NYSBA

2013 Antitrust Law Section Symposium

NYSBA

2013 Antitrust Law Section Symposium

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Introduction and Welcome

MR. ROONEY: Good morning. My name is Bill Rooney, and I am for the next few hours the Chair of the Antitrust Law Section of the New York State Bar Association. It is our pleasure today to begin our 2013 Annual Meeting, and I really have but one role this morning, which is a genuinely privileged role, and that is to introduce Eric Stock, who is the Program Chair and the incoming Chair of the Antitrust Law Section. I will say again, only by way of introduction, that I have reviewed this program, and it looks awesome to me. I can certainly verify the number of hours and effort that went into preparing it, all of which are due to Eric Stock's excellent leadership.

With that, Eric, would you please introduce the program.

MR. STOCK: Thanks a lot, Bill. You understate your contribution to this program, which was significant.

I am very excited about the program we put together today. Thanks to everyone for getting up so early to make it here. We have five panels set up. These panels are all designed to showcase the New York-centric practice and the very strong practice of antitrust that we have in this city. We have terrific lineup of New York and non-New York practitioners to talk about these issues.

I do want to remind everyone that we are getting CLE credit, although I am sure that is in no part the reason for your attendance today. But it is important to remember, so that you get the CLE credit that you deserve, there is a form in the materials in green. There is one for the morning program and one for the afternoon program, so just make sure you fill that out properly after the program and indicate that you were here, and then you'll get your credit.

There is also a program evaluation form, and I encourage you to fill that out. I will caution you that technically before you fill in all excellent you should wait until after the program.

(Laughter.)

On to the content, which as Bill said, we are very excited about. We are going to start with a program moderated by Elai Katz. This program is going to bring everyone up to speed on what's been happening for the last year in antitrust.

The next panel, after Recent Developments, will be a panel on the FTAIA which relates to the extraterritorial application of the antitrust laws. Again, New York as an international city, we thought this was another good theme for a New York-based presentation.

There is a break at 10:15 in between the panels to get refreshments. Because, aside from Bill Rooney, all of us need sustenance, aside from just antitrust theory. So there is coffee and plenty of food out there too.

In the afternoon, after the break, we have a panel on the New York Field Office and developments there that Steve Tugander has put together. It will be very exciting, and we have people from Justice as well to talk about the criminal program at the Antitrust Division.

Then we will have two industry-specific panels, again focused on New York-based or tri-state area industries. The first one is on the financial services industry, and Stacey Mahoney will be moderating that. We will find out whether the financial services industry has too much or too little regulation.

Then last we have a panel on the pharmaceutical industry, which is particularly timely in light of the Supreme Court's decision to grant cert in the AndroGel case. If you thought you've heard enough about reverse payments, well the situation just got a lot more interesting, and it is probably the most timely cutting-edge issue now. We are one of the first, I think, to have a large panel on it.

I want to thank Lori Nicoll for helping to organize all the logistics for this program. And I do want to mention that a lot of people have contributed to this and worked very hard, and I am very excited about the way it is turning out already. Thank you all for being here.

Antitrust Developments in 2012: The Year in Review

MR. STOCK: We'll get started with our first panel. Elai Katz is partner at Cahill Gordon & Reindel, filling the shoes of such luminaries as Bill Lifland at that firm. Elai does a lot of work in antitrust from class actions to merger review to pretty much everything, although he has a special focus in financial services and intellectual property.

Many of us know Elai, because without him we wouldn't know what was happening in the antitrust world. He writes a monthly column for the *New York Law Journal*. So I guess one way we could have had this Recent Developments panel would be just to hand out copies of Elai's column for the past twelve months. I was told we couldn't get CLE credit for that. So we're going to try something a little different. But I do commend to you his column in order to stay up to date.

MR. KATZ: Good morning, everyone. While we are working out some technical issues I am just going to get started.

As many of you know, every year at this meeting we have a program talking about antitrust developments, and we have done this for many, many years. In recent years we've tried to do it by inviting different distinguished guests; we have had economists, enforcers, seasoned practitioners. This year we are very fortunate to have two leading antitrust professors to help us review this past year in antitrust. So this morning we are going to take a look at some of the more significant developments.

As you know, it is not really possible to delve into everything, so there are some things that we will skip, of course. Before we delve into the program, I am going to actually start with a few things we are not going to talk about. But before that I would like to thank Helena Franceschi, my associate, who was very helpful in putting this together.

Now I am going to introduce our panelists. First, to my immediate left, is Professor Harry First. Professor First is the Charles Denison Professor of Law at NYU. He's also the Director of the law school's Competition, Innovation and Information Law Program. Many of you know him well, and I think some of you here had him as a teacher. You also might know that from 1999 to 2001 he was the Chief of the Antitrust Bureau of the Attorney General's office in the State of New York.

He teaches, in addition to antitrust, regulated industries and many other areas. He has written case books on antitrust, on regulated industries, on business crime. He is currently working on a book that I think is forthcoming very soon entitled *Microsoft and The Globalization of Antitrust Law*. And he is also a member of the Executive Committee of this Section of the New York State Bar Association, Antitrust Section.

To his left is Professor Mark Patterson. He is Professor of Law at Fordham University. He teaches antitrust law, patent law and contracts. He has written many articles in areas of both IP and antitrust law, and he writes a lot about the interface between intellectual property law and antitrust law.

Mark started out as an engineer. He studied electrical engineering and worked in robotics and only subsequently became a lawyer and then a law professor.

Among many of the things that he's written, recently he has been writing about Google and search engine market power, which is something of great interest to many of us.

As I promised I'll tell you just a little bit, and if you don't mind I am going to go where I was intended to be seated from the very beginning. We are going to do this more roundtable style than speech style.

I will start by telling you some of the things we are not going to talk about, because we are going to focus on other things. One thing we are not going to talk about this year is mergers, even though there are some interesting merger matters that came up. We don't have the blockbusters we had the prior year. In 2011 we had AT&T and T-Mobile and the stock exchange matters.

I want to briefly mention one merger that is interesting is the Medco-Express Scripts merger. It was a $29 billion combination of two of the top three PBMs, or pharmacy benefit managers. The FTC decided to close its investigation, despite the fact that some Commissioners thought that would lead to too high a concentration in that industry. The FTC said smaller rivals could still bid for employer contracts, despite that increased concentration.

There were a bunch of hospital mergers, and I think when we look at it there have been a lot of developments in health care, so those were of some interest but not to be addressed today.

Now there are also some cases that are going to be decided by the Supreme Court this term that are of great interest. It happens that both of those also have to do with health care.

One is a reverse payment case, *FTC v. Watson*. We will not talk about that, but if you stick around, at 3:45 there is

a really great program later today that will be discussing those topics, reverse payments in pharmaceutical patent dispute settlements, in great detail.

The other case that the Supreme Court is going to be deciding this term is another hospital merger matter, but the case isn't really about merger law. It has to do with state action immunity, and the FTC there is appealing the Eleventh Circuit's decision where they have said that the state action doctrine immunized a hospital authority's acquisition of what is alleged to be the only other hospital. This is in Albany, Georgia. So that case is *FTC v. Phoebe Putney Health System*.

So after that short detour about the things that we won't be delving into but are of some interest, let us now turn to what we are really going to talk about. Here the first thing we'd like to focus on today is what we are calling the "Big Pay Day."

Without saying anything more about what that means, I am going to turn it over to Professor First.

PROF. FIRST: Thank you, Elai.

So we thought we'd try to do this in more of an interactive way, a nice roundtable. But then we are up here, so I don't know if that's going to happen. When I say things in class students often raise their hand and challenge me, so don't feel like you're students, although some of my students are here, but feel free to chime in particularly when I make mistakes.

First of all, I'll start with a little disclaimer. I am going to talk about two cases in which I do have some involvement, one is the *Visa/MasterCard* proposed settlement, and the other is the Libor class actions. I've been consulting to some extent on both of them, to objectors in the first and to plaintiff's class action in the second.

MR. KATZ: I'll interrupt, because you are reminding me that I should disclose that I do represent some parties in the Libor matters as well.

PROF. FIRST: So I asked someone if there is overcrowding of financial regulation in that program and whether people were going to discuss Libor. And the answer was no, no one can discuss Libor because everyone is in Libor. So if you're conflicted out from listening I won't ask you to raise your hands.

So let's start with the first thing, the Big Pay Day and talk a little bit about private actions. One little interesting statistic, in 2012 there were 702 private antitrust cases filed in the United States in federal district court. Now this is up from 475 the year before, so it's almost doubled. This is sort of an indicator that maybe private litigation is coming back from the dead, the dead of *Twombly*, and that parties are once again filing suits.

So if you compare it to some other historical figures, the 700 pales in comparison to the number of cases filed in 2008, which was 1,300. But it has been consistently going down, so in 2009, 812; 2010 there were 544; 2011 we had 475. This year it's coming back from the dead. I am not sure I have an explanation for why that's so, except that litigants seem to have a more positive view about what they can accomplish by way of private antitrust litigation.

Maybe one of the reasons is the second part, which is the proposed settlement in the class actions brought against Visa and MasterCard. The settlement in these class actions was announced in July 2012, and the class actions involved basically two aspects of the practices of Visa and MasterCard: One is interchange, the fees the two systems charge to merchants for processing payments over their networks, on their system. And the second is something that is often referred to as merchant rules, a variety of rules that both Visa and MasterCard have imposed on merchants who are involved in payments on their system.

The main rules are something called anti-steering rules, and these are basically rules which prevent merchants from giving their customers incentives to use cards other than Visa and MasterCard. So one incentive would be a cash discount; if you pay cash you might get a lower price. And the other incentive would be a punishment; if you pay with Visa and MasterCard, you're surcharged, thereby incentivizing you to use some other form of payment. Both of those are not permitted under their rules, and these were subject to the class action suit.

Now as many of you know of course, maybe everyone in this room knows, this is a mini-industry of suits over payment systems. There have been a number of them over the years. Many of them have involved membership in the Visa and MasterCard system, brought both by private plaintiffs and by the federal government. One case involved the tying of debit cards and credit cards brought by private parties and settled with injunctive remedy and money a number of years ago.

So the basic argument in the case that the plaintiffs have made was that these rules were basically price-fixing rules. They enabled the parties to fix and raise prices. They were collusively set was the theory of the case. And it involved Section 1 of the Sherman Act, basically viewing the banks as a cartel raising the price of interchange.

There is a parallel Justice Department suit involving the no-discount rule of the anti-steering rule, which has been settled with Visa and MasterCard by consent decree, where they have agreed to eliminate the practice. But AmEx is still litigating; that case is under litigation now. So there is again, as can happen in these areas, some parallel between government enforcement and private enforcement.

So the Big Pay Day, of course, as you may know was the settlement dollar amount, which was roughly in the

$7 billion range. When I saw that I said, that's a lot of zeros. So, a little more than $6 billion in cash payment and the rest is in agreement by Visa and MasterCard to lower their interchange rates to merchants for a period of eight months. So, this is a lot of money, and it is a Big Pay Day for somebody, for the claimants, presumably. As members of Antitrust Bar, we always hope for their lawyers.

So what is so interesting about this, other than the zeros? Some of you may say nothing is of interest, but actually, there are some very interesting issues which are fundamental issues relating to questions of antitrust policy. First of all, Visa and MasterCard agree to allow surcharging. Merchants can now charge you more—this doesn't sound like a great attractive proposition for merchants, but maybe they will do it if you use their cards, but under some very restrictive rules. This agreement lasts as long as the injunction, which will expire in 2021. These things always seem like a long time from when they are entered, but as we all know, time passes quickly. So after that it is back to whatever the parties want to do that they feel is in their own self-interest.

The agreement does not end Visa and MasterCard's setting of interchange rates. So again, there is this eight-month hold down, but after that they continue whatever practice they want. What's aroused some interest are the releases in the case. There is this injunctive provision on the anti-steering rule, but there is also a release for class members who are not seeking money damages, the so-called B2 class that is just seeking injunctive relief. And they release all claims for basically collusion over interchange, now and forever. Forever is longer than 2021 in everybody's calendar. Plus the class consists of merchants who are not yet merchants. I just had a grandchild, and I guess if he goes into business, he will not be able to sue over interchange fees.

So it is in some sense an immunity. Of course, there is still government action, but it is a very broad sweeping release. It has not yet received final approval, but something to watch for.

There is also a provision allowing the merchants to form joint buying groups—whatever they are supposed to be—to negotiate jointly with both Visa and with MasterCard, not at the same time, but to negotiate jointly with them so long as it is done pursuant to the Justice Department-FTC Collaboration Guidelines—you remember those guidelines about joint ventures, and the Health Policy Statements. What the merchants have to do with health we are not sure, but basically the idea was that they can get together, if it is lawful, and negotiate with Visa and MasterCard. Now, this is in the settlement, and the interesting provision in a way is that if there is any dispute about this, the dispute has to be submitted to the District Court to determine whether presumably it complies with the antitrust laws or not, and the District Court's decision under the settlement is final, no appeal. So this is really somewhat of an unusual provision.

What one might think about in this kind of settlement is the interaction between the private deal and the public parts. Normally in a cartel case, when a cartel fixes prices and a suit is brought they stop fixing prices, unless they want to go to jail in the future. But not in this case, so they continue. This is an unusual part. The continuing oversight by the judge, sort of a mini-regulatory agency for this industry, is also unusual and something normally that in antitrust we don't prefer. See the Court's opinion in *Trinko* for example.

A quick comparison would be to the Google books settlement. If you recall, this is the settlement dealing with the orphan works problem, copyrighted works that are still under copyright but no one can find their parents. If you remember, the District Court eventually refused to approve this settlement, in part because it required very strong continuing supervision of this industry by the Court. And in part because the Justice Department appeared and was concerned about the competitive effects of the settlement, particularly with regard to access and also in some sense with regard to pricing.

So to come back to the Visa and MasterCard case, and to tie into the Reverse Payments Panel you will hopefully be at this afternoon, there is this interesting public/private overlap as parties settle cases privately. When will the Justice Department appear? I keep thinking about where is Waldo? So where are they? Why aren't they before the District Court Judge, Judge Gleeson, expressing their views about the competitive impact of this? Or one could ask perhaps when will they appear? You never know. I am not Houdini. There is also the interest of the states, so it is also possible that the states, which actually are covered by these releases, might appear before the judge and bring some public regard to these private settlements.

MR. KATZ: When you say the states are covered by the releases, do you mean from bringing *parens patriae*, or as merchants of some kind?

PROF. FIRST: They are released from bringing *parens patriae* cases. They are also users of cards, so their claims are released in that way. It is a very broad and, from my view, somewhat troubling release that these private parties could release state, what are basically state government claims.

I've only covered one of the four points. So now I am going to talk very quickly.

Libor. The Libor class actions, this is just something to be aware of in case you've not been reading the papers. Maybe the most important thing is to remember what Libor stands for, which I always have to write down. It is the London inter-bank offered rate. This is the alleged

rate at which a group of banks thinks banks will be able to borrow money at 11 a.m. in the morning in the London Inter-Bank market. Not the rate at which banks will lend money, but at which they can borrow.

A private group, the British Bankers Association, gets these assessments from 24 banks, drops off the outliers, top four, bottom four, takes the mean of the middle and announces that as the Libor rate. Weird idea to me, but everybody follows it. As you may know and as apparently a lot of people have known and as was broken by the *Wall Street Journal* in 2008, something is fishy with this rate. So there was a period at which the rate was very, very stable, and the quotes given in by the contributing banks were very close. The bottom line is there does seem to be some collusion in the setting of these rates. The rates involve ten different currencies, so there are plenty of conspiracies to go around.

I am not going to talk really about the government part of this; governments all over the world are involved. The antitrust part is the thing that interests people in this room. Just as a footnote on the criminal part, so far there has been only one case, one criminal antitrust case brought. It is one count of three, and that involves one trader from UBS, I believe, involved with the Yen Libor. That's the only criminal case that's been brought. No criminal case has been brought against the corporate participants, against the banks. I'll get back to banks later. Gargantuan class actions are now pending in the District Court before Judge Buchwald. This is more of a heads up, lots of potential problems, some of which Mark may talk about in terms of whether the Libor, which is just a reference point, is subject to Section 1, is that a product subject to Section 1; how do you compute damages, standing, and all those things.

Again, I just want to point out the interaction with the Justice Department. There are two amnesty parties, UBS and Barclays, which have received Amnesty for different conspiracies apparently, and of course, they should be cooperating with the plaintiff classes under ACPERA.

Finally, and I have less than a minute, *Comcast v. Behrend*, to alert you to a Supreme Court case now pending. Supreme Court was argued in November. This involves class certification, a very important case for plaintiffs, and a case in which the Third Circuit, running contrary I think to even Third Circuit precedent *Hydrogen Peroxide* and Second Circuit precedent the *IPO* litigation, was willing to certify the class if there was a predominance of class issues, particularly with regard to antitrust impact and damages.

The Supreme Court has taken this case, as I mentioned, and my prediction—I will not predict the outcome because I don't want to do that, so I will predict when the Court will decide this. So it will decide it right before the ABA spring meeting.

(Laughter.)

PROF. PATTERSON: So I am going to talk about three different cases that arose this year, all of which involve antitrust related to some form of information. This is my current hobby, which is how should antitrust handle information? So my goal here is not to answer that question; it is just to point out that one of the things that happened in 2012, I believe, is that it became very clear that we need an approach to handle these issues.

The first instance is Libor, which as Harry said I'll say a little more about. I am not involved in the Libor case, so that means you can believe what I say about it.

(Laughter.)

Unfortunately, I am not going to say anything helpful to anyone. So my interest is from an informational point of view. Defendants argue that whatever is going on in Libor is not a restraint of trade for a variety of reasons. The one I am most interested in, and I'll quote from one of the memoranda in support of the motion to dismiss: "Plaintiff's theory runs directly counter to the antitrust rule that provision of alleged default information generally does not constitute a restraint of trade." Sort of, I guess.

They cite a couple of different things, and one of them is the case that's usually cited in this context, which is Judge Easterbrook's opinion in the Seventh Circuit in *Shankar v. The American Academy of Ophthalmology* where he talks about information affecting demand, not supply. Antitrust is all about supply. Restraints involve supply, not demand.

So that may be true when it is just statements made that affect people's purchasing decision. Libor is different. So Libor affects contracts, many of which were in existence before the parties started manipulating Libor, allegedly started manipulating Libor. In that case I don't know what you call that. Is that a supply issue? Is that a demand issue? I am not really sure, but I think it is fair to say that any unwillingness that we might have in another context where there are just statements made out in the market might not be directly applicable to Libor.

The party defendants also cite various cases involving false advertising where antitrust courts have been unwilling or at least reluctant to treat false advertising as an antitrust issue. But again, the Libor stuff is different from false advertising. False advertising, the reasons that are usually stated, for example in the Areeda Treatise, for why we don't think false advertising is an antitrust issue is that it doesn't last long; competitors can respond pretty effectively to false advertising with their own advertising. The people are just skeptical about advertising generally.

None of these really apply to Libor. Libor had an effect over a significant period of time. There were no real competitors to respond to Libor, unless you view the *Wall*

Street Journal as a competitor in the marketplace of ideas as to what's going on in Libor. And it is not a context where we would have been skeptical, right? When you hear advertising from somebody about their product you think they are probably just puffing. But in Libor, the representation of the British Bankers Association at least, what they are providing is some sort of objective information that were facts, not opinion, not puffery.

That raises the question: Are we entitled to rely on the BBA's representations about what Libor is. Then if we are, then when they make a misrepresentation, does that make it an antitrust case or does that make it some other sort of case? The Department of Justice has mostly pursued these things through the Criminal Fraud Division; maybe that's the right way to approach it.

Now, on the other hand, there are collusive elements to this. Some of the allegations about collusion are not terribly compelling, but it seems plausible. If there is collusion involved, then it is not just a fraud case. And the defendants also argue that hey, whatever was going on when we manipulated the rates, it wasn't competition. We weren't competing among ourselves for Libor rates; we are just providing information, so that's not a restraint of trade because we weren't competing. I don't know. It may not be a restraint of trade in the usual sense, but it is a contract that restrains trade in the sense that it distorts downstream contracts. So maybe it isn't a collusive effect upstream, but it certainly costs consumers, that is, whoever has Libor-denominated loan money. So it is a very weird sort of case.

That's basically my point today. These informational issues present weird cases in the antitrust context. I think there are going to be more cases like this. You can imagine certification schemes being similar. There are all these certification schemes out there done by trade associations, certifying things as organic, certifying things as sweat shop free or whatever. At some point some of these are going to be misrepresentations, and then is that going to be an antitrust case?

What exactly is that going to be? I don't think it really fits in false advertising; I don't think it clearly fits in antitrust. This is my main point; we need to figure out how to handle these.

So my second comment is about Google. This really was resolved in 2013, but we are treating it as a 2012 development because we can. So the FTC investigation involved four things: Standard essential patents, which I will talk about in a minute, search bias, scraping, and scraping is Google's use of information from other providers, other websites in its search results, and multihoming in which Google had some rules that made it more difficult for advertisers to advertise both through Google and through other search engines and other sorts of Internet services. The latter two, the scraping and the multihoming, are the two mice that Commissioner Rosch said the FTC delivered instead of the elephant it had been promising for months. It delivered those mice through some sort of informal agreement that doesn't really have any clear legal status. But it didn't even deliver a mouse for search bias.

The search bias claims—the FTC didn't do anything; it said we don't really see a problem here. The basic claim involving search bias, what Google does is it demotes in its search rankings, lowers in its rankings sometimes to the second page, which of course no one ever sees, the sites of its competitors, putting them lower in the rankings than they "should be."

Now one of the questions is, is there any "should be"? Is there any objective measure for where a website, a particular website should end up? So the FTC didn't do anything, because it said, in the main, I think was the phrase it used, the things that Google did, the changes that Google made could plausibly be interpreted, understood to have been intended to improve its search results. Notably the FTC didn't say they improved the search results; they just said they could plausibly have been intended to improve the search results. Which sort of makes sense in a Section 2 case because that might be enough to constitute a legitimate business application. But it is hard to know how we would assess improvement in search results or worsening search results.

This is not a market that works really well. Consumers don't generally know how to compare search results. We don't really generally do it. You're usually searching for information you don't have, so it is hard to evaluate what you get. The information is free. When I talk to my students or other people about are you happy with Google's results, they say hey, it is okay. Well, okay doesn't really sound to me like a market working really effectively, but hey.

So one can wonder how did the FTC decide these things were designed to improve Google's results? It refers to Google's testing program. What Google does—and Google makes this pretty public. But like most people who have written on Google, Google invites you in. If you're an academic and you write about Google, they invite you to the Google offices to inform you or twist your arm or however you prefer to think about it.

Their testing scheme is they will imagine a proposed change to their search results, and then they have a focus group of a bunch of people out in the world, users who they use as basically their testers. They will then display to them the old result and the new result side by side and ask them which they like better. For example, if Google has its search results without, say, any specific restaurant reviews, it might compare those to search results that in-

clude Zagat reviews, because now Google owns Zagat. Then if consumers like the results of Zagat, Google will say okay, we like that better so we will now display that. The FTC refers to this type of scheme and says, well, Google is trying to improve its results.

One of the things I asked when I was called into Google was do you ever compare—instead of comparing your old results with something that incorporates new stuff of yours to see if it's better, do you ever compare your old results display with something that incorporates something else of somebody else's to see if people like it better? So do you ever, for example, compare your results with Zagat, which you own, with your results from Yelp, which you don't own? Their answer was no, we probably wouldn't do that. So then you wonder, all right, so they are designing comparisons to decide whether they are improving their product in a way that is of course going to give them the answer they want to get. Maybe the FTC took this into account, maybe it didn't. Maybe it shouldn't have to.

One of the questions that you have to ask in the Google context is how do we even decide what criteria we need to use? Is it enough for them to design tests that say they are making their results better every time, is that enough? Or should we consider the fact that they could have made them even better? Do they have to be even-handed in their testing scheme between themselves and other potential competitors? That's hard to say. Do they have any obligation to provide something that we might say are objectively the best results possible? A lot of people say it is not possible to even know what that means. I think it's not that much more difficult maybe for search results than it is for other products. But it is possible. It is also possible we would say Google can do whatever it wants, particularly if it tells us.

Another thing that I talked about with Google, they asked me well, what if we said to people—they weren't saying this is what we do—we don't make any pretense to providing objective results; we just provide results that we think will make us the most money. Would that make you happier? I said, well, maybe.

I am not sure how consumers would understand that. I think nothing would change. I think they could say that we distort our results as much as we want, and people would just yawn and would go on to continue to use Google. But it's a question as to why they don't say that. In fact, they make representations about what it is they are doing in their search results. And sort of like Libor then, the question becomes are we entitled to rely on their representations about what they are trying to do? And if they are not doing what they say they are doing, does that have implications for the antitrust analysis? I don't think any of these questions—I don't think it is even clear how to approach these questions from an antitrust point of view, and yet I think this kind of thing is going to get even more important.

Another interesting thing in the Google case was the footnote in Commissioner Rosch's opinion in which he talks about Google's half-truths, which he is concerned about and which the Commission did not address. What he says is that Google might tell people when we gather your personal information it is to improve the search results we give you. When in fact, when they gather people's personal information it is to make more money on advertising. And Commissioner Rosch said those are half-truths that we might care about and cites cases about half truths. You can ask yourself, okay, I didn't even know that was part of the case, this sort of privacy consumer information issue; that sounds like a Facebook problem rather than a Google problem. It makes me wonder is Commissioner Rosch thinking about Facebook? Is the FTC thinking about Facebook? When will we start thinking about Facebook? It will present all the same kind of difficult issues presented by Google.

My final topic is standard-essential patents, and this is the familiar holdup problem that you're all familiar about. A patentee gets its patent in technology adopted into a standard and later demands high licensing fees. A few years ago the cases that arose in this context were patentees who hid that they had intellectual property that was relevant to the standards of the *Rambus* case and *Dell* case at the FTC.

This year the cases have been different. Now the cases that are mostly creating the controversy are cases in which firms have revealed their patented technology, have committed to fair, reasonable and non-discriminatory licensing terms and then have demanded licensing terms that potential licensees think are not fair, reasonable and non-discriminatory. So much of the controversy in these cases is on what FRAND means, that is, what percent royalty is a fair, reasonable and non-discriminatory term. But most recently, and I think maybe most interestingly, the issue that's come up that has been creating more controversy is the one about whether you are allowed to seek an injunction. If your patentee committed to FRAND licensing are you allowed to seek an injunction, or are you only allowed to seek damages because you've committed to licensing? So again, this is not a question to what FRAND means, but what a commitment to license means.

Judge Posner in the *Apple v. Motorola* case in June said if you made a FRAND licensing agreement, you are just not allowed to seek an injunction. If you demand what you think are FRAND terms and the licensee refuses them, you can't seek an injunction. Your only option is to bring a damages action. So basically when you commit to licensing, you've committed to no injunctions. This has been the position largely reflected in the EC's positions on SEPs too.

So the FTC issued a statement in June that didn't go quite as far to say it's a no-injunction rule. This was in an ITC case. It said what you're allowed to do is seek an injunction if the potential licensee receives a reason-

able offer. So I guess what this would mean is if you're a patentee and you seek an exclusion order in the FTC, or in the ITC, excuse me, and the FTC said the rule would have been the same in the District Court, you can seek an injunction, but the Court would have to first determine whether you made a reasonable RAND offer and the licensee refused it. Only then would you be entitled to an injunction. Echoes of the *E-bay v. MercExchange* Supreme Court decision on patents and injunctions.

It is interesting that the agencies are kind of trying to define what it means and what your injunctive rights are. The DOJ took a similar position in a statement issued with the PTO saying an injunction may be appropriate if a patentee offers a license and the licensee refuses to negotiate. Now interestingly, Judge Posner, in the *Apple v. Motorola* case, said the patentee is not entitled to negotiations. The patentee, if it makes an offer and the licensee just says go away, it still can't seek an injunction. All it can do is get damages. In other words, when you make a licensing commitment, you aren't making a licensing commitment in exchange for an obligation on the part of the licensee to negotiate; you're making a licensing commitment in exchange for the inclusion of your patent in technology in the standard, and negotiation is not part of the deal. The DOJ took a slightly different view.

The Google settlement, again just a few weeks ago, said that Google is allowed to demand FRAND licensing, and it can only seek an injunction—I am over simplifying in each of these instances somewhat—can only seek an injunction if the potential licensee refuses to make a binding commitment to license at whatever rate the Court determines. Not too far from Judge Posner's opinion, but still allows an injunction if the licensee is not willing to make that commitment.

So I guess what interests me about these cases is they have really gotten away—or these cases and statements have gotten away from trying to figure out what is a licensing commitment. If we are trying to figure out what it means to make a FRAND licensing commitment, that sounds like an interpretation of a contractual obligation. That sounds like a contract case, and a lot of these cases have been brought more recently as breach of contract action under various sorts of estoppel theories. But the agencies are weighing in, and they clearly view these as antitrust issues. The FTC and the DOJ statements don't talk about them so much in terms of what does a licensing commitment mean, but in terms of how are we going to structure this market. It sort of echoes the class action cases Harry was talking about. We have gotten away from figuring out what the law is, and now we are trying to do some regulatory action. That's the way the FTC and the DOJ statements sound. That we think the market will work best if people can't seek injunctions, and therefore, we are just going to argue that that's what a licensing commitment means. It's just all fairly odd.

If you compare it to the EC, the EC pays little attention to the commitments. It basically says if you have a standard-essential patent, you can't seek an injunction. So there is all this restructuring of antitrust and IP obligations and rights are in the standard-essential patent context that sort of gets away from the usual model of court adjudication and gets into some sort of regulatory approach, which is interesting.

So in all three of these instances I am interested in how antitrust handles this information. We talk all the time of having an information economy, and antitrust is supposed to make the economy function, yet we don't have a good handle on how to make information products work. That's a problem. I think it is reflected in the recent focus on FTC Section 5, and that brings a lot of these sort of informational issues or we pretend it offers the hope of dealing with these informational issues. Anyway, I think this is where antitrust is going to be seeing a lot of action in the next five or ten years.

MR. KATZ: Thank you.

We are going to turn next back to Harry, and now the focus is going back to enforcement, something that you know about from personal experience and as an academic.

PROF. FIRST: I first want to say that information should be free, but advertising is not. That's Google's model.

I also want to do a little poll. How many people think the European Union is going to bring suit against Google?

(Show of hands.)

Interesting. Just a little reminder about multiple enforcement. One of the problems really in evaluating Google, to pick up the information theme, is that we really lack some information, like what did the FTC find? What's in the emails? It's really a little hard to interpret whether the FTC backed away from this or not without knowing that. So it is good to have other enforcers—I was going to say on the block, but it is a very big block. It is a long one that crosses the Atlantic.

So I am going to take up now what I suggest may be the changing nature of Justice Department enforcement. Some interesting trends just to bring it to the fore, and I'd love to have your views on this as well.

As we know, with the Justice Department it has been cartels, cartels, cartels nonstop. Heavy emphasis on international cartel prosecutions. Although in the afternoon program you'll get a broader sense of—maybe a little broader program, but certainly the big ticket items have been international cartels. Very little civil enforcements of Section 1, certainly Section 2 historically not much. But civil, as they say noncriminal, Section 1 enforcement is very light. This has been traditional for quite some time. Not historically but certainly in modern enforcement over

the last ten, fifteen, maybe twenty years. So this year I think more of the same, but maybe something new.

In the more-of-the-same, *AU Optronics* is a very interesting case for a number of reasons. This involves price fixing in LCDs, liquid crystal displays, and it has been one of the big cases for the Justice Department. Prior to this case they had obtained criminal fines of about $890 million against a variety of defendants who pleaded guilty, along with a number of individuals who pleaded guilty. This case actually went to trial. AU Optronics is a Taiwanese manufacturer of LCDs. The jury convicted both the corporation and eventually three executives—one had to be retried—and acquitted two executives. The judge imposed a $500 million fine on AU Optronics, tied for the largest antitrust fine in the U.S. historically.

So what's interesting in the case, of course, is the first thing I started with. It actually went to trial. This is unusual generally in many ways. In the civil system and criminal systems in the U.S. most cases plead out, certainly true in antitrust. But this did go to trial, and both for the corporation and the individuals. Their defense as I understand it was sort of—I hate to say this—the Bill Clinton defense. They were there but they didn't inhale. They were at the table but they never fixed prices. It didn't work, and the jury convicted.

One of the things that is unusual, besides there being a trial, is the penalty on the corporation. The District Court judge required the Justice Department at trial to prove the amount of damages, the overcharges. Obviously not damages to the U.S. but the amount of overcharge.

Now as we all know in Section 1 price-fixing cases, this is not part of the government's burden. It is illegal to fix prices, even if you never sell Libor, to go back to Libor, assuming Libor is subject to Section 1, it is illegal to collude. But he made the Justice Department prove the damages, over the Justice Department's objection, because the Court was concerned about imposing a penalty on AU Optronics without a jury finding. So the jury did find, on Justice Department proof, $500 million in damages in overcharges. And under the Criminal Fines Enforcement Act that can be doubled; the fine is twice the gain or loss. So a billion dollars was on the table for AU Optronics. The judge in the end only imposed the $500 million.

Now the interesting thing legally about that is the sort of lurking question, but maybe not lurking anymore but was at the time, about whether constitutionally in cases that involve a fine a jury is required to make a finding that will break the statutory maximum under the statute. So for twice the gain or loss that can go over the $100 million max in Section 1. And as we know, a lot of fines that have been agreed to have gone over that amount.

About three months after the jury came in with this decision the Supreme Court actually settled the issue. And it is a case called *Southern Union Company v. The United States*, decided in June of 2012, opinion by Justice Sotomayor. The question was, first of all, does the Sixth Amendment apply to fines, and of course the law applies where the fine is not insubstantial. The fine in that case was not insubstantial. And again, the question was whether, given that the fine or the penalty, dependent on fact finding, doesn't have to be done by the jury. Was it a violation of the Sixth Amendment for the judge to decide it? This was not a Sherman Act case. It was a Resource Conservation and Recovery Act case, RCRA. But the Supreme Court held that it was a violation of the Sixth Amendment for the Judge to decide this rather than the jury.

The Court in the course of its opinion referred to the Criminal Finds Enforcement Act at least twice, so it's quite clear after you read this case that this does implicate antitrust criminal prosecutions where the government is going to look for a fine beyond a $100 million maximum. Presumably this may affect bargaining, to the extent in this goes on, over pleas by corporations. So have this case in mind. It is a potentially important development, even though the Supreme Court's case is outside the antitrust setting.

The second case—it's not quite the same old, same old, but it's a little bit of the same old, same old but different. Who has never heard of the *Apple eBooks* case? Will you confess. It is not every antitrust case that gets this kind of publicity, but the *Apple eBooks* does.

As we all know, Apple was charged along with a number of book publishers with coordinating in a price-fixing conspiracy to raise the price of ebooks. The basic PR defense—I say PR because it's not been put into court—is the OMG defense; I like to say, oh my God, if we don't do this, Amazon is going to kill everybody and become a publisher and all the publishers are all going out of business and all we'll read is trash. That's not quite it, but that Amazon was forcing the publishers to take really low prices and was threatening to become a publisher itself. They were going to own the book industry. The publishers had to do something. So what they had to do was have dinner at Picholine in the back room and discuss this. And then after Apple's Eddie Cue calls them on the phone, call each other and say we are all into this, right.

Reading over the complaint, I stress the word I wrote in my notes last night—indictment. Then I realized I knew it wasn't an indictment; it was a complaint. So this is a civil Section 1 case. Read over the complaint. It is wonderful because it is just filled with collusion. The question I raise for you is not whether this was a good antitrust case—that's hard for me to believe that antitrust lawyers in our heart of hearts would think it is anything but a great antitrust case—but why it is a civil case. That's a question for which I don't have an answer. I kept feeling that if this were road pavers doing this with someone at

the center coordinating this conspiracy, they would be in the criminal dock. So why not the book publishers?

So this is a civil Section 1 case, and there may be an argument that it shouldn't have been. So are we going to see more civil cases?

The third interesting thing is these non-prosecution agreements. Just to set this up, for those of you who don't know, non-prosecution agreements have been quite a favorite Justice Department tool, going back to roughly the turn of the millennium—how does that sound? It sounds like a long time ago, but roughly 2002-3, the accounting fraud scandals of those times. Think Enron, those kind of accounting fraud scandals.

There was a really strong enforcement push that went on at the Justice Department to get to the bottom of those scandals. In the course of those prosecutions the Justice Department—these were special task forces for the criminal division—developed a tool that was sort of there but not quite called non-prosecution agreements and deferred-prosecution agreements. These were basically ways to get corporations to cooperate with the government, to help them convict responsible individuals, and they would either get no prosecution, NPA, or a deferred prosecution; there would be a criminal complaint filed, and then it would be dismissed after a number of years if the defendant helped out, the corporation helped out and was good. It didn't violate anymore.

So this was worked out sort of in parallel with what we're familiar with, which is the leniency program or the amnesty program actually, where the Antitrust Division gives a pass, criminally, completely if you come in and rat on your competitors in a cartel case.

So the Antitrust Division hasn't used the deferred prosecution agreement and the nonprosecution agreements pretty much until recently in the municipal bonds investigation. So this involves collusion among banks, relating to how the proceeds of municipal bonds are going to be invested basically. And beginning with amnesty applicant the Bank of America, in 2009 I believe, the Justice Department has been heavily involved in this industry.

Now, what's different again, usually amnesty applicants are not revealed publicly. Bank of America was, and they paid money over in restitution but were not criminally prosecuted. But they were first in. But then what has happened since that time, in we'll call it 2011-2012, and we can call it 2012-2013. Some of these happened in December 2011, so we will call it this year. There have been four nonprosecutions; this means this is just a letter that the party signed saying we really won't do this again, we promise, and we'll pay over some money. Wachovia Bank $148 million, GE Funding $70 million, JP Morgan Chase $228 million, UBS $160 million. Now this came along with some rather vigorous prosecutions of individuals, some from these companies, but not the corporations. And there has only been one corporation prosecuted, but sole owner, and he was prosecuted too.

So I raise this question in connection also with the Libor criminal cases. So we have not seen yet the Justice Department Antitrust Division dealing with Libor, except for this one individual. We do know there are two amnesty applicants who apparently have been given amnesty, but we don't know how the Justice Department is going to deal with the rest of these with the Antitrust Division.

The Fraud Division of the Department of Justice in Washington has negotiated nonprosecution agreements with a number of these defendants. It doesn't bind antitrust at all, so these are again we probably will not prosecute you. This is in Libor. You'll pay over a lot of money, but we won't prosecute you.

As I said, antitrust is still sort of hanging out there as to what the Antitrust Division is going to do. Are they going to go along with this nonprosecution approach, the NPA approach, which really gives a big pass to corporations, because they don't have any criminal conviction, or are they going to go the traditional antitrust way, which is we pay the first one in and the one who brings us the information first, and then everybody else gets a big fine and a criminal conviction. So we have yet to see this.

I have to say, I've raised this question. I know the Justice Department people here aren't going to answer this, I guess. But is it banks? Does the Justice Department have an aversion to criminally prosecuting banks? I'll just put it out there. Why would they have that? I have no idea. That's it.

I have another really interesting case but I'll tell you about it another time. *U.S. v. SG Interests and Gunnison Energy*, filed in February 2012. How many people have heard of this case?

(Show of hands).

Excellent. This involved two parties bidding on natural gas development leases on federal land. They got together and said, you know what, let's not bid against each other, this is ridiculous. You bid, and then we'll split the property 50/50, and I'll pay you half of your costs, and then we'll develop it, but you bid it. Let's not bid this price up. What would you call that?

(Audience: Bid rigging.)

What did the Justice Department call it? A civil Section 1 case. What? Plus two interesting things. They brought it as a Section 1 case; there is also a fraud aspect to it. Both parties agreed to pay $275 million under Section 4-A of the Clayton Act, which gives the federal government the right to sue for treble damages for its injuries. It has not been used by the Justice Department since 1994. They brought this under 4A of the Clayton Act, and that's the hook for the $275 million each.

So keep in mind a couple things. Treble damages possibly out there for the federal government if they have finally awakened that they can have a Big Pay Day too. Second, civil for this rather than criminal. We have a question.

AUDIENCE MEMBER: Isn't that all the Arthur Andersen effect?

PROF. FIRST: On these companies, no. The banks, yes. We are afraid they are going to fall on their heads, right, yeah.

AUDIENCE MEMBER: Right. You're going to put them out of business. You just saved them in 2008 and now you're going to sue them and they are going to be—

PROF. FIRST: Some people might say too big to sue. Not only too big to fail but too big to sue.

AUDIENCE MEMBER: Criminally.

PROF. FIRST: Criminally, yes. What the heck, they are going to pay Libor, they are paying everybody. But in the Libor case the Justice Department has said explicitly they don't want to bring criminal cases. This is in the fraud stuff. Antitrust people have not said this yet explicitly, but it is the same Justice Department. So yes, but it doesn't explain this *Gunnison* case.

And the final interesting thing which you really want to know about, Judge Matsch, the District Court Judge, in December vetted an impact statement at a Tunney Act hearing, refused to approve the settlement. Now he refused to approve the settlement because the defendant finally came in and said we didn't do anything wrong. Everybody does this. We are just doing this because it is nuisance value, and this Justice Department is full of it. He said any defendant who has the blatant—well, he didn't say chutzpah because he's in Colorado—to say that, you know, we are not going to approve it. So the judge refused to approve this settlement, and it is now sitting there. I don't know what is going to happen with this case, but it is a really interesting case for a whole bunch of reasons.

Again I say where do we have some new enforcement trends in the Justice Department, or not? That's it. I have gone over time.

MR. KATZ: But we do have two very interesting cases I do want to try to talk about. With your permission, and I'll blame our technical difficulties in the beginning, I am going to steal a little from your break.

Mark, these have to do with doctrinal issues, and I'll let you take it away.

PROF. PATTERSON: Before I do that I want to harp back to Harry's comment about the information wants to be free. You hear that in the computer area. The original source of that is Stewart Brand, and he said information wants to be free because it is so cheap to distribute, but on the other hand, information wants to be expensive because it is very valuable. So you have a supply curve that is really low and a demand curve that is really high, and all of that room in between is room for bad behavior.

So the first case I want to talk about is *ZF Meritor v. Eaton*. I am sure most of you have read all 204 pages of the opinions in this case and 80 footnotes. I've read most of it, but not all the footnotes, I concede. So it involved heavy duty truck transmissions. There were two sellers in the market, Eaton, which had 80 percent of the market, and Meritor, which had the rest of the market. Basically they sold their transmissions to OEM truck manufacturers like Volvo and FreightLiner and the four companies that manufacture big trucks. When buyers buy trucks they enter into a contract with one of these OEM manufacturers and specify what transmission they want.

So Eaton, the monopolist, had as I said an 80 percent share. It had various rebate structures that required the OEMs, in order to get the rebates which were significant, to sell at least 90 percent share of Eaton transmissions. And they had other requirements that involved—you couldn't put Meritor's transmissions in the data book. When you go to the car dealer, you get a brochure that lists the options, and you couldn't have Meritor's transmissions in there. There were preferential pricing rules. The dispute was addressed in the majority's 94 pages and the dissent's 110 pages. This makes law professors feel good about themselves because judges do it too.

So the basic dispute was whether we should call this a pricing case, because it involved rebates, or whether we should call it an exclusion case. Both of the opinions talked a lot about *Brooke Group*, *Weyerhaeuser, Cargill v. Monfort* and *Arco* and said, you know, the Supreme Court has said that above-cost pricing is generally okay. The question for both opinions, both the majority and dissent, were okay, does that mean that that principle, above-cost pricing is good, mean we have to reject the claim here? The majority said no, because the case did not only involve pricing. It actually involved other things, like keeping them out of the book. There was this claim the majority made that if people didn't agree to the rebates, that Eaton would not let you have any transmissions at all. And the dissent said the majority was making that up, but there are all these other sorts of aspects to it. The majority ultimately said if pricing is the predominant mechanism of exclusion, then above-cost pricing basically makes it per se legal. But if the plaintiff doesn't plead pricing as the method of exclusion but pleads exclusion as the method of exclusion, then that's good, so then it is not a pricing case but rather an exclusive dealing case. And the dissent said that's just empty formalism, because it just focuses on how the case is pled. I think that's sort of right, but I think it is formalism for a good reason. I think it is formalism battling formalism.

The dissent basically wants to say because this involves pricing it is kept out of the courtroom on *Brooke Group*. The problem with that approach is it is not like the other pricing cases. Market share rebates are not like the other pricing cases. It's not the same thing to institute a practice that requires your competitor to charge low prices as it is to institute a practice that requires your competitor to charge low prices and also sell 90 percent of the market.

So the majority was taking this dichotomy between these two cases, and this is where the doctrinal categories come in. We are being hamstrung in both of these two cases by the categories that we have developed over the years. So it either has to be a pricing case or an exclusion case. And then the majority concluded it was an exclusion case, and then the problem persisted, because then it ignores that it was pricing related altogether. It said well, this is de facto partial exclusive dealing, 85 percent foreclosure, five-year contracts, *Tampa Electric*, we are done. The plaintiff wins. And then just ignored completely the fact that it really is still a pricing, or pricing-focused method of exclusion. So basically the case was decided by plugging it into a preexisting category that it doesn't fit and then treating it only within the confines of that category. And I think that's the problem with the *ZF Meritor* case. We lose all context.

The Court ignored all of what has been written about the contestable portion of the market and how much pricing, how strong the effect of the discounts are, all of that stuff, and it just looked at market share and that seems to be a problem.

The next case is *Brantley v. NBC Universal*, a class action brought by cable subscribers against the programmers, the TV networks that sell packages to the stations, to the distributors and to the cable distributors themselves. The claim was a tie. It went through a sequence of several complaints, but the complaint that the court addressed was one that basically just alleged that the harm was that the customers didn't get to choose between the stations they wanted. They instead had to take packages. So NBC Universal sold a whole package to its distributors, other programmers sold different packages. Your only option as a buyer, as a cable subscriber, was to pick these packages or none. And then the court relied on statements from *Jefferson Parish*, saying look, it's fine, maybe you don't want some of these channels, but *Jefferson Parish* said if you're forced to buy as a tied product something that you wouldn't have purchased anyway, even from another competitor, that's not a problem. We need to have some sort of foreclosure, and that isn't foreclosure; that is just raising price.

The problem here I think is that *Jefferson Parish* was an exclusion case, so it makes sense in *Jefferson Parish* to talk about things that aren't exclusion. But I've always at least thought, I think all of us have thought, that tying had two aspects. That it was an exclusionary effect on competitors of the tied product and also this coercive effect that causes buyers to take products that they don't want. Surely that has competitive impact, even if it is not really a foreclosure effect in the usual sense. So it's got to be true that if I can pick and choose channels on my cable service, that's going to have an effect on competition upstream. And if I can't, the competition is going to be distorted. I think that has to be true. I have the most basic cable package, because I don't want to pay for the next chunk of stuff, but I'd certainly pay for individual channels, and therefore, the market would be working with respect to the channels that I pick and the ones that I don't pick, and that's what we think of as competition, right. But the court said that we don't really care about that aspect, unless you can fit it into some foreclosed tied product competitor category, and then the case is gone. So it seems to me to kind of turn the whole competition non-competitors thing on its head. Are we now about competition and not consumers? We don't care about consumers anymore; we only care about tying foreclosure? It seems to me that the foreclosure that's involved is the foreclosure of the plaintiffs from making any claim that doesn't fit in the archetypical tying claim. And again, we have lost track of what we are trying to do, which is make competition work, and we are now just trying to fit things into categories, or at least the courts are trying to force us to fit things into categories, rather than looking is it monopolization or is it contract exclusionary. That is my take on that.

MR. KATZ: I think we do have a couple minutes to talk about this. What I would like to ask back at you, it certainly makes sense when you read the statutes, whether Section 1 or Section 2, these are common-law type of legal rules, so the categories aren't necessary. And yet over the many years I think we found that it makes sense. I think judges like it because it is easier for them to make decisions, but also attorneys like to be able to advise their clients about the kinds of activity that they might typically do, such as a provider of services who likes to give one bundle versus another you won't be open to a lawsuit every time they make some choices of what packages are available. They don't think there should be an opportunity to bring a case to court every time that you make a selection as a provider of what kind of packages you put together.

Or by the same token, in the pricing cases, isn't there some benefit to categorization? I know this is an age-old debate, but isn't there some benefit to the functioning of an antitrust world with people being able to actually put things into categories with the understanding that we will miss some bad conduct from time to time, but overall people will be able to be guided with some more hard and fast rules?

PROF. PATTERSON: Well, of course there are benefits to that. There are also costs to that. I mean I think the question is have we as of 2012 established all the catego-

ries that are ever going to be relevant for antitrust, and I think the answer for that has to be no. Firms are resourceful, and they will create restraints that don't necessarily fit into any of the established categories, sometimes for good reasons, sometimes for bad reasons. And we ought to be willing to develop new categories.

I think everybody or most of us now think of bundled discounts and market share discounts as a category.

Yet the Court in *ZF Meritor v. Eaton* didn't seem to recognize that that was a category now, and instead tried to fit it into two of the older categories, neither of which it is well suited to. So it seems to me that, yes, I appreciate the value of categories, and I am not advocating that you not be allowed to talk about tying or pricing in cases. But it is also the case, I think, that some cases don't fit in, and courts, particularly in this case, ought to recognize when the plaintiff has a meritorious claim that doesn't fit neatly into the categories.

MR. KATZ: Certainly that makes sense. I think to try to tie back to what we were talking about before, in terms of what enforcers are doing, it seems sometimes that the government enforcers are in a better position to come up with the theory of a new category than private plaintiffs. Especially I think one of the things, at least my read of the *Eaton* cases, is one of those cases with a spurned competitor, a competitor who didn't succeed, and one of the judges on the panel in this case, felt that this is just sour grapes and you brought a lawsuit. And then I think it is different, I think it is taken differently when the claim is asserted by an enforcer, and then maybe there is more room for them to say this really isn't a category, and we should view some different metrics. But still it is a new category as opposed to just reading the statute that says monopolization is unlawful.

PROF. PATTERSON: Let me be clear. I am not saying I thought the plaintiff should win. The dissent in the case pointed to a number of other factors that might have eroded Meritor's share. And those actually sounded fairly compelling to me. I think the majority should have not ignored pricing once it decided it wasn't a pure pricing case, and then maybe the defendant should have won for that reason. My concern is not the result, but that we need to analyze and include in the analysis the entire context of the case without being hamstrung by things that we think don't fit the model.

PROF. FIRST: Well, I would just suggest another category. It is called the Rule of Reason. How is that for a category we all love.

These cases are very interesting, and one of the things that occurs to me with the *ZF Meritor* case, we do have trouble when we move away from the pole. So if clearly all that's going on is predatory pricing, as in the *Matsushita* case, we can deal with that, just as we can deal with the pure cartel price fixing. When we move a little away from the poles we always have trouble. So you can argue that *eBooks* moves a little way from the pole.

The case that came to mind, which always come to mind to me for virtually anything, is *Microsoft*, which also had this mixed aspect. Microsoft, for some users of Internet Explorer, not only charged zero, they actually charged less than zero. They paid people to use it. This is a great definition of predatory pricing, but it was not put into a construct in that category of predatory pricing because of all the baggage that that now carries. So tactically presumably the same thing is going on here. And it does give us fits when businesses mix various things, presumably making it hard to give advice as well, because it's vague. The other aspect of *Comcast v. Behrend*, which is now in Supreme Court, is to some extent like the *Brantley* case. It is a consumer class action, and involves entry to consumers, because really someone may be excluded, although one of the problems is it is not clear that anybody wanted to enter the cable market. And basically what they are talking about is not only choice but price. So you would have thought in *Brantley* that a court would say well, it is going to be a higher price. We don't like higher prices. Congress tells us why we don't like it. Normal people tell us we don't like higher prices than you should be able to charge. So in some sense we have a little bit of schizophrenia in antitrust of over-protected classes. There is the excluded competitor class and the consumer class, consumers don't like high prices, lack of choice. Competitors don't like to be excluded. But the one class we don't usually protect is producers, so I don't know what is quite going on in *Brantley*.

MR. KATZ: Well, now we are indeed over our time. So I really thank all of you for listening. I want to also thank Helena Franceshci for helping us put this together. Since we are out of time, I won't make you all sit here for questions, but if you do wish to ask a question, feel free to come on up and we'll continue chatting. Thank you very much.

(Applause.)

The FTAIA After 30 Years: What Does the Recent *Potash* Decision Mean for the Future?

MR. STOCK: Please take your seats. We are going to start up again with our next panel.

Next we have a panel on the FTAIA and the recent *Potash* decision. The FTAIA, for those of you who don't know, stands for the Foreign Trade Antitrust Improvement Act. Probably even fewer of you realize that the FTAIA was recently voted best acronym in antitrust.

(Laughter.)

It actually had some serious competitors—you shouldn't laugh. MOFCOM came in second, and I think some people thought it was an opponent to Godzilla and so it lost. It is actually the Chinese Competition Authority.

This panel is being led by Greg Asciolla, but I want to thank Robin van der Meulen who helped put it together. It highlights the international status of New York and we will talk about to what extent the U.S. antitrust laws apply extraterritorially.

Just to introduce Greg for a moment, and Greg will introduce the rest of the panelists, some of whom have traveled far and wide to come here.

Greg is a leading litigator in New York City at Labaton Sucharow. He is especially knowledgeable and active in antitrust and commodities class actions. Greg is also a great contributor to the Antitrust Section. We very much appreciate all the work that he's done for us. And many of you may not realize that Greg actually started his career at the Antitrust Division. So thanks again to Greg and Robin.

And take it away, Greg.

MR. ASCIOLLA: Thank you, Eric and Robin as well, and also Elaine, who was very helpful in organizing the panel. And I'll tell you a little more about Elaine very shortly.

As the title of this panel suggests, the FTAIA, enacted in 1982, is celebrating its 30th anniversary this year and is a hot area in antitrust law right now. Thanks in large part to the *Potash* litigation in the Seventh Circuit, although other district and circuit courts have been active as well. As Eric said earlier this morning, the FTAIA is of particular importance to lawyers in New York as many of you practice on a global scale, and this really is an international city.

As markets become more globalized so too do the effects of anticompetitive conduct taking place in these markets. And as we in the U.S. try to combat that conduct, enter the FTAIA which governs the extraterritorial reach of U.S. antitrust laws.

Before I introduce the panel we thought it would be helpful if I made two quick points. First, a quick refresher on the FTAIA. I believe the statute is in your materials. As you all probably have heard many times in the cases, it is awkwardly worded. So I am going to try to give you a nutshell in English, and simplified.

The FTAIA lays down a general rule taking all conduct involving foreign commerce outside the Sherman Act's reach; however, it excludes conduct involving import commerce. That stays within the Sherman Act reach. In fact, it never left the reach of the Sherman Act, and that's commonly known as the import-commerce exclusion. Then the FTAIA brings back into the reach of the Sherman Act such foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce, import commerce or export commerce and such effect gives rise to a plaintiff Sherman Act claim. In short, this is an exception to the FTAIA commonly referred to as the direct effects exception.

So simply put, when it comes to conduct involving foreign commerce, plaintiffs want to fit into the FTAIA's import-commerce exclusion or direct effects exception, therefore bringing that conduct into the reach of the Sherman Act. And defendants typically want neither the exclusion nor the exception to apply, therefore keeping that conduct out of reach of the Sherman Act.

Recently there have been a number of District Court and Circuit Court decisions examining the import-commerce exclusion and the direct effects exception, the most recent being the *Potash* case, where the interpretation of the exclusion and the exception may be coming to a head, and you'll be hearing about that today.

That brings me to my second point, which is a short procedural overview of the *Potash* litigation. And a quick disclosure, my firm is involved in that litigation, and I am sure we are going to hear the same from many people up here.

Potash is a mineral used primarily as fertilizer. Both direct and indirect purchasers of potash filed class actions alleging price fixing. The case went to the Northern District of Illinois. Defendants moved to dismiss on various grounds, including the FTAIA. I note there were other sovereignty defenses raised, and we will be talking about those too today.

The District Court denied the motion, holding that the import-commerce exclusion was satisfied, and therefore, it didn't reach any decision on the direct effects exception. Defendants appealed, a two-judge panel—one sadly passed away—held the case should have been dismissed, and reasons were that neither the import-commerce exception or the direct effects exception were satisfied.

Plaintiffs sought a re-hearing en banc; it was granted. The DOJ and the FTC filed an amicus, as AAI did as well. The Seventh Circuit en banc affirmed the District Court order denying the motion to dismiss. This opinion was written by Judge Wood. The Seventh Circuit found three things. One is that the FTAIA is not a jurisdictional statute to be challenged under 12(b)(1) but instead it actually adds a substantive element to a Sherman Act claim. It thus overruled its prior decision in *United Phosphorous*. It also found that both the import-commerce exclusion and the direct effects exceptions were satisfied.

Defendants then filed a petition for *writ of certiorari* to the Supreme Court. Plaintiff's response is due February 22. And at least as of a few days ago the Queen of England weighed in with an amicus coming from the Province of Saskatchewan, and you'll see why that's important.

MR. SIMON: Her Majesty the Queen, the province of Saskatchewan.

MR. ASCIOLLA: Thank you.

What you'll hear from our panel today is that construing the FTAIA goes beyond a mere exercise in statutory construction. Indeed, how the courts interpret the FTAIA could have far reaching implications on domestic and global commerce, as well as the practice in New York and everywhere else in the U.S. The broader the statute is interpreted, the more foreign conduct may fall within reach of the Sherman Act, and the greater the chance our antitrust laws may encroach upon the sovereignty of other nations. The stricter the FTAIA is defined, the greater the chance of potentially harmful effects of foreign conduct linked to the U.S. consumer without any means for redress.

As you can see, it is an intricate balancing test, active antitrust enforcement in the United States versus deferring on principles of prescriptive comity.

With that in mind, let me now introduce our distinguished panel. All are or were in some way involved in *Potash* litigation. Closest to me is Elaine Johnston, head of Allen & Overy's U.S. antitrust practice here in New York. She is very experienced in complex foreign legal issues. Among other honors, she has been featured in *Euro Money's Expert Guide to the World's Leading Competition and Antitrust Lawyers*.

Next to her is Britt Miller, a partner in the Chicago office of Mayer Brown; she practices extensive antitrust litigation. She's the group leader of Mayer Brown's antitrust and competition practice, was recently named by Law 360 as one of the ten competition lawyers under 40 to watch. And she has many other honors.

Next to her is Bruce Simon, a named partner at Pearson, Simon in San Francisco. He specializes in complex antitrust litigation, among other things. He is the immediate past chair of California State Bar Antitrust Section, a frequent speaker and prolific writer on antitrust issues.

MR. SIMON: And I am not on any under 40-list, regrettably.

(Laughter.)

MR. ASCIOLLA: And at the end is Kristen Limarzi, attorney for the Appellate Section of the Antitrust Division of the United States Department of Justice in D.C. She practices both civil and criminal antitrust law. Before that she was at King & Spalding, and before that a law clerk with Judge Brinkema in the Eastern District of Virginia.

We are going to start with Britt. And just a little note on the structure, each is going to give a 12-minute or so presentation and statement, and then they might have a little rebuttal. I'll then ask questions, and we'll open it to the floor for questions at the end.

MS. MILLER: Good morning, and thank you all for having us. Thank you to Greg and Elaine, Bruce and Kristen for joining me here.

As Greg mentioned during his comments, the *Potash* litigation is ongoing. Vis-a-vis this panel that makes it both a good and a bad thing. A good thing because it makes my job very easy because I am very limited in what I can say, and I am limited to that information that is in the public record. That is a bad thing, because that will make me the most boring member of this panel today.

My job here is to try to give you a little more detail on how we got from a complaint filed on September 11, 2008 to where we are now, and the various arguments that have been raised by the parties. So for those of you who have not read the literally thousands of pages of briefings, decisions and the cases cited therein, you will have a little more familiarity with this pending litigation.

As Greg mentioned, the Foreign Trade Antitrust Improvement Act was enacted as part of the Export Trading Company Act of 1982. As you know, it is celebrating its 30th anniversary. It was enacted at a time when antitrust enforcement was largely an American institution. As the Supreme Court explained in *Empagran*, it was

enacted to make clear to American exporters and firms doing business abroad that the Sherman Act does not prevent them from entering into business arrangements, however anticompetitive, as long as those arrangements adversely affect only foreign markets. It therefore governs the extraterritorial reach of the U.S. antitrust laws and provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations, unless… such conduct has a direct, substantial and reasonably foreseeable effect" on commerce in the United States.

Through this inartful wording and essentially a double negative, the FTAIA precludes antitrust liability for all conduct involving foreign commerce, unless one of the two exceptions that Greg mentioned is met. One, the conduct "involves" U.S. import commerce, the so-called import commerce exception; or if the conduct does not involve U.S. import commerce, but nevertheless has a direct, substantial and reasonably foreseeable effect on U.S. markets, so-called direct effects exception.

Prior to the Seventh Circuit's decision in *Potash*, the Second and the Third Circuits had explained that foreign conduct "involves" U.S. imports when it "targets" or is "directed at" import transactions. Look at the *Turicentro* case and *Animal Science* case out of the Third Circuit and the *Kruman* case out of the Second Circuit.

The Ninth Circuit had explained the word "direct" within the meaning of the FTAIA means "proceeding from one point to another in time or space without deviation or interruption" and not "depending on uncertain, intervening developments." That's out of the *LSL Biotechs* case, which is part of your materials. The *Biotechs* case was relying on the Supreme Court definition of the term direct in the context of the Foreign Sovereign Immunities Act in the *Weltover* case.

Now as Greg mentioned, the FTAIA has received very little attention from the courts in recent years, having been addressed at just a handful of court of appeals cases in its 30-year history. *F. Hoffmann-La Roche v. Empagran* is the only Supreme Court case addressing the law. In *Hartford Fire* the Court noted that it was "unclear" whether the FTAIA actually "amends existing law or merely codifies it," but declined to address the issue.

The increasingly global nature of the nation's economy and the commodities markets has really pushed the FTAIA back into the forefront.

According to the legislative history, the FTAIA was intended to "clarify" the law concerning the extraterritorial reach of U.S. antitrust laws. As the Supreme Court said in *Empagran*, "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, and perhaps to limit, but certainly not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce."

Clarification was not Congress's only goal in enacting the FTAIA. The statute was passed during a time when antitrust tensions between America and its trading allies were at an all-time high. Congress also intended to alleviate "foreign animosity toward U.S. antitrust enforcement" by "limit[ing] the reach of the U.S. antitrust laws in a manner consistent with the [interests of America's] major trading partners."

In *Potash*, the remaining defendants are producers of Canadian potash, a key fertilizer as Greg indicated, that is mined from miles beneath the ground. Because potash is of great importance to the economies of Canada and of the Canadian province of Saskatchewan, the province has long encouraged potash exports through a joint export-marketing and distribution company called Canpotex, which is owned by the three remaining defendants and is named as a non-defendant co-conspirator.

While Canpotex sells to many overseas purchasers, the plaintiffs concede, and Seventh Circuit acknowledged, that Canpotex does not operate in the United States.

The plaintiffs are direct and indirect purchasers of potash in the United States. Their complaint—although there are two of them, they make the same factual allegations so we'll treat them as one—essentially alleges that defendants, including the three remaining defendant families, and the settling Russian and Belarussian potash producers, conspired to raise the price of potash in Brazil, China and India, which in turn resulted in increased prices for potash imported into the United States, because the price of potash in these foreign markets served as an informal "benchmark" that influenced U.S. sales.

Plaintiffs do not allege that petitioners agreed to charge particular prices to the United States or to limit, or allocate sales to U.S. customers. Let me say that again. Plaintiffs do not allege that petitioners agreed to charge particular prices in the United States, or to limit or allocate sales to U.S. customers. They do not allege an American price or even a global cartel price. They do not allege that defendants agreed to charge the U.S. benchmark price, or any other price in the U.S.

Instead, the North American defendants' joint export sales through Canpotex to China, India and Brazil are alleged to have a spillover effect on the United States through a "chain of events resulting in increased prices throughout the world and in the United States."

As part of this multi-step chain, the plaintiffs say, "the prices for cartelized term contracts [in China, India and Brazil] become benchmarks for spot market sales" that "directly affect prices of potash in the United States."

The defendants moved to dismiss both the indirect and the direct complaints, arguing in relevant part that the FTAIA bars the action because plaintiffs do not allege conduct "involving" U.S. imports or overseas conduct with a direct effect on U.S. markets.

The district court, as Greg noted, denied the motion, finding that the complaint alleges conduct involving U.S. imports insofar as it alleges that defendants participate legally in U.S. import commerce and their import transactions were affected by the alleged overseas price-fixing.

Specifically, the court said that there is a "tight nexus between the alleged illegal conduct and defendants' import activities." The court declined, given that it found that import exception applied, to even address the direct effect question.

Recognizing that the FTAIA is a close, contestable issue of law, Judge Castillo, the district court judge, certified the matter for interlocutory appeal and the Seventh Circuit took it. It was originally heard before a three-judge panel, Judges Manion, Sykes and Evans. And as Greg noted, unfortunately Judge Evans passed away before the decision issued.

That three-judge panel and the two sitting as a quorum initially reversed on interlocutory review. The panel determined first that the FTAIA import-commerce exclusion did not apply because it is "not enough that the defendants are engaged in the U.S. import market," and are alleged separately to have fixed prices abroad. For the exclusion to apply "the defendants' alleged anticompetitive behavior [must be] directed at an import market."

As for the direct effects test, the panel adopted the Ninth Circuit's approach and held the test not satisfied because the complaint offered only a "cryptic" "chain-of-events" theory of causation that relies on "too many intervening variables to suffice as support for application of the FTAIA's direct-effects exception."

The en banc court granted review and reached the contrary conclusion as to both FTAIA provisions.

The court resolved the import-commerce question by observing simply that the defendants are alleged to be involved in U.S. imports and that "the FTAIA does not require any special showing in order to bring these transactions back into the Sherman Act," even though the defendants' import activity is not alleged to be part of the anticompetitive conspiracy.

The court went on to hold that "much of the complaint alleges straightforward import transaction," to which the FTAIA is inapplicable, and that the complaint's allegations regarding those transactions are actionable under the *Alcoa* standard—namely, the Sherman Act applies "when actual and intended effects" on U.S. commerce are shown.

The court thus rejected the panel's and the Third and Second Circuits' view that the import-commerce exclusion applies only when the alleged overseas competitive conduct targets or is directed at importation.

On the direct-effect test, the court said in the first instance that "the requirements of substantiality and foreseeability are easily met," such as the only question is what does direct mean." On that the en banc court expressly rejected the Ninth Circuit's approach, adopting instead the test proposed by the Department of Justice in its *amicus* brief.

The term "direct," according to the Seventh Circuit and the Department of Justice, means "a reasonably proximate causal nexus." Thus in the Seventh Circuit's view it was sufficient under the FTAIA that foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers."

It is important to note that the DOJ presented the same argument to the Ninth Circuit in *LSL Biotechnologies*; the Ninth Circuit expressly rejected it.

On these bases, the Seventh Circuit affirmed the district court's denial of the defendants' motion to dismiss.

Notably, the DOJ filed an amicus before the en banc court, but it took no position on whether the complaint's allegations satisfied the "reasonably proximate causal nexus" it was advocating and agreed that the original panel's decision on the import commerce exclusion was correct.

The en banc court's holding that the FTAIA is a merits—i.e., a Rule 12(b)(6) issue—rather than a subject matter jurisdiction issue under Rule 12(b)(1), makes clarity on the underlying "import trade or import commerce" and "direct effects" determinations all the more critical lest we all get caught in the "Serbonian bog" of discovery that Judge Posner warned of.

So as Greg noted, the defendants have since filed a petition for certiorari in the U.S. Supreme Court. We make six primary arguments. The brief, if you want to read it, is in your materials, but I'll give you the short, short version.

The arguments are this: That (1) the Seventh Circuit has created two conflicts of authority. The first on the import-commerce exception by rejecting the reasoning of the Second and Third Circuits, and the second on the direct-effect test by rejecting the reasoning of the Ninth Circuit. From a defense perspective, that alone warrants further review.

Argument number (2). The issue is tremendously important from a comity perspective. The Seventh Circuit's decision disregards considerations of international comity and stated a rule that is sure to antagonize the foreign nations that authorized the very conduct that is now held below to be actionable in the U.S. courts.

(3). The Seventh Circuit's decision will open the floodgates for new litigation. In the interconnected global economy, in which we all now live, plaintiffs can easily allege a wide range of foreign conduct by U.S. importers that had some spillover effect on U.S. consumers.

Some plaintiffs, attracted by the powerful lure of treble damages, attorneys' fees, liberal discovery, joint and several liability, and the like will, to use the Fifth Circuit's words, "flock to the United States federal courts" rather than pursue claims in the foreign nations whose consumers are the real targets of the challenged conduct.

The fourth argument is that allowing the use of the Sherman Act to outlaw foreign operations that are expressly approved and encouraged by the nations in which the defendants are based is the sort of "legal imperialism" that the Supreme Court has instructed the U.S. courts to avoid.

(5). The United States permits coordinated export marketing by U.S. companies through organizations just like Canpotex, exempting U.S. participants in those organizations from U.S. antitrust scrutiny through the Webb-Pomerene Export Trade Act and the Export Trading Company Act. The double standard permitted by the decision in the Seventh Circuit inevitably will foment tension and resentment between the United States and its trading partners.

(6). This argument is simply that, most fundamentally, the Seventh Circuit erred.

The word "direct" simply does not mean "reasonably proximate causal nexus." That is especially clear given that Congress's goal was to "clarify" the law. Courts have long recognized that the doctrine of proximate cause is "difficult to comprehend."

Beyond that, for the import-commerce exclusion to apply, the challenged anticompetitive "conduct" must itself involve "import trade or import commerce." As the Second and Third Circuits say, the conspiracy must "target" imports. But the alleged anticompetitive conduct here is directed exclusively at foreign markets.

As the *Turicentro* court said, the FTAIA differentiates between conduct that "involves" import commerce and conduct that "directly, substantially and foreseeably affects" such commerce. To give the latter sufficient meaning, the former must be given a relatively strict construction.

As Greg mentioned, Her Majesty the Queen, through the Province of Saskatchewan, has filed an amicus in support of defendants' petition, emphasizing the importance of clarity in FTAIA interpretation and comity and the implication of the Seventh Circuit's decision.

Plaintiffs' response to brief is currently due February 22.

I will now turn it over to Bruce, who I am sure will tell you the rest of the story.

MR. SIMON: Thank you for inviting me. You truly got the participants in this matter. And I also thank you for bringing out your best weather for me, the lonely Californian. It was a very hard trip to pack for. I have to go to LA after this, and it is supposed to be in the 70s. So what should I put in my small suitcase?

I like to think that I am a trial attorney and I try cases, and all these lofty things having to do with FTAIA and appeals and everything are really very grand.

Professor First mentioned in the first panel about the *LCD* criminal trial against AUO. There also was a civil trial last year, which I was one of the trial counsel for seven and a half weeks, that resulted in a plaintiffs' verdict. I look at cases really from a reverse engineering standpoint. What is the trial going to look like, and then work back to what the complaint should say and how you should prosecute the case. So I come at it from a little bit different perspective.

I am the attorney who argued for the plaintiffs in the original panel, and I am the attorney who argued the en banc. I will say that walking into that courtroom in the Seventh Circuit with eight judges up there, some of the most noted antitrust jurists in the United States, with about 200 people in there, each judge with about eight clerks, all who went to better schools than me, was a very interesting experience. I am going to give credit where credit is due, and even though this is being transcribed, I am happy to say Britt, her team, the defense team have done a fantastic job in this case. I believe that the plaintiffs' team has also done a great job and brought a great team together. But what that has meant is that we have created a case at the highest levels of the antitrust law of things that are being argued in a very quality way, and I am lucky to have had the opportunity to be a person to stand in front of that vast audience in the Seventh Circuit argument en banc and be able to state my position.

So going back to being a trial attorney and looking at the case from a common sense and practical standpoint, I want to throw some things out to you. The case is pending, and we haven't filed our response yet. I usually don't make disclaimers when I present. Trial attorneys usually just wave their arms around and say a bunch of colorful things, and I am a little bit limited in doing that today, because we haven't filed our response, and we are still fighting about things.

But I would like to just give you some thoughts about why or why not this might be rife for the Supreme Court to take a look at it. I am going to try to stay away from expressing too many positions about what we might say in the Supreme Court ultimately, either on the responses to petition or on the merits, if we are accepted.

One thing I will tell you, and it has already been talked about somewhat, is that being the 30-year anniversary of the FTAIA—and I have been practicing for 33 years and been in antitrust that whole time—I will tell you, it is only in the last ten or fifteen years that I even knew what it was. And I have handled some of the biggest international cartel cases in the country, going back to the citric acid case. Which you all may remember, fructose licensing, citric acid, the movie *The Informant* and all that, that was that case. The FTAIA and the *DRAM* case and *Methionine* case and all of these tech cases with international cartels going on really didn't come up a whole lot. So it is interesting to me, and in the cert petition it is quoted there are 50 FTAIA cases that have been pending in courts since 2000. When you think of that in the context of how many cases that are out there that are antitrust cases, it really isn't that much. And there isn't really that much written on it when you take it in the constellation of the universe of what we all do as antitrust attorneys.

I would suggest to you that one reason the Supreme Court may not take this is maybe the FTAIA is really not that relevant anymore. It was written in a time when the global economy was just starting to become what it was and what it is now. The information technology age was not what it is now. The instantaneous sharing of information, the Internet and everything that you're all familiar with was never envisioned by the FTAIA authors. Even though it is only 30 years ago, just think back to yourself what you were doing 30 years ago, those of you that are old enough to remember that, and what it compares to now in terms of your law practice. That same overview I think should be applied to this statute.

Some would say, and I am sure Britt would argue, that because of that it has to be interpreted, and that's one reason why the Supreme Court should take it.

Another interesting point that you might think about is the defense position in this case has morphed a little bit since the time the case began. Of course, the plaintiffs' position morphs sometime in the cases. We try not to change anything we say in the beginning of our complaint. I am being facetious.

But this whole interlocutory appeal and the appeal process started as a *Twombly* issue. It was really a *Twombly* case, and Judge Castillo certified the interlocutory appeal based on *Twombly*, because *Text Messaging* had not come out of the Seventh Circuit yet when this was all unwinding. He commented in his opinion that maybe the Seventh Circuit needed to look at this because they haven't really spoken on the *Twombly* standard in an antitrust case. Then *Text Messaging* came out, which kind of decided that tissue, and this all of a sudden turned into an FTAIA case, and now it is purportedly the granddaddy of all FTAIA cases. But it really started as a *Twombly* case, that there was no plausible theory that this cartel could have worked allegedly the way it did.

Another interesting thing and it is mentioned a number of times in the brief and Britt reiterated here again, is this concept that what is it that is the direct effect in the United States? Now remember, if you're talking about import commerce, it is taken out of the FTAIA, right. And as was mentioned by Greg, Judge Castillo didn't even get there. He didn't get to the direct effects because he stopped at import commerce. He said there was import commerce, and there was a nexus between the activity overseas and the commerce in the United States—he called it a tight nexus I believe—sufficient to give you the import commerce and taking it out of the FTAIA to begin with.

If you get into the point of direct effects, or what's called sometimes the direct effects exception, there is this whole discussion about what is direct or not. The buzz word is spillover, and that's one of the words you'll see if you read the cert petition over and over again, that we are just alleging a spillover effect. The Seventh Circuit en banc decision says it is not that. It is not—I think they called it a house that Jack built—in any sense. And given a global market in the way that economies work and the way that prices are set, it is direct in the most common meaning of that word or whatever meaning you want to apply to it.

I wanted to point out that both sides rely on the legislative history of the FTAIA, and it's a fascinating read if you're into these things. But in the legislative history itself it is acknowledged that it was not the intent of the FTAIA to get in the way of antitrust claims related to international cartels, even if the conduct occurs overseas and has an effect in the United States. They don't use the word spillover, but they use words that are very similar that those type of cases should still be able to be litigated in the United States by DOJ and by private litigators.

So when you look at this case the way I look at this case, there are some common sense things, some practical things about the case which led to the result in the Seventh Circuit, and the Seventh Circuit tells us about those things in the opinion. One thing the Seventh Circuit case says, which you all know and is kind of a truism, is in this time of homogeneous commodity product, with a global market it is especially vulnerable to price-fixing. So we start with that premise.

We also have allegations, which the defendants obviously deny, that there were coordinated production restraints by an admitted cartel that raised the price of potash by up to 600 percent in total. As the court said in the en banc opinion, whatever the floor is on what's de minimus in terms of effect, this is so far above it they didn't even need to discuss the amounts.

The other thing that the Seventh Circuit en banc decision said, which I think gives you insight as to the theories of the case, getting away from all the highfalutin'

stuff about what the FTAIA means, is at pages 16 and 17 of the en banc decision. It kind of gives you insight into what they are thinking and what I would argue as a trial attorney and what I think really is the correct outcome of this case.They say the applicability of U.S. law to transactions in which goods or services being sent directly into the United States, with no intermediate stops, is both fully predictable to foreign entities and necessary for protection of U.S. consumers. Foreigners who want to earn money from the sale of goods or services in American markets should expect to have to comply with the U.S. law.

Now that is a pretty common sense and practical notion, which is really the lens from which you should take a look at the FTAIA. Obviously, as the Seventh Circuit en banc opinion acknowledges, there are billions of dollars of sales of potash in the United States. There is a certain argument made in the cert petition with respect to there being a split in certain ways on the import aspect of the FTAIA, which I don't think, if you drill down and look at it, we would argue is really a split at all. Because the Seventh Circuit opinion, as opposed to saying you just import and you're done, like it is strict liability, really is saying that the commerce, based on all the facts in place, based on looking at the merits of everything, because that's when you do it now, you look at the merits at the end of the case, is either directed at, targeted, or in the defendants' word in their cert petition, related to U.S. commerce in a substantial way. I don't think there could be a whole lot of argument, although there is, that when you ship billions of dollars of potash to the United States to U.S. farmers and agricultural interests and they purchase it directly in the United States, they pay for it in the United States, that there is not a substantial effect in the United States.

Another point that came up both in the opinion as well as at oral argument—and everybody knows who is on the Seventh Circuit, but there is little old me standing up there and there is Judge Easterbrook and Judge Posner, Judge Wood, who wrote the opinion ultimately, and these people know a little bit about antitrust. One of the questions posed by Judge Posner and mentioned a couple times in the opinion is the whole issue of arbitrage. One of the common sense points that we certainly would emphasize and have emphasized is if you have a world market in potash, and you're setting prices outside the United States to establish a benchmark for a worldwide price, economically speaking and common sense-wise you really are not going to have a different price in the United States, otherwise people will trans-ship that potash, and the United States price will undercut the price you've set on a worldwide basis. So the way cartels work, and particularly in the ways this alleged cartel worked, arbitrage is a common sense way to kind of blow out of the water this whole idea that somehow the pricing on a worldwide basis is not related to the U.S. pricing.

Let me talk for a moment, in my little bit of remaining time, because I got the card, that the direct effects comes down to the word direct. If any of you are keeping your scorecards and wondering if the Supreme Court will take it or not, our position certainly will be and has been that that's only one part of a three-prong test. There is substantially, reasonably foreseeable, and direct, and those words should be taken together. As the Seventh Circuit said, defendants take the position they should be looked at independently, and direct has a special meaning.

Whether direct means proximate cause, whether it means reasonably proximate nexus, whatever it means, as the Seventh Circuit has said, it doesn't mean it is remote or ancillary. So looking at it in the negative, as opposed to what the word direct means, is one way to look at it. Looking at the facts and circumstances in this case, I think most would come to the conclusion it is not remote or ancillary, the effect in the United States.

There are cases that have come out, trial court cases, I think *Vitamin C* and *Animal Science* on remand, that have talked about this and have said things that suggest proximate cause and causation is kind of the realm in which you decide what direct means. We can argue and will argue about what those cases mean. But let me suggest to you that you all are experienced attorneys, and just take it out of the antitrust context, proximate cause has been in our legal jurisprudence for hundreds of years. It means what it means in the context of the facts of a case once the merits are decided. It is always a fact issue. It is rarely a legal issue. Proximate cause, if that becomes the standard or is argued to be the standard, is not one cause; there could be multiple causes, concurrent causes. It doesn't mean there can't be other substantial causes. In fact, in California, under California state law the substantial factor test is the law meaning there could be multiple substantial factors; it doesn't have to be the only substantial factor. So the idea that somehow (1) proximate cause is just too elusive and confusing to apply, I believe, is not the way a court would view it. And number (2), the idea that even if you apply it, it is going to make direct problematic for the plaintiffs to overcome in this particular case, I think is probably not going to be the way the court would apply it as well.

So I am sure you're all sitting there wondering, well, what are you predicting Simon, what's the court going to do?

MR. ASCIOLLA: We are going to take that poll later. Kristen.

MS. LIMARZI: Thank you, Greg. And thank you to the Bar Association for having me here today.

Before I begin, I need to make the necessary disclaimer that my comments today are my own and do not necessarily reflect the views of the Department of Justice.

I am going to try not to get between Britt and Bruce on the particulars of *Minn-Chem*. As Britt noted, the DOJ and the FTC's joint amicus brief in this case didn't take a position, didn't support either party and didn't take a position on this particular complaint and whether it meets either of the FTAIA's exceptions. I don't intend to do that today either.

I would like to talk a little more about the FTAIA generally. As Greg mentioned, it is 30 years old now. It is funny to think about a panel on a 30-year-old statute being very timely, but I think this one qualifies.

In our global economy anticompetitive conduct often spans national orders, and price-fixing cartel cases more and more involve foreign conduct and foreign commerce. These sorts of cases, I think, raise two questions necessary to the analysis. The first is of course presented by the FTAIA itself, and looking at the language of the statute, that question really concerns not where the conduct takes place but the type of commerce that's involved for effect.

Going back to basics a bit, the first thing you find when you look at the language of the FTAIA—and I am sure you all have your pocket copy of the FTAIA you carry close to your heart all the time—no?

MR. SIMON: Right next to the real estate rule of perpetuity, right next to that.

(Laughter.)

MS. LIMARZI: You never know when you're going to need to pull out the language of the FTAIA, and it is very difficult to memorize.

So the FTAIA, first of all, only applies to conduct that involves trade or commerce with foreign nations. So an ordinary cartel, where they are fixing the price of goods sold in interstate commerce, the Sherman Act applies there, and we don't even have to look at the FTAIA. Similarly, a worldwide cartel that has a U.S.-based participant, that U.S.-based participant selling price-fixed goods to U.S. customers in interstate commerce, the Sherman Act is going to apply to that, because it is commerce involving interstate commerce.

Where you don't have interstate commerce, you've only got foreign commerce, then the FTAIA says—and Britt went through the language before, but I'll say it again because it is hard to keep in your head—then the FTAIA says the Sherman Act applies if the conduct involves import commerce, or where it doesn't involve import commerce, if it has an effect on certain kinds of commerce, commerce within the U.S., U.S. import commerce, certain kinds of export commerce. We have talked some and we will talk more about what those terms mean—involving and affecting.

But first, just notice that the language of the FTAIA makes the application of the Sherman Act turn not on the nationality of the players, not on the kind of business that they do generally, not on where the conspiracy meetings took place; it is all about what sort of commerce is involved or affected.

I said earlier there were two questions you need to think about in looking at these cases. The second question is where did the conduct take place? We know from *Hartford Fire* and other decisions that the Sherman Act applies to wholly foreign conduct if the conduct has an actual and intended effect in the United States. So we do want to know where the conduct takes place. The FTAIA doesn't care where the conduct takes place, but we still need to know, because if it is entirely foreign conduct, then we might need to look at the traditional requirements from *Hartford Fire*.

The distinction between these two questions is an important one, if only because it is so easy to conflate these two ideas. Some of the same facts are going to be relevant to both of these inquiries, some of the overlap in the evidence that you're looking at here. But the questions are distinct, and you can have cases that implicate one of these issues and not the other. For example, imagine a U.S. export cartel, they are U.S. exporters, so they are probably located here. The cartel probably operates largely if not entirely within the United States. *Hartford Fire* is not going to be an issue here. You've got tons of conspiracy conduct in the United States. But the commerce involved—it certainly isn't interstate commerce. It's foreign commerce, in this case specifically export commerce, so unless you can meet one of the FTAIA's exceptions, the Sherman Act is not going to apply.

Conversely, you could have a conspiracy to fix the price of products made abroad and sold into the United States. The FTAIA is not going to have a big role to play here. Products made abroad and sold into the United States, that sounds like import commerce, and under the FTAIA's import commerce exception, the Sherman Act is going to apply. But *Hartford Fire* might be an issue for you, if all the relevant conduct took place abroad, then you might need to consider whether there is that actual intended effect in the United States that the Supreme Court talks about in *Hartford Fire*.

This panel is really about the FTAIA, so I am trying to focus more on that question. I think one takeaway from the government's brief—and Bruce alluded to this earlier—is how the purpose of the statute itself can really inform its interpretation and application. And perhaps because the language has been so perplexing we look especially to kind of the history and purpose of how we got here to understand what's going on and how we apply it.

The FTAIA was passed as part of the Export Trading Company Act, and as others have said, it grows out of a concern really for American exporters and American companies doing business abroad. There was a sense that

these American companies felt hamstrung in effect. They weren't sure whether the Sherman Act applied to their conduct in foreign markets, and at least in Congress's view that uncertainty made those American companies wary of entering into contracts abroad or entering into joint ventures. It made it generally harder for them to operate.

So Congress starts out by drafting a statute that says the Sherman Act shall not apply to conduct involving trade or commerce with any foreign nation, unless it has the requisite effect in the United States. Pretty quickly people realize that trade or commerce with any foreign nation, that is going to encompass import trade or commerce. So the language taken at face value means that the Sherman Act wouldn't necessarily apply to a restraint on import commerce, something that pretty obviously has the potential to harm U.S. consumers.

So Congress wants to solve that problem right away, but they don't want to change it to the Sherman Act shall not apply to export commerce, because that leaves totally unaddressed what you do with wholly foreign commerce, commerce between two other nations, which is definitely something they want to address. In the legislative history of the FTAIA they cite specifically this case, *Pacific Seafarers*, a D.C. Circuit opinion from I think 1969. The case was holding American companies liable under the Sherman Act for conduct they had engaged in that concerned the shipment, I think, of concrete between Taiwan and Vietnam. So sort of this idea that when we are operating in wholly foreign commerce, can we give our American companies some guidance. So they definitely want to give some clarification about how the Sherman Act applied there.

So that's how you end up with this double negative construction: The Sherman Act shall not apply to conduct involving trade or commerce, other than import trade or commerce, with foreign nations. It is a weird way to put it, but it is born of this idea that whatever changes or clarifications Congress was trying to make with the FTAIA, they wanted to make sure that import commerce remains fully protected. If import commerce is involved, we want the Sherman Act to apply just as it ordinarily would.

MR. SIMON: I always think if I was going to tell my kids something, and I put it in the way the statute was written, how far would I get with that?

MS. LIMARZI: There is a funny bit of FTAIA history on that. The statute was passed in 1982, but a predecessor version of it was proposed in 1981. It is similar—the language is not exactly the same, but the idea is somewhat similar. And the representative who was presenting it on the House floor says in this sort of very nice self-congratulatory way, after he describes it, he says my proposal has the great merit of clarity, brevity and effectiveness. So apparently, they thought they were doing pretty well.

(Laughter.)

So how do we tell whether or not import commerce is involved? In trying to articulate what it means for conduct to involve import commerce, a couple of courts, including the earlier panel decision in *Minn-Chem*, have said that the conduct that is directed at or targets import commerce, that conduct involves import commerce. And a big focus of the government's brief to the en banc court is pushing back against that description. The theory is that those words suggest a kind of subjective intent to harm U.S. import commerce specifically or even exclusively, as if the cartelists have to be staring down the barrel of the rifle at U.S. import commerce. But the actual language of the FTAIA doesn't impose any kind of subjective intent requirement.

We know from the history that the one thing Congress wanted to do was make sure that the Sherman Act applied fully to import commerce. There is nothing in Section 1 of the Sherman Act that has a subjective intent requirement. So a big part of the government's brief is basically to eradicate that kind of loose language in describing the import commerce exception. I am not sure it was essential to the panel's holding in *Minn-Chem* to talk about it in this way, but it was the way that they had chosen to describe it.

Certainly anticompetitive conduct that is particularly directed at or targets import commerce, that's probably going to involve import commerce for purposes of the FTAIA. But it can't be limited to that. If you have a worldwide price-fixing conspiracy, you don't get a pass on the price-fixed goods that you sell into the United States just because you're also selling price-fixed goods in other countries. That's why we see in some cartels where the agreement specifically carves out the United States. We are going to fix the price of goods that are sold around the world, but we are still going to continue to compete on the price of products we sell into the United States. Those agreements are made because the Sherman Act is so clear, that it protects U.S. customers from this kind of activity.

For commerce, that doesn't mean the import commerce exception. We have to look at the effects exception, conduct that it involves, export commerce, or more frequently wholly foreign commerce can still be within the reach of the Sherman Act if it has this direct, substantial or reasonably foreseeable effect. As has been clear, and I think it is probably clear to most of you, all the action is really on the word direct.

As others have noted, the en banc court adopted the government's position that an effect is direct for purposes of the FTAIA if it is proximately caused. Here again, the government relies on the history and purpose of the statute for that interpretation. Proximate cause has a long history in antitrust. For example, the effects-based application of the Sherman Act in interstate commerce obviously has been around for quite some time. And the courts there

have said that determining whether there is a direct effect on interstate commerce is a question of proximity and degree. Certainly private plaintiff's damages actions are ordinarily limited to those that are proximately caused.

So defining direct in the FTAIA in terms of proximate cause harmonizes the FTAIA with a century's worth of antitrust law on these similar concepts. This has long been the Division's position on the word direct and the position advocated in *LSL*, as Greg mentioned.

In my last 30 seconds, before I turn it over to Elaine, I want to make one quick point about *LSL*. I think *LSL* is a really interesting case on this point, both for what it tells us and what it doesn't tell us about the direct-effects exception. Obviously the *LSL* court articulated the directness requirement differently than the government had advocated in that case and differently than the Seventh Circuit has done in *Minn-Chem*.

But the peculiar facts of *LSL* means that the decision is really, I think, of limited value or limited utility to antitrust lawyers. Recall in *LSL* the conduct at issue was a contractual restraint of trade, sort of a noncompete agreement, and it concerned tomato seeds that hadn't been invented yet. The seeds, once they were developed, were going to be grown into tomatoes in Mexico, and then the tomatoes would come into the United States. Whatever you think about those allegations and how direct they were, that conduct is markedly different from an ordinary price-fixing cartel, and not only because ordinarily price-fixing cartels fix the price of products that exist. So as a result, I think *LSL* tells you relatively little about how the directness requirement, even as it was articulated by the Ninth Circuit, would apply in the more run-of-the-mill price-fixing cartel case.

With that I think I'll cede the microphone.

MR. ASCIOLLA: Thank you.

MS. JOHNSTON: I am going to talk about a couple of issues that do not, if you like, refer fully to the center of the FTAIA and the discussion we have been having, but I think sit on the fringes of a lot of these cases involving alleged international cartels. I am going to look at the role of the sovereign defense and also ask the question as to whether there is still a role for comity in the brave new world in which we find ourselves.

There are three long-standing sovereignty defenses, and these all predate the FTAIA. But as you think about it, the types of cases where the FTAIA is likely to be invoked by defendants are generally cases involving exclusively foreign actors, or at least some foreign actors, and some of those foreign actors may be government-owned or they may be acting under foreign government mandate. To the extent that the trend towards narrowing the protection of the FTAIA for antitrust defendants, I think it opens up the possibility of defendants, perhaps, taking a closer look at the use of these potential sovereignty-related defenses.

There are three main sovereignty-related defenses: The Foreign Sovereign Immunities Act, the Act of State Doctrine and Foreign Sovereign Compulsion. As said, they are not antitrust-specific, but they have been around for quite a while. It is interesting to look at them again in the light of some of these other developments we are seeing in the light of FTAIA caseload.

Starting with Foreign Sovereign Immunities, it is a long-established doctrine developed originally largely in the maritime area. It is now governed by the Foreign Sovereign Immunities Act. And the fundamental rule of that act is that U.S. courts do not have the jurisdiction to adjudicate a case against a sovereign or its instrumentality.

However, there is a really important exception to it. There are a number of exceptions actually, but the most important one, I think, in an antitrust case is the commercial activity exception. So effectively, the basic rule is U.S. courts can't hear a case against a foreign sovereign, but if that foreign sovereign or its instrumentality is engaged in commercial activity, then they perhaps can.

What is interesting is that whether commercial activity is involved or not is looked at by reference to the type of conduct at issue, not by reference to its purpose. So even where a state is engaged in conduct, for example, the issuance of government bonds for a public purpose, that does not make the conduct noncommercial. The leading case on that is the *Republic of Argentina v. Weltover, Inc.*, Supreme Court 1992. Judge Scalia gave the opinion that issuance of bonds by Argentina was a commercial activity because the foreign sovereign was not acting as a regulator of a market, but in the manner of a private player within it. The purpose didn't matter; the issue was a type of conduct that the nonsovereign could have engaged in.

Justice Scalia contrasted that with a situation that if you had issuance of regulations limiting foreign currency exchange, that would clearly be sovereign because a private party couldn't engage in that; whereas, they could issue bonds, and therefore the issuance of bonds was commercial.

Fast-forwarding to the *Potash* case, this defense was successfully invoked by Belaruskali, the Belarusian state-owned producer. Belaruskali qualified as a foreign state under the FSIA. It had been established by the government of Belarus to explore, develop and trade potash extracted from the mines of Belarus, and it was directly and entirely owned by the Republic of Belarus. Interestingly enough, the court found, and this is consistent with some other decisions out there both in the FSIA area and the active state area, which I'll get to separately, Belaruskali was not engaged in commercial activity. The allegations

in the complaint against Belaruskali related to its decision to reduce the amount of potash it extracted. That was a sovereign decision. It was the right of a country to regulate its natural resources. That's a uniquely sovereign function. The fact that Belaruskali owned 50 percent of a joint venture, BPC Minsk, that sold the potash, didn't undermine that, because the plaintiffs were found not to allege the sufficient control that would have been necessary to attribute the act of that joint venture to Belaruskali.

Turning quickly to the Act of State Doctrine. This again, like FSIA, was formulated in areas other than antitrust. The leading case is *Underhill v. Hernandez*. Basically the Act of State Doctrine is that every sovereign state is going to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the act of the government of another, done within its own territory. So U.S. courts will not sit in judgment on the act of a foreign government done within its own territory.

The doctrine is generally regarded as being based on separation of powers rather than sovereignty. It is the job of the U.S. executive to set foreign policy. The judiciary should keep out of it.

Contrasting the two, because there are some quite interesting differences here, FSIA is jurisdictional, may be raised any time during litigation. Act of State is not jurisdictional; therefore, it can be raised under 12(b)(6) and the limitations involved with that. I think more interesting is the FSIA can be invoked only by the foreign states themselves or instrumentalities.

The Act of State Doctrine can be invoked and has been successfully invoked by private parties. Sovereign state does not need to be a party to the action.

Commercial activity exception is in the FSIA. It is unclear whether that exception also exists under the Act of State Doctrine.

FSIA can apply to conduct outside of the foreign state, including conduct in the United States, which may be immune under the act. The Act of State Doctrine generally is viewed as applying only to conduct within the foreign state, or at least within its jurisdiction.

So the doctrines, in some respects FSIA is more permissive, and in some respects it is less permissive.

I think the leading recent case on Act of State was the case in Texas, refined petroleum products, a case brought against National Oil Companies of Saudi Arabia and Venezuela. Those are both OPEC members, also against Lukoil and its U.S. subsidiaries. The allegations fundamentally were that these entities were participating in a conspiracy orchestrated by OPEC to restrain output and fix prices of crude oil, thereby increasing prices of refined petroleum products in the U.S.

The case was dismissed on the basis of the Act of State Doctrine, because the acts at issue that caused the price-fixing were essentially government acts undertaken by sovereigns. In other words, Saudi Arabia and Venezuela decided as a sovereign matter how much crude oil they were going to take out of the ground. That crude oil was ultimately sold by their national oil companies. But to try to sort of bootstrap the fact that the national oil companies sold that oil into trying to sort of break the chain between what the sovereign was doing and what the oil company was doing was viewed as unsuccessful by the court. The court took the view for the court to have adjudicated the case, it would have effectively had to come to a decision regarding the acts of those sovereigns as to how much oil they were going to take out of the ground.

More recently the *Vitamin C* antitrust litigation. The Act of State Doctrine, that motion was denied in that case. There wasn't a whole lot of discussion in detail in that case. Most of the discussion in that case was around foreign sovereign compulsion.

Potash again is denied. But again, explicitly because the court believed that it would not have to inquire into the official acts of the Republic of Belarus to adjudicate the case. You can see the OPEC-related decision out of Texas is really quite a potent decision.

Turning to the third sovereign defense, Foreign Sovereign Compulsion, basically is a defense to U.S. legal action if a party can say that they were compelled by a foreign sovereign to engage in the conduct. The conduct does need to be compelled. It is not enough that it is encouraged or it is approved. The International Antitrust Guidelines are quite explicit on this, and a number of the courts have been as well. The Guidelines also take the view that the conduct has to take place within the foreign state, though actually some of the case law has been a bit more liberal on that issue.

Touching again on some of the decisions that really underscore the fact that there does need to be compulsion and there need to be penalties and the sanctions need to be lethal for a party to be able to invoke this defense.

Those are the three sovereignty defenses. They are alive and well, though they are not always going to prevail. But we are seeing some claims dismissed on the basis of those in some recent cases.

I also want to say a little bit about comity. Is there still a role for comity? Comity was developed in a very different world. The *Alcoa* effects test has given antitrust law very broad jurisdictional ambit. There was little or no international consensus on the illegality of conduct condemned by U.S. antitrust law. Most countries did not have antitrust laws. If they did, they weren't criminal. They generally weren't enforced territorially. They were not enforced by private plaintiffs. This has led to a num-

ber of high-profile conflicts between the U.S. and other countries. It started in the mid-50s and through the 60s and 70s, various commentators and courts came up with what was described variously as the balancing test or even jurisdictional Rule of Reason which would attempt to weigh the various U.S. interests and foreign interests implicated before deciding whether to pursue or apply U.S. law. These culminated, if you like, in the FTAIA with its direct, substantial and reasonably foreseeable test, which was not as liberal, I think, as some of these balancing tests. But at least it was attempting to, in part, address some of these issues, though the point has been made, I think correctly, that the focus may have largely been on U.S. companies rather than foreign companies.

Congress, during the debates regarding the FTAIA, was actually neutral on the issue of comity. It took the view that a court could still decline jurisdiction on the basis of comity, even where the requirements were met and the conduct was brought back into the scope of the Sherman Act.

But the doctrines really developed in a very different world than the world we are in today. The high point I think was the 1970s. I think in the 1990s you begin to see an erosion of really having any meaningful teeth in most contexts. In *Hartford Fire*, the court took jurisdiction over an activity by foreign reinsurers outside of the U.S. The Supreme Court found that comity did not require abstention, and that there really wasn't a conflict between the regulatory regimes of the U.S. and U.K. There was really no application of these sorts of balancing factors. And this of course came up with the test that Bruce had mentioned earlier, that the foreign conduct was meant to produce and did, in fact, produce some substantial effect in U.S.

It did raise its head in *Empagran*, where it was invoked in favor of the sort of narrower finding of liability there, that the U.S. courts shouldn't be looking at purely foreign conduct, purely adversely affecting foreign purchasers. Again, it sort of gets annulled in the Antitrust Guidelines, but the DOJ took the view, if they had dropped suit, then the court couldn't order dismissal on the basis of comity, because they had already engaged in a comity analysis.

You have to think about the fact that the world has changed. We have 125 or more antitrust regimes globally. Extraterritoriality is just not controversial anymore. We are no longer the only country that sends people to jail. Private actions are going elsewhere. The EU fines are outpacing the U.S. fines. New regimes are flexing their muscles.

India imposed $1 billion in fines last year for antitrust violations. China just imposed a $56.7 million fine against the global LCD cartel. So really what does comity mean in that world where there is significance convergence, perhaps not total but significant convergence, on how people see the role of antitrust laws.

So I think just in conclusion, I think that comity considerations will be reformulated, I think, to give something of a different focus. I think what we may begin to see is perhaps we will see more exercise of prosecutorial discretion to avoid some notion of double jeopardy, though it is not really double jeopardy, but effectively where you have multiple regulators going after the same conduct. You will maybe see private actions being limited to some actions to compensating the consumers in the individual countries.

I think the bottom line is if a court has jurisdiction under *Hartford Fire* with import commerce, or under the FTAIA, however it is being defined in other situations, I think it is very unlikely that they are going to abstain from taking jurisdiction on the basis of comity.

MR. ASCIOLLA: Thank you to Elaine and everyone. We have run out of time. I actually had questions for the panel, but I think I can squeeze out two more minutes so we can take one question from the floor.

But before we do that, in honor of Bill Rooney, who likes to take polls, how many think that the Supreme Court should take up this issue?

MR. SIMON: I am covering my eyes.

MR. ASCIOLLA: Well, then, how many want to wait for Bruce's brief? That's probably a better question.

Do we have any questions?

Bernie.

MR. PERSKY: What if the unlawful conduct is respective of product manufactured abroad, then put into a larger product abroad and imported into the U.S. with the knowledge that parties fixing this component part are putting it into a product they know comes to the U.S., but what is coming to the U.S. is a product containing this part of a product. What kind of analysis applies there?

MR. SIMON: Look at the *Vitamin C* opinion, because it talks about that. And you should also look at the DOJ's position with respect to finished products coming into the United States.

But my view obviously is that if you know it is going to be manufactured and put into a larger product that comes into the United States, it is still covered.

MR. PERSKY: Is that import commerce or?

MR. SIMON: I would say it is still import commerce. I know there is a big difference of opinion.

LCDs, for example, some of the televisions were made in Mexico. The panels were made overseas, and then shipped to Mexico and assembled and the finished products came to the United States. And then Judge Illston did some things with respect to some of the opt-out plaintiffs, who actually had them assembled overseas

themselves, under their control and then shipped them to the United States, and she knocked those out. Whereas, she kept the ones the defendants had control over, even though they came through Mexico as a finished product in the case.

The takeaway for me is it is very fact based, so there is no one size that fits all, Bernie, on applying it.

MS. LIMARZI: I would just agree with that. I think that in this area it is dangerous to privilege form over substance. So I think your question is whether or not, if you're looking at the effects exception, whether or not that conduct had an effect on commerce within the United States or U.S. import commerce, maybe bringing in the finished good constitutes that. But whether or not that effect exists, that's going to be a fact-based question.

In terms of the government's view, I would urge you to look at the government's papers in our prosecution of AUO, where that question is addressed extensively.

MR. PERSKY: But you wouldn't have to get into the effects question on import commerce, because it might not be import commerce.

MS. LIMARZI: That's right. Judge Illston had various ways in which she treated these different categories in the civil suits. In the criminal suit I think it was a little bit more simplified. But that's pending. That case is pending on appeal, so I won't say any more about it.

MR. ASCIOLLA: Well, thank you all. I would like to thank all the panelists.

(Applause.)

MR. STOCK: Thanks, Greg. That was a great panel.

Before everyone breaks for lunch I just want to mention a couple of issues we have on the agenda.

First, we are going to have a five-minute business meeting here for the Antitrust Section. Everyone is welcome to stay for that.

We will have lunch for those on the Executive Committee. There will be a meeting at the Beekman Parlor on this floor at 12:15. For those of you not on the Executive Committee, you are off for lunch, and then we will reconvene here at 1:15 for the next of our great panels. We will conclude at 5:00 p.m., at which time there will be an Associate Happy Hour, which we encourage you to attend if you fit into that category. And then the cocktail party and dinner, as usual, will be at the University Club, starting at 6:00.

So with that I will turn it over to Bill for the Business Meeting.

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

MR. ROONEY: Before everyone flocks from the room, we have a little bit of business, but very important business to conduct.

First, we would like a motion to approve the minutes from last December's meeting, which I know you all recall perfectly well.

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MR. ROONEY: Anybody disagree?

All in favor?

(Ayes vote.)

That is done. Now I would like to ask Stacey Mahoney to give the report of the Nominating Committee, which is the most important business of this meeting.

Stacey.

MS. MAHONEY: Thanks, Bill.

And I want to thank the other members of the Nominating Committee. They are always a pleasure to work with, and we have a great slate again for you this year.

So what I am going to omit doing is reading the folks who are simply returning for their second year. I am going to, however, identify the folks who are beginning their two-year term this year. So they will be on the Executive Committee through 2015: Randi Adelstein, Barry Brett, Professor Ned Cavanagh, Bruce Colbath, B.J. Costello, Steve Edwards, Professor Harry First, Larry Fox, Andy Frackman, Nick Gaglio, Ilene Gotts, Professor George Hay, Adam Hemlock, Steve Houck, Bob Hubbard, Pat Jannaco, Elaine Johnston, Dan Jonas, Elai Katz, me, Jayma Meyer, Joel Mitnick, Saul Morgenstern, Anne Nardacci, Chul Pak, Bernie Persky, Wes Powell, Bruce Prager, Eric Queen, Yvonne Quinn, Pat Rao, Harry Robins, Aidan Synnott, Steve Tugander, and Michael Weiner.

We have a few new members to the Executive Committee. We welcome Robin Adelstein, Kerin Coughlin, Bill Efron, Hollis Salzman, Robin van der Meulen and Wendy Waszmer. Their terms will also run through 2015.

And importantly, we have our officer slate: Eric Stock will be the Chair; Barbara Hart will be the Vice-Chair, and Elai Katz will be the Secretary. Each of those are for one-year terms. Lisl Dunlop will continue as the Financial Officer through next year.

So thank you, and may I have a motion for that slate.

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MS. MAHONEY: All in favor?

(Ayes voted.)

MS. MAHONEY: Any opposed?

(No response.)

MS. MAHONEY: Thank you all and enjoy lunch.

(Luncheon recess.)

SAVE THE DATES

2014

New York State Bar Association

ANNUAL MEETING

January 27–February 1, 2014

Hilton New York Midtown
1335 Avenue of the Americas

Antitrust Law Section Program
Thursday, January 30, 2014

Latest Developments in Criminal Antitrust Enforcement in New York

MR. STOCK: Thanks, everyone, for joining us for our afternoon session. The first panel on our agenda is being moderated by Steve Tugander. The panel is on criminal enforcement of antitrust in New York. We have a great panel here of several people from the New York Field Office and elsewhere, including a top official from D.C., which we are very thankful for.

I'll just introduce Steve, and then he'll give you more detail on the panelists.

Steve is well-known to many of you. He's one of the stars of the New York Field Office. He's been practicing there since I believe 1989—is that right?

MR. TUGANDER: That's correct, Eric.

MR. STOCK: He's also a former Chair of this Section, which shows you that in fact being a Chair of the Section can lead to great things.

Steve has set up a great panel for us today, so I'll let him take it from here.

MR. TUGANDER: Thanks for the introduction, Eric.

Because this is a New York State Bar Association panel we want to keep the focus on New York. A good portion of the program will be devoted to the discussion of three cases that were tried by the Division's New York Field Office in 2012. Two of those trials related to the municipal bonds industry, which has been mentioned a couple times this morning already, and the third related to contracts awarded by New York City area hospitals.

Our panel this afternoon is varied in experience. It is made up of two Antitrust Division attorneys, an IRS special agent and two antitrust defense attorneys.

Even though we are not seated at a round table, the format is going to be of a roundtable nature. I'll pose a series of questions to the panelists, and they will provide some facts, figures and their varied perspectives. We will leave time for questions at the very end. I will ask you to hold your questions until then.

Before we begin let me take a few moments to introduce our distinguished panel. All the way to the right of me we have Marvin Price. Marvin has been employed as an attorney in the Antitrust Division for over 25 years, and since July 2012 he has served as the Division's Director of Criminal Enforcement. From 1999 to July 2012, Marvin was the Chief of the Chicago Field Office, and before that he was the Assistant Chief of the Chicago Field Office.

Steve McCahey, to my immediate right, is a trial attorney in the Antitrust Division's New York Field Office. He has extensive experience in investigating and prosecuting criminal antitrust cases and was the lead prosecutor of the New York City hospitals investigation, which we will spend some time on this afternoon.

To my left is Special Agent Michael Okubo. He's employed by the Internal Revenue Service in its Criminal Investigative Division in New York. Mike has worked extensively with the Division on the municipal bonds investigation, and he is also a Certified Public Accountant, licensed in the state of New York.

To the left of Mike we have Mark Rosman, a partner in the Washington D.C. office of Wilson Sonsini. He's a member of the firm's antitrust practice. Mark previously served as an Assistant Chief of the Antitrust Division's National Criminal Enforcement section. In addition, he was a Special Assistant to the Directors of Enforcement in the Division's Office of Operations. Those who are familiar with the Division know that that title is sometimes referred to as a PUP, and maybe Mark at some point will explain how it started.

MR. ROSMAN: I think it is a term of endearment.

(Laughter.)

MR. TUGANDER: Mark began his career as a trial attorney in the Division's Dallas Field Office.

Last, but not least certainly, Steve Edwards is one of Hogan Lovells' litigation practice group directors. His practice focuses on complex commercial litigation, including a substantial antitrust practice. From 1998 to 2000 Steve served as the President of the Federal Bar Council and he is also a past Chair of this Section. I think most of us know Steve pretty well.

Before we start talking about any substance, I just want to throw out the Antitrust Division disclaimer. Any views expressed this morning by Marvin, Steve or myself are our own views and do not necessarily represent those of the Antitrust Division or the U.S. Department of Justice.

With that, we will start with Marvin. Marvin, the Antitrust Division and the New York Field Office were both fairly active in the criminal arena in 2012. Can you highlight some of the criminal program's most significant accomplishments, both throughout the Division and specifically in New York?

MR. PRICE: Yes, I would be glad to do that.

It is a pleasure to be here this afternoon. Someone who is an expert in cold, having lived in Chicago for 23 years, I can tell you it is really cold here.

(Laughter.)

I am going to start off by talking about, very briefly, some of the achievements of the Antitrust Division as a whole during last year. Basically what I want to do is give you a feeling for what we accomplished in total.

One of the main things I want to talk about at the very beginning, of course, is our fines total, which is something we're very proud of. This year it was $1.1 billion in fines that we obtained through the criminal program. That is a record-setting year for us. It is the first time that we have gone over a billion dollars in fines. We did have a total of a billion dollars in 2009. To show you the trend in how criminal fines have grown over the years, in 2003 the total fines for the criminal program was $107 million. So, you can see what a dramatic increase has occurred over those nine years.

One major contributor to that $1.1 billion fine total is a $500 million fine that you may have heard was imposed on AUO in the LCD price-fixing case. AUO was convicted in the early part of 2012 along with its American subsidiary and two of its former executives, and that was certainly a major trial then for the Division. As I said, subsequently they were sentenced, that company was sentenced to pay a fine of $500 million, which is equal to the largest criminal fine ever imposed on a company for antitrust violation.

In addition to the number of fines, I want to highlight for you the number of criminal cases filed. We filed 67 criminal cases last year. That is not a record. The record is 90 criminal cases filed the previous year, but nevertheless the trend is the same. In 2003 there were 41 criminal cases filed. So again, you can see a significant increase in the number of criminal cases filed, just as we saw that there was a significant increase in the criminal fine totals.

Finally, with respect to the jail times and how long those are, the average prison sentence in months for the 2010-2012 period was 25 months. That is a substantial increase over what it was in the 1990-1999 period, which was only eight months. So again, the trend is an increase and a substantial one.

Overall, we see those trends during the past year. I think the past year was a very good one for the Antitrust Division. The AUO conviction was a major trial win. And speaking of major trial wins, I want to talk about the major trial wins that the New York Field Office had, which was not just one major trial win but three major trial wins. Certainly I think that anyone reviewing what the New York Field Office accomplished last year, and I know I am biased, but I would say that it was really a stellar performance. These three trials were all very high-profile trials, very complex, and the kind of trials where a lot of things can go wrong, trials where the New York Field Office was able to bring convictions in all three of those trials.

It has already been alluded to that one of those trials involved the muni bonds investigation. I am just very briefly going to touch on that particular trial, because we have people here who know a lot more about it than I do. It was basically an investigation involving bid-rigging and fraud on investment contracts in the municipal bond derivative industry, generally referred to as muni bonds. The time period of the alleged illegal conduct was 1999 to about 2004.

There were numerous rigged or otherwise corrupted transactions and some of those had value into the hundreds of millions of dollars. These were very complex transactions and very difficult to understand. The factual scenarios that were involved certainly didn't lend themselves to explaining them to a jury. It certainly made it challenging to obtain convictions based on a reasonable doubt standard. Nevertheless, the New York Field Office was able to win not one but two muni bond trials.

There was one trial, early in 2012, that ended in May. That was a trial of three former executives of GE affiliates. The second trial ended in August, and that was a trial of three former executives of UBS AG. Both trials lasted about a month and in both there were convictions of all three defendants.

These were really tremendous victories by the New York Field Office and ones that I think people took note of. You want to know what constitutes a high-profile trial, I would say if your trial is discussed at length in an article in the *Rolling Stone* magazine, then that means you've got a high-profile trial. That was with respect to the first trial.

Furthermore, with the second trial, as you may know, *FTC Watch* published the transcripts of the second trial on a serial basis, which reminds me of how Charles Dickens novels used to be published. Frankly, I think if you learn about what happened in those trials, there was a certain amount of drama that I think Dickens might be proud to be associated with.

With respect to the New York hospitals investigation, again other people on the panel are going to talk about that and know a lot more about it than I do. The trial grew out of an investigation of bid-rigging, fraud, bribery, tax-related offenses in the award of construction, maintenance and service contracts to a department of the New York Presbyterian Hospital.

This was a trial that occurred very early in 2012, in January. It was a four-week trial. Four individuals and three corporations were convicted for their participation in an eight-year conspiracy to defraud the hospital that

I just mentioned. There were kickbacks involved which were in excess of $2 million. So again, another major trial win for the New York Field Office.

The one other thing I want to talk about, and I know that it is not specifically located in New York, but it is a matter being handled by the New York Field Office, and that is their tax lien auctions investigation, which really involves the state of New Jersey and municipalities in New Jersey. That investigation involved collusion among bidders at tax lien auctions conducted by various municipalities in New Jersey. The evidence was that these bidders rigged the bids for the purchase of tax liens. Basically what happened was they allocated the tax liens prior to the auction, and then the bidders refrained from bidding against a predetermined bidder.

I don't know if you know about how tax lien auctions are conducted, but in case you don't, what happens in a tax lien auction is the bidder bids what interest rate he or she is willing to accept. It starts typically at 18 percent, which is the maximum that most municipalities or states allow. In New Jersey that is what they use, a maximum of 18 percent. When there is competition it is often the fact that the interest rate is bid down to the low single digits or even zero percent.

The goal of the conspiracies involved here was to keep the interest rate at 18 percent and have the winner receive an 18 percent profit with respect to the tax lien auction.

To date there have been eight individuals and three companies which have pled guilty. One of the companies was recently sentenced to pay a $2 million fine, and the other individuals and companies are awaiting sentencing.

That is just a brief discussion of some of the highlights of what the New York Field Office has been doing and their major contributions to the Division's success. Again, I think it certainly shows and clearly demonstrates that it was just truly a stellar performance by that office during the past year.

MR. TUGANDER: Marvin, as we move forward in 2013, what do you see as the priorities for the criminal program, both in New York and throughout the Division?

MR. PRICE: As many of you know, Bill Baer is now the Assistant Attorney General for the Antitrust Division. He's only been in that position for maybe a little over three weeks, so we certainly have to give him time to get his bearings and decide what he wants to do. It will be up to him to determine what the priorities of the Division are, and I am sure that we will be hearing more from him soon about that.

Briefly, what I would expect, and this is solely my opinion, is that the investigation and prosecution of international cartels will continue to be right at the top of the list of priorities for the criminal program and for the Antitrust Division.

Secondly, I would certainly expect, given the outstanding results that the New York Field Office has achieved with respect to the financial sector, that the New York Field Office would be the key office with respect to investigations and prosecutions in that area, that they would essentially be the hub for the Antitrust Division's criminal program with respect to the financial sector.

Third, I would expect that all of the offices in the criminal program, including the New York Field Office, would be doing a mix of work. What I would expect is that the New York Field Office, as I think will be true of all of the other offices, will be doing international cartel work. They will be doing the important major cases, like muni bonds. But the offices also will be doing local and regional investigations and prosecutions, especially regional price-fixing cases and local and regional bid-rigging cases, especially those that involve federal, state and local government entities as victims. So they will handle these matters within their assigned territory in addition to the international matters and the large important matters, which are not necessarily international.

MR. TUGANDER: Thank you, Marvin.

I want to move over to the other side of the table for a moment.

Mark and Steve, speaking from a defense counsel perspective and following up on Marvin's overview of the Division's accomplishments in the last year, what do you view to be some of the significant recent trends in the Division's Criminal Enforcement Program which defense counsel should be especially aware of?

MR. ROSMAN: First of all, thanks to Eric and to you for inviting me. I am very happy to be here today.

There is no question it was a banner year for the Division; just listening to the summary of accomplishments that Marvin just went through is very impressive, and they were very successful.

I think that, notwithstanding that there are some challenges they face, that defense counsel are watching closely, I think I would agree with Marvin that we are in this age now, and we have been in for quite some time, what I would call the blockbuster investigation where you just have massive amounts of resources being devoted to investigating these huge international cases, multinational companies, multiple jurisdictions involved, billions of dollars in commerce. So I think that that trend is going to continue, especially since you have a recession that is still ongoing in places like Europe and Japan.

When I was in the government we would say in those times, the times of hardship in the marketplace, it was the time when companies and executives were most likely to

start to reach out to each other and try to survive the economic turmoil. So that is likely to continue.

I think the challenge and what the defense bar is looking at is, can the Division stay on top of that wave? One example is this auto parts investigation, which is multiplying like kudzu, if you will. There just seems to be no end in terms of the number of parts to which it is spreading. I am hearing a lot of talk from my colleagues that are actually involved in representing companies, individuals that they are not getting calls from the Division; they are not hearing from the Division. They are not complaining about that. That is a good thing.

But I think there are a lot of questions in people's minds, is this a situation where the Division has bitten off more than it can chew, literally? When you have that situation, combined with the atmosphere where they are closing offices, as everybody is aware—they are closing four offices including my original office. I started in Dallas, and those attorneys are not necessarily being replaced. There are hiring freezes. People are not relocating as had been predicted. You have to ask the question: Are they going to be able to handle all the cases that they are bringing?

Of course, that raises questions of fairness. If companies are coming in cooperating early, is it fair to them if the resources aren't there to go after everybody. It raises a lot of questions, and I think that is a trend people will be watching.

Just to hit on Marvin's last point very quickly, what do the office closures mean for these regional cases. I think it is been great, and New York is certainly an example to be held up where they have been able to do the block buster investigations as well as the regional investigations. Now that these other offices are closing, if there is some regional case involving a municipality in Alabama, who is going to cover that? Do they have the resources when they are dealing with these blockbusters? Are they going to continue to be able to provide coverage, now that there is not an Atlanta office or no longer a Dallas office? Because these investigations are very manpower intensive, and you've got to go to those places to interview witnesses. So I think that is going to be another trend and challenge that defense counsel is watching.

MR. TUGANDER: Thanks, Mark.

Steve, do you have a view on this that the defense trial attorneys would be interested in?

MR. EDWARDS: Sure. I see four major trends, and it is not limited to the last year; it has been over the last few years.

Obviously, leniency has had a big impact on the practice. The existence of leniency programs all around the world has really created a rush to the door. So we are no longer trial lawyers, we are leniency negotiators. And that is certainly going to continue.

Secondly, there has been a trend toward tougher sentences. The Division is trying to get stiffer sentences. I know in the muni bonds case you asked for 17 years for one of the defendants; I think you got four or five. But 17 would have been somewhat unprecedented and extraordinary, and people certainly take notice of that.

Thirdly, there is more discovery. There has always been a lot of discovery and document production, but we are getting into tapes and wiretapping, things like that, a lot more than we have in the past.

Then finally, the Division has been relying extensively on laws other than the antitrust laws. I believe it is the case that in the muni bonds case and the *New York-Presbyterian Hospital* case there actually were not any antitrust claims in the case. I could be wrong about that, I see somebody shaking their head.

(Laughter.)

But I know that is true for the muni bonds case, and they were not indicted on antitrust grounds, as I understand it. The problem there was there was no horizontal conspiracy; the alleged conspiracy was between the brokers and the providers. And as a result the major charges were mail fraud, wire fraud and tax charges. That is perfectly okay; the Antitrust Division has the ability and power and capability to do that, but I think we are going to see a lot more of that in the future.

One implication of that is if a lot of your victories are in areas of the law other than antitrust, when are you going to win your first big antitrust prosecution here in New York, since the *Taubman* case.

MR. ROSMAN: Just to pick up on that last point, as far as a trend in the financial sector, it certainly seems like the New York office is right in the center of that trend. I think another challenge is to provide some clarity in that area as far as what's happening with the non-proses that are being given out, and how does that affect the amnesty program. If you read the Federal Principles of Prosecutions of Corporations it sort of outlines for Title 18 offenses what a corporation has to do to not be prosecuted. It specifically carves out the amnesty program, saying this doesn't apply to antitrust. I think the problem is, and Scott Hammond has in forums like this tried to sort of cabin off these financial cases by saying well, these are fraud cases; these aren't antitrust cases. So you might see some non-process in fraud cases. But in situations where you have an overlap, where there is a genuine Section 1 conduct element, and you have some fraud, you know I think there is a legitimate question to be asked about well, what is this? This is not expressly a fraud case, and there is an antitrust component to this. So there is a lot of murkiness I think from the defense standpoint about when can

a lawyer argue for non-process. So I think the defense bar would like to see more clarification on that.

MR. TUGANDER: Steve, as far as the next big New York antitrust case, stay tuned.

(Laughter.)

And that is actually a good segue to my next question for Mike, who is Special Agent Okubo. I think it is maybe somewhat of a surprise to antitrust lawyers in the room that Special Agent Okubo and people from his office work with us in the New York Field Office fairly frequently.

Mike, maybe you can just give us a little overview as to how our offices come together on a good number of these cases.

MR. OKUBO: Absolutely. Before I begin I would like to thank Steve Tugander for inviting me to speak here today about the government's investigation into the muni bond industry.

Typically, when I meet someone for the first time and they ask what I do for a living, I say forensic accounting, because the conversation lasts a lot longer than if I say IRS. I'll just go over my normal procedure and really expand upon what my office does.

Generally, the IRS Criminal Investigation Division investigates a broad spectrum of complex financial crimes, and those crimes can include basically anything that has a financial motive. That can include investigating individuals that have undisclosed foreign bank accounts, investigating offshore tax shelters, identity theft—which is a very hot topic right now—money laundering, of course the standard tax evasion, and last but not least, anticompetitive practices.

The criminal conduct that we investigate can also involve situations where there are payments of kickbacks, and that is what really brings our two divisions together, that quid pro quo. Oftentimes in bid-rigging cases there are kickbacks that are paid, and because of the illicit nature of those kickbacks, typically they are not reported in income. That is why we are interested in these investigations; there is a financial incentive.

Over the past few years our offices, the Internal Revenue Service and Antitrust Division, have worked together on several cases where it was determined there was that quid pro quo. There was a payment of kickback either to a purchasing agent or a bidding agent, and those payments were made for the purpose of either attempting to reduce or eliminate competition from certain industries. So really, it is those two aspects; the financial motives that interests the IRS, and then the anticompetitive nature is really what the Antitrust Division is interested in.

MR. TUGANDER: Thank you, Special Agent Okubo.

Steve, let me turn to you now. You've spent the last few years successfully prosecuting bid-rigging and fraud awarded by contracts to various New York City hospitals, and Marvin alluded to that earlier. Can you give us a quick overview of the conduct that was prosecuted and the number of cases filed and the charges that were brought.

MR. McCAHEY: Sure. I would like to thank Steve and the committee for inviting me to be here.

The investigation involved bid-rigging and fraud for the award of contracts by purchasing officials at two major New York City hospitals. Ultimately, three indictments were filed, charging seven individuals and three corporations. Two of those indictments had antitrust charges, but those individuals pled out, so I didn't have an opportunity to be that next big case. But ultimately, fifteen individuals and six corporations were convicted. The charges included bid-rigging, mail fraud, wire fraud, tax conspiracies and false statements.

Collectively defendants received approximately 220 months of prison time, over $4 million in fines and over $1 million in restitution either to hospitals or to the Internal Revenue Service.

MR. TUGANDER: Were there any particular sentencing issues that came up during your sentencing procedure?

MR. McCAHEY: The one case that went to trial was a four-count indictment against seven defendants, four individuals and three corporations. Counts one and two were severed from counts three and four, so the first trial was against all seven defendants on the wire fraud and the substantive wire fraud conspiracies. All the defendants were convicted, and subsequently the defendants in counts three and four pled out, and we had one sentencing.

The main argument that the defendants made at sentencing were about the four guidelines, they should not have received a 16-point enhancement for the $2.3 million in kickbacks that the government proved at trial. Their argument was that while the defendants may have received this money, it was not a loss to the hospital, and that the government hadn't proven an actual loss to the hospital. The government argued that we did prove an actual loss, but the court didn't have to directly resolve that issue, because under The Guidelines, unlike restitution, it allows the court to substitute gain for loss when the court is convinced that there was a loss, but it just can't be calculated. In this case that is what the judge did, and he did the 16 level to one enhancement on the defendants at sentencing. That was essentially the main issue because that significantly raised the defendants' exposure at trial, at sentencing.

MR. TUGANDER: When we talk about the trial itself, *U.S. v. Yaron*, would you talk a little bit about the nature of the government's evidence and some of the defenses that were raised?

MR. McCAHEY: As I said, at trial the government presented fifteen witnesses, four of whom testified with cooperation agreements, and introduced over 200 exhibits. The government also played approximately ten minutes of a tape of one of the defendants. The case was largely circumstantial in terms of showing the money going from the purchasing official, from the contractors to the purchasing official, who had set up a company in his mother's name. And then of course the awards going back to them, as well as some testimony regarding the payments, specific payments being made.

The main theme of the defense, therefore, was that the evidence of payments to the company did not show they were quid pro quo for the work. They never explained why they were paying, why the purchasing official was receiving $2.3 million, but they argued it was not for receiving the work. They would have received that in any event.

With respect to the tapes, the defendant argued that the defendant on the tape, who did not testify, argued that he was just giving his own opinion. He was just bragging about things he didn't know anything about, and they were not conspiratorial statements and should not have been admitted as co-conspirator statements. And they were not admissions against him because he really wasn't admitting anything; he was just opining on what might have been happening.

The government successfully argued against that. The tapes were played. It went to the jury, and the jury convicted all the defendants on all counts, and they came back within less than a day of deliberation.

MR. TUGANDER: Thanks.

So we are going to move over to the muni bonds part of the program for a couple of minutes.

Special Agent Okubo, you and I have worked extensively on this muni bonds case together.

MR. OKUBO: Six years, a while.

MR. TUGANDER: We've seen our children grow in that time, right.

If you can just provide the audience a quick overview of the conduct that was prosecuted, the number of cases that were filed and the charges that were brought.

MR. OKUBO: Absolutely. And I will do my best to condense six years of investigative work into the next five minutes.

Basically, the issue that was at the center of the investigation was the manipulation of what should have been a competitive bidding process to obtain guaranteed investment contracts.

Let me tell you a little bit about what those contracts are all about. By way of background, each year state and local municipalities in the United States issue billions of dollars of tax-exempt municipal bonds, the purpose of which is to raise capital for public projects, so basically, roads, hospitals, schools, things of that nature. Now, when a municipality obtains the proceeds, they are not spent right away but rather over a period of time. Because of that, municipalities don't want the money to sit idle, so they invest the money in a guaranteed investment contract, which essentially is a contract that is custom tailored to meet the municipalities' financing needs.

Now because the reinvestment of those proceeds is subject to Department of Treasury regulations, it was oftentimes common that the municipality would obtain those contracts through a competitive bidding process. I'll tell you a little bit about how that works and the parties being investigated throughout the years.

There were generally two parties that were involved and were the focus. They were the investment providers and the brokers, also known as bidding agents. The investment providers were typically large financial institutions or insurance companies that submitted the bids for these contracts. So they are essentially trying to get the municipality's money so they can invest it and in exchange pay a rate of return on that money to the municipality. So they are submitting the bids.

On the other side of the bidding process is the broker, also known as the bidding agent. Typically these brokers were small, closely held corporations that were hired by the municipality to conduct the bidding process. So they are essentially soliciting bids from the investment banks and the insurance companies.

Now what we uncovered in the investigation was that the brokers and providers were essentially colluding to rig bids and allocate contracts to preferred providers. So that really was the scheme. While it seems very simple, it was a very complex scheme, and it involved hundreds and hundreds of transactions.

To date we have successfully prosecuted 19 individuals and one corporation, and from those prosecutions six of the defendants were found guilty at trials that you previously heard about. The remaining defendants pled guilty. As far as the charges to date, basically the individuals were charged with violations of Section 1 of the Sherman Act, substantive wire fraud and conspiracies to commit wire fraud. As far as the conspiracies charges are concerned, there were generally two objectives, to defraud municipal issuers and the Internal Revenue Service.

Other than the criminal prosecutions, and we did hear a little bit about this earlier today, the government had entered into financial settlements with five of those provider institutions, and those settlements totaled approximately $740 million. Essentially those settlements were disgorgement of profits, penalties and restitution.

MR. TUGANDER: Then Mike, those settlements involve settlements with agencies such as the SEC and the various Attorneys Generals offices, correct?

MR. OKUBO: That is correct.

MR. TUGANDER: Mike, just in a real nutshell, if you can, could you describe for the audience how competition was affected by the conduct and who were the victims?

MR. OKUBO: Absolutely. I'll briefly describe how the defendants essentially rigged the bidding process.

As I mentioned, there were two parties: The brokers and providers. What we found in the investigation was the brokers took various steps to rig the bids, and that would include the brokers excluding competitive providers from bidding on contracts. In other instances the brokers conspired with certain providers and essentially solicited noncompetitive bids, thus favoring other providers. In other instances there was evidence of horizontal collusion between the investment providers. And lastly, there were situations where the broker allowed a certain provider to reduce the rate they were otherwise willing to pay on the investment agreement, thus depriving the municipality of interest earnings.

MR. TUGANDER: And we are not going to get into it now because it is complicated and we don't have that much time, but there also was an Internal Revenue Service-U.S. Treasury harm. I don't think we have enough time to discuss it in great detail, but I would refer you to some of the program materials to get a better grasp of that.

MR. EDWARDS: Can I just interrupt, Steve, so the audience is maybe not misled and maybe not misinformed. In talking to people and reading the press releases it is my understanding that in the cases that actually went to trial the antitrust charges were not presented to the jury, is that correct or incorrect?

MR. TUGANDER: The cases that went to trial were on wire fraud conspiracies, so there were no antitrust charges. But the Antitrust Division was involved because it is anticompetitive conduct.

And focusing on that, Special Agent Okubo, would you talk about the nature of the evidence introduced at trial, specifically the voluminous audio tapes?

MR. OKUBO: Absolutely.

Throughout the course of the investigation the government obtained a significant amount of evidence, which was somewhat unprecedented. As Mr. Tugander just referred to audio, I will discuss a little bit of what that was all about.

During the course of the investigation the government obtained literally hundreds of thousands of audio recordings, and these were essentially audio recordings of live trades, and they were made contemporaneously at the time the trades were executed. So there was a tremendous volume of audio. That particular part of the evidence proved to be very, very compelling, and the jurors had an opportunity to hear quite a bit during the respective trials.

Now although the defendants did not testify on their own behalf, the jury still had the opportunity to hear their voices, and they had the opportunity to hear them on the phone with the brokers essentially rigging the bids. That was extremely compelling. The only thing that I can really say about that audio is that if a picture is worth a thousand words, to the prosecution team that audio was priceless, and the jury believed so as well.

MR. TUGANDER: Thank you.

Now, to switch gears a little bit, I want to turn it over to our defense colleagues.

In both the hospitals and the muni bonds investigation and prosecutions, the New York Field Office relied heavily on cooperating witnesses. In both prosecutions some defendants decided to cooperate early, some on the eve of trial and some decided not to cooperate at all but go to trial.

Steve, starting with you, can you provide some insight from a defense perspective on what goes into the decision-making process between attorney and client on whether and when to cooperate in an antitrust criminal investigation? And can you also tell us is there any difference, does that process differ depending on whether or not your client is a corporation or an individual?

MR. EDWARDS: Sure. I think whether the client is a corporation or an individual makes all the difference in the world, unless you're talking about a small closely held corporation or a limited liability company.

I don't think a major corporation has much choice but to cooperate. A major corporation wants to be on the good side at the end of the day. They want to be part of the solution, not part of the problem, and so the corporation is going to cooperate in terms of giving information and providing documents. I mean, you really have no choice.

I have been involved in situations where corporations have tried to give you a hard time on the Grand Jury subpoenas and that sort of thing, and it usually backfires, because it only annoys the prosecution and makes things worse. So I think from a corporate standpoint you really, really don't have much choice.

From an individual standpoint it is a very different calculus. It is very fact intensive, and there are really two major variables. One is obviously the culpability of your client, and the second is what is the government willing to do. If the government is willing to give my client immunity, and my client is interested in cooperating, I will almost always cooperate, because if you can get immunity, why not. Even if you think you are on the periphery of the activity, it always helps to get it past you.

On the other hand, if the government is insisting on a guilty plea for cooperation, then that is a completely different set of facts and a completely different set of issues. Culpability is going to make a big difference. I am a great believer in the notion that if the client is innocent, the client should stand on his or her innocence and seek vindication. So you're unlikely to get cooperation from me if you're insisting on a guilty plea and I think my client is ultimately innocent.

Obviously, if my client has a problem and a plea can result in favorable treatment, then that is a long complex discussion where no one size fits all, but you might get some cooperation. I always want you to think I am cooperating.

(Laughter.)

MR. TUGANDER: This is cooperation today, right?

Mark, what's your view?

MR. ROSMAN: I think Steve is exactly right.

I would just add that within the context of the financial institutions, if that is going to be a continuing trend for the Division, which it appears to be, and a focus of the New York office, then you do have the issue of company if you're cooperating and what that means.

Historically, the Division's bread and butter has been corporate pleas, where the corporation takes a guilty plea, gets some kind of substantial assistance credit and reduction in fine, and there was only this one gilded lane that was available for the amnesty applicant.

Now in the muni bonds you've got these non-prosecutions out there, and it is interesting. The facts are complicated, there is no question about that. The special agent here talks about the elements of horizontal collusion among the providers in that investigation and situations where providers were providing comp bids. If they weren't talking directly to the other providers, they may have at least had knowledge through the brokers that the bids were rigged. When you've got situations like that it is not clear to me that you can sort of cabin that off and say no, this is Title 18 and that is why we did a non-pros here, as opposed to really being in a Title 15 situation. I think those are examples where it sounds like there is an overlap situation. So I think the Division could really provide more clarification there.

It is important for a company trying to make a decision if they are going to cooperate—what does that mean for them? Because in a Title 15 context, traditionally if they are not the amnesty applicant, it means the company is going to have to plead guilty and pay a fine if it is cooperating and admitting guilt. So I think that is one note.

Another thing I would add, as far as an individual, just as a practical matter, somebody in one of these cases, if they are going to decide to go to trial, one of the things you're going to tell them is look, this office went to trial three times last year, and it is not a happy story for those defendants. So these recent trial successes definitely are going to factor into the equation for any defendant and potential defendant as to what to do, whether to roll the dice or not. You've got to admit that.

MR. EDWARDS: Just so we are clear and the audience is clear on this, and correct me if I am wrong, I believe it is the case that in the muni bonds case a lot of the provider companies, maybe all of them—you tell me—received nonprosecution agreements, not deferred prosecution agreements but nonprosecution agreements, and in return agreed to provide restitution and disgorgement, etcetera.

MR. TUGANDER: That is correct. That is correct.

We are kind of running out of time, but Marvin, I want to ask you, as we know, prior to seeking an indictment the Division will typically allow defense counsel an opportunity to argue against indictment, both at the field office level and in D.C. Can you just explain briefly how that process works, and can you give us some insight as the Director of Criminal Enforcement, even going back to your days as Chief, what do you view as an effective presentation by defense counsel?

MR. PRICE: Well, the process is very simple. You will be told that you have an opportunity to be with me and with Scott Hammond, who is the Deputy Assistant Attorney General in charge of Criminal Enforcement. If you're interested in meeting, that meeting will be set up so that you can come to Washington and meet with us. It is called a pitch meeting, and it is your opportunity to pitch why your client should not be prosecuted. So that procedure is straightforward.

In terms of what I would suggest that you do when you get to the meeting, I would first talk about something that I would suggest that you not do, which is don't come to the meeting and consider it an opportunity to try to find out from us what we are thinking and treat it as a fishing expedition. It is a pitch meeting, where you're supposed to be talking and explaining to us why your client should not be indicted. It does no one any good for you to come there and not be ready to do that.

I sat through one meeting where the attorney came to the meeting. He sat there, we sat there, he said nothing,

we said nothing. It wasn't a very useful meeting. We are expecting the attorney to talk and tell us what he or she thinks, not for us to talk.

In terms of what you should do, the most effective pitch meetings that I have seen in terms of the pitches that were made by defense counsel involved pointing out to us facts that we missed, pointing out to us that we haven't given sufficient weight to certain facts. Also, pointing out to us that there are significant reasons why certain evidence will not be admissible; perhaps there are significant statute of limitations problems that somehow or another we have overlooked, whether there is some sort of statute, some obscure statute we don't know about may somehow affect our decision-making process in terms of whether we are going to prosecute someone, because that statute may imply the conduct is in some way authorized by that statute.

Another thing that I would suggest is that when you come to the meeting that you be ready to broach the issue of a negotiated settlement. It certainly is still possible that at that time, at that point in the proceeding that could be done. Certainly it is often in the best interests of both the client and the government to negotiate a settlement, if both sides can agree on the terms.

So those are some of the things that I would suggest you think about doing when you come to the pitch meeting.

MR. TUGANDER: Let me throw it out to the defense side. Any tips from defense counsel on how to make an effective pre-indictment pitch presentation?

MR. EDWARDS: Well, I think it is always useful to come in with a white paper. I mean obviously, the downside of that is you're giving away your defense to a certain extent, but the prosecutors already pretty much know what you're going to say. If you can pull it together in a coherent way, then I think you have a greater chance of having a favorable impact on the head of the office in New York, who hopefully you'll be speaking to. And then if you want to go down to D.C. and talk to the people there, having a white paper that precedes you, I think, can often be very helpful and very effective.

I think if you're going to go to D.C., you go there to try to convince the government that it is going to lose the case. As a defense lawyer, that should be the theme of your presentation. If you're going there to beg for mercy in some way, that is a pitch you make to the New York office. My impression at least is that the people in Washington aren't interested in that.

(Laughter.)

MR. PRICE: We like to see you beg.

(Laughter.)

MR. EDWARDS: But again, the important thing is candor, marshaling the facts.

I have done these presentations also with an economist in tow, and that can also be very effective.

MR. TUGANDER: And Mark, I would like to get your perspective, having been on both sides of this table.

MR. ROSMAN: Having been on both sides it is interesting. As an attorney with the Division I used to sit there in a corner of the room in those D.C. meetings with Scott. If the defense gave a presentation that often sounded like an opening statement, I'd be sitting there jotting it down. Because although you do have a good idea of what the defense is going to be, if someone is really going to lay it out and try to win the case, I think it is risky, because you're sort of giving the government a little bit of a heads up.

In my own opinion and experience I think I wouldn't necessarily go to D.C. and have that meeting, unless it was a really close call on the facts and I thought I could convince them that they are going to lose, or I had some real policy issues that were unique and unusual, for example, or statute of limitations issue that I don't think they were fully appreciating.

That is what my experience, from being on the other side, that is what really resonated with D.C., the policy arguments. That is the stuff they are most interested in, to make sure they are not deviating from what they have done before or not missing something that is new. As far as the D.C. meeting, unless you have a situation like that where it is a real close call—I don't know if you all keep a success ratio, but my guess is it is probably a pretty low success ratio for people going in there just on the facts and getting them to change their minds. But having said that, your facts can be complicated, and if you feel like you can do it, it might be worth a try. I have rarely seen it work when I was with the government.

The meeting with the local office, the New York office here, I think that is a different kind of meeting, in the sense it is less policy oriented, and it is more fact oriented. You're likely to get much more of a dialogue going, which is helpful in terms of even getting to a settlement.

I have had my own experience dealing with this office not long ago, and it was very productive. We actually had two meetings, with the Chief and the Assistant Chief, and we were actually able to get a dialogue going. And it wasn't just, you know, Scott Hammond and Marvin just sitting there and listening to you. I feel like the local meeting is really an opportunity where you can learn about what the government is thinking, and if there is a settlement that is in the offing, we might be able to get there by having that meeting. The D.C. meeting, it is a different animal I would say.

MR. TUGANDER: Let me just throw this question out to both of you. Are there any particular New York Field Office or Division practices or procedures relating to the criminal program that you particularly like or particularly dislike?

MR. EDWARDS: What can I say? Don't indict my client.

This is sort of a difficult issue to talk about, but I like having a dialogue with the office. I have found from time to time some people would prefer not to talk. I think talking is good. You learn something from talking, maybe we learn something, maybe we get on the same wavelength. Maybe we correct some mistaken impressions. So I would encourage more communication during the process.

MR. TUGANDER: And Mark?

MR. ROSMAN: Yes, I agree with that. When I started off as a young prosecutor my inclination was always to keep the cards close to the chest, you know, you've got all the information and power, you don't share anything. But then as I got older I think what Steve said is absolutely true. It is just more productive to share information when you have it.

Most of these cases settle. That is just a fact. And you're likely to get to that place much quicker by having a dialogue back and forth. You may not agree, and that is fine. But I think having more of an effective policy in terms of encouraging the attorneys to share information, I think we saw that that was very effective in the *Air Cargo* investigation that I was leading, where we were able to get a lot of pleas and a lot of cooperation that way.

The other thing I would like to see change on, I talked about the non-pros case, getting more clarity about when a company could be entitled to a non-pros for its role in the defense. I have a little bit of an issue there. The Division does not give minimal or minor reduction in sentencing to people who play a minor role in the offense. They are very glad to bump people up for an aggravating role or being a leader in a conspiracy. But they have never, as far as I am aware, given a minor role adjustment, giving people a two-point reduction. I think that is really unfair. I don't think that is following The Guidelines, and I think the Division should really take a closer look at that.

I have to tell you, when I was a prosecutor that would have been a nice tool for me to have in order to negotiate a plea and offer a defendant, in a situation where they did play a minor role, a reduction in sentencing. But I think the Division doesn't want to do that for a variety of reasons, and I do think there could be some change there.

MR. TUGANDER: Well, thank you very much.

We are really just scratching the surface on a lot of these topics, and we could easily spend a couple more hours, and we wouldn't mind doing so, but unfortunately we are out of time.

I want to let people know that, again, if you want to get more information, the written materials are very helpful. There are some press releases about our cases, some indictments that were filed to give you more information.

Just one more thing I want to note, a very sad development, our former Chief, Ralph Giordano, passed away at the beginning of this month, and I just want to acknowledge him. I want everyone to know that we are going to be honoring Ralph at the dinner tonight. So if people can be there, we are going to do that for him.

Thank you.

(Applause.)

Antitrust Enforcement on Wall Street: Crucial Added Oversight or Regulatory Overcrowding?

MR. STOCK: Let me just introduce this panel. You can't have a panel or a CLE program that focuses on antitrust issues in New York without talking about the financial services industry. So we are very lucky that Stacey Mahoney put together this fabulous panel.

We all know that the financial services industry is one of the most heavily regulated industries in the country. It is regulated by the SEC, it is regulated by the Federal Reserve, and there are probably half a dozen more agencies that have their hands in the pot of financial services regulation. Some would say that is too many regulators; some would say that even with all those regulators, it is not effective enough. One of the key issues this panel will talk about is what role does antitrust play in this constellation of regulators, and what role should it play.

So thanks to Stacey for organizing this. Stacey, as many of you know, is a partner at Bingham. She has been involved in some of the most high-profile private litigation antitrust cases and mergers which she has litigated during her time. She has been involved in a lot of high-profile Section 2 cases, a former Chair of this Section and currently Chair of the Nominating Committee.

So many thanks to Stacey for organizing this.

MS. MAHONEY: Thank you so much. And I really want to thank my panelists. And a special thanks goes to Karen Yen, because she parachuted in this week for us.

I am going to introduce my panelists, but let me just start with the elephant in the corner here of Libor. This is really meant to be a policy-oriented discussion, so we would really like to not address specific pending cases or specific pending investigations. The whole theme here, as Eric suggested, is to get into the idea of whether antitrust enforcement is warranted in this space, and if so, what is the best way to use antitrust as a tool for the enforcers, and how do we make that work for the entities that are being regulated by these numerous regulators.

So this is the order that we are going to present the folks in. What we intend to do is give you a chance to hear each of their world views, and then we are going to open it up to discussion, discussion amongst panelists and also with you all. There will be an array of divergent opinions up here, not by accident, and so I do expect that the conversation is going to be enthusiastic.

So immediately to my left is Mike Osnato. Mike is the Assistant Regional Director for the New York Regional Office of the SEC. In that role he's responsible for supervising the Enforcement Division investigations across a wide spectrum of market activity and coordinates with federal, state and local criminal law enforcement agencies. Prior to being at the SEC, Mike was counsel at Linklaters, where he did white collar and internal investigations.

To Mike's left is John Terzaken. He is now a partner at the Washington, D.C. office of Allen & Overy, but prior to that John was the Director of Criminal Enforcement for Department of Justice, Antitrust Division. He is largely, but not exclusively, wearing that hat today. This is such a hot topic and such a timely topic that nobody from Department of Justice was given permission to speak with us on this panel right now because of all of the activity going on out of that office. So we have borrowed John from his previous role to speak on some of those issues.

To John's left is Karen Yen. Karen is the Executive Director and Counsel at UBS in the Americas Litigation and Investigations Group. She has been at UBS since 2006; prior to that Karen was with Cadwalader Wickersham & Taft and Chadbourne & Parke here in New York.

Holly Kulka is to her left. Holly is the Executive Vice President, Deputy General Counsel of Legal and Government Affairs at the New York Stock Exchange Euronext. Before joining the New York Stock Exchange, Holly was a partner at Heller Ehrman specializing in parallel, civil, regulatory and criminal proceedings. Again, a very apt background for our proceedings here today.

In addition, while at Heller, Holly was the Co-Chair of the Firmwide Diversity Committee and Chair of the New York Hiring Committee.

On the end is Jonathan Arnold. Jonathan has graciously agreed to be the nonlawyer on this panel of lawyers. He's a Ph.D. economist and is the Chief Economist for the Office of the Attorney General for the State of New York. He handles the Antitrust Bureau, as well as the other bureaus that have need for economic advice.

Prior to his role at the New York AG's Office he was principal at the Analysis Group in Chicago, Illinois.

Thank you to each of the panelists.

So let's begin. Mike, I would like you to kick us off and give us a sense of the SEC's role in this situation.

MR. OSNATO: Good afternoon. I have to, of course, start with the standard disclaimer that I am not speaking on behalf of the Commission. These are my own views, so you can feel free to leave if you want.

Since we have a new Chairman as of 2:30 today I don't know that I can say anything about the SEC world view today. But since the general topic is the necessity of wisdom of antitrust enforcement in the securities space, I can start by going out on a limb and saying that we at the

SEC feel we have the securities piece covered. Ultimately, what we investigate typically is one set of actors in the market fleecing another set of actors or people injecting false information into the marketplace: Insider trading, false statements, market manipulation. I think it is pretty rare that you see widespread collusion amongst the entities that we regulate, but we all know it happens. I think because it happens, it is important that we have this discussion. I think when it does happen there are important policy interests in having institutions and government agencies that have interest in that conduct, that have different mandates to look at that. So today I want to spend a little bit of time talking about our process and then give you a road map about how you can expect the SEC and antitrust authorities to look at the same set of facts by the same set of actors so you have a feel for that paradigm.

Big picture, the bottom line is there is increasing concentration among the key players on Wall Street, and we all know what that can mean. We see incredible sophistication and complexity in the market, and the more complexity introduced, the more opportunities for mischief, quite frankly. So I do think it is important to have this discussion.

I also think it is important to note that for us to be involved in this space we need a security, all right. If there is no security transaction or offering or something to that effect, we are not involved. So I don't think we should overstate how much overlap there will be, but I want to make sure everyone understands where our jurisdiction begins and ends.

I am not sure everybody in this room understands our process and how it works, so let me start with a little primer there about how we regulate and investigate Wall Street entities. I will talk briefly about how we interact with our colleagues at the Department of Justice when we do look at the actors to give you a feel for the cooperation paradigm. I will then end briefly with some observations, that may not be all that satisfactory, about how to address those situations where you have multiple government agencies looking at the same conduct.

First, when you're talking about Wall Street that typically means regulated entities, broker-dealers, investment advisers. From our perspective our power is at its peak when we are dealing with regulated entities. They have to give us the information we want. Individuals have to cooperate, and if they don't, obviously there are significant consequences. And that, from an enforcement perspective, certainly gives us a lot of leverage. If you are a person and you are being investigated, your livelihood is on the line, and that creates a lot of opportunities for us on the enforcement side.

In terms of how we go about getting information, if you are a broker-dealer, investment adviser registered, you have to give us information even absent a subpoena. We can issue a demand, and the universe of records that is covered by that demand is massive, everything from emails to trading records and everything in between. That is important, because it gives us a quick way to get access to things to see if there is an issue. More typically, as you might expect, we would issue subpoenas in our investigations on Wall Street, subpoenas to get documents. There are a lot of documents you can't get from the entity that you need from records and the like. We do things like take testimony. And I think everyone understands our process: once we think we have a sufficient record to proceed with an action we present that to the sort of rule-making parts of the Commission, and they weigh in—and trust me, they weigh in probably more than they should. We give it to the Commission, and the Commission votes on whether to authorize that case.

Since we are talking about antitrust enforcement, I thought it might be useful to give you a feel for how we might as an agency approach that from a charging perspective. We don't have the Sherman Act; we don't have the Clayton Act. We have Rule 10(b)(5), and that is an incredibly broad antitrust statute that covers everything from insider trading to misstatements by CEOs. It also covers schemes to defraud, when market participants get together and engage in conduct that affects the market. In effect, it is a conspiracy to commit securities fraud. So using some of the cases that have been in the news, you can understand how that concept could translate into an overlapping SEC-antitrust focus on a given set of market participants.

That is a really condensed view of the enforcement side. When talking about Wall Street, I would be remiss if I didn't at least mention our exam program. The SEC in New York has a huge core of examiners. These are accountants, trained forensic investigators who every day go out into the field and visit—visit is a kind word. They go on site at broker-dealers, investment advisers, get documents, ask questions, interview people. At its core it is like a safety and sound check, but also for purposes of enforcement it is the tip of the spear. These people are in the field every day, and they bring back incredibly valuable information about what they are seeing as to trends and issues on Wall Street, and that is usually valuable from an enforcement perspective. They can go in because they received a tip. They can go in because it is a routine exam. They can do something called a sweep, which I think is relevant to this room. If we in the SEC see a trend that is of interest, and I will make up an example—if you see all of a sudden every broker-dealer on the street shifting to a different pricing convention for some kind of offering, municipal bonds, that is an interesting fact. What do you do? You send the exam team out the same day to seven or eight broker-dealers to look at that issue, and it is a fantastic way to get information about the trends we are seeing on Wall Street.

We take that information back. We have very sophisticated staff now, people who are not lawyers, who are not accountants, but traders, risk managers, quants. They

look at that and help us make an educated assessment of where to put our resources. That is the exam side.

Let me just briefly touch on how we work with our counterparts, typically the DOJ, but it could be the Attorney General's Office, so we can get a feel for that paradigm. That is the paradigm that would apply if we are working together with the DOJ on issues that implicate antitrust issues as well. Bottom line, we have, particularly in New York, an excellent track record of cooperating with our criminal counterparts; we do it all the time. The way we typically do it is not through the Grand Jury. The idea is to ensure that everybody at the table on the government's side can get access to the information, so we will use SEC subpoenas or requests so that everyone can see and look at the same information. No testimony; people are not typically put on record. Proffers, with the FBI present, to record 302s, and that sort of builds the record we use.

When you get to the end of a case or investigation I know that cooperation and leniency is a very important concept in this space. We don't have the same exact concepts, but we have very similar practices. Cooperation has always been and is increasingly an important part of our practice, how we resolve cases. So we have leniency. We have something called the Seaboard principle, and I won't get into why it is called that. But the basic concept is if you are early in, you self-report and you are vigorous in the way you remediate, then you get favorable treatment. We have the ability to offer companies, issuers, broker-dealers, NPAs, DPAs, which of course is a familiar term in this space. So if you think about ways to look on a macro level important differences from a jurisdictional perspective, important differences from a statute perspective, but at the end of the day we are speaking the same language and can approach cases the same way and exchange information freely. Ideally, and particularly if you are representing a company or have a company, resolve things in the same way.

I will close by offering some high-level observations on what to do if you find yourself in a situation where you are regulated and you get a subpoena from the SEC calling for what you think is an incredibly broad set of documents. If that is the case, it is not coming from New York, because our subpoenas are perfectly surgically precise. Then a day later you get a request from an antitrust authority that overlaps somewhat, but not entirely, what do you do? Should you do nothing? I think the answer is no. There is no magic answer here; there is no silver bullet. But what I see all the time in our investigations are missed opportunities to open a dialogue, and to come to the staff and say look, here are the issues your subpoena raises, here are the other people looking for the same information. Aren't you one Government, capital G, and the short answer is sometimes. Work it out, and if you say to us, look, we are going to get you what you need, but the Abntitrust folks need it sooner, you can rest assured we are going to sit down and talk with them to figure out how we all get the same thing on the same schedule. So again no magic bullet, no magic words you can say on the phone, but pick up the phone, be proactive. If you can do that, cooperation becomes a lot smoother.

MS. MAHONEY: Thanks. Just posit in your head, does it give an entity a worry if they have now gotten multiple subpoenas and they are submitting it to multiple different governmental entities, does that make you more or less cautious? But I will let you think about that for a bit while we give John a chance to share with us his thoughts.

MR. TERZAKEN: Thanks, Stacey.

The short answer to that, having been in private practice a very short time, is yes, from a client perspective.

So Stacey mentioned at the beginning I am going to speak with my enforcer hat. Unfortunately I don't own that anymore, so I don't have to give the general disclaimer. But I am coming at this from a slightly different perspective. Up until June of this year I was with the Antitrust Division, and was there when the Libor case and other things were coming out. Since I have left I have spent a lot of time, particularly from the firm perspective, talking with clients from the other side of the table about what this all means. What does antitrust mean to this sector, and what do they have to prepare for. So in thinking what I might talk to you about is really principally the kinds of questions that I have been asked from the clients about what they can expect going forward in terms of the antitrust role in the financial services space.

I have really boiled it down essentially to three principal questions that have been asked. One is: Is this a flash in the pan? So are municipal bonds, Libor, these kinds of cases, is this a one-off, or is this the beginning of something greater for antitrust.

The second question is, okay, now they are here, and if they are, are there any advantages or disadvantages to having them be part of the enforcement pool? Is there anything about the way the Antitrust Division works that might be advantageous.

The last question is what are the challenges of having antitrust in this case, not just from the client perspective, but from the enforcement agency's perspective.

The first question, is antitrust in this for the long hall? I can't speak any better than my colleagues already have. They mentioned on the earlier panel that financial services is going to continue to be an area of priority for the Antitrust Division and I think department-wide.

During the last Presidential term, the focus was on financial fraud and enforcement. I have no doubt, given we have the same President, that that enforcement focus will continue. It is also the case that in the New York Field Office, as you have heard, in a lot of the cases that have

been coming out of that office the primary focus has been financial services. I think for those reasons, at least in terms of the long-term enforcer view, for sure the Antitrust Division is going to be looking for ways to be involved in these cases if the right facts arise.

More important, I think, from the outside looking in, is to think about what the Libor cases, the muni bonds cases, other cases mean to the regulated community; because from my view it is going to be less about the enforcers going out and digging out cases. A fraud is a fraud is a fraud, so these things are going to come about. A company is going to find out about it, and then they are going to have to figure out how to do we fix this.

How these things, municipal bonds and others, have changed the landscape is if you are sitting on the in-house counsel ranks, you now have to consider it as an antitrust violation. You now have to look at this and say to yourself: Is there an aspect of this that might be antitrust? Why? Because you'd be doing a disservice to your client if you didn't. You've got to think if there are strategic options available. Do I go to the Antitrust Division for leniency? Do I go to the Division before I run to my regulator? Do I go to my regulator and then the Division? Do I go to the Division and the Southern District of New York or the Criminal Division and others? There are a lot of very scary questions, but it just adds another wrinkle to the mix.

From my view, given that now antitrust has inserted itself in the financial services space, many of the cases we are going to see going forward are not necessarily going to be on the backs of people sitting in the New York Field Office and other places, although they love to see this. It is going to be people in-house. They are going to find a problem and say, you know what, antitrust; I need to go talk to the antitrust enforcers about whether or not I can get leniency or otherwise. And that I think is going to spike the rise of antitrust generally long-term in this space.

Second question I have been asked is what are the strategic advantages? I think there are two. One, the Division has a long track record of dealing with corporations and doing so in a way that is transparent and predictable. So a lot of time is spent at the Division—and I mean a lot of time, and my brethren who are here can vouch for this—thinking about how to do things the right way when it comes to sending a message to the regulated communities. It is because time and again the Division is dealing with corporations, who again, when you are on in-house counsel side, want to understand what's at the end of the tunnel if they are going to start down this road. I think that is an advantage for having antitrust in this space.

So we don't have all the answers yet, but my expectation, if antitrust is going to continue to be an enforcer and a primary enforcer among these violations, that you are going to see more guidance and transparency coming out of the Division as to how these kinds of cases will be handled long term.

The other thing the Antitrust Division brings to the table is resources and expertise. When the Antitrust Division approaches a case, it doesn't approach with one or two attorneys and a few boxes of documents. The Antitrust Division tackles massive cases, terabytes of data, five or six attorneys at a time, economists that come in to look at the economics of it. Why do I think that is an advantage? At least for those of us who deal on the defense side, I think it makes a big difference to be able to come in and have an intellectual conversation about the meaning of a violation, whether it is a violation and what the ramifications of it are with people on the other side who understand the facts as well as you do. So I think long term that is going to be a value to people in this regulated space.

The last issue I will touch on is the challenge. I think this is what Mark Rosman and a few others on the last panel sort of teed up. In this space you are dealing with big banks, financial institutions that are very important to various aspects of the economy, and the kinds of institutions that can't necessarily take something like a criminal hit and often don't when prosecuted by the criminal division and others. That is a problem for the Antitrust Division, because the Antitrust Division has generally not issued nonprosecution agreements, deferred prosecution agreements. This is going to be a challenge, I think, for the Division going forward, figuring out whether or not it is going to have to change that policy in the context of financial services long-term.

The flip side of that is the leniency program. The leniency program, of course, is the crown jewel of the Antitrust Division, and it is a way that the Antitrust Division develops a lot of its leads, and they are really good leads in cases. If I am right about my earlier expectations, a lot of these cases in the financial services space are going to come in through the leniency program.

I think one of the questions with this DPA and NPA issue out there is what the value of leniency is going to look like in this space. Because one of the benefits you get as a corporation coming in and seeking leniency is, of course, you don't get criminally prosecuted, but everybody else does. That is not clear in this case that that is going to happen with respect to other financial institutions that might be colluding with a leniency applicant because of the concerns that come out of the principles of federal prosecution about the ancillary ramifications on the ability of those businesses or financial institutions to continue to do important business. So that is going to be become a real loggerhead at the Division and something they are going to be challenged with. I think there are ways around it. I think the Division will find ways around it and continue to make the incentives positive for financial institutions to come in and seek leniency. But I do think it is an area they need to continue to explore.

MS. MAHONEY: Super. Thanks so much, John.

Karen, do you want to give us the first perspective of someone who is subject to this myriad of regulations, as described by one of the previous panelists as a murky situation to find yourself in.

MS. YEN: I think that is a good word. I said it was challenging, so that is the word I will be using a lot.

Let me first apologize for not being Mark Shelton, who is very sorry he could not be here today. Though I am not Mark, I hope I can share some thoughts from the perspective of an in-house lawyer to a financial institution which has had some experience dealing with antitrust and market regulators.

I will focus my comments today on some of the practical considerations for a financial institution that has made a choice to suffer for and seek immunity pursuant to the DOJ's amnesty program while also seeking to respond to and cooperate with market regulators. This is a challenging, or murky, area with a lot of difficult-to-reconcile and conflicting practices.

Clearly, the DOJ antitrust corporate leniency program represents the most striking difference between the approaches taken by antitrust enforcers on the one hand and market regulators on the other. I won't dwell on the policy itself for too long, but as all of you know, the policy encourages antitrust violators to self-report by rewarding the first in the door.

Whereas, speed is the absolute key in attaining protection from the Antitrust Division, a company generally is not rewarded for being the first to self-report to other regulators. These regulators expect cooperation from the financial institutions that they regulate, and typically you don't get extra points for doing what is expected of you as a regulated entity, i.e., self-reporting any improper conduct.

So a financial institution that goes in first and receives leniency for conduct that falls within the jurisdiction of antitrust authorities, as well as other authorities like the SEC, finds itself in a difficult position. Unless the company decides to withhold certain information and provide less cooperation to the market regulator than it does the Antitrust Division, it will be giving the regulators everything it has submitted to antitrust under the leniency policy but without receiving the same protections from the other regulators. The result is that in the financial services industry, the potential to obtain leniency from the Antitrust Division may be less attractive or certainly more problematic than it is in other industries which don't have the same market regulators.

The practical consequence of pursuing leniency is that one has to provide the same cooperation to the market regulators who offer no amnesty or even credit for such cooperation. Thus in the financial services, self-reporting can be more complicated and more costly, and the burden on a company to engage simultaneously with multiple authorities seeking to enforce completely different regulatory schemes and laws can be significant. This tension presents complications to you and I think potentially dilutes the DOJ's amnesty program.

The different ways in which the market regulators approach investigations and antitrust approaches in the context of leniency investigation makes it a challenge to cooperate. In terms of the type of cooperation that you will have to provide, clearly under the leniency program the leniency applicant has to provide full, continuing and complete cooperation. And I would say this obligation cannot be underestimated by any means. You have to be prepared to devote the necessary resources, which can be significant, and you have to have the full support of the company and its management. As an example, counsel for a company that is seeking leniency might provide extensive oral proffers and share information obtained from interviews.

When you add market regulators into the mix, again regulators who naturally expect the same level of cooperation, the situation is difficult. Whereas, and John alluded to this, DOJ tends to take an approach that they will endeavor not to leave an immunity applicant in a worse place than they otherwise would be, market regulators are not necessarily bound by this same principle. For example, DOJ antitrust operates a paperless process, which means when you cooperate you do so on an oral proffered basis, and this is consistent with most of the other significant global competition enforcers. The Antitrust Division is seeking to avoid requiring a cooperator to create a written record that is discoverable and would put a defendant in a worse position in downstream civil litigation. In contrast to this, some market regulators expect communication to be by letter. They may ask for written presentations or summaries, all of which is potentially discoverable by civil plaintiffs.

The situation is further complicated when you are a global financial institution, like the one I work for, when you are dealing with enforcers and regulators in multiple jurisdictions around the world, which frequently occurs. This raises a lot of issues around, again, inconsistent requirements and coordination between the enforcers and the regulators.

International market regulators often have different expectations of what constitutes good cooperation, and they may have varying sensitivities to the collateral consequences of cooperation. For example, different international market regulators may not recognize the same privileges. They may expect the production of interview memoranda or reports prepared by counsel, and this again presents challenges for the company seeking to cooperate. So here the concerns about the collateral consequences to civil litigation must be weighed carefully against the regulatory relationships you have around the world.

I would say in contrast, the antitrust scheme, although there is a little bit of variation, there is in general a convergence of policies such as the way you cooperate with one antitrust enforcer is pretty much the same as you do with another. And they are mostly similarly sensitive to not wanting to create a written record, for example.

I am going to briefly touch on a couple of issues that are particularly relevant to in-house counsel, which is dealing with your employees and how you remediate problems in the context of these parallel investigations by antitrust and market authorities.

Clearly, a key component of any internal investigation is interviewing employees when you are seeking leniency, and it is especially important to do so quickly and get as much information as you can from the individuals involved. The more cooperation you get from the individuals, the more information you have and the more information the authorities have. In this regard the individual and the company's interests are aligned, in the sense if the company receives leniency, Type A leniency, so do its employees, assuming they provide their full cooperation.

As a practical matter, when you interview employees they should be told of the importance of maintaining confidentiality, that a leak could result in the loss of leniency status and the benefits to both them and the company if we are not first in the door to report collusive conduct. But when there is a simultaneous risk of prosecution from another authority, there is an increased chance that the individual will not feel that their interests are aligned; there will be more lawyers involved, potentially resulting in a less efficient process for everyone. So when individuals face personal exposure with other authorities, normal cooperation becomes much more difficult.

The second point I want to make relates to remediation. As I mentioned a minute ago, until a company receives leniency, conditional leniency, they must keep the fact of the investigation known to a very small group in order to prevent leaks, which would jeopardize your leniency. This may impact a company's ability to fix the problem, to take action against the wrongdoers and to develop appropriate monitoring and training programs necessary. So in this regard, again personal actions and other remedial efforts have to be undertaken very carefully and often in consultation with the Antitrust Division.

Another point is the company will not be able to reach out to former employees who might also be critical to the internal investigation and to our understanding of the facts without prior consent from the authorities.

The last issue I want to discuss was around confidentiality and waivers. Again, here the DOJ policy is to protect the confidentiality of the investigation, including the identity of the leniency applicant and information produced in connection with the application. This is true, unless the leniency applicant gives them permission to speak to another authority. This waiver concept is well established in the antitrust enforcement world and is intended to promote and facilitate cooperation between the different enforcers. However, antitrust authorities may expect confidentiality waivers as an aspect of good cooperation required for leniency. They may also seek confidentiality waivers to talk to a jurisdiction in which the company does not have leniency or even to speak to noncompetition authorities. This again potentially undermines the purpose of the amnesty program, which is to protect the confidentiality of the cooperator, and is another example of a potential mismatch between antitrust and market regulation practices in an enforcement context.

In conclusion, I think it is clear that the tension we see in the antitrust enforcement authority world and market regulation is something we will continue to see where you have collusion in the financial services industry. I am not saying here today that one enforcement regime is better than the other. I think the regulators are carrying out their responsibilities consistent with their policies and with their authority and within their legitimate interests, but really the challenge falls on those of us who represent companies to navigate these pitfalls responsibly and carefully.

MS. MAHONEY: Thanks so much, Karen. Holly, how do you see the policy orientations and the pitfalls that will result from those?

MS. KULKA: It is scary, right.

So let me add a little bit to my background. I also was an AUSA, so I have spent a chunk of time being a typical line prosecutor, a chunk of time at a big law firm defending individuals and entities in all types of matters, criminal, civil and regulatory. And now I have been in-house for five years working for a financial service company. So I have a little bit of every perspective. I come at this a little bit differently from the prior speakers. I am not here to talk about being a target or being a prosecutor in that way. Rather I am here to talk about the collateral damage of a highly regulated organization, of which my company is one. We are very, very regulated by a number of entities and how difficult it is on a day-to-day basis. Again, not criticizing, but there are a lot of pitfalls that companies and their counsel have to be aware of because business people are not expert in this area.

By way of background, since this is not necessarily a group of people who are in the financial industry, I work for NYSE Euronext. People think of us as a government entity, but we are not. We are a Self-Regulatory Organization. We are a public company, and as a public company we face all the hurdles of other public companies. We are a special public company, because we have this Self-Regulatory Organization, SRO, status, so we are very, very highly regulated by the SEC, to the point where we interact with all areas of the SEC—not one area—all levels of the SEC, from the Commissioners down to ex-

aminers, lawyers, anything you can imagine, on a day-to-day basis, often in real time. During market impact there can be an open line with the SEC for hours on end. There could be a hundred calls to ten or twelve people in my company. So we have this constant relationship with the SEC, which some days it is good, and some days it is bad. It is kind of like a match.

You should know that the SEC, part of its mandate—obviously it is mandated to protect the markets, etcetera, but it also has a requirement to consider efficiency, competition and capital formation and most other things like that. So it has a lot of the same interests as the Department of Justice.

So here we are, we sit in the middle of it, and we are routinely talking to the SEC informally, at their request—sometimes at our request. Saying there is this policy issue. There is a new product out there. There is an existing product out there. There is an issue, the market structure is changing. The players are changing. How should we deal with this? They want us to deal with a new product. They are uncomfortable with an existing product that has been around for a while, and they are considering asking us to withdraw the product. We always listen to that, sometimes we do, sometimes we don't. But we have concerns if it is an important product, if you want us to withdraw the product, we have competitors or other exchanges out there, and how are we not at a competitive disadvantage? What's going to happen with our competitors who have the product out there? They say to us we are asking them to withdraw the product too. If they don't agree, what's going to happen? They tell us go speak to your competitors and work it out.

Well, it is quite possible that is okay, really if there is a record of that. Is the Department of Justice going to come after us because the SEC asked us to do something informally? But maybe not. Maybe the staff level person we are dealing with hasn't thought it through. Maybe it is not really a Commission mandate. Of course they speak on behalf of the Commission, but some things go up and some things don't. Maybe it is a just a preliminary discussion. So we are in a situation, and these discussions could happen with the business people. Are the business people attuned to these issues? They may not care that much. Maybe they have been thinking that withdrawing the product just makes it easier.

Everything we do is by rule.

It is a very formal situation. Every one of our products, many of our products are only offered pursuant to a rule that is filed with the Commission that is subject to notice and comment and it is well-publicized to any market participants. So if we do a withdrawal, it would be the same way, we would withdraw it quite publicly. The SEC would have to weigh in on it to some extent.

These are the issues that we deal with day-to-day. Is this good? Is this bad? Maybe in the past we would not be as concerned, but now that we hear that the antitrust authorities are much more interested in the financial services sector, then we have to be that much more cautious. Notwithstanding the fact that we are trying too appease one regulator who we live with. This is the regulator we have to deal with all the time. It is most important to make them happy.

But at the same time we have this scary regulator over here who has other jurisdictions, appropriately, and how are we supposed to deal with that? If we don't have a written record, people move on at the SEC and all these government agencies all the time, it becomes history. What's the story, who remembers the exact story? It is really a rock and a hard place, I think.

Just as an example of how complicated it is now, you probably all know that there is an SEC-sponsored entity that collates, accumulates and sells market data. It is required. It is the main way by which market data is disseminated these days. It was mandated by SEC a few years ago to kind of bring together a fractured market. The SEC sits on that entity, as well as a number of markets and all the exchanges and helps develop a very, very complicated pricing structure and is there for all the meetings, and it is relatively transparent. So that is an entity that is sitting right in the middle and it is very, very important to a lot of SEC's principles.

At the same time the exchanges sell another set of market data that competes with this, the Consolidated Tape Association. So that is procompetitive, right; it forces this Consolidated Tape Association to make sure its prices are appropriate and that there is a competitor out there that maybe can do 90 percent of what CTA does, so it certainly puts pressure on. And that is very precompetitive; at the same time it is very awkward because it is unclear how happy the SEC is with all the competitive market products that are out there. Again, another rock and a hard place, and we are in the middle and we don't necessarily know what's the best. I don't even know if there is anybody in the SEC who has a firm feeling for really where this should go. Because they have their own issues internally, because they do have these requirements that may be even for them a little inconsistent or conflicting.

MS. MAHONEY: That is super. Thanks so much.

I think, Mike, she has teed up a number of questions for you.

We will let Jonathan speak, and then we will give you a chance to address some of those.

MR. ARNOLD: Thank you.

Today I am going to speak from a somewhat different perspective, as you might imagine, and talk about legal clarity, inadvertent misconduct and how to better define

the contours of prohibited conduct, and a little about the cause and benefits.

This is unfortunately the point of view of an economist, and there are many considerations that lawyers have above and beyond what I am going to talk about today. I notice that Karen actually gave some points that I think weigh against some of the things I am going to say, so I fully recognize that it is a complex problem.

Before I start I will just give the usual disclaimer. What I have got to say does not reflect the policy of Attorney General Schneiderman or New York State or obviously the Attorney General. Sometimes I wonder if my comments even reflect my own views, but having come from the private sector over to the public side, things do look different. I see different information than I did, so even for a Chicago boy, such as myself, opinions can get updated.

Antitrust laws are, of course, intended to promote competition and efficiency. Securities laws and regulations are designed in part to promote transparency and sometimes to assign responsibilities to market participants. So in that respect I do not see they are in conflict as to overcrowding, which is the title of this session. To the extent that they do conflict, *Credit Suisse*, I think, at least attempts to address that. So I don't see the existence of antitrust and securities applying to Wall Street as a source of overcrowding. That is a different question from whether or not we have overcrowding in the sense of too many antitrust laws or too many securities laws and regs. That is not something that I am going to discuss today.

What I do want to turn to though is that at least as important as the number of laws governing conduct is the meaning and clarity of them. We are after all in the antitrust realm, seeking to promote maximum quantity and assortment of output given scarce resources. Vague rules can drive firms to depart from the optimal path and reduce output, because they are trying to avoid inadvertent violations of the law and the attendant prosecution. That is a cost.

We heard from Harry First and Mark Patterson today about some of the sources of that vagueness or fuzziness could be new products, like information that we discussed. It could be well-known products that are the source of antitrust scrutiny that result in confidential settlements which are not generally known to all market participants. That is also a cost and helps contribute to the indeterminacy that I am talking about.

I have heard from many people, both when I was in the private side and also in the public sector, that the contours of prohibited conduct are getting fuzzier over time and not clearer. This is of course a problem generally, but I think it is especially costly when it comes to Wall Street and financial services because of the volume of economic activity that takes place on Wall Street. So a minor variation multiplied by a really large amount of economic activity, and obviously it is going to impose a greater cost on society.

Now this fuzziness can arise from honest disagreements about the meaning and scope of various laws and regulations, as well as creep into new products that have not been litigated previously. This I think creates a situation in which firms can inadvertently wander into misconduct that is going to get prosecuted. Firms will try to operate within the limits of the law, but fail to do so because of the gray areas that exist.

So what to do with this? There are a variety of ways that one can handle it. You can have public pronouncements by regulatory and enforcement authorities as to what the rules mean. That is valuable. I think it will probably happen more often, but it comes with the risk that policies can change over time. There is an old saying that questions are a burden to others and answers a prison unto oneself. In that respect taking cases to verdict and getting published opinions actually binds people going forward, illuminates an area that previously might not have been understood totally or very well at all, and that is valuable. Now public goods, by their very nature, are under produced by the private sector. I would not expect private litigants to take cases to verdict in order to contribute to the general knowledge of society. But enforcers have a different objective, or at least should, I think. And that is not just to get a good result in a particular case, but also to provide more information and clarity as to what the rule is to everybody. So I think that that raises the question of whether or not enforcement authorities should as a matter of policy take more cases to verdict, even if they lose. Now this is not something that enforcers want to do obviously. They are people, too, and like to win, but they might have an incentive to settle a case to avoid a loss. So it takes some discipline and policy mandate to be willing to take cases to verdict, win or lose, in order to introduce more clarity into the system.

One other area I want to touch on, that is actually unrelated to the fuzziness point, is intentional misconduct. Now intentional misconduct obviously does not occur in the gray area that I am talking about but within the area where people pretty much agree that some sort of action or conduct is prohibited. So why would someone engage in intentional misconduct? Economists would say because the expected cost is not high enough compared to the expected benefit. So someone who would do it either expects not to get caught or expects not to pay a particularly high price. Or more precisely hopes he won't get caught, but if he does, hopes that his employer will litigate it for a few years, pay a fine, while the individual is betting his bonus on some sort of enjoyable consumption activity.

Now that leads me to the question of whether or not some greater portion of enforcement resources should be devoted to prosecuting individuals, either civilly or crimi-

nally. It sidesteps the issue of the too-big-to-sue question that people have mentioned earlier today. It also zeros in on the fact that it is really not corporations that are violating the antitrust law; it is individuals that are picking up the phone and coordinating a price or engaging in some other activity. If we can deter that conduct, it will save a lot of people a lot of mishegas and a lot of costs, suffering, that we as enforcers are trying to deter. And when we can't, we are trying to mitigate.

MS. MAHONEY: Okay, super. Well, that raises a lot of questions in and of itself.

But I want to give Mike a chance first to respond specifically to some of the issues that Holly raised: When your company is working closely with a regulator in an area and may impose perceived or actual anticompetitive impacts, and how do you align those instructions from the securities world and the antitrust world simultaneously.

MR. OSNATO: I think the short answer is note to file. If you get a call from someone at the SEC and they ask you to go set down with NASDAQ and have a cup of coffee about a product, note to file.

I understand the issue. I frankly don't touch that part of the SEC. I try to avoid it. I am more on the investigation and prosecution side, but it is a real issue. I understand it. We should be made sensitive to it, to the extent we are not. It is an important point. I think, to understand from the Commission perspective, I come at it from the investigative perspective, the prosecution perspective that is the enforcement side. But the Commission sits on top of a lot of divisions that consider policy, and the idea and hope is that by the time a communication like that happens, it has been vetted across the different constituencies in the Commission, and it reflects a reasoned view, and it gives the market participant a degree of comfort that they ought to go out and do it without fear there will be repercussions, and if there are, we will not shirk from saying hey, we set this ball in motion.

MS. MAHONEY: When do the Antitrust Division and the SEC talk to one another? When there seems to be some market activity that indicates that there may be some discussion or alignment or tacit or explicit collusion? And how does that information get communicated to the target? Or does the target stay in the dark until at some point the government decides to share that?

MR. OSNATO: I think to answer the latter question first, it depends on the nature of the investigation. If it is covert and you are dealing with a whistleblower or a complainant who has brought you information in confidence, then to the extent there is discussion and dialogue between agencies, it will remain invisible, not subject entity, and that is the way it should be.

As far as how often the dialogue happens, I mean to circle back to what I said in the beginning, I don't know if Libor is an anomaly, but certainly in my time at the SEC I have not in any substantive way coordinated with the Antitrust Division. New York has a little bit. So I don't think this is a phenomenon that is going to gather tremendous pace. It will happen because we are in New York, and when the dialogue does happen, it happens because we are always speaking about institutions. We may at the SEC get a phone call from someone at DOJ that says give us a feel for what you have in your pipeline investigations about broker-dealer X, and we will go take a look. And that is the kind of discussion that often sparks well, we are looking at them too, so let's sit down and talk.

MS. MAHONEY: John.

MR. TERZAKEN: Just a slightly different perspective. I agree, and I think historically there hasn't been a tremendous amount of coordination between the SEC and CFTC for that matter and antitrust specifically, because we didn't have these kinds of cases arising. There wasn't much need to talk, because it wasn't as if the Antitrust Division was viewing these types of things as market manipulation and securities fraud as antitrust cases. So it didn't make sense that you would have to cross wires. I think where appropriate, and there have been cases of course, there is a lot of coordination. And as Mike says, it just depends on the way the case comes in and the nature of the case.

I do think though one difference I would bring is there is going to be much more coordination on this front. And again, it goes back to the fact I was mentioning earlier, not so much because antitrust is going to be reaching out and grabbing misconduct, but because now that antitrust is on the radar screen, in-house counsel are going to have to seriously consider whether antitrust is making a strategic play for making and reporting these allegations. It is a pretty difficult decision to make if you are in-house counsel. If you find a violation that you now think may constitute antitrust, if you don't run into the Antitrust Division and seek leniency, or decide what is that worth, the person you are colluding with very well may, and you've lost a significantly huge benefit. In my opinion that is what's going to drive more of this these cases and more of this discussion. Frankly, it is going to mean the Antitrust Division is going to have to be pretty tightly netted with SEC and FTC in the future.

MR. OSNATO: One quick point, if I was at the Antitrust Division and I got a tip about some information about misconduct by a market participant or broker-dealer, the first call I would make would be to the SEC, because at least on the exam side they are sitting on a tremendous amount of information about that business, everything from emails to IMs to the core data, and that lets you kick the tires internally on the government side before you take the next step.

MS. MAHONEY: Karen, I think you touched on the question of whether there is a tremendous benefit if you go in and where the incentives are aligned and possibly not aligned, particularly as between the individual and the

entity. So is John's answer sufficient to you in that regard? How do you do that as a practical matter?

MS. YEN: No, I don't disagree with what John said. I think the benefits are obvious and great, that if you are the first in the door you potentially could get leniency, and if you don't, you find yourself kicking yourself down the road for not having gone in first.

As I tried to articulate, though, I think that comes with challenges. Because you will have gone in first, you have to then self-report to your market regulators, and all of a sudden you are dealing with four different authorities plus market regulators wanting information all at the same time. You have individual employees who aren't going to be so willing to talk with you if they realize and understand that you are going to turn around and provide that information to a criminal prosecutor. So that is a challenge.

I think ultimately if you have an antitrust problem, you would really have to think hard about not going into antitrust because the benefit is so great of getting in there quickly.

MS. MAHONEY: Is there solace in the fact that so far there has been no criminal prosecution of financial institution companies? So that what the companies are looking at is a potential fine situation, but they are not necessarily getting the advantage of not being criminally prosecuted where their non-financial institution colleagues may be looking at a criminal prosecution. Does that impact the analysis?

MS. YEN: I think it does. Although, do you mean there haven't been criminal prosecutions by antitrust against financial institutions?

MS. MAHONEY: Right.

MS. YEN: Yes, that is definitely something that we consider and think about. I would hate to be the entity that is the first to be criminally prosecuted, though, as someone who did not get leniency. That is definitely an incentive.

MS. MAHONEY: John.

MR. TERZAKEN: I think the important part is that, one, you don't know what's going to come out the other side. So it is not exactly clear that this NPA-DPA issue and leniency are always going to shake out and that criminal prosecutions aren't going to be warranted at financial institutions. Maybe that will continue, maybe it won't. I am not sure you want to be the first to test that.

The second issue I think is just because you don't necessarily get criminally prosecuted down the line doesn't mean the penalties you may incur by way of NPA or DPA being the not first in the door may not be significantly higher than perhaps you are going to get in a criminal fine by being a leniency applicant. So there are other incentives that come into play for going in for leniency than just the criminal pass.

MS. KULKA: So all you guys, there is this issue of having many, many regulators and the leniency policy may not be as valuable to the other regulators. If somehow or another we manage to get the U.S. law enforcement agencies to cooperate on this somehow, or other states are involved, is that enough because of the international perspective?

MR. OSNATO: The short answer is it depends on what international regulator you are talking about. Frankly, speaking for the SEC, I think we have excellent relationships with the regulators in the major financial centers, the FSA in the U.K., the SFC in Hong Kong, and we do a tremendous amount with them and can often synchronize and coordinate, and these cases require that.

Beyond that, the short answer is, for example, if you are in China, it is a different question. So it depends on where the conduct took place.

MR. TERZAKEN: My view on it is that is a really tough question and particularly in this space, because financial services touch all kind of counter-parties all over the world. The problem in antitrust is you've got over 115 regimes of antitrust laws—at least 30 to 40 that actively pursue cartels on a regular basis, and ten of them that will significantly penalize you if one of you is playing in this space pretty regularly. So if you have an antitrust problem, it usually means you are not just dealing with the U.S., but you've now got to deal with five, six, seven other regulators where significant penalties might occur. It is a big proposition.

We touched on this a little from in-house counsel side. It is not a decision you make lightly, because although you may cure your U.S. problem, you are going to invite a lot of regulators to the table from all over the world. While they try to coordinate, they all have their own mandates, and they all have their own penalties and they all have their wants and dislikes, and they don't always align.

MS. MAHONEY: Jonathan, you drew a distinction between inadvertent violations and purposeful or intentional violations and the enforcement perspectives of those two things. In this space, I am sure sometimes it is obvious, but the idea of going after individuals for conduct that they may not have realized was inconsistent with the antitrust laws, when they thought they were complying with one of their other regulatory requirements, how does that comport with a sound public enforcement policy?

MR. ARNOLD: Well, I think the distinction is between the public good aspect of it, of getting an answer to a question that had previously not had one. I guess the fact is that there is some poor guy who is on the receiving end of a prosecution from an enforcement authority. I mean this happens in other areas, not just antitrust.

My point is from the point of view of social value. I understand that these are also individual people, and it is a miserable thing to be upon the receiving end of a litigation when you didn't even realize you were doing something wrong. But just having an investigation and a settlement that is not public helps address your point, but it doesn't do anything to help resolve uncertainty going forward, which I think is the bigger issue.

MS. MAHONEY: And then of course there are scarce resources that you also need to deal with from the government perspective. A loss is one thing, but to choose to take a case through a whole trial, which has expenses and its own set of ramifications, how does that factor into your analysis of the value of the public good of a trial in this context?

MR. OSNATO: Well, it is certainly much more expensive to take a case all the way to verdict. I think that is clearly a factor that enforcement authorities are concerned about. I am not suggesting that we cut the number of cases that we do by 90 percent and take the remaining 10 percent all the way no matter what, but rather raising a question of whether or not there should be an adjustment and a tilt towards taking more matters to verdict in order to better delineate the contours of prohibited conduct.

MS. MAHONEY: I have a few more questions, but I would like to put it out to the audience. Are there any questions for any of the panelists?

Eric.

MR. STOCK: I have a question maybe for John, but anyone feel free.

Given the concerns that people have raised about indicting of financial institutions, does it in some ways make more sense to pursue antitrust cases in this industry civilly instead of criminally, and has that been discussed at the Antitrust Division and/or what would be would the implications of that on the leniency applicant? What happens when a leniency applicant comes in and you decide you want to pursue that case civilly, if that ever could happen?

MR. TERZAKEN: Well, the technical question first. If a matter is civil, there is no leniency. Leniency is a criminal concept; it is a way of carrot-stick approach to getting someone to come in and self-report. It doesn't apply in the civil context.

In terms of the civil-criminal distinction, there is a very clear set of conduct that has been laid out that is pursued criminally versus civilly. So the Division guards that very closely, and the reason why is because there can't be confusion in a regulated community about what is criminal and what is civil.

So I don't ever see the Division sitting down, and it has never happened to my knowledge and hopefully not since I left, of people musing about well, maybe we should use the civil tool here, because although this is clear price-fixing conduct or clear bid-rigging conduct, it would be a kinder, gentler way to deal with this industry.

I think the short answer to your answer is no. I think if they find price-fixing, bid-rigging conduct or market allocation, they are going to bring a criminal case. If they really decided this was a space they don't belong in, then I think the decision would be we are not just going to put an antitrust violation on what could otherwise be prosecuted as wire fraud or something else.

What you would more likely see is just a withdrawal from antitrust in the space. That hasn't been the case though.

MS. MAHONEY: Holly or Karen, are those lines always so easily discerned when you are in this environment and you are talking to the business people and you are trying to figure out whether you are looking at something that might be a criminal or a civil violation?

MS. YEN: No, it is not. I was having a side bar with John before we walked in. It is not always so easy to articulate that difference to the business. And one of the challenges that we have on the in-house side is really educating the business about what is antitrust? That is a concept that people in the financial industry don't spend a lot of time thinking about it. So I think as these matters become more common, even though that is not what we want to see, the proper education of the business is a critical aspect of that.

MS. MAHONEY: Holly, did you have anything to add?

MS. KULKA: No.

MS. MAHONEY: One of the things that happened a couple of years ago, of course, is the New York Field Office of the Department of Justice Antitrust Division got a civil mandate for the first time in about 25 years. At the same time, more or less, they were also tasked with very increased oversight of the financial services sector. To any of you, how do you see that playing out, the civil side of the investigatory work and the pursuit of those kinds of cases from that office? And maybe more generally, what should it be, what should the role of that office be?

MR. TERZAKEN: I'd be happy to speak to it. I am the antitrust front.

To say the New York Field Office, like all of the field offices, got a civil mandate recently is probably not exactly accurate, because it has always been the case. San Francisco is a good example of a field office being asked to participate on a civil level on a variety of investigations.

I think what's happened over time by way of practice is the field offices traditionally have been utilized to do criminal work. And that has become a very specialized area, and the field offices really targeted that. The lawyers

who grew up in those offices were really criminal prosecutors, not necessarily civil prosecutors. I think what it changes, and I think it is a positive change, is you are going to have people locally dealing in the local markets and see activity that goes on in New York and they are going to understand it better. It is the same reason why SEC has offices in New York, and the CFTC has offices in New York, and people put offices in various locations in hot-button markets, because you need to understand the market and the activity and have boots on the ground and be able to address it.

So I think from a civil capacity it will help. But do I think the New York Field Office is going to wind up doing all the mergers coming out of New York? No, it is a resource issue. The brain trust that is the merger outfit and the boots on the ground really sit in Washington. But in terms of having somebody local, that has expertise, that can help to prosecute the case, can do depositions, who can try the case, I think that is where New York comes in.

In terms of financial services, I mean you got to hear the accolades of the New York office over the last year on the last panel. It is pretty remarkable. Over the course of the last two years the New York office has reemerged on the map as a litigation powerhouse, as least as far as antitrust. It had some really big high-profile cases. I think that is a great thing for the Division, particularly at a time where antitrust is coming on the financial services scene. If you are going to be in financial services, you have to be in New York. Any of you who practice in the market know that. So I think this office in New York is going to continue to be a very strong and visible one in the Division going forward.

MS. MAHONEY: Any other comments from the panel?

Yes, question.

AUDIENCE MEMBER: I was going to say in my perspective, contrary to what was mentioned earlier, having worked in the Antitrust Division as an economist 15, 20 years ago, the Division was heavily involved with the SEC on matters like NASDAQ and exchange investigation, it was in very close contact. I can recall literally a T-1 line running from the SEC to the economists' shop at DOJ.

What really made a difference was *Credit Suisse*, and maybe other decisions that said with respect to conduct and that conduct wasn't egregious per se, but there was an argument that it was immunized.

I would be curious how people's thinking on that question maybe has evolved or changed, or maybe it hasn't.

MR. TERZAKEN: Feel free anybody to take that, anybody who wants to cross *Credit Suisse*.

I think the short answer is the thinking hasn't gone much further than *Credit Suisse*. *Credit Suisse* still applies, right. I think that thinking is going to continue, particularly in the civil space, but true in the criminal space as well, to the extent that it appears that the conduct that is at issue is somehow covered by regulation.

To me it goes back a little bit to this question we asked about, well, if the SEC goes and asks me to do something and I go and do it, are you going to turn around and prosecute me. The answer to that, as a practical matter, is no. That is an ugly case for the Antitrust Division to make. I certainly wouldn't want to be the one prosecuting that case. I think when you get into a heavily regulated area the big question is going to be is what you are looking at is a fraud, whether you place an antitrust label or some other fraud label on it, you are going to know it is a fraud. The only question is who is involved in it. When you get down to the bottom of a lot of these cases, muni bonds, Libor, there is no question that what went on there is a crime. The only question is would you call it antitrust, wire fraud, or should you call it something else.

I don't know if this directly answers your question, but I don't think the Antitrust Division is perceived as trying to work its way around *Credit Suisse*. I think the bottom line is it is just a different area in the sense of looking at these kind of cases with an antitrust lens as a fraud. Typical fraud cases are now going to have to be viewed from an antitrust lens.

MS. KULKA: From an in-house perspective I take a lot of comfort from *Credit Suisse*. There is only so much you can rely on in a case. But it allows me, notwithstanding my comments, to say well, okay, if this is something the SEC really wants and we have it documented, maybe we should do it, at least raise the issue with them. But at least I can rely on that. It is when things are more fuzzy, how formal of a request is it, how important is it, is everybody on the same playing field understanding who is being asked, that is when you just don't know. But I take great comfort from counsel based on that.

MS. MAHONEY: Are there any other closing thoughts that any of the panelists would like to share with us this afternoon?

All right, well, I think that we borrowed a few minutes, but Eric is suggesting that we are done. Thank you so much.

(Applause.)

MR. STOCK: Many thanks to Stacey. This was a great panel. Thank you for joining us.

(Coffee break.)

The Dispute Over "Reverse Payment" Settlements in Pharmaceutical Cases: Will the Supreme Court Have a Cure?

MR. STOCK: Thanks, everyone. We are going to start with our Pharma panel, also called reverse payment panel or pay-for-delay panel—no, we don't call it pay-for-delay. Depending on who you are, you can use different words.

I am very proud of this panel, because while the issue of so-called reverse payments has been percolating for quite a long time, it has never been bound for the Supreme Court until now. So this is an extremely timely panel, and I believe it is actually the first panel that has been convened to discuss the so-called reverse payment issue since the Supreme Court granted cert in AndroGel. And I say that with what I call ostrich-like precision; absolutely no attempt to verify that there have been no other panels until today. But I asked Eric, and he agreed.

MR. GRANNON: So it must be true.

MR. STOCK: Yes. I also want to say that I am sure this is the first panel convened on this issue since the FTC filed its brief on Tuesday. We do have copies of that brief.

Thanks to Elinor for organizing this program. I will introduce Elinor, who will then introduce the rest of the program and moderate.

Many of you know Elinor extremely well. She is a long-time supporter of this Section, and she has been one of the leaders at the New York Attorney General's Office Antitrust Bureau for quite a long time. She has been extremely active in health care cases, and we really appreciate that she put this panel together for us. I now turn it over to Elinor.

MS. HOFFMANN: Thanks very much.

So this is the very last panel of the day. The only thing that stands between you and your first drink or dinner. So it will be fun.

Our issue is the legal standard applicable to reverse payment settlements. I am going to use the term reverse payment. I think that is pretty neutral. It is an issue that is before the Supreme Court now, as Eric said, in *FTC v. Watson*, which I am going to refer to as the AndroGel case.

First of all, introductions. Robin Adelstein is Vice President and Associate General Counsel at Novartis, and she oversees their entire litigation portfolio, including all the antitrust issues.

Then we have Eric Grannon, who is second to my left there. Eric is a partner at White & Case in Washington. He represents one of the defendants in the AndroGel case and is counsel of record in the Supreme Court.

Third, I have got Markus Meier here to my left. Markus is an Assistant Director of the Bureau of Competition at the Federal Trade Commission. Markus is in charge of the Health Care Bureau, and he has been at the forefront of litigation that the FTC has brought on this issue over the past decade. And the FTC is the petitioner in the AndroGel case.

Finally, Bernie Persky, over there, down at the end. Bernie is a partner and Co-Chair of the firm's Antitrust Practice Group at Labaton Sucharow, here in New York. Bernie has represented private plaintiffs in class actions on the reverse payments issue in cases like the *Cipro* and *Tamoxifen*, cases that those of us who work in the area are very familiar with.

Before we go further, just a disclaimer that I am going to try and do on behalf of everybody. Every person on this panel, including me, is speaking only for him or herself, and nothing they say here, nothing anyone says here today should be attributed to an institution, government agency, firm, client or other organization with which he or she is affiliated.

The structure of the program is: I am going to do a five-minute overview of what a reverse payment is, for those of you who are not familiar with the concept. Then we are going to have an interactive discussion, followed by any questions from the audience.

So what is a reverse payment settlement? Here is the typical fact scenario. There is a brand company, it has a pharmaceutical product on the market, and it is covered by a patent. A generic company wants to market a copycat version of that product, a bioequivalent version of that product. It seeks approval from the FDA, a fast approval process or a speedy approval process—nothing is fast in this industry—that is set up by the Hatch-Waxman Act.

So generic files for approval, and if it wants to market its product before the expiration of the brand's patent, it sends the FDA and the brand company something called a Paragraph 4 Certification. It is called Paragraph 4 because that is the relevant subsection of the Hatch-Waxman section. But the Paragraph 4 Certification says you, brand, your patent is either invalid or uninfringed, so I get to market.

Now you can think of that as kind of a constructive act of infringement, because under the statute the brand

gets to sue the generic for patent infringement, even though the generic isn't on the market yet. It hasn't received approval. So brand sues generic, and they litigate. It is patent litigation, which is expensive, long, complex, and then they settle. In this kind of settlement, a reverse payment settlement, the brand pays the generic money, cash, or maybe offers it some consideration that is also of value to the generic. And the generic agrees to come in with its generic product at some date that is earlier than the termination of the patent, but some date after the settlement date. So, somewhere between settlement date and patent termination. That is what a reverse payment settlement is.

If you strip away the patent, the Hatch-Waxman Act and the fact that it is a settlement, if we looked at this in any other context, what we have are two competitors, or one manufacturer and a potential competitor agreeing not to compete or not to compete for some period of time, and it would raise antitrust questions.

There was a case in the Supreme Court, *Palmer v. BRG*, which had some of these issues. That was back in the '90s, and I think it will come up in the discussion.

So that is what we are talking about. Now, the FTC, private plaintiffs and the states have attacked such settlements under the antitrust laws multiple times over the past decade. Right now there is a split in the circuits. The Eleventh Circuit, which is the circuit in which the AndroGel case arises, the Second Circuit and the federal circuit all have adopted a test called the scope of patent test. Meaning you, antitrust plaintiff, have no case, you are out on a 12(b)(6) motion to dismiss, unless you can plausibly allege that there is fraud in the litigation, that there is fraud in the underlying patent litigation, or that the agreement went beyond the scope of the patent, meaning it went beyond the temporal scope or the subject matter scope of the patent.

The Third Circuit is taking a different approach. The Third Circuit, in a case called *K-Dur*, last year took the view that these agreements are presumptively unlawful and as a rebuttal of presumption, the defendants have the right to rebut that presumption by showing that there is a procompetitive benefit to the agreement, or that payment is made for something other than delaying generic entry.

So that is kind of where we are now. In the AndroGel case, as Eric said, the Supreme Court granted cert. Arguments are March 25th, and we should have a decision in June.

So that is all I am going to say, other than ask questions.

Markus, can you tell us in a few sentences what the government's position is.

MR. MEIER: Let me actually start by saying thanks to the New York State Bar for inviting me. It is nice to see a lot of familiar faces, some of which are friendly, and it is also nice to see some new faces too.

I do have a couple extra caveats that I have to add. In the Supreme Court the FTC is represented by the Office of Solicitor General, so it is the Office of Solicitor General that handles that appeal. The brief was filed by the Office of Solicitor General, so I don't speak for them, nor do I speak for the FTC. If you really want to know what is going on and what the position of the government is, read the brief. It is all in there. I am not going to elaborate on anything that is in the brief, so anybody that has had a chance to read it, don't ask me a specific question about what a specific line means, because I am not going to answer that. And anybody who draws any inference that anything I say is inconsistent with anything in the brief, that inference is incorrect.

(Laughter.)

Lastly, I see that this is being stenographically reported. If Eric Grannon asks for an expedited copy of this transcript, let me know, please, because he still has to file his brief.

So what is the government's brief about. Basically, normal antitrust principles—and since this is an antitrust audience they should be familiar to this audience, normal antitrust principles condemn agreements where a competitor pays another competitor not to compete. That is pretty straightforward, Antitrust 101. Hopefully everybody understands that and grasps that.

What this brief and these cases really reflect is should that normal antitrust principle be different when the agreement arises in the context of a settlement of patent litigation between pharmaceutical companies. As Elinor indicated, a number of courts of appeals have said yes, it should be different when it arises in the context of a settlement of patent litigation between pharmaceutical companies. Court of Appeals and Third Circuit said no, and what the government's brief says is no; no, it shouldn't be different. The normal antitrust principles and normal antitrust economics ought to apply here, and it doesn't really make a difference that this arises in the context of a settlement of patent litigation.

What the government advocates for and what the Supreme Court will hopefully resolve is whether a reverse payment should be treated as presumptively unlawful. That is the position that the government takes in the brief. It should be presumptively unlawful when a brand company pays a generic to stay out of the marketplace. The government advocates that they should apply a "quick look" rule of reason, as established and set forth and elaborated on by the Supreme Court in the California Dental Association case. The government then goes on to establish why that is absolutely consistent with well-established antitrust law, principles and economics. Why it is also consistent with the Patent Act, despite arguments

made to the contrary. And why it is also very consistent with and in keeping with what Congress was hoping to accomplish when it passed the Hatch-Waxman Act in 1984 and introduced procedures to try to get generic products to the market sooner.

Lastly, the government's brief goes on to describe why the so-called scope of the patent test, which Elinor described briefly a few minutes ago, why the presumptively unlawful approach is superior to the scope of the patent test, which as the *K-Dur* court Third Circuit had recognized basically insulates reverse payments from the application of antitrust law at all, and I think that is correct. So we reject the scope of the patent test, and we tell the court why we think that is not a good test to follow. And then the brief also tells the court why yet another standard that has been proposed and has been discussed in some briefing and by some courts at some time which is that you should have the antitrust court do an after-the-fact analysis of the patent and decide who would have won the patent case had the parties not settled.

The nice thing with the case going up to the Supreme Court right now in AndroGel is nobody is advocating for that position, but it is nonetheless discussed in the brief, because it has been discussed before; shouldn't we just resolve who would have won the patent litigation, and that will tell us after the fact whether the agreement would have been anticompetitive or not.

With that overview I am going to stop.

MS. HOFFMANN: Bernie, you are not in the case before the Supreme Court, but I know you have some views on what the Supreme Court should do here. So what are they are?

MR. PERSKY: Well, I like to think I am speaking for the plaintiff's bar, but put that aside.

I agree with the government's position, but I would go a bit further. I agree with the Third Circuit's approach of presumptive unlawfulness of a reverse payment, but I think that not taking into account the amount of the reverse payment as an express factor to look at is a serious mistake. I think there should be a safe harbor, for example, where the reverse payment is less than the brand name drug company's litigation cost. That should be per se lawful. I don't think anybody should worry about that. But on the other hand—and we have been involved in cases where we have expressly alleged this—some of the reverse payments in these cases are alleged to be even greater than the amount that the generic drug company would have made had they won the litigation, struck down the patent or proved that the patent would not have been infringed and gone to market. It can be determined how much the generic would have made. But if the brand company is giving the generic more than the generic would have made had it won the case, I don't see why the benefits of settling federal litigation would even apply. That to me is very close to a bribe. In my humble opinion, if the amount of the reverse payment can be objectively determined to be more than the generic would have made had they won the case, that should be per se unlawful—forget about presumptively unlawful, that should be a per se rule. So I would look at the amount of the reverse payment in addition to the *K-Dur* rule.

MS. HOFFMANN: Thanks very much, Bernie.

Eric, I know you can't speak for all the defendants, but—

MR. GRANNON: I can't.

MS. HOFFMANN:—but for yourself.

MR. GRANNON: I am not even speaking for myself.

All the caveats that we outlined earlier, this is really obviously just for educational purposes. So we will be commenting more generally than we would in a court filing.

With that caveat I want to briefly touch on three problems with the presumption that the Third Circuit adopted and the FTC is now advocating in the Supreme Court.

First is that presumption gives no weight whatsoever to the lawful restraint that a patent entails. Under the Third Circuit's presumption, the settling parties are presumed to violate the antitrust laws if they settle a patent litigation contemporaneous with the exchange of any other consideration whatsoever, if they do any other business transaction. That is very different than, for example, if you were settling a patent litigation, and the alleged infringer were permitted to take a license under the patent, and along with that license were to pay a royalty. Antitrust law doesn't question the amount of the royalty the infringer pays in a dispute between a patent holder and infringer. That has never been done.

Now, under the Third Circuit's presumption the defendants, it is incumbent upon them to rebut that presumption, but the Third Circuit gives no guidance as to how they are supposed to do that, other than perhaps make arguments about the fair market value of whatever the side deal is. And the defendants are not allowed to say anything about the likelihood of the patent holder winning the litigation. That is very interesting to me. Because the central allegation that the FTC had in this very case in its complaint was that the brand company, Solvay, had entered side deals with the generics, contemporaneous with settlement, because Solvay was "not likely to prevail." That is the central allegation in the FTC's complaint. That rendered those side deals inappropriate payoffs. But now under the Third Circuit's test there is no element of whether the brand holder was going to exclude the generic. So that is the first problem, there is no consideration of the patent strengths.

The second problem with presumption is that it is just frankly doctrinally unsound as a matter of antitrust law. The Supreme Court has repeatedly said that per se rules are only supposed to be announced after the judiciary has had substantial experience condemning a practice under the rule of reason. And derivatively it is the same for the "quick look" approach. It is only supposed to apply when it closely resembles conduct that the courts have repeatedly condemned. There is no judicial experience whatsoever condemning a settlement agreement between a single patent holder and a single alleged infringer who does not have a patent. All the antitrust cases that the Supreme Court has announced that impose antitrust liability for misuse of patents have to do with multiple patent holders' pooling type of arrangements. Now, as a "quick look" approach, the court has only used that twice. In 1984 in the *NCAA* case; that had to do with restrictions on broadcasting college football games, and then two years later in 1986, in *FTC v. Indiana Federation of Dentists*, which had to do with dentists agreeing not to submit x-rays for certain insurance reimbursements. It was more recently in 1999 that the Supreme Court rejected the FTC's reliance on the "quick look" approach in the *Cal Dental* case and said a more full assessment needed to be taken of the facts in this case. So critically in those cases where the court did use the "quick look" approach, it was talking about those specific cases. The court has never, ever said as to any category of conduct this category of conduct should get the "quick look" test. That has never happened, and I don't think it is going to happen here. And particularly because to say that in the patent context would actually make it easier to establish an antitrust violation for a reverse payment settlement than it would under the only two areas where the court has said that patent holders are subject to antitrust liability. Some of you might be familiar with the first one, the *Walker Process* fraud exception.

MS. HOFFMANN: Let's just make this an overview.

MR. GRANNON: Very briefly, the "quick look" presumption would say that it is easier to establish an antitrust violation than it is even under *Walker Process* fraud or sham litigation under the *PRE* case.

This may seem a little bit in the weeds, but these weeds are the jurisprudential building blocks for how the court is going to resolve this. It is not going to resolve this based on one side says this about policy and one side says that. It is going to look at precedent, and all of these precedents say that the patent matters in antitrust analysis.

MS. HOFFMANN: Thank you.

Robin, from your perspective as an in-house counsel, and Novartis has both brand and generic lines, what would you like to see the Supreme Court do here?

MS. ADELSTEIN: Sure. Can you tell Eric is in the process of writing a brief?

(Laughter.)

These issues really lie at the heart of the intersection between antitrust law, patent rights and conduct of litigation in the courts, and it is unique in that way.

What we need here is a balanced approach that protects the intellectual property of companies that promote life-saving and life-enhancing drugs. This point always gets lost here in the ether somehow, that what the patent laws are designed to protect or designed to do is to encourage companies like Novartis to go out and spend money, $1.3 billion on average, to create a new drug. It takes years and years, five to ten years, maybe longer to create these drugs. Patent protection is so important, because without that patent protection companies wouldn't be developing new drugs. We need to incentivize the pharmaceutical companies to go out and do that, and we need patent protection to do that.

We also need to incentivize the generic companies. The generics are spending $5 million defending the patent litigation. They are not out there filing new ANDAs. They are not out there trying to develop new bioequivalent compounds to launch. So the FTC's rule really would have the opposite effect. Because the generics can't settle this litigation, fewer generics are going to come onto the market, where we would have more if we could more easily settle these cases.

As a result, I believe that the Eleventh Circuit, Second Circuit and Federal Circuit cases are correct, in that the scope of the patent should really apply, and that is what we should be concerned about here. The antitrust laws shouldn't trump the patent laws.

But that said, at Novartis we have three companies that actively engage in ANDA filings frequently on both the brand and generic side. What is most important to me in trying to counsel my clients is having certainty. Because right now—well until the *K-Dur* decision, we had courts saying one thing and the FTC saying something else. So, when the business people came to me and said "well, what do I do?" it was either "well, we go with what the law says or we go with what the FTC believes the law should be." It has been very difficult to counsel in this area. How much risk do you want to take? Now that we have a split in the circuit it is even more difficult to counsel in this area.

What we need most of all and what we are hoping for is clarity out of the Supreme Court.

MS. HOFFMANN: I want to go to a question that has come up repeatedly in these cases and has come up in some of the panelists' comments. That is how important is the fact that there is a patent involved here? Why does that make a difference?

Robin, I just would ask to go back to you for a minute here.

MS. ADELSTEIN: Sure. I think it is critically important that this area of the law be viewed in the context in which it comes up, and that is in the context of the unlawful monopoly over the right to exclude generics from practicing intervention. If the generic is excluded within the scope of the patent itself—and by the way, most of these settlements allow for early entry for the generic, so even in the payment context, in the case where there is a reverse payment, almost always the generic still enters earlier than the last to expire patent. So the fact that we have this context here is critically important.

Also there is an interesting statistic that in cases that are litigated to conclusion, the generics came onto the market early only 48 percent of the time. In cases where there were settlements, the generics came onto the market early 76 percent of the time. So the context in which this takes place is very important.

MS. HOFFMANN: Markus, do you want to respond?

MR. MEIER: Yes, I do.

I think one has to be really, really clear and make sure they understand what the scope of the patent test is as articulated by the Second Circuit, Eleventh Circuit, Federal Circuit. This is an antitrust audience, rather than an intellectual property audience. But I often speak in front of intellectual property audiences, and I am sure there are some intellectual property people here too.

When you stand in front of people who do intellectual property and you talk about the scope of the patent, the very first thing they think about is the claims construction, what does the patent actually claim, what does it cover, and then you look at the generic product, whether it reads onto that patent or not. That is not the scope of the patent test as articulated by the Second Circuit, Federal Circuit, Eleventh Circuit. Their scope of the patent says unless you show and unless you allege—because you get thrown out on a motion to dismiss if you don't even allege these things. That is what happened in AndroGel, we were thrown out on a motion to dismiss, so the record is just a complaint. That is about the entire record in the case, and of course the Supreme Court has to take the facts as we pled them, since there is no other record. But we did not plead the necessary requirements to create the scope of the patent test. What we didn't say is we didn't say that the litigation, the underlying patent litigation, was a fraud—was a sham, I should say; let's use the right words. It wasn't a sham. And we did not say that the patent itself was procured by fraud. That there was not fraud on the PTO. That is the scope of the patent test. Basically it says as long as the agreement doesn't keep the generic out any longer than the statutory term of the patent, whatever that patent is, say it ends in 2020, as long as that generic doesn't stay out any longer than 2020, and the underlying litigation wasn't a sham or the patent wasn't acquired by fraud, that is the scope of the patent test. It has nothing to do with actually looking at the claims of the patent and doing any kind of assessment of that. So let's be really clear about that.

Under the scope of the patent test, as articulated by the Eleventh Circuit, it is completely and utterly irrelevant when these settlements actually allow the generic to enter before the end of the term. Under the scope of the patent test they could be paid to stay out, perfectly legal, paid to stay out until the very end of the patent term. Everybody knows they can't be paid to stay out longer than the term of the patent. I hope everybody knows that and I wanted to make that clear.

But then it also becomes important to say what does a patent real really cover? I agree a hundred percent with Robin on this point, that the context is absolutely critical. But you have to look at what a patent really does. A patent doesn't give you the right to exclude competition. A patent gives you the right to exclude somebody from practicing your patent. It doesn't give you the right to enter a market, and it doesn't give you the right to keep somebody else out of the market. It only allows you to keep somebody from practicing your patent.

The vast majority of patents in these cases are not the patents on the active pharmaceutical ingredient. They are not the patent on the thing that makes the drug the drug that it is. For example, everybody is familiar with Prozac, the underlying product that makes Prozac is something called Fluoxetine; that is the generic name of Prozac, Fluoxetine. That patent had expired long before the litigation that was involved in that particular agreement between the brand and the generic.

Most of the patents involved in these cases involve what are known as formulation patents, so they are secondary patents that if you get a person from the pharmaceutical industry in a quiet conversation on the side, they will admit those aren't particularly strong patents, and in many cases they can easily be invented around. They are not good, like the compound patent that keeps anybody out of the market intentionally. They are formulation patents.

So what does the Patent Act actually give people the right to do? What it gives you the right to do is it gives you the right to refuse to license your competitor, and they can either accede to your patent, or they can go ahead and try to enter the market. If they try to enter the market, it gives you the right to keep them out of the market by getting an injunction. That is how the Patent Act works, and that is what the patent rights are.

What the scope of the patent test does is it basically creates an incredibly high burden for a plaintiff or government to actually try to stop these practices, and it actually makes exceedingly weak patents just as valuable as exceedingly strong patents. And I don't see what the benefits to innovation and to consumers are for that. And I will stop there.

MR. PERSKY: Just to follow up on that for one second.

MS. HOFFMANN: Wait, Bernie. Sorry, we don't want to.

MR. PERSKY: Pile on.

MS. HOFFMANN: Pile on, exactly.

Eric.

MR. GRANNON: I will try to be very brief, Elinor.

First, it is not exactly true that the FTC can't survive a motion to dismiss in these cases under the scope of the patent test. The FTC survived a motion to dismiss in the *Cephalon* case without alleging either a sham litigation or a fraud on the PTO. It did that by alleging the fact that the restraint in the settlement actually restrained products that were not at issue in the litigation. So that is one example.

Second, to say that while the scope of the patent should be the adjudicated scope of the patent of what would have been the scope after conclusive market determination obviously would give parties no certainty whatsoever as to what kind of settlement terms they could reach at the beginning of a litigation. So that would be entirely unworkable.

I am glad that Markus ended talking about the fact that patent holders can get injunctions, because a patent is not just the right to get treble damages against your infringers. It is the right to get an injunction and stop them from entering the market. There has been reference made to the *Palmer* case, and I went back and I read it, and it is something that all of you might remember from law school. It had to do with Barbery and a local barber of course agreeing not to compete with each other. There was no patent involved. There was no license of any intellectual property involved whatsoever. Barbery and a Georgia company simply agreed Barbery would not compete within Georgia and then that company would not compete outside of Georgia. I ask all of you, is that analogous to a patent holder who has a statutory monopoly reaching an agreement with an alleged infringer on basically a baby split of the patent filer. It is very, very analogous to a patent holder and a potential infringer entering the license agreement under which the licensee pays royalties and antitrust law has nothing to do with the setting of those royalties. The language "scope of the patent" comes from Supreme Court precedents, like *Standard Oil*, *Singer* and *Line Material*. You can hardly read any of those antitrust cases in the patent context where the court doesn't use the phrase "scope of the patent."

Now as to the idea that it is going to just open up the windows for all kinds of reverse payments, when the scope of the patent test was the unchallenged law in this country from 2005 through 2012, before the *K-Dur* decision, reverse payments went down. Every year they steadily went down. And the scope of the patent test was the unchallenged law of the land.

One of the reasons they went down is because Congress substantially revised the Hatch-Waxman regime in the 2003 MMA Amendment, specifically to reduce incentives for reverse payments. They changed the calibration of that act by doing a number of things. Allowing share exclusivity, so now there are multiple first letters, four, five, six seven first filers with every big drug. They stopped bottlenecking. A patent holder can no longer pay the first filer generic to bottleneck subsequent generic entry. These were Congress's fixes.

By the way, Congress was thinking about antitrust violations in this area. It said two things. It said that settlements entered between brands and generics have to be filed with the Antitrust agency. And then Congress—this is hardly ever mentioned—Congress in the MMA amendment legislated a specific penalty when one of these agreements violates the antitrust laws. It is not that the settlement is blown up. It is not that the patent holder loses their patent. It is that the first filer generic loses 180 days. That doesn't sound anything like the stick the FTC is wielding now with a presumptive violation of the antitrust laws.

MS. HOFFMANN: Bernie.

MR. PERSKY: I just wanted to mention that the legislative purpose of the Hatch-Waxman Act is to incentivize generics to enter the market early and to challenge weak patents. Under the Hatch-Waxman Act, when drug patents are challenged and then go to judgment, three out of four are struck down as invalid or not infringed. So what happens when money enters the equation? That corrupts the process. There can easily be settlements without reverse payments being the alleged infringer, which is money going the wrong way. All you have to do is have them sit down, negotiate a settlement based on an early entry date, and each side will present to the other side their strengths and weaknesses, and the early entry date will be a direct function of the strength and weakness of the patent.

Once money enters the equation, what happens is the monopoly profits then are used to pay off the generic, and the early entry date has nothing to do with the strength or weakness of the patent.

One other thing: Under the Hatch-Waxman Act, when the brand name drug company brings suit within 45 days of the Paragraph 4 Certification, no matter how weak the patent is, no matter how ridiculous it is, assuming it is not a sham or obtained by fraud, the brand name drug company gets a 30-month stay of FDA approval, which is equivalent to a preliminary injunction, no matter how weak or crappy the patent is.

In the *Tamoxifen* case, the patent was struck down, held to be invalid; it was on appeal, and then the generic

was paid off, and that is what happened there. So it seems to me that by allowing money to enter the equation, you are undercutting the entire legislative purpose of the statute. I think the Third Circuit got it right; it just didn't go far enough.

MS. HOFFMANN: I want to kind of shift subjects a little and talk a bit about what kinds of evidence are before the courts in these cases.

Now the Eleventh Circuit made pretty clear in its opinion that it thought a discussion of the validity of the patent or the strength of the patent was an inappropriate or not a feasible thing to do in the context of an antitrust case. The court said it would be a "turducken" exercise, and I am not going to explain that. I am a vegetarian. It is really not an issue that is very much front and center in the AndroGel case, but it could come up, and it has been discussed in other cases.

The Eleventh Circuit wasn't looking at much of anything. The Eleventh Circuit said you are out, unless you can plausibly allege fraud or sham litigation or the agreement goes beyond the temporal or subject matter scope of the patent, you can't show anything. You are out of court. Does that apply that if some other approach is adopted, the validity of the patent or the strength of the patent should or would be an issue?

We will start with Markus.

MR. MEIER: Well, I am going to answer that. And I will explain for the benefit of people who aren't from the south what a turducken is, and maybe most people know what that is by now.

Actually, before I do that I want to make a quick pitch there is lots of information on our FTC website, so I would suggest if you are interested in more about this topic that you go on to the site.

I want to address two factual assertions that I think are demonstrably not correct, and the FTC put out reports that show this very clearly.

What we do—and again this is an important practitioner point— anybody who enters into these kinds of settlement agreements has to file them with the FTC, and they have had to file them since 2004. So we now have nine years of these settlement filings, and we get to see the entire settlement agreement. And we read them, some people in my office do that, and we summarize them, and we discuss them, and we keep statistics on them. Every year we put out a report, and what these reports clearly show is that there are definitely ways for pharmaceutical companies to settle without reverse payments, and they do it about 70 percent of the time. So I think that I have to debunk the argument that you can't settle if you can't do a reverse payment. That is not true. At least 70 percent of the time companies are able to settle. And we have put that out year after year after year, and we continue to run the statistics, and it is shown on a report with a nice little table.

Second factual assertion: This is an empirical matter. It is not a matter of argument; it is a fact. It was raised by Eric. He raised it in a cert petition to the Supreme Court. We replied to it, I thought he might get the answer to it there, but apparently he didn't read it or read past it. The belief that somehow the incidence of reverse payments has been going steadily down because of action Congress took is simply not true. What Eric's statistic that he is pointing to, back in 2011 as a percentage of all the settlements it went down in percent. But in absolute numbers it didn't go down at all. It just happened to be there were a lot of settlements in 2011 that didn't involve a reverse payment. But the numbers have been quite steady for many, many, many years. Again, it is an empirical question, so it is not even one that we need to be debated. You can go and take a look at that, and if you don't trust me, look at our report.

Back to Elinor's question. I want to make sure people get the facts too and not just all the arguments. Do people know what turducken is? A turducken is apparently—I come from the south, and I have never had one, but it is when you take a chicken and you stuff it into a duck and then you stuff it into a turkey and you cook it and eat it at Thanksgiving. So it is a chicken, a duck and a turkey.

So what the Eleventh Circuit said is to try to do a patent litigation in the middle of an antitrust case is a turducken task. It doesn't make sense to do that. Actually, that is the position we take also in our brief. However, Eric pointed to some language from our complaint in the AndroGel case in which we said Solvay was not likely to prevail in the patent litigation. Why did we say that in our complaint in AndroGel? Because there was at least some possibility, depending on how you read the Eleventh Circuit precedent until AndroGel, that they would actually permit that; that they would actually permit the turducken task. What they finally said expressly in AndroGel is no, they wouldn't permit that, and they clearly adopted exactly the same scope of the patent test in the Second Circuit and Federal Circuit. That was an open question at the time we filed the complaint; therefore, we put that in there because there was at least some possibility that the Eleventh Circuit would entertain a review of the patent. But they said no, it would not. I don't think the Third Circuit would entertain a review of the patent either. We put reasons in our brief why we don't think it is a very good rule. It is certainly not one that I think Robin would like, because it would mean you would have this settlement that took place years ago, and then all of a sudden you'd be stuck with the vagaries of what an antitrust court said about a patent that was settled many years ago, it wouldn't give you much certainty at all. So I think most parties actually agree that is not a particularly good rule to try to go back and reassess the patent merits, some after-the-fact litigation, where all of a sudden the brand

and generic that used to be fighting each other are actually defendants in an antitrust case.

MR. GRANNON: I could briefly respond to that, Elinor. I will try to do it with as few adjectives as possible.

Looking at the brief in opposition that we filed, which quoted a presentation made by Markus' colleague, Bradley S. Albert, who is also a Deputy Assistant Director at the FTC Health Care shop. And in Brad's report he said that in 2006, 50 percent—these are his percentages —50 percent of final settlements were reverse payment settlements or potential reverse payment settlements. In 2007 they were 42 percent. In 2008 they were 24 percent, all the way down to 2011 when they were 18 percent. So if the percentage isn't relevant, I don't know why your colleague Brad put that in his report.

I am going to say something that is really stark, and I want you to remember it. For purposes of antitrust law there is no such thing as a weak patent. There are sham patents and non-sham patents. When I say sham, that includes a patent obtained by fraud on the PTO. This is not my interpretation of what the law is; this is the law. If you look at *Walker Process*, what *Walker Process* established is the exception for an antitrust claim against a fraudulently obtained patent. It said, okay, that is one case. We don't want to impose liability "for patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attendant to the issuance of a patent."

Antitrust believes in bright lines. Antitrust does not take out some patentometer and say, well, this patent has a 62 percent chance of winning. The court is not going to adopt that kind of approach.

As to this idea the presumption will be easy to administer and avoid I think Markus referred to collateral litigation, the presumption is going to invite collateral litigation. Do you know why? Because parties have spent all their time defending their side deals and whether they were fair market value. We went through that with the FTC in a 40-day trial where the FTC said in the *Schering-Plough* case that Schering-Plough had paid $60 million to Upsher-Smith for some IP licenses, that that payment was a disguised pay-for-delay, rather than a fair market value for those IP licenses. After a 40-day trial in front of the FTC's own administrative law judge, after hearing all of the testimony and reviewing all the evidence, he agreed with us, that those side deals were fair market value. It wasn't good enough for the FTC; they appealed to themselves, to the full Commission, and reversed their own administrative law judge. We took them to the Eleventh Circuit and got that flipped.

That is exactly the kind of collateral litigation that you are going to see under this so-called presumption, with parties trying to prove fair market value. One important point, it is not even clear under the FTC standard that their market value is enough, because then they came up with something called an inducement theory, which is if the so-called side deal, even if it is fair market value, it is still an improper inducement to the settlement.

Just recently the FTC filed an amicus brief where a district court within the Third Circuit in New Jersey was applying the *K-Dur* test. The court said an agreement between a brand and a generic for the brand not to launch an authorized generic product, so basically a straightforward exclusive license, was not the type of improper consideration that the Third Circuit test had in mind. The court rejected the FTC's argument. So this idea that the presumption will give clarity and certainty is not true.

As to the number of reverse payment settlements, their most recent report shows that out of the 40 that they count as potential pay-for-delay, 19, nearly half of those, the only so-called compensation is an agreement between the brand and the generic not to launch an off-price generic, which is classic exclusive license under patent law.

MS. HOFFMANN: Robin, if I could ask you to comment on just that point. How do you view authorized generics versus cash payments in your position?

MS. ADELSTEIN: Sure. Can I respond to any of the other points too?

MS. HOFFMANN: Absolutely.

MS. ADELSTEIN: So on the authorized generics, it is hard to see why the FTC is challenging this. And Markus told me to go read the briefs. I have read the briefs. The brand should have the right—the brand doesn't have to launch its own authorized generic. And certainly there is a public policy reason why you want to give the first to file generic 180 days exclusivity on the market without competition from the brand itself.

CMS, the Centers for Medicare and Medicaid, the governing body, has said in its best price filings the brand has to include the authorized generic that it launches in its best price, so it has to provide to Medicare and Medicaid that price if it launches an authorized generic, the lower price not the branded price. So they are discouraging the brand from doing this.

I know Chairman Liebowitz has talked often in the past about the idea that the brand shouldn't be launching its own authorized generic. I know Congress had tried to pass laws saying that the brand shouldn't be allowed to launch its own authorized generic. Here we want to encourage the first filed generic to be on the market. It is an exclusive license, and it is very different from a cash payment, although I don't have a problem with a cash payment either.

To address a couple of the other things that were said, I think the Third Circuit test would require a review of the patent litigation in the defense of that case. I don't see

any way around it. I think in defending it, in trying to rebut the presumption you will get into an overview of the strengths and weaknesses of the patent. Because you'll be looking at whether or not the payment was for the purpose of delay, and in order to determine that you have to see what the strengths and weaknesses of that case were, and it would become impossible in practice.

I also don't think that we can assume that all formulation patents are weak just because they are formulation patents. Certainly the Patent and Trademark Office granted that patent right, and you have a presumption of validity there.

Finally, I just want to mention that there is a brand new statute, the America Invents Act, where the patents now can be challenged, where before they couldn't be challenged. They could only be challenged in court; now they can challenge before the Patent and Trademark Office. So I think a lot of the concerns that weak patents will issue will be vitiated with the new statute.

MS. HOFFMANN: Bernie.

MR. PERSKY: I think there is an article by Professor Ianicke, where he analyzed the challenges to new chemical entity patents versus other types of patents such as formulation patents. And the statistics are quite clear, that the other types of patents, method of use, and not the new chemical entity patents, get struck down multiples of times more than the new chemical entity patents.

With respect to authorized generics—and I think Markus probably knows a lot more about this than I do, my understanding is that the first generic filer makes the bulk of its money during the 180 days exclusivity period. That is the biggest deal for them. After the 180 days run out, multiple generics enter the market, the price plummets to ten, fifteen percent of the brand price. But during the 180 days of exclusivity, it may be 70 to 80 percent of the brand price. So the first generic filers capture a good portion of the market and make most of their money during that period. So the brand name companies' threat or actual launching of an authorized generic kills the first filer. That is just one way to put it.

MS. HOFFMANN: I just want to clarify, for those of you who again don't practice in the area, the first generic filer who files a Paragraph 4 Certification gets 180 days of exclusivity; no other generic can be approved to market during those 180 days. That is a lot of money in a lot of markets.

The other thing, for those of you who don't know what an authorized generic is, it is a generic product manufactured under the brand's NDA original approval for the drug.

Bernie, can I turn back to you. Earlier you mentioned safe harbors, and can you explain what you mean by that and what you might think of as a safe harbor.

MR. PERSKY: Well, if the brand company feels so strongly about its patent and it feels it is extremely well protected, and all it pays the generic to settle the matter is how much the brand company would have had to pay in litigation costs to defend its patent, I don't think that should be of concern to anybody, and I don't regard that as a possibly anticompetitive settlement. At least that is one direct indication that the reverse payment might not be of concern in the competitive context.

But conversely, I think that once a plaintiff alleges, and hopefully he's doing it in good faith, and can prove that the reverse payment is more than the generic would make, that is not a settlement. That is not entitled to any protection. An example would be a brand name drug company that has sales of billions of dollars per year or hundreds of millions and the generic, when it enters the market, could only make 20, 30, 40 million dollars. So the brand company pays a few hundred million dollars of its anticipated profits and gives it to the generic, which makes more money by taking that amount, perhaps entering the market on some date picked by the brand company, at the brand company's convenience, and the generic goes away until then. For the generic, it is an offer you can't refuse. You are getting more than you ask for. How can you possibly refuse more than you would make if you won the case? That to me should be per se unlawful. That is how I look at it.

MR. GRANNON: Elinor, I will just note briefly that the FTC has not adopted the kind of sliding scale that Bernie is talking about here. There is no allegation in this case that the so-called payment exceeded what the generics would have made had they gone to market.

A couple of reactions otherwise. One thing that the Eleventh Circuit noted, in fact quoting a much earlier district court decision, is that litigation is risky, inherently risky. And basically, anyone who has litigated knows that you can never have more than about a 70, 75 chance of winning anything at trial. It is just part of the inherent risk of trial.

To use your example, if you are talking about a brand that has a product that is worth $2 billion, and there is a risk of 25 percent that you can't do anything about once you step foot in court, it makes perfect economic sense to insure yourself against that loss by having a reverse payment settlement.

MR. PERSKY: Price-fixing is rational, too.

MR. GRANNON: But the difference is with price-fixing there is not a statute saying that you have a legal monopoly, and this idea of—I think Elinor respectfully said earlier, if we looked at a typical case and stripped away the patent and stripped away the settlement and stripped away the Hatch-Waxman Act, then we would have a price-fixing agreement or a horizontal allegation agreement. That is stripping away all of the features of these cases.

Something that Bernie said earlier was that absent a payment, the entry date I think you said should be a direct function of the parties' relative views of the strength of the patent. This issue also came up in our trial against the FTC, and we had experts from the heart of the project on the negotiation who demonstrated, apparently convincingly to the FTC's administrative law judge, that on the eve of trial, in the parties' views, each side thinks it has about a 65 percent chance of winning. The parties' subjective views are colored by all kinds of things, and they don't come close to totaling 100 percent. In that example they exceed 100 percent. They are also colored by things like risk aversion and all kinds of other factors that can't be quantified.

Secondly, the presumption that the FTC is advocating—not your rule, but that the FTC is advocating that the Third Circuit has—I agree with Robin, that it doesn't make sense, if you don't have the scope of the patent test, I don't know how you analyze these things without looking at the patent in some shape or form. But the Third Circuit has not one sentence in it that indicates that that should be part of the analysis.

In a private case, not the kind of case that the FTC is bringing that only seeks injunctive relief, but a private case the Third Circuit presumption makes no sense whatsoever, because it gives no measuring stick for damages. How are you going to assess when the earlier entry date would have been without the payment if you just have this presumption and you don't look at the patent merits. It is entirely unworkable for private cases. And the FTC almost says as much in their brief, it gives a footnote or it is a side point where they say we are not advocating this, by the way, for private cases where damages would have to be assessed.

MR. PERSKY: I thought most settlements to date have been made in the Hatch-Waxman context without reverse payments.

Markus, am I right about that?

MR. MEIER: I already made that point, and I invited everybody to take a look at the reports we put out every year that show that very clearly.

MR. PERSKY: And what I was saying, once the money, the reverse payment enters into the mix, you can have the weakest, crappiest patent in the world that has a tremendous chance of being struck down. Pay enough money, and it doesn't matter.

MS. HOFFMANN: Robin, we have heard a couple of people here say that one way to do a settlement and not run into trouble is to simply negotiate on the entry date. From your perspective as an in-house person, how does that work; can you negotiate a settlement on that alone?

MS. ADELSTEIN: It is not enough. One dimension is not enough to get a deal done in many cases. Obviously, it is in some cases, and they keep quoting statistics they are done without any additional compensation. But typically you need something else to negotiate besides the entry date, because the parties have different views of the strengths and weaknesses of their cases.

MS. HOFFMANN: Markus.

MR. MEIER: All I can offer on that point is that 81 out of the 140 that were done in 2012 did not have any compensation in them, and they negotiated an entry date. So I will just offer that fact.

MR. GRANNON: That is about two-thirds.

MR. MEIER: Yes, and then there were 19 that had no restriction on generic entry and were allowed to enter right away. So that is 100 out of 140 of them, and 40 of them involved potential pay-for-delay.

MR. GRANNON: What do you do about the case where on the eve of trial each side thinks they have a 65 percent chance of winning?

MR. MEIER: They work it out, just like you do in any litigation. Because presumably that same statistic holds true for any litigation, not just patent litigation involving pharmaceutical companies.

MS. ADELSTEIN: But the end result is there will be fewer settlements, and that means less innovation. You are discouraging brands from R&D. You are discouraging generics from creating new bioequivalent components.

MR. MEIER: I don't think there is proof of that, and I don't think that is correct either.

MS. HOFFMANN: I just want to ask the panel one question, kind of round-robin, and then we will go to the audience.

So if you can, I would like to ask you to tell me what you think the Supreme Court will do, as opposed to what they should do, and we have heard about what they should do.

MR. MEIER: I have no idea, and I don't offer any opinion on that.

MS. HOFFMANN: Eric.

MR. GRANNON: With all the caveats that we said before, I think that we will see an opinion that is grounded in sound antitrust principles and precedent.

(Laughter.)

MR. MEIER: I agree with that.

MS. HOFFMANN: Robin.

MS. ADELSTEIN: I just hope we don't have more questions following the opinion and more open issues than we did before, so hopefully we will have some clarity.

MR. PERSKY: Well, if it is grounded in sound and trustworthy principles, that would be wonderful. But what I believe is this Supreme Court is hostile to class actions and plaintiff actions, actions against large companies. And I think it may lean towards the Eleventh Circuit test, which is a get-out-of-jail-free card to anybody with a patent that is willing to pay enough money.

MR. GRANNON: Which was the test across the country from 2005 to 2012 when the incidents of reverse payments went down.

(Laughter.)

MR. MEIER: The instance did not go down. That has been demonstrably shown. As a percentage of total settlements it went down some years and up some years, but in absolute numbers it did not go down.

MR. PERSKY: It is my understanding that after the *Tamoxifen* case, the number of reverse settlements rapidly went up. That was my understanding, that the scope of the patent rule led to larger numbers of reverse payment settlements. That is my understanding, but I haven't studied all the numbers.

MR. GRANNON: All I can say is, P.S. 152, 18 percent was less than 50 percent, so.

(Laughter.)

MR. PERSKY: This idea of looking at the amount of the payment is not something that I made up. It is in Judge Pooler's dissenting opinion in *Tamoxifen*, and I think it is something that should be considered by the court. Although it is not being presented to the court, they should think about it.

MS. HOFFMANN: Eric, a question.

MR. STOCK: Before my question, I would like to be the peacemaker. I will just mention that it may be true that Eric may be right that the incidence, C-E, of reverse payments went down, and the incidents, T-S, went up. They are both right, they went up and down. But in any event.

MR. PERSKY: Percentage down, absolute numbers up, is that what you are saying?

MR. STOCK: Right. So my question is for Markus and Bernie, and it relates to a comment that Eric made, which I think points out one of the most fascinating parts of the FTC's brief and, frankly, from an antitrust counseling point of view may be the most important part of the brief.

Footnote 11 acknowledges that even if the FTC's position were accepted at the Supreme Court, that the merits of the patent litigation should not matter in proving liability; that the FTC is accepting that in proving damages, you very well may have to look at the merits of the patent case. I was really interested to see that, which I have never seen the FTC say before.

So from a counseling perspective I am wondering, well, number one, I am curious, Markus, has the FTC ever said that before?

And my second question is, does this mean that from a counseling perspective we can tell our clients that if you are confident you can prove you would have won the patent case that you can proceed with a reverse payment patent settlement, and the worst that happens is you get an injunction?

MR. MEIER: Again, I have to be very careful about what I comment on, because this is not personally my brief. It was filed by the Office of Solicitor General, and they will answer for that. But I will say that this footnote, as far as I am concerned, reflects a very fundamental principle in antitrust that is constantly misunderstood and constantly being clouded in litigation, that there is a difference between liability and damages and what you have to show to establish liability and what you have to show to prove damages. And I think this is just consistent with a line of questions, and with Areeda and Hovenkamp that draw that out.

I know from other litigation that I do, parties constantly want to have me prove the absolute amount of harm. That is different than proving the liability for the case in the first instance, especially when you are speaking injunctive relief. And as I see it, this footnote is a reminder to the Supreme Court that the FTC here, the government, seeking injunctive relief is different than what might happen in a damages case. That is how I read that footnote.

MR. PERSKY: It shouldn't be that unusual to determine what the damages are in the but-for world. But for this unlawful agreement, what would have happened? And if that involves looking at when the generic would have entered had there not been this unlawful agreement, that shouldn't be that unusual. When Markus mentioned the Eleventh Circuit precedent, my recollection is that the *Valley Drug* case hinted at the possible analysis of the strength and weaknesses of the patent. I am not promoting that as a test of the legality of the agreement, but looking at who would win a case that didn't go to judgment is not incredibly unusual; it is standard damages analysis in a malpractice case. It is not impossible.

MR. GRANNON: It is not impossible. It is actually quite good for lawyers and economists, because it makes for a lot of work.

In the parallel private litigation in this case, the private plaintiff survived this missile by alleging sham litigation, and we spent the next two years in discovery litigation just on the issue of whether the patent case was a sham, and ultimately the judge granted us summary judgment that it was not a sham. So it takes that much effort, millions spent on legal fees and experts, just to prove that wasn't a sham. What kind of a battle, collateral battle do you think we are getting into to prove whether the brand

actually had a 60 percent chance and not a 50 percent chance, as reflected in the entry date. That is just unending parallel collateral litigation.

MR. PERSKY: That is just the difficulty of proving damages. First you have to prove the agreement was unlawful. Once you get beyond that, then the antitrust damages have always been a difficult issue.

MS. HOFFMANN: Barbara.

MS. HART: This was somewhat followed up on, but I was wondering if you could elaborate, under the belief that we are all in the room because we believe in competition and innovation, and you are essentially saying that this will be detrimental to innovation, which is a close cousin of competition, what do you have to substantiate your last point, that this will actually—if we cynically listen to it, it sounds a little bit like, well, the brand manufacturers therefore won't do this or the generics won't do this because we can control the outcome. But is there data that can support your point that this will actually cause innovation to lessen?

MS. ADELSTEIN: Well, are you suggesting it is not intuitive? I mean, can't—

MS. HART: Please go ahead. Forgive me.

MS. ADELSTEIN: I mean really, really, if what you are doing is discouraging settlements and forcing brands to put at risk many, many millions, hundreds of millions of dollars in potential liability, what you are doing is saying to generics you can't settle these cases, and you need to continue to litigate. And so the $5 million you are going to spend on legal fees for that case—I spend a lot of time counseling our generics. We are the second largest generics business in the world. We do a lot of ANDA litigation, and the generics business works on very slim margins, extremely slim. So $5 million in legal fees to a generics company is huge. That is money that they can't then go invest to run bioequivalent studies for another compound that they may want to enter. So the fact that they have to continue to litigate these cases means that new generic products are not going to come on the market in the future. The fact that you are forcing the brands to continue to litigate, when they may have otherwise wanted to settle, puts at risk the very issue. These patent rights are what get the brands to invest in research and development. In the absent of patent rights, in the absence of strong patent rights the brands wouldn't engage in research and development to begin with.

So I guess I don't see why all of that isn't intuitive.

MR. PERSKY: Why are you forced to litigate? If you are just not permitted to make a reverse payment, can't you still settle a case in some way that would not be challengeable?

MR. GRANNON: There is an empirical response to that in the *K-Dur* case, which is kind of a sister case to this one here. In the *K-Dur* case the petition is just being held in abeyance.

There were two generics in that case, a first filer and a second filer. My firm represented the first filer. As to the second filer, the parties, the brand company in that case, Schering-Plough, and the second filer was AHP, they had an intractable disagreement. They could not settle just on entry date. And it was actually the magistrate judge took them into chambers and said to the brand company, give these guys something so we can avoid this trial, and gave them $5 million, and I believe the terms were that $5 million would go to $10 million if AHP's ANDA actually received FDA approval.

I think there is an empirical example of parties that could not settle. Because of Hatch-Waxman we have a very robust generic industry and are larger and better financed than brand companies. But there are still very small generic companies out there that cannot survive just on the idea in the offering; somewhere in five to six years in the future, they are going to get to the market with a product. They don't know what the market conditions are going to be then, five, six years in the future. Maybe then the entire landscape will change. Maybe the brand will have initiated a follow-up product, and there won't be much of a product at all for that generic product. They need some cash to keep their lights on.

MR. MEIER: We are in front of an antitrust audience of competition lawyers who understand sometimes businesses succeed and sometimes businesses fail; that is just too bad. That doesn't justify an anticompetitive settlement.

By the way, what we really haven't expressed is where is all this money coming from that the brand is able to pay for the generic? Well, it is coming from you all. It is coming from us. It is making drug prices higher in the context of the Hatch-Waxman Act where Congress was trying to spur earlier generic competition for our benefit. And instead that money is being divided; the pie is divided between the brand, the generic. And the savings is being taken away from us as being divided between the brand and generic. I want people to keep that in mind too when you are thinking about these issues.

MR. GRANNON: The one thing I will say in antitrust terms about the presumption, it will be the only antitrust rule that I am aware of that turns on the amount of money parties exchange in consideration. There is not one other aspect of antitrust law that turns on how much you pay for something. Obviously, monopolists can charge as high a price as they want for any product—

MR. MEIER: Monopolists can't pay their competitors not to compete.

MR. GRANNON: Antitrust law says nothing about that. In looking at a merger, if company A is going to buy Company B, you look at the competitive consequences

that the acquisition would have on the market. You don't say well, company A is paying $1 billion more than the fair market value of this company, therefore there must be some anticompetitive intent to the acquisition, and therefore, we are going to factor that in as to whether the merger should go through.

MS. HOFFMANN: Any other questions from the audience?

(None.)

All right. Well, as you can see, people have very strong opinions on this subject. And to be fair, the government's brief is in; the defendant's brief is due. It is not in yet, and it will be due in February. You can all read it then.

I have to thank the panelists; they have done a terrific job here. I really appreciate them coming here to express their opinions and their views. I, for one, am going to go down to the argument.

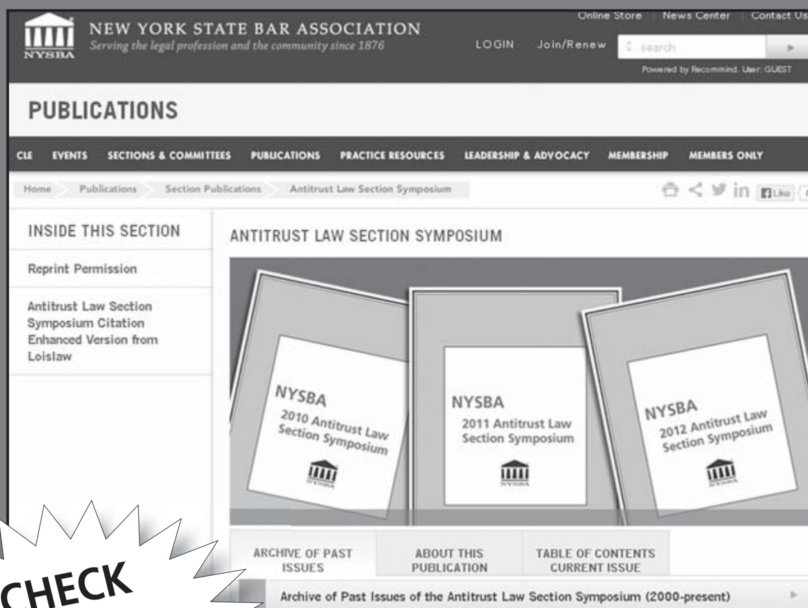
(Applause.)

MR. STOCK: Thanks a lot to Elinor and to all of you. This was a fabulous panel, very interesting. Thanks for coming here in the midst of this litigation.

That concludes our CLE program. Hopefully we will see you at the dinner.

(Whereupon, the Antitrust Law Section CLE Program concluded.)

The *Antitrust Law Section Symposium* is also available online



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NEW YORK STATE BAR ASSOCIATION

Scenes from the 2013 NYSBA Antitrust Law Section Dinner

Thursday Evening, January 24, 2013 • Hilton New York • New York City

The 2013 NYSBA Antitrust Law Section Dinner

MR. ROONEY: Good evening. May I have the privilege of welcoming you to the New York State Bar Association Antitrust Law Section Annual Dinner. It is usually—and is tonight—a very festive occasion, so we will dispense with the introductions in short order and allow you to get back to the fun socializing at the tables.

If I may just have your attention for a moment while I introduce the dais. To my right is Michael Weiner, and he was very helpful in organizing this wonderful affair this evening.

Bob Hubbard is next in line who is a representative of the New York State Attorney General's office.

We have our Vice Chair, Barbara Hart.

We have our Finance Officer, Lisl Dunlop.

We have our new Secretary, Elai Katz.

And most important, we have our new Chair, Eric Stock, to my immediate right.

(Applause.)

On the far left we have Ilene Gotts, who is really responsible for organizing this wonderful affair. Thank you very much, Ilene.

We have Bill Efron, who is head of the FTC's Regional Office in New York.

We have our distinguished keynote speaker this evening, Commissioner Ramirez, from the Federal Trade Commission.

(Applause.)

We have Deirdre McEvoy, who is head of the Department of Justice, Antitrust Division in the field office here.

And we have Molly Boast, who is the recipient of our Lifland Award.

(Applause.)

Now also on the very important acknowledgment list are our Platinum Sponsors for this evening's event. Those include the Analysis Group, the Berkeley Research Group, The Garden City Group and NERA Economic Consulting.

(Applause.)

We are very grateful to our Platinum Sponsors who really make this dinner possible, along with our Silver and Gold Sponsors.

MR. STOCK: We do have a couple presentations we would like to get under way before we serve the dinner.

First, I would like to thank Bill Rooney, past Chair of this Section.

(Applause.)

I'll have more to say on that in just a second, but I think we can truly say that under Bill's leadership this Section has been brought to new heights, and we really appreciate it.

I just want to very briefly thank the people who put a lot of hard work into today's panels, and I want to make sure they are recognized. We had a full CLE today, which many of you attended. I think it was a success, and I hope you agree. We had terrific work done by the moderators and panelists, and I just want to quickly thank them.

Elai Katz, thanks to him we had a great panel on the Antitrust Developments in 2012.

Next, Greg Asciolla and Robin van der Meulen put together a great panel on the FTAIA, including not only a member from DOJ but also the actual litigants in the case, which was a real challenge since all their words were being transcribed.

Third, Steve Tugander led an incredible panel on developments in criminal practice in New York. And I think it is clear to everyone who attended that program that the New York Field Office has had an incredible couple of years, and we look forward to their continued success.

Fourth, congratulations to Stacey Mahoney for running what I think was perhaps the most thought-provoking panel I have seen in a while, focusing on whether and to what extent we need additional antitrust regulation in the financial services industry to supplement all the many other regulators that are active there. So thanks to Stacey for that.

Then finally, in what was perhaps the most animated discussion of the day, thank you to Elinor Hoffmann, from the New York Attorney General's Office, for organizing a panel on the reverse payments issue, which is incredibly alive right now due to the AndroGel case.

I also want to give thanks to the associates and young lawyers that attended our first annual happy hour. That was also a great success, and I encourage people to continue to support that event in the future.

Finally, before I just say a couple words about Bill, I do want to give special thanks to Ilene Gotts and Mike Weiner, our dinner co-chairs.

(Applause.)

We would quite literally be eating on the floor if it weren't for them.

I also want to thank Lori Nicoll at the New York State Bar Association.

And I don't want to forget Bill Rooney's fabulous team of Willkie Farr associates, without whom we would also be eating dinner on the floor.

(Applause.)

Now, if you will bear with me for one more minute, I want to say a couple words about Bill Rooney, who has really given his heart and soul to the Section for the past year.

All of us in the Antitrust Section this year have benefited from Bill Rooney's deep knowledge and strong dedication to antitrust law, and we will continue to benefit for the years to come.

Under Bill's leadership our Section's roster of regular programs went up to as many as four or more programs per year, including the Fall Forum, which Bill organized every year for the past several years, and the Antitrust Lecture which Bill conceived of and implemented.

Anyone who knows Bill knows that Bill strives for perfection, and everyone who works for him has benefited from that. Whether it is picking the ideal topic for a new program, putting together the best set of panelists or even picking out exactly the right artwork for the flyer for the program, Bill wants everything done exactly right. If you care about what you're doing, you want Bill Rooney on your team.

Now I can't claim to know exactly what Bill wanted to accomplish when he joined the leadership of the Section, but from what I can tell, Bill is on a mission to enhance the prominence of the Section within the Antitrust Bar, make it an unsurpassed platform for antitrust practitioners, scholars and economists to talk about cutting-edge antitrust issues and contribute even more greatly to our practice area. And this is exactly what Bill has done.

Bill, it is my extreme honor and privilege to present you with this gift, in Tiffany blue, on behalf of the Section, and thank you for the great service you performed to the Section this year.

(Applause.)

MR. ROONEY: Thank you for those kind words. I have only two things of consequence to say.

The first is thank you to those who made my term possible. Those people really are Robin van der Meulen, Jodi Lucena-Pichardo and Stuart Lombardi from Willkie Farr and Tiffany Bardwell and Lori Nicoll from the State Bar. Without their help there is no way I could have navigated this year.

The second thing of consequence I would like to say is to thank my fellow officers and my colleagues on the Executive Committee for giving me a wonderfully rewarding experience, which for me was a lot of fun and personally extremely gratifying, and I really have all of you to thank. I would invite those who are in the audience who have not actively participated in our Section, it is a ton of fun, and I warmly invite you and welcome you to do so.

Thank you very much, and enjoy the evening.

(Applause.)

Antitrust Law Section William T. Lifland Service Award

So we are now coming to the really important part of the evening in which the Lifland Award will be presented. And the Lifland Award is presented to someone of excellence in the antitrust world, along with excellence in public service.

We are honored here to have Christine Varney, who is a former Assistant Attorney General and currently a partner at Cravath, to present the Lifland Award.

Christine.

(Applause.)

MS. VARNEY: Thank you so much, Bill.

For those of you still chatting, the only thing between you and your main course is the presentation and acceptance of this award, so we have some important things to say.

It is such an honor to present the William Lifland Distinguished Service Award tonight to Molly Boast. The Lifland Award is presented to a leading professional in our field who exemplifies not only excellence at the bar, but serves as a leader in the antitrust community. In Molly Boast we have a lawyer who is a leader not only in the antitrust community but in the bar more broadly. There are so many reasons it is our honor to present this award to Molly. Let me offer just a few.

Molly has an unparalleled commitment to and passion for public service. It was clear Molly would be a life-long contributor to the advancement of law through public service when in 1979—sorry, Molly—Columbia Law School awarded Molly the Jane Marks Murphy Prize for professional promise in public interest law.

Molly is one of the very few individuals who has served at the highest levels of the Federal Trade Commission and the Department of Justice. At the Federal Trade Commission Molly was a thoughtful leader, a trusted advisor, and a mentor to legions of young FTC staff attorneys. In fact, Molly's success at the FTC was so legendary that she was the first person I called to serve as a Deputy Assistant Attorney General for President Obama. In that job Molly reprised the role she had at the FTC and added so much more.

One area that merits special attention is her commitment to the First Amendment and her promotion of sensible antitrust principles to publishing and media. Many of you may not know that among her many achievements Molly also has a master's in journalism from Columbia. Molly brought her keen legal instincts, coupled with her firsthand understanding of the importance of a free and vibrant press, to the DOJ, where she reframed how we think about competition in publishing and the media, guiding us in litigation and investigations to sensible results.

When not serving the public Molly has been held as a leader in the private sector. As the former Chair of the Antitrust Practice at Debevoise, Chair of the Litigation Practice at LeBoeuf, Molly has an impeccable reputation for advising clients in pharmaceutical, financial, media and beverage industries.

Currently, Molly is a partner at WilmerHale, where I have no doubt she will end up running the firm, if they are lucky.

To me, as one of the Molly's many fans, her most important achievement is here with us tonight, her family. To have the career Molly has had, as well as the job of mother and wife, is not easy. You can't do it without the support of a spouse.

And Tom, when your country has called on Molly, you have always supported her. I am sure that Molly's government service has tried your patience and stretched your wallet, and you deserve the reflective recognition of this award for your part.

Emma, you are always first and foremost on your mom's mind. Many is the Monday morning meeting where we would get our Emma update. Your mom is so proud of you, and I know she is so happy to have you back in Brooklyn after being awed by your time in Japan. This award is for Molly, but our gratitude is to the entire Boast family.

(Applause.)

MS. BOAST: Well, the first thing I will say is I wish I had a different name, because somehow Molly sounds so juvenile compared to the glory of those remarks.

Thank you so much, Christine. They were highly laudatory, and thank you for the opportunity and honor to have served with you in the Antitrust Division.

Thanks to Bill Rooney for his leadership of this group. I have listened to the comments about him, and I thought, yes, this is a guy who loves nothing more than wrestling an antitrust principle to the ground. But one does need to have patience with him while he does that.

And to Eric, congratulations on your new position and for organizing today's events, which by all accounts have been off-the-chart successful.

I'd also like to thank Commissioner Ramirez for gracing us with her presence this evening. We are all looking forward to your comments, and it is truly an honor and a privilege to have you here.

To my colleagues from WilmerHale, who are hosting my family: I have been with you for a little over a year, and it has been an unbelievably rewarding experience. They are a superlative group, not just in their raw talents, which are quite formidable, but also in their collegiality, which has been remarkable and embracing for me.

I am tempted to say—picking up on the 1979 reference—that an award like this only comes with age. But that might insult the giants of the New York Antitrust Bar who have received this award before me. I am humbled but thrilled to join their ranks. But I am also thrilled because this award comes from all of you.

For better or for worse, I have spent time with a great many bar associations over the course of my career, and I have enjoyed none of them more than this one. Part of the reason is that this is the New York Bar. I think we practice antitrust law a little differently than in some other cities. We are mainly litigators by background, but we do transactional work. We bring that litigator's instinct to all of the problems we try to solve. It is a unique perspective that I think isn't shared elsewhere.

But the principal reason I have always found this group so rewarding is its balance. This is an institution that brings together the plaintiff's bar, the defense bar, my former tribes, the FTC and the DOJ, and the Attorney General's Office, and everyone's view is respected and valued in the same way. There is no tilt; there is no preset agenda. I think that is actually quite unusual. I hope you will treasure that mission and preserve it for many years to come.

Before I let everybody move closer to eating, let me thank you all once again. And also thank my wonderful husband for everything, and my beautiful daughter for joining me here this evening. Thank you so much.

(Applause.)

MR. STOCK: Enjoy your dinner.

(Dinner is served.)

In Memoriam: Ralph Giordano

MR. STOCK: Thank you. I hope you have enjoyed your dinner. We do have a couple of very important agenda items now. So the first thing I would like to do is invite Steve Tugander up to the podium. Steve is going to talk for a little bit about a person you don't see at the dais today, but he was with us for quite a long time, Ralph Giordano, former Chief of the New York Field Office of the Antitrust Division. We are very thankful that Steve is willing to come up and talk about Ralph. Thank you.

(Applause.)

MR. TUGANDER: Thank you, Eric.

As Eric mentioned, I think most of us who knew Ralph knew that he was really a fixture at this dais for years and years. Before we were here, it was at the Marriott Marquis, at least when I got involved with this organization. Originally we had planned to honor Ralph back in June, and unfortunately Ralph passed away just this past January. So I am going to take about five minutes of your time, and if I could just indulge you to keep quiet while we are talking and allow this tribute to Ralph.

Sometimes it is easy for us to take for granted what came before us, the things that helped us succeed, the roads that were paved, the foundations that were laid, the bricks that we built upon.

A few years ago *The New York Times* published a computer-generated image of what Manhattan probably looked like in 1609 when the famous explorer Henry Hudson came across the narrow island the first time. Wilderness, marshes, grassland, sparsely populated. Fast forward to today, New York is the financial and cultural capital of the world, crammed with skyscrapers, bustling with people, filled with energy—the city that never sleeps. But how often do we think about the people that literally, literally built this great city. The architects, the engineers, the laborers that provided us with engineering marvels like the Brooklyn Bridge or the New York City subway system, and built them not with today's technology, but rather in the late 1800s and early 1900s when computer models were at best a figment of someone's imagination. It is easy for us to take these people for granted, but without them Manhattan is wilderness, marshes and grassland.

During today's program we discussed the latest cutting-edge areas of antitrust law. We focused on cases and issues of unprecedented scope and complexity. But just like the people who built the bridges and subways many years ago, it is easy for us to forget the lawyers who brought us to this point; the lawyers who built our antitrust foundations.

Ralph Giordano was certainly one of them. Ralph's career with the Antitrust Division spanned 50 years, 1962 to 2012. His tenure as Chief of the New York Field Office lasted 32 years, 1978 to 2010. To say that the law evolved over Ralph's 50 years is to put it mildly.

When Ralph started his career, JFK was in office. There were no Merger Guidelines, no Sentencing Guidelines, no Federal Rules of Evidence. There was no such thing as Miranda warnings. Violations of the Sherman Act were considered misdemeanors, and today we talk about jail sentences of up to ten years and fines in the billions. High-tech back in 1962 was an electric typewriter.

Over fifty years presidential administrations came and presidential administrations went. Assistant Attorneys General came and Assistant Attorneys General went. But Ralph Giordano stayed, and the Antitrust Division's New York Field Office chugged along with him, filing case after case and creating antitrust law. Fifty years' worth of antitrust cases and antitrust law.

To put this in perspective let me quote you some statistics. During Ralph's tenure as Chief the New York Field Office filed 307 cases resulting in the imposition of 41,225 jail days, or in other words 113 years. And on top of the substantial corporate and individual fines that the New York Field Office collected for the United States Treasury, the New York Field Office collected a total of more than $180 million in restitution payments for victims while Ralph was Chief.

But statistics are only part of Ralph's legacy. They do not give you the full picture of what Ralph was about. If you worked in the New York Field Office with Ralph, as I did for 24 years, you saw a man whose door was always open. You saw a Chief who was never too busy to listen when somebody wanted to talk, regardless of whether that somebody was a senior attorney, a junior attorney, a paralegal or secretary. And if you had to take a day off because your family needed you at home, Ralph understood, and he let you take that day off without feeling guilty.

Sure, like all bosses, Ralph wanted his subordinates to work hard and to achieve, but he understood that work is only part of a balanced life. Ralph believed in family. Ralph had compassion. Ralph had a heart. And he had compassion not only for his subordinates in the New York Field Office, but also for the outside attorneys and defendants who crossed paths with the New York Field Office. For Ralph, the job wasn't about notches on his belt; it was about being fair, about being just.

If you worked in the New York Field Office you also saw a man who was dealt a very tough hand in his personal life—the loss of his wife at a very young age, and the responsibility of raising a young daughter as a single parent. Although Ralph had every right to be bitter or complain about his personal tragedy, he never did. And much to his credit, despite how difficult it must have been, he never let his personal loss affect his work.

This past June we held a little retirement party for Ralph in our office at 26 Federal Plaza. In conjunction with the party we asked some of Ralph's colleagues from all walks of antitrust life to submit video tributes. Some of those colleagues are here tonight. As we watched those videos in our conference room on the 36th floor, 26 Federal Plaza, a common theme quickly emerged. Those who sat across the table from Ralph, over the course of 50 years, saw the same thing that we saw in the New York Field Office—that Ralph was man of fairness, of compassion, of justice.

Now, I am going to conclude my remarks very shortly, but before I do I want to take a moment to acknowledge two people who are here. I am not sure if Barry Brett is here tonight, but I know Molly Boast is.

The first is Barry Brett. When Barry Brett heard that Ralph was retiring in June, he wasted no time in recommending that Ralph be honored during this dinner. It is because of Barry that Ralph knew, before he passed, that he would be honored by his colleagues here tonight.

I also want to congratulate Molly Boast, our other deserving honoree tonight. Perhaps Molly put it best when she said in her video tribute back in June that it would be hard to imagine an antitrust community without Ralph Giordano. Of course Molly's words are especially meaningful now.

As Molly also mentioned in her video, time marches on, and of course, antitrust law will continue to grow and reach new heights. All of us in this room tonight will make sure that it does. But as we build our antitrust structures higher and higher, let's try not to forget Ralph Giordano, and others like him, who laid the foundations for all of us to build upon. And if you ask me, the best way that we can honor Ralph's memory is to treat our colleagues, our adversaries and our clients with fairness, with compassion and with justice. Thank you.

(Applause.)

Keynote Dinner Speaker Edith Ramirez

MR. STOCK: Thank you, Steve, for that moving tribute.

Next it is my great honor to introduce our keynote speaker tonight, Commissioner Edith Ramirez.

Commissioner Ramirez was sworn in as an FTC Commissioner in 2010, three years ago. In that time Commissioner Ramirez has testified before Congress on a whole multitude of issues, privacy, data security antitrust and intellectual property issues. In fact, Commissioner Ramirez has developed somewhat of an expertise in IP-related issues, and I highly recommend to you, for example, her insightful testimony before the Senate Judiciary Committee on the competitive issues raised by granting injunctions to holders of standard-essential patents.

In the Commission's challenge to the consummated merger in *Polyvore*, Commissioner Ramirez wrote the decision that was recently upheld by the Eleventh Circuit.

Commissioner Ramirez has also taken the leading role for the Commission on international issues, and that can be very clearly seen in her very hard work both with the International Competition Network and with the Latin American competition agencies, with whom she's been working very closely.

Before joining the FTC, many of you know that Commissioner Ramirez was a partner at Quinn Emanuel.

Please join me in welcoming Commissioner Ramirez and thanking her for coming to New York to speak with us tonight. Thank you.

(Applause.)

HON. EDITH RAMIREZ: Thank you very much, Eric.

Let me tell you, it is a pleasure to be here in New York, speaking to so many who share the Federal Trade Commission's mission of keeping markets healthy and competition robust.

We all operate today in a time when markets are morphing at lightning speed; when products and industries that did not exist ten years ago shape the economic landscape; when consumers' opportunities to access innovative goods and services are surpassed only by equally innovative threats to consumers' privacy and pocketbooks.

This evening I would like to discuss how we at the FTC navigate these unpredictable times, relying on a roadmap penned almost a century ago by members of the Progressive movement, who themselves were struggling to navigate their own unpredictable times.

The FTC was established at the height of the Progressive Era and imbued with principles based on the best thinking of the great minds of the day. Today, we still adhere to those principles with results that would make our founders proud: The Commission issues decisions rooted in bipartisan consensus reached through scientific and careful analysis of the record and facts at hand.

As an American history buff with a particular interest in the Progressive Era, I cannot help but be struck by the similarities between then and now. As today, the economy at the start of the 20th century was struggling to overcome major financial shocks that had pushed down wages, increased unemployment, and hit the working poor and newly emerging middle class hardest. The public, fueled by stories from a new class of muckraking journalists, was rapidly losing faith in government's ability to respond to the economic and social challenges of the times.

By 1914, Progressive leaders had started to develop and put in place a public policy framework relying on the dispassionate decisions of experts in the new social sciences. Corruption and cronyism began to give way to consensus based on fact and reasoned analysis.

That year marked three milestones of American history that illustrate just how fully our nation was turning toward a brave new world governed by rationality. First, the FTC Act made it through Congress and created an agency that was, in the words of a 1914 Senate report, "competent to deal with [complex antitrust matters] by reason of information, experience, and careful study of the business and economic conditions of the industry affected."

Second, noted journalist and thinker Walter Lippmann published, to great acclaim, the Progressive manifesto, "Drift and Mastery: An Attempt to Diagnose the Current Unrest," in which he argued that, to respond effectively to profound economic and social upheaval, the public needed to make collective decisions based on scientific methodology and hard evidence.

And third, with the disappearance of the bustle in the late 1800s and the rise of hemlines above tripping level, women's clothing finally began to make sense.

Of course, that first milestone—the creation of the FTC—is of most interest to me and I assume most of you in this room tonight. But I hesitate to examine it through the lens of Walter Lippmann's work: Although I believe he described the philosophical underpinnings of the FTC well in "Drift and Mastery," his views on antitrust regulation do not withstand modern scrutiny. Rather than breaking up monopolies and allowing competition to produce efficient markets, Lippmann believed trusts managed by dispassionate technocrats—a class of Platonic philosopher-CEOs—were the remedy for the abuses of the Standard Oils of his time.

So I will turn to women's fashion instead.

There is a wonderful exhibit at the Daughters of the American Revolution Museum in Washington right now called "Fashioning the New Woman: 1890 to 1925," displaying how clothes adapted during the Progressive Era to match women's increasing role in business, academia, and public policy. One of the earliest dresses in the collection, an afternoon dress from 1890, is all bustle, cinched waist, and adornment. It required 14 pounds of undergarments to hold the whole thing up, no doubt rendering the unfortunate wearer unable to sit, move, work, protest for the vote, talk in a normal tone, or do much of anything. By contrast, the more practical clothes displayed from the 1920s befit the modern woman taking her place in the office, on college campuses and at the polls.

Those designing clothing for women were taking a Progressive view of the task, fashioning attire with the "proper knowledge of both the public requirements and practical affairs" of their clients. That quote, by the way, is not from a turn of the century fashion rag, but from the Senate Report on the creation of the FTC. Like the fashion designers of that time, the FTC was, and is, meant to come to its decisions after thorough consideration of the "public requirements and practical affairs" of the industries we regulate. And like the Progressives of that time, the Commission was—and is—meant to arrive at an apolitical consensus by analyzing the evidence with rigorous application of sound social science.

In my view, that description fits today's FTC like a Gibson Girl's shirtwaist dress.

The FTC Today

Oscar Wilde's famous take on fashion is that one "can never be overdressed or overeducated," and with at least the latter part of that analysis, the FTC is in complete agreement. The Commission could not tackle a modern antitrust investigation, which routinely involves millions of pages of documents and a myriad of facts and figures, without the backing of our economic research and policy arms.

Both are direct legacies of the Bureau of Corporations that was folded into the FTC upon its founding. In addition to working on investigations with our very capable attorneys in the Bureau of Competition, the FTC's Bureau of Economics staff also routinely engages in policy-oriented economic research. Our Office of Policy and Planning similarly devotes itself to antitrust policy issues. This evening, I would like to highlight how we have used our research and policy functions in two areas: mergers and high-tech matters involving intellectual property.

Mergers

As antitrust enforcers, we routinely forecast how mergers or challenged conduct will impact future competition. The predictions and assumptions underlying our actions must be sound, and one way to ensure that is to engage in retrospective analysis of past enforcement decisions. Mastery of this history is particularly important when the Commission is struggling with whether to bring an enforcement action in a complex and close case. Two such studies make my point: the FTC's hospital retrospective project in the early 2000s and the merger remedy study in the 1990s.

Hospital Retrospectives

The reinvigoration of the FTC's hospital merger enforcement efforts, due in large part to the hospital retrospective project, represents one of the best comeback stories since, well, 1914, when ankle boots—last seen on soldiers at the end of the 19th century—began to reappear below women's slowly rising hemlines.

Throughout the 1980s and early 1990s, the FTC and Department of Justice successfully challenged a number of hospital mergers, and courts were receptive to the agencies' arguments that such mergers were harmful to consumers. Beginning in 1994, however, the agencies suffered seven consecutive hospital merger losses.

In 2002, the FTC decided to examine why the hospital merger program had fallen so hopelessly out of style. The Bureaus of Economics and Competition undertook a retrospective study of the effects on pricing and quality of care resulting from a handful of consummated hospital mergers. This project was supplemented by a series of health care workshops convened jointly with DOJ.

BE's empirical studies revealed that many hospital mergers were, as the agencies had contended, anticompetitive. BE showed that hospital competition was highly localized: Even mergers in metropolitan areas with a large number of hospitals could cause competitive harm because patients demand the inclusion of certain institutions in their insurance networks. The studies also showed that quality of care does not necessarily improve with consolidation.

Armed with this information as well as the findings from the workshops, the Commission revamped its approach to litigating hospital cases. To show competitive harm, the FTC now emphasizes how a merger can leave an insurer with few alternatives to include in its network, increasing the bargaining leverage of the combined hospital and leading to higher prices. We have also used retrospectives, which provide real-world backup for our arguments, to bolster judges' confidence in our predictions of price effects.

Our new approach sparked a winning streak, starting with the *Evanston* case in 2007, that includes three successfully litigated merger challenges and a growing tally of hospital deals abandoned after the FTC threatened a challenge. These victories are a perfect fit for consumers already burdened with staggering health care costs. And they came about because we tailored our approach on a pattern created by our Progressive Era predecessors: sophisticated economic analysis and a nuanced understanding of hospital markets.

Divestiture Study

Most merger retrospectives focus on whether enforcers correctly identified anticompetitive transactions. But during the 1990s, the FTC used the same type of intensive historical review to examine the effectiveness of merger remedies, particularly divestitures.

Although the analysis found that three-quarters of FTC-ordered remedies produced the desired outcomes, it uncovered problems with the remainder. The agency learned that many buyers of divested assets lacked the information they needed to succeed; that sellers tended to look for weak buyers or sometimes tried to undermine the buyer's success; and that divestitures limited to select assets often failed to produce the intended results.

Based on this, the FTC adopted a number of changes to its divestiture policies. Identifying upfront buyers capable of restoring competition is now a central part of our assessment of a proposed divestiture package. When necessary, we also require the seller to facilitate the transfer of technology and knowledgeable staff to the buyer. We sometimes turn to interim trustees to oversee the process, especially when the order requires ongoing ties between the buyer and seller. And finally, where possible, we favor divestitures of full, freestanding business units.

Nowhere are these improvements more evident than in our pharmaceutical divestitures. Prior to the study, FTC pharmaceutical orders were definitely underdressed, typically requiring only the divestiture of the relevant IP to a buyer of the seller's choosing. The FTC has replaced those modest orders with more robust requirements—requirements that our informal follow-up studies have shown overwhelmingly achieved our intended results.

While I recognize that merger retrospectives can be hard to conduct and may not answer every difficult question, I believe they are both useful and necessary. I also recognize that one of the biggest obstacles to this type of analysis is a lack of post-merger data. To address that, it is worth considering whether the FTC should use its subpoena power and information gathering authority under Section 6(b) of the FTC Act to obtain necessary data. It is also worth exploring whether to include ongoing production obligations as part of our consent decrees, particularly in cases where the decision to settle rather than litigate was a close call. If such an inquiry were to reveal that certain kinds of settlements don't work in certain markets, we would have to rethink our calculus for deciding when to litigate a case.

I also think we should do more to encourage outside scholarship in this area. Academics have shown considerable interest in merger policy, and many have made valuable contributions. But scholars have sometimes been hampered by a lack of information about how we as enforcers make our decisions. We do our best to explain our reasoning in Commission statements, especially in difficult cases, but that is probably an area where we could stand to do better.

IP Studies

Intellectual property in the high-tech sector is another area where we weave research into our enforcement efforts. For well over a decade, the Commission has studied the role that patents play in high-tech industry.

Our work on this is too extensive to summarize in a short speech, but let me touch on a few highlights.

In 2002, the FTC and DOJ held a series of hearings that resulted in a 2003 FTC report focused largely on patent quality. The FTC devoted significant attention to the special challenges facing the high-tech sector, and the study confirmed what was already clear to market participants: firms developing new products were facing a dense thicket of overlapping patents of vague scope and ambiguous quality; they perceived themselves as litigation targets; and they relied increasingly on defensive patents. The result was a full-blown patent arms race in the tech sector with disturbing implications for innovation, competition, and consumers.

These same hearings exposed the complicated economic incentives at play when patented technologies are incorporated into industry standards—what we refer to today as "standard-essential patents." Industry players and academics urged the agencies to recognize the pro-competitive role that standard setting organizations play in reducing the risk of abuse by standard-essential patent owners. Others disputed that abuse was common and cautioned the agencies against mandating particular SSO policies, suggesting that onerous patent disclosure or licensing requirements could slow the SSO process and discourage participation. The broad evidence and testimony collected during those hearings provided the basis for the SSO enforcement guidance in our 2007 joint report with DOJ.

The FTC built on the extensive 2002 record with a second set of hearings in 2008, focusing on competition policy issues associated with patent notice and remedies. These hearings informed our 2011 report on "The Evolving IP Marketplace." And while the evidence confirmed the important role that exclusive patent rights and a strong system of remedies play in promoting productive R&D expenditures and technology transfers, we also found that the growing patent thicket in the IT sector continues to act as a drag on resources and innovation. We also looked at industry reaction to the Supreme Court's landmark *eBay* decision and cases applying the four-factor *eBay* framework, leading us to recommend several ways for courts to better align application of the test with competition policy.

Since our 2011 Report, we have held two additional workshops that have taken a deeper dive into some of the topics examined previously. In June 2011, we looked more closely at the costs and benefits of various SSO policies for managing the risk of undue patent leverage. And just this past December, the agencies held a workshop dedicated to the economics of what we call "patent-assertion entities"—known derisively as "patent trolls"—companies that are in the business of buying, selling and asserting patents. A central empirical question, which we will continue to examine, is whether PAEs encourage invention or instead hamper innovation and competition. I am confident the agencies' talented economists and policy staff will advance the dialogue on this as well as the many other tough questions raised by PAEs.

This brings me to our most recent enforcement action in the patent arena: Google. As most of you know, earlier this month we announced that Google settled claims that it had violated Section 5 of the FTC Act following its acquisition of Motorola Mobility by pursuing injunctions against willing licensees for alleged infringement of several Motorola standard-essential patents. The Commission alleged that Google breached the FRAND commitments Motorola had made to various standard-setting organizations before its technologies were adopted into the relevant standards.

Infringement claims in the smartphone sector raise many of the complex patent policy issues the Commission has studied, and our order in the Google matter reflects many of the lessons learned. To remedy the alleged violation, the Commission ordered Google to follow a process-based approach to resolving its disputes with potential licensees that respects the quid pro quo inherent in a FRAND commitment. Broadly speaking, Google may not seek an injunction based solely on a dispute over licensing terms without first seeking a FRAND determination from a neutral third party. At the same time, the order recognizes that in making a FRAND commitment, a SEP holder does not give up its right to exclude where it cannot secure a license on fair and reasonable terms. Under the order, Google is free to seek an injunction where the infringing firm is not subject to jurisdiction in the United States, or the infringer refuses to agree to licensing terms set by a neutral third party. By requiring that Google keep the promises that Motorola willingly made to the relevant SSOs, the Commission's order protects the critical interests of all stakeholders in the SSO process, including, importantly, consumers.

Google Search

Before I conclude, I would like to say a few words about the other Google matter we recently concluded and which is, no doubt, on most of your minds—our decision to close the investigation of Google's search practices. Let me say at the outset that this decision is a perfect example of our evidence-based, consensus-driven approach to antitrust.

As most of you know, the heart of the investigation concerned allegations that Google harmed competition and consumers by unfairly preferencing its own content and demoting the content of rivals on its search results page. After evaluating the extensive factual record developed over a 19-month investigation, and taking into account considerable input from market players, the Commission unanimously concluded Google's search design changes were product improvements that did not, on balance, harm competition or consumers, even if they may have harmed certain rivals.

The post-decision commentary runs the gamut. Some applaud us; some recognize the complexity of the investigation and defer to our expertise; some claim we got it completely wrong. The critics' main charge is that Google's design decisions will ultimately reduce choice and competition in Internet services. However, the evidence did not reveal that Google's design changes were predatory. It suggested instead that Google was engaged in competition on the merits. Particularly in fast-paced technology markets, condemning legitimate product improvements risks harming innovation and consumers. The evidence in this case simply did not support taking that drastic step.

Others assert that we wrongly focused on Google's intent. I can tell you that is a misreading of the Commission's statement. Evidence showing why a company made the decision it did is certainly relevant in antitrust when it casts light on the effects of that decision—and that is exactly the role Google's intent played in our investigation.

Still others question whether we ignored the advertising side of the market. We did not. In this multi-sided market, advertisers, as well as content providers, largely follow end-users, and the investigation did not show that Google likely acquired or retained those users through anticompetitive tactics.

Now, while I may disagree with such criticisms, these questions are all legitimate ones. But in my view, others are not. Some have claimed, without basis, that the Commission yielded to pressure from Google, the White House, Congress, or all three. You will not be surprised to hear that I take issue with those accusations. As in all of our cases, our decision in this investigation was based on our independent assessment of the facts and our interpretation of the law, nothing more and nothing less.

In conclusion, Coco Chanel once said: "Fashion changes, but style endures." The FTC is fortunate to have inherited from our Progressive Era founders a style that has allowed us to endure as an effective, consensus-driven agency able to respond to each successive year's economic challenges. While the markets of today may bear little resemblance to the markets of tomorrow, the process of studying—scientifically, rigorously, apolitically—the causes and effects of our past actions and the markets we regulate will keep the FTC grounded, useful and relevant into the uncertain future. Thank you very much.

(Applause.)

MR. STOCK: Thank you very much, Commissioner Ramirez, for those thought-provoking comments.

Those remarks are a fitting end for a day that was filled with many interesting panels and learning on antitrust. We very much appreciate all of you for joining us and contributing to this event.

This concludes our program, but I do commend to you the dessert buffet, which will start in just a moment. Thanks again. I'll see you next year.

(Applause.)

(Whereupon, the Antitrust Dinner proceedings concluded.)

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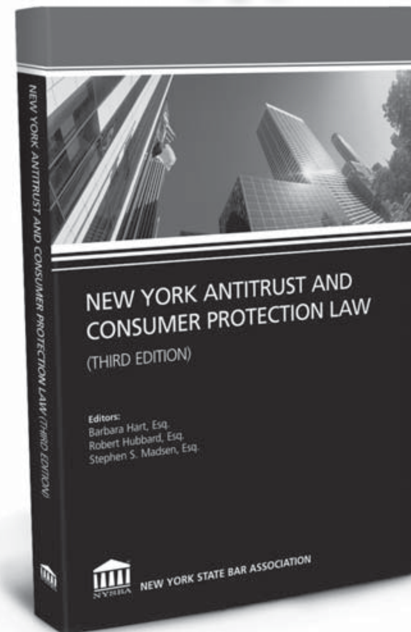

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