindful, as the courts are I think, that their evidence may not be the best evidence on harm to consumers. So we approach working with them with an appropriate degree of caution. They can provide very useful industry background sometimes, but they are not always the best people to put on the witness stand.

Now, I don't want to discredit competitor testimony completely. There is an adage one hears from time to time that, if competitors are complaining, the merger must be procompetitive. I do not subscribe to that adage. In today's markets, there are so many companies that are interrelated in so many ways that you might have a customer or a competitor that is a customer at one level and a competitor at another. And if we were to disregard their views altogether, we might miss some important nuances of the transaction. Purely horizontal competitors can sometimes be among the most important sources of new technologies, for example, that are coming up on the horizon and are necessary to an understanding of a transaction's likely competitive effects.

But let's assume we have gotten over the fact that we don't have anyone who can totally carry our narrative. We have found a few customers we can keep on board. We haven't been able to resolve our concerns, and we have assembled a case. When we get to court, we are before a neutral decisionmaker.

Now, I have also heard the claim that antitrust enforcers are advantaged in court because judges reflexively side with the United States. I fundamentally disagree with this. In my experience, both in and out of the government, judges are fair and even-handed, assess the evidence in an unbiased fashion, and hold the agencies to their burden of proof. Things have changed since Justice Stewart quipped in *Von's Grocery*—I hate to mention it, 50 years ago—that the sole consistency you can find in merger litigation under Section 7 was that "the government always wins." We have seen plenty of Division and FTC cases over the last ten or fifteen years that show that there is no predisposed bias in favor of the government—cases like *Arch Coal*, and, going back, *Baker Hughes*.

Some of these cases highlight yet another issue that we face, this one of greater or more recent vintage-- the use of the Horizontal Merger Guidelines in the litigation. Those of you in this room who are steeped in agency lore know that the Guidelines, as originally designed and in all subsequent iterations, are intended to be a transparency device, a way to tell the bar and the business community the elements and the framework that we use to evaluate mergers. They were not otherwise intended to be an enforcement tool.

But ten years or so ago, perhaps a little earlier, the agencies started quite proudly citing the Guidelines in a number of cases, principally to illuminate areas where case law did not completely provide the answer. The agencies used the sophisticated learning reflected in the Guidelines, a kind of gap-filling measure in the courts. Guess what happened? The courts actually embraced this over the course of time. Now the Guidelines have almost a sort of quasi common law status in some courts. That means that both sides are free to use them, and they do. And so we see defendants pointing to places where we somehow haven't checked off a box in the Guidelines and using that against us. Even looking back as early as the *Baker Hughes* decision, the court chided the Division for not following its own Guidelines.

This is an important consideration in our current project to consider updating the Horizontal Merger Guidelines. I think most people who are involved in the project and the vast majority of those who participated in the several workshops we held over the last few weeks agree that an update is timely, since the last substantial revision took place 18 years ago. But it is in my view a big challenge to think about how to balance the need for increased transparency and making certain the Guidelines reflect current practice and economic thinking, something we are really dedicated to, but avoid an overly prescriptive set of Guidelines that will create more boxes that could be checked in litigation and somehow end up confining us. It is a healthy debate between the lawyers and the economists on our working group, and I don't know where we will come out.

Let me mention one final complication, again familiar to all of you, and that is litigating the fix. Sometimes the parties will undertake a new transaction if they think we have concerns, and so while we are reviewing transaction A, they implement or propose to implement transaction B, suggesting that that would cure the competitive problems. And then if we are actually still looking at litigation, we are doing it with the shadow of this fix in the background.

Most often the threat to litigate the fix is really part of the settlement negotiation. And in most cases, if the clients are willing to go to point A in settlement, they are probably going to be willing to go to point A plus something, and we can resolve it. But when it doesn't work, we essentially find ourselves litigating two cases. The first is the case in which we are trying to keep the court focused on the fundamental problems in the original transaction, and the second is we are trying to tell the court why the proposed fix or the fix if it has been implemented doesn't satisfy our concerns and shouldn't satisfy the court.

Now, none of these hurdles--incipiency standard, the absence of a client to carry our narrative, the frailties of our witnesses, litigating the fix, the Merger Guidelines—is insurmountable. And even taken collectively we bring cases and we win them. But I think that by putting this in perspective for you, I can help you understand that when we do go to court on merger cases and win, it is an enormous and substantial achievement.

I neglected to say at the beginning and so I will say now, before I conclude, congratulations to our outgoing Chair Bruce, our incoming Chair Steve, and to my long-standing good friend Steve Edwards.

I hope you've enjoyed looking through my end of the telescope. When I proposed this title somebody in the Division said, well, that's the wrong way to think about it, Molly, because when you pick up the telescope from the other end you just see miniatures down there. From my perspective, my end of the telescope is not small. We are very lucky to have people on the other side, like those of you who are in the private bar, who are so cooperative and such intelligent professional people. Thank you very much.

And I will entertain a couple of questions.

MR. MADSEN: All right, you heard the lady. Who has got some questions? Anybody? We can't let her off that easily.

Well, thank you very much. I am really grateful for your commenting and for that interesting presentation.

At this point we have reached the stage in the evening where that dessert bar, brought to you by generous calorically-minded law firms, is now made available. So we are basically at the end of the program.

I want to thank you all for coming, and I want to thank everybody who made this event the success I think it was. I want to add one little note, I have had so many people say nice things about my partner and friend Bob Joffe. I am reminded that particularly in this field of antitrust, where our cases go on forever, we litigate not who shot John, but what is the structure of an industry and who should it be, and where the stakes are enormous and sometimes literally armies of lawyers are employed, we really are a fraternity, a community. We are people who know each other over long periods of time. We have friendships even across practice orientations or other kinds of divides. It is a wonderful group of people. I am so glad you're all in it. And if there is any person in the room who is not a member of the Antitrust Law Section of the New York State Bar Association, now is your chance.

Thank you so much. With that, our program is over. Go enjoy dessert. Thank you all for coming.